

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 30.01.2018

PRONOUNCED ON : 13.02.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.Nos.1031 & 1032 of 2003

J.Munikrishnan Appellant in both second appeals

Vs.

K.J.Padmanaban ... Respondent in both second appeals

Common Prayer: Second Appeals filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 31.12.2002 made in A.S.Nos.50 & 68 of 1997 respectively on the file of the court of Subordinate Court of Kancheepuram District reversing the judgment and decree dated 31.01.1997 in O.S.Nos.8 & 60 of 1993 respectively on the file of the Additional District Munsif Court, Kancheepuram.
In both appeals

For Appellant : Mr.V.Manohar

For Respondent : Ms.R.Ramya
for M/s.V.K.Elango

C O M M O N J U D G M E N T

These second appeals are directed against the common judgment and decree dated 31.12.2002, passed in A.S.Nos.50 & 68 of 1997, on the file of the Subordinate Court, Kancheepuram, reversing the judgment and decree dated 31.01.1997, passed in O.S.Nos.8 & 60 of 1993, on the file of the Additional District Munsif Court, Kancheepuram.

2. The appellant and the respondent are brothers. It is found that both the appellant and the respondent have filed separate suits against each other, seeking the relief of permanent injunction, on the footing that the suit property in

their respective suits had been allotted to them under the partition deed dated 22.05.1978 and both of them have also admitted that though there is a building in the suit property, to avoid the stamp duty, it is their case that the above said partition deed was effected showing the property therein as a vacant site and thus, each claim to be entitled to 12 feet east to west and 158 feet north to south with the building thereon and complaining that each are trying to interfere with the possession and enjoyment of the other unlawfully, it is found that both the appellant and the respondent have laid the suits separately for the relief of permanent injunction.

3. It is found that the suit laid by the appellant and respondent were tried separately by the trial Court and in O.S.No.8 of 1993, in support of the respondent's case PW1 was examined and Exs.A1 to A3 were marked. On the side of the appellant DW1 was examined, no document was marked. Exs.C1 and C2 were also marked. In O.S.No.60 of 1993, on the side of the appellant PWs 1 and 2 were examined and Exs.A1 to A11 were marked and on the side of the respondent DW1 was examined, no document was marked.

4. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to dismiss both the suits. Aggrieved over the same, it is found that the appellant has preferred A.S.No.68 of 97 and the respondent has preferred A.S.No.50 of 97 and both the appeals were disposed of by the first appellate Court by a common judgment and the first appellate Court set-aside the judgment and decree of the trial Court and holding that the appellant and the respondent should enjoy the portions respectively allotted to them under the partition deed above stated, as they had been hitherto enjoying and further, directed them to enjoy the wall in between the respective portions measuring 27.6 meter in common by both the parties and also directed them to jointly incur the expenses for maintaining and renovating the common wall etc., and accordingly, it is found that by way of a panchayat decision, much against the pleadings, evidence and materials set out by the respective parties, the first appellate Court had accordingly forced its decision on the parties to enjoy their respective portions as determined by it. Aggrieved over the same, the present second appeals have been laid.

5. At the time of admission of the second appeals, the following substantial questions of law were formulated for consideration:

1. Whether the lower appellate Court is justified to frame the scheme of it's own and give the decision which is

outside the scope of the cases of the parties?

2. Whether the decision of the Courts below had paved the way for more differences between the parties and complicated issue rather than resolving the differences or not?

3. Whether the decision arrived by the Court below is supported by any such pleading of such evidence of the parties or not?

6. The appellant and the respondent are brothers, both claim to have title to their respective suit properties by way of a partition deed dated 22.05.1978. On a perusal of the description of the suit property described in both suits, would go to show that the suit properties are shown to be measuring 12 feet east to west and 158 feet north to south consisting of both the house and sites within the specific boundaries. It is thus found that both parties claim that they have title to their respective suit properties by way of the above mentioned partitioned deed. However, both complaining that each is attempting to encroach into the property of the other, have come forward with the respective suits seeking the relief of permanent injunction.

7. It is further found that both have admitted that though the suit property consist of house and site, according to them, in order to avoid the payment of stamp duty, they have shown the property in the partition deed only as a vacant site and it therefore found that and as rightly found by the trial Court, both parties are basing their claim to their respective portions only on the basis of the document which had come into existence by suppression of material facts to avoid the payment of stamp duty. It is therefore found that the partition deed dated 22.05.1978 relied upon by both the parties appear to be stealthily entered into between the parties concerned to avoid the true nature of the properties comprised therein, in order to avoid the payment of stamp duty. Only on the basis of such a document, it is found both are vying with each other to claim title to their respective portions as described in their suit and are complaining against the other that the opponent party is trying to encroach or interfere with their respective portions. However, when it is found that both parties are trying to seek the reliefs based on a document fraudulently effected to avoid the stamp duty, as rightly determined by the trial Court, the parties cannot be allowed to obtain the reliefs based on such a

document, particularly the equitable relief of permanent injunction.

8. That apart, according to both the parties, each have title to their respective portions as described in their respective suits and as the same is being denied by each of them, accordingly, it is found that the title issue in respect of the properties claims projected by each of them is put to test and in such view of the matter, as rightly determined by the trial Court, the parties should have endeavoured to seek the relief of declaration in respect of the portions to which they claim to have title under the alleged partition deed dated 22.05.1978. However, it is found that in order to avoid the payment of Court fees, accordingly, they had avoided seeking the relief of declaration and come forward with the suit simpliciter seeking the relief of permanent injunction, based on a document which had, as seen earlier, come into existence by suppression of material facts to avoid the payment of stamp duty. Therefore, it is seen that both the parties had not come to the Court with clean hands and they seem to be endeavouring to obtain the declaration of title for the portions allotted to them by way of the partition deed by seeking the relief of permanent injunction, as such, in their respective suits and on that ground alone, it is found that the suit laid by the respective parties are not maintainable.

9. That apart, it is found that the parties claim to be allotted the respective portions in the properties concerned showing their respective extent in feet. However, the property subjected to partition is shown to be measuring in acres and it has not been explained by both the parties as to on what basis they have come forward with a plea that each of them had been allotted 12 feet east to west and 158 feet north to south consisting of both house and sites within the specific boundaries. That aspect of the matter has also not been properly explained by both parties.

10. Further, when it is found that the suit property involved in both suits comprises of both houses and sites and when there is no material to hold that at the time of the partition, the parties had measured their respective portions and accordingly been in the enjoyment of the same, the case of the respective parties that the other party is attempting to encroach into his portion, as such, cannot be countenanced in the absence of any material to hold that at the time of the said partition, the parties had been actually allotted each 12 feet east to west and 158 feet north to south. Therefore, it is found that there is no clear material adduced by both the parties as to what is the actual extent allotted to them at the time of partition in the suit survey number and when the property is shown to be in acres in the document of title and

when there is no material correlating as to how they claim their respective portion as measuring in feet and when the parties had not endeavoured to measure their respective portions with the assistance of a surveyor for settling the issues, it is found that the trial court was perfect in discountenancing the reliefs sought for by the parties.

11. The core issue between the parties seems to be the wall situated in between the alleged portions of the respective parties. Each party is claiming the subject wall to be belonging to him, however, when there is no clear indication as to from and to what point, the extent of each portion had been allotted to the parties under the partition deed and when it is found that the partition deed itself had come to be effected showing the property as a vacant site, accordingly, it is seen that the parties are unable to ascertain as to what portion, each had been allotted in the property concerned, which actually consisted of both house and sites, therefore, unable to sort out their issues one way or the other, however, claiming that each had been allotted a definite portion under the partition deed, but showing the same as measuring in feet, whereas the document is shown to be measuring in acres, it is found that based on the above position, as rightly determined by the trial Court, the parties had miserably failed to establish that they are in actual possession and enjoyment of their alleged portions claim to have been allotted to them respectively under the partition deed. Accordingly, it is seen that the trial Court sans material pointing to the claim of the respective parties as projected by them, rightly dismissed the suit laid by the both parties.

12. In the light of the above position, I do not find any error, mistake or infirmity in the determination of the trial Court that both parties have come to the Court with unclean hands suppressing the material facts to avoid the stamp duty/Court fees and further, sans material/proof in support of their respective cases, it is found that no interference is called for in the dismissal of the suits laid by the respective parties by the trial Court.

13. However, on appeal, it is found that the first appellate Court, without any basis has forced its decision on the parties concerned by directing them to enjoy the portions as hitherto being enjoyed by them and also directed them to enjoy the wall in dispute in common and also directed them to bear the expenses in common with reference to the maintenance and renovation of the wall in dispute and accordingly, disposed of the first appeal. This approach of the first appellate Court, as rightly

put forth, seems to be nothing but a forcible and compulsive panchayat decision without any material for arriving at such a conclusion. In other words, it is found that a decree in the nature of a scheme has been formulated by the first appellate Court thrusting its decision on the parties concerned that they should enjoy the respective portions only as determined by it when there is no material in support of the same and in such view of the matter, it is found that the forcible determination of the first appellate Court directing the parties to enjoy their respective portions as formulated by it cannot be sustained in the eyes of law, since, there is no material to support the same and on the other hand, it appears to be a thrust decision on the parties without their giving any consent with reference to the same and in such view of the matter, it is found that the judgment and decree of the first appellate Court cannot be allowed to sustain any further in the eyes of law and are liable to be set-aside. The first appellate Court cannot traverse beyond the pleadings of the respective parties and the materials placed on record and thrust its decision on the parties concerned compelling them to enjoy their respective portions as determined by it, particularly, forcing them to enjoy the disputed wall in common when each party is vying with each other that the opponent party is trying to interfere with the portion claimed to have been allotted to him and accordingly, it is found that the decision forced by the first appellate Court on the parties concerned would only foment further difference of opinion between the parties and complicate the issues further than enabling the parties to enjoy their respective portions peacefully and harmoniously.

14. For the reasons aforesaid, the determination of the first appellate Court thrusting its decision on the parties concerned to enjoy their respective portions as determined by it, particularly, the said determination not being supported with any material and also found to be exceeding the pleadings set out by the respective parties and the materials placed on record and when it is further found that the said determination of the first appellate Court would only nurture further rivalry and difference of opinion between the parties in the enjoyment of their respective portions and complicate the issues further, the determination of the issues involved in the matter by the first appellate Court is found to be perverse and illogical and liable to be set-aside and accordingly, the substantial questions of law formulated in this second appeals are answered.

15. In conclusion, the common judgment and decree dated 31.12.2002 passed in A.S.Nos.50 & 68 of 1997 are set-aside and the judgment and decree dated 31.01.1997 passed in O.S.Nos.8 & 60 of 1993 are restored. Accordingly the second appeals are

allowed. Considering the relationship between the parties there is no order as to costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Asst.Registrar (CS VII)

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Sub Asst. Registrar

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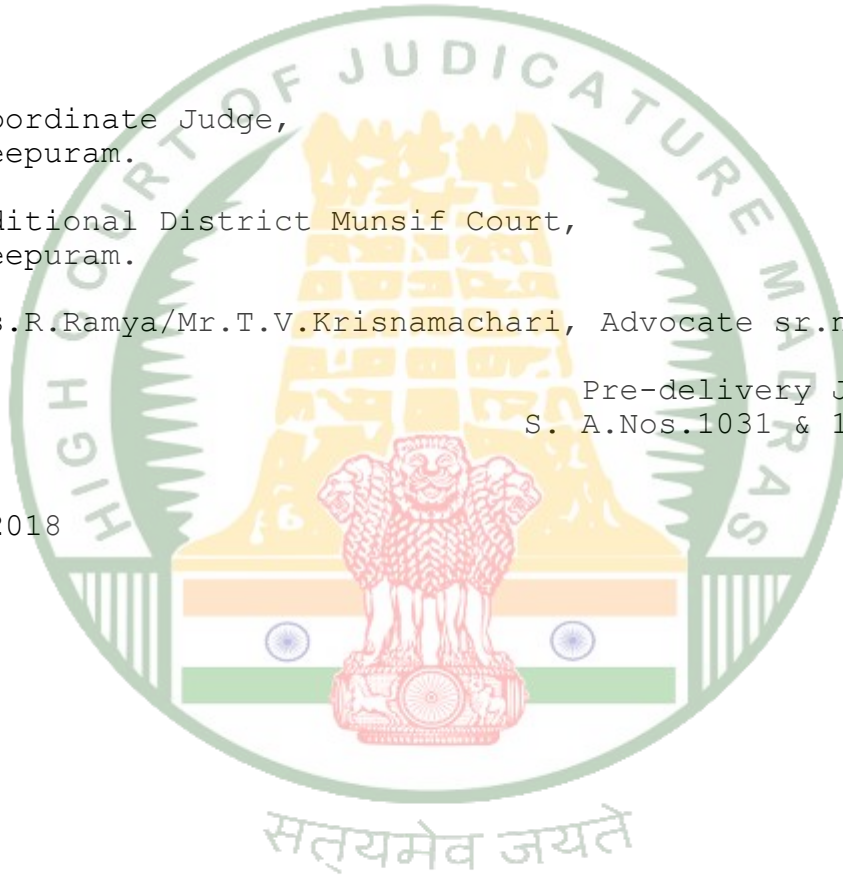
To

1. The Subordinate Judge,
Kancheepuram.
2. The Additional District Munsif Court,
Kancheepuram.

+2cc to Ms.R.Ramya/Mr.T.V.Krisnamachari, Advocate sr.no.11128

Pre-delivery Judgment in
S. A.Nos.1031 & 1032 of 2003

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nr 10/04/2018



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