

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.02.2018

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

S.A.No.718 of 2000
and
C.M.P.No.5589 of 1997

1.Balashanmugasundaram
2.Rukmani
3.Jayalakshmi

...Appellants/Respondents 2, 4 &
5 /Defendants 2, 4 & 5

Vs.

1.S.V.Subramaniam @ Subbusamy
2.Mani
3.S.Pushpa

...Respondents/Appellants/
Plaintiff/Defendants 1, 3 & 6

Prayer: The Second Appeal has been filed under Section 100 of C.P.C. against the Judgment and decree dated 30.11.1995 made in A.S.No.8/94 on the file of the Principal District Judge, Coimbatore reversing the judgment and decree dated 22.02.1993 made in O.S.No.1078/87 on the file of the II Addl. Subordinate Judge of Coimbatore.

For Appellants : Ms.Mythili
for M/s.Sarvabhauman Associates

For Respondents : Mr.S.Subramaniam for R1
Mr.Mani for R2

Not ready in notice -R3

WEB COPY
J U D G M E N T

The appellants / defendants who have lost their case before the the First Appellate Court have filed this second appeal. The sum and substance of the plaint averments as follows:

The plaintiff and the defendants are brothers. During the partition in the 1965, the suit schedule property was

allotted to the plaintiff. In the year 1985, the first defendant arranged the marriage of the third defendant, for which the first defendant requested the plaintiff for a house for the purpose of marriage. Accordingly, the back portion of the house was handed over to the first defendant for the purpose of marriage. After the marriage, the first defendant refused to vacate the house.

2. Aggrieved by the same, the suit was filed by the plaintiff for recovery of the house and for mesne profits i.e. a sum of Rs.150/- per month from 1985 onwards.

3. The sum and substance of the written statement filed by the second defendant and adopted by the defendants 1, 3 & 6 are as follows:

The defendants deny the plaint averments in respect of physical possession of the property from 13.06.1981. The plaintiff approached the second defendant to give him Rs.5,000/- as security for the house given to him for the purpose of his daughter's marriage. The plaintiff had given his house for his occupation, accordingly, the second defendant occupied the house and Rs.5,000/- was paid to the plaintiff towards the lease amount and the second defendant occupied the suit schedule property from 13.06.1981 onwards. Since the plaintiff did not repay the amount, the second defendant refused to vacate the premises. Therefore, the plaintiff, further prays for mesne profits.

4. The defendants further contended that unless the plaintiff pays Rs.5,000/-, he is not entitled for any relief and the defendants are ready to handover the house property if the plaintiff pays Rs.5,000/-.

5. The Lower Court believed the version of the defendants and dismissed the suit. However, the Lower Appellate Court disbelieved the version of the defendants and allowed the appeal. Accordingly, decreed the appeal in favour of the plaintiff.

6. This Court has not admitted the Second Appeal and has only ordered Notice of Motion. Till date no substantial questions of law are framed. In the grounds of appeal, the learned counsel appearing for the appellants has raised the following substantial questions of law:

a) Whether or not the plaintiff should fall or succeed on the cause of action pleaded by him and not on account of the weakness in the defence?

b) Whether the Lower Appellate Court is right in

law in permitting the plaintiff to let in additional evidence to fill up the lacunae in his case particularly when the plaintiff has not satisfied any of the ingredients of Order 41 Rule 27 C.P.C.?

7.The learned counsel appearing for the appellants / defendants would submit that in the year 1981, the plaintiff borrowed a sum of Rs.5,000/- and given the house as security purpose and as and when the amount is repaid, the defendants should be ready to hand over the possession. In order to prove their occupation, the defendants have marked the house tax receipts and water charges from the year 1981 viz., Ex.B1 to B5. It clearly establishes that the defendants are in occupation of the suit property from the year 1981.

8.The learned counsel for the appellants fairly conceded that there is no receipt produced by the defendants/ appellants before the Courts below:

9.Admittedly, there is no agreement between the plaintiff and the defendants. However, without considering the materials marked by the defendants, the First Appellate Court committed an error in disbelieving the case of the defendants and accepted the case of the plaintiff and without considering the defendants' documents, the First Appellate Court allowed the application filed by the plaintiff under Order 41, Rule 27, which is erroneous.

10.No one appeared on behalf of the respondents/ plaintiff. However, this Court decides to proceed the case, based on the available materials and upon perusing the judgments and decrees of the Trial Court and the First Appellate Court.

11.On a perusal of the judgment and decree passed by the Lower Appellate Court, it is seen that the plaintiff and the second defendant are brothers and the suit property was allotted to the plaintiff, while partition was executed in the year 1960. The plaintiff being the owner of the property, given the house for the second defendant's daughter's marriage in the year 1985. After the marriage, the second defendant refused to vacate the premises. Hence, the plaintiff had filed a suit for recovery of possession.

12.In order to prove the possession of the suit schedule property, the appellants/defendants filed I.A.No.5326 of 1993 under Order XLI Rule 27 of C.P.C. And sought permission of the First Appellate Court to mark water tax receipts for the period from 1981-82 and 1984-85. Accordingly, the Lower Appellate Court granted permission to the appellants / defendants to mark the above said documents. Accordingly, the said documents are

marked as exhibits.

13. Even on a perusal of the defendant's documents i.e. B series, which shows that the defendants have produced some tax receipts to prove his occupation from 1981 onwards which are self service documents. However, the defendants were not able to establish their case by producing any lease agreement or receipts to show that the plaintiff has borrowed Rs.5,000/-. In the absence of any materials to show the defendants bonafide, I do not find any error in the order passed by the First Appellate Court. The defendants should establish their case by producing materials to show that Rs.5,000/- was lent to the plaintiff.

14. In view of the above, I do not find any error in the judgment and decree passed by the Lower Appellant Court and the substantial questions of law have been answered against the appellants / defendants.

15. Accordingly, the second appeal is dismissed. The Judgment and decree dated 30.11.1995 made in A.S.No.8/94 on the file of the Principal District Judge, Coimbatore, reversing the judgment and decree dated 22.02.1993 made in O.S.No.1078/87 on the file of the II Addl. Subordinate Judge of Coimbatore is confirmed. No costs.

Sd/-

Assistant Registrar (CS V)

//True copy//

Sub Assistant Registrar

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To.

1. The Principal District Judge
Coimbatore

2. The II Addl. Subordinate Judge
Coimbatore.

+1cc to Mr. Sarvabhauman Associates, Advocate SR.No.9323

S.A.No.718 of 2000

GJ (CO)
GN (19/03/2018)