

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.04.2018

CORAM :

THE HONOURABLE MS. JUSTICE V.M.VELUMANI

Second Appeal No.1025 of 2015
and M.P.Nos.1 & 2 of 2015
and CMP No.9128 of 2017

Judgment reserved on 18.04.2018	Judgment pronounced on 28.04.2018
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1.M.Robert
2.R.Arokkia Marian Dinesh

... Appellants/Plaintiffs

Vs.

V.Balakrishnan

... Respondent/Defendant

Prayer:- Second Appeal has been filed under Section 100 of C.P.C against the judgment and decree dated 19.12.2014 passed in A.S.No.142 of 2010 on the file of III Additional District & Sessions Judge, Coimbatore reversing the judgment and decree dated 01.11.2010 passed in O.S.No.631 of 2008 on the file of III Additional Subordinate Judge, Coimbatore.

For Appellants : Mr.R.Kannan

For Respondent : Mr.ARL.Sundaresan,
Senior Counsel for
M/s.A.Kalaivanan

J U D G M E N T

This Second Appeal has been filed against the judgment and decree dated 19.12.2014 passed in A.S.No.142 of 2010 on the file of III Additional District & Sessions Judge, Coimbatore reversing the judgment and decree dated 01.11.2010 passed in O.S.No.631 of 2008 on the file of III Additional Subordinate Judge, Coimbatore.

2. The appellants are the defendants and respondent is the plaintiff in O.S.No.631 of 2008 on the file of III Additional Subordinate Judge, Coimbatore. The respondent filed the said suit for possession of the 'B' Scheduled property by ejecting the appellants and directing the appellants to deliver possession of the 'B' Scheduled land encroached upon to the respondent after removing the structures put up thereon and for mandatory injunction directing the appellants to remove the illegal RCC building put up by the appellants over the 'B' Scheduled 'C', 'D', 'E' & 'F' properties.

3. According to the respondent, he is the owner of the property measuring 2 acres 23 cents in Survey No.83, Ganapathy

Village, Coimbatore Taluk describing in 'A' Scheduled property. According to the respondent, he purchased the said property from one A.Palanisamy s/o Appa Naidu vide deed of sale dated 07.02.2006. The respondent's vendor A.Palanisamy purchased the said property on 29.04.1981 from M/s.Sujini Textiles who purchased the same in Court Auction Sale held on 19.01.1971 in E.P.No.113 of 1969 in O.S.No.3 of 1968 on the file of Subordinate Judge, Coimbatore. The total extent of the property in Survey No.83 is 4 acres and 47 cents. The 'A' Schedule property is 2 acres 23 cents on the southern side. It was a dry agricultural land and the portion in between northern side and southern side were not demarcated. The respondent and his vendor used to raise dry crops whenever there was rain.

4. The appellants claim to have purchased the property from one Chinnaiah Gounder son of N.Arumuga Gounder alleged to be the owner of the north eastern portion of Survey No.83 who appears to have encroached 20 ¼ cents in the northern side belonging to the respondent which is shown as 'B' Scheduled property. The respondent came to know about the said encroachment when Advocate Commissioner appointed in

O.S.No.413 of 2006 on the file of Principal District Munsif Court filed his report. In view of the encroachment, the respondent filed the suit for the relief stated above.

5. The first appellant filed written statement and the same was adopted by the second appellant wherein it is contended that the entire 4 acres 47 cents of agricultural land in Survey No.83, Ganapathy Village, Coimbatore Taluk alongwith other properties are ancestral properties of the family of one Arumuga Gounder. After his death, his wife T.Thangammal and her two sons Chinniah Gounder & Nachimuthu Gounder, by deed of partition dated 14.09.1966 partitioned the properties. In the said partition, Chinnaiah Gounder was allotted 3 acres 36 cents in G.S.Nos.81, 82, 83 & 84 in Ganapathy Village, Coimbatore Taluk and Nachimuthu Gounder was allotted Schedule II properties in the partitioned deed. Thangammal was allotted life interest in the Schedule II properties without any powers of alienation with vested remainder to pass on to Chinniah Gounder and Nachimuthu Gounder. Nachimuthu Gounder, vide deed of release dated 22.07.2005, released his common half share in the total extent of 15.90 $\frac{3}{4}$ of acres of land in G.S.Nos.81, 82, 93 and 84 in Ganapathy Village,

Coimbatore Taluk to his brother Chinnaiah Gounder after receiving a sum of Rs.2,00,000/- as sale consideration.

5(a) The appellants purchased 20 ¼ cents in G.S.No.83, Ganapathy Village, Coimbatore Taluk from Chinnaiah Gounder by deed of sale dated 16.09.2004 bearing Doc.No.4809 of 2004 for a total sale consideration of Rs.3,60,000/-. The said Chinnaiah Gounder handed over the possession of the property to the appellants. From the date of purchase, the appellants are in possession and enjoyment of the properties. The properties conveyed to appellants are ancestral properties of Chinnaih Gounder and his only son C.Raju @ Arumugam has sworn to a notarised affidavit dated 19.05.2006 ratified the sale in favour of the appellants and that he has no further claim over the property. Patta stands in the name of the appellants.

5(b) The appellants have denied all the averments in the plaint and stated that it is for the respondent to prove his contention. They also denied the title of the appellants' vendor Palanisamy and M/s.Sujini Textiles. The respondent, alongwith one Gopalakrishnan filed O.S.No.1460 of 2006 and I.A.No.1170 of 2006

on the file of I Additional District Munsif Court, Coimbatore. Interim injunction was granted in favour of the respondent. The defendants 2 to 8 in O.S.No.1460 of 2006 filed CMA No.50 of 2007 and the same was allowed by the I Additional Subordinate Judge holding that the respondent and Gopalakrishnan have no valid document to prove their title or possession. 'B' Schedule property is a portion of the property mentioned therein. The appellants have purchased the property from original owner Chinnaiah Gounder and they are not encroachers. After purchasing the property, appellants have put up RCC building after getting proper approval from the authorities. The respondent has no right to eject the appellants.

6. Based on the pleadings, the learned III Additional Subordinate Judge, Coimbatore framed necessary issues. Before the learned Judge, the respondent examined himself as PW1 and marked nine documents as Exs.A1 to A9. On behalf of the appellants, the first appellant was examined as DW1 and A.Palanisamy was examined as DW2 and ten documents were marked as Exs.B1 to B10.

7. The learned Trial Judge, considering the pleadings, oral and documentary evidence dismissed the suit holding that DW2 vendor of the respondent did not have any title when he sold the property in favour of the respondent. The learned Trial Judge also held that the sale in favour of Palanisamy is of the year 1961 and the respondent purchased the property in the year 2006 and he has not produced any encumbrance certificate to show that his vendor did not sell the property to anybody earlier.

8. Against the said judgment and decree, the respondent filed A.S.No.142 of 2010 on the file of the III Additional District and Sessions Judge, Coimbatore. The first Appellate Judge, framed necessary points for consideration. Before the first Appellate Judge, the respondent filed I.A.No.563 of 2014 under Order XLI Rule 27 and Section 151 CPC for leave to the respondent to file documents and receive the documents mentioned therein. According to the respondent, he was under the impression that it was the appellant to prove that his vendor Palanisamy sold portion of the properties mentioned in Schedule 'A' before the sale in favour of the respondent. The learned counsel also did not inform him that he has to file encumbrance certificate before the Trial Court. The

appellants filed counter in I.A.No.563 of 2014 and opposed the said application and contended that the respondent did not file encumbrance certificate in the suit. The respondent's vendor sold entire 2.23 acres in Survey No.83 to various third parties but in encumbrance certificate, there is no entry. The appellants also made various submissions on merits.

9. The learned Judge, considering the averments in the affidavit, counter affidavit and judgment of the Trial Court, allowed the said application and marked two encumbrance certificates as Exs.A10 & A11 and compromise petition and order in I.A.No.484 of 2013 in O.S.No.144 of 2008 on the file of the Sub Court, Coimbatore as Exs.A12. The learned First Appellate Judge considering the pleadings oral and documents, allowed the appeal holding that the respondent's vendor did not sell the property to any third parties before the property was sold to the respondent and appellants failed to prove Exs.B8, B9 & B10. The sale deed dated 16.09.2004, Ex.A6/B4 by which the appellants purchased the property does not contain proper description of the property purchased by them.

10. Against the said judgment and decree dated 19.12.2014 made in A.S.No.142 of 2010, the appellants have come out with the present Second Appeal.

11. At the time of admission, the following substantial questions of law were framed -

(i) Whether the First Appellate Court was right in granting the decree in favour of the plaintiff when the description of "B" schedule property is not so clear enough to indicate as to whether it forms part of "A" schedule property or not ?

(ii) Whether the First Appellate Court was right in going into the title of the defendants as though the defendants are bound to prove their title for the property purchased by them ?

(iii) Whether the First Appellate Court was right in casting the reverse burden upon the defendants ?

12. The learned counsel for the appellants contended that the First Appellate Judge erred in allowing the appeal based on the weakness of the appellants case. The first Appellate Judge failed to see that the respondent did not prove his title and possession. The appellants have denied the title of the respondent and respondent ought to have proved his title by seeking decree of declaration. Appellants have proved their title by sale deed dated 16.09.2004 Exs.A6/B4 in their favour. The First Appellate Court ought to have seen that appellants have proved their title by marking sale deed in their favour Ex.B4 which was also marked by appellants as Ex.A6. The appellants by marking Exs.B8, B9 & B10 proved that respondent's vendor already sold the suit property and respondent's vendor did not have any title to suit property at the time of purchase by the respondent and respondent did not get any right interest title when he purchased the property from his vendor.

12(a) The respondent purchased the suit property from Palanisamy by Ex.A5 dated 07.02.2006 entire extent of 2.23 cents while his vendor purchased from M/s.Sujini Textiles vide sale deed dated 29.04.1981 by Ex.A4. The respondent failed to produce encumbrance certificate from 29.04.1981 to 31.12.1986 before the

trial court to prove that his vendor did not sell the property during that period. The respondent filed Ex.A11 encumbrance certificate in the First Appeal before the First Appellate Judge which does not show the transaction done by the respondent's vendor. On the other hand, the encumbrance certificate dated 20.05.2015 filed in the present Second Appeal shows the transaction done by the respondent's vendor. The first Appellate Judge failed to properly appreciate Exs.B8, B9 & B10 wherein the respondent's vendor admitted his earlier transaction. The first Appellate Judge erroneously held that there is ambiguity in Ex.B4 sale deed by which the appellants purchased from their vendor and rejected the claim of the title by the appellants.

12(b) In the Second Appeal, the appellants filed M.P.No.2 of 2015 for permission to file seven additional documents mentioned therein. According to the appellants, the respondent purposefully suppressed the transaction made by his vendor during the period from 29.04.1981 to 31.12.1986 in respect of suit property and also subsequent transaction in respect of the suit property after alleged sale in favour of the respondent. In view of the same, the appellants have obtained certified copies of the documents and

encumbrance certificate to prove the material defects in the respondent's title.

12(c) In support of his contention, the learned counsel for the appellants relied on the following judgments -

(i) 2015 (8) SCC 673[State of Madhya Pradesh v. Ushadevi]

33. Once we have given our finding on the maintainability of the Suit, we need not to go into the other issues. But in view of the alternative argument advanced by the counsel, we are of the view that we should throw some light on those issues. It is the finding of the Trial Court that the lands were retransferred to the Holkar State in the year 1951, and re-transferring is without any authority and it is bad. The Trial Court held that though it is the specific case of the plaintiff that they are paying Tauzi, there is no evidence to show that they have paid Tauzi prior to 1951 and the correspondence of the plaintiff and her father shows that the Suit scheduled properties were not included in item no 14 of the list of properties and further held that Suit scheduled properties were allotted to the Forest Department. First coming to the issue of transfer of land to Forest Department, it is settled law that parties are governed by their pleadings and the burden lies on the person who pleads to prove and further plaintiff has to succeed basing on the strengths of his case and cannot depend upon the weakness of the defendant's case. The State having alleged several things, has failed to mark any document to show that the properties were transferred to the Forest Department and the retransfer in the year 1951 was without any

authority of law. Though the State has filed certain documents before us, but as they are not part of the evidence, we are not inclined to look at those documents.

(ii) 2008 (6) CTC 237 [Anathula Sudhakar v. P.Buchi Reddy (Dead) by LRs and others]

HEAD NOTE:

When it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief : Where a plaintiff is possession but his title to property is in dispute or under cloud or where defendant asserts title and there is also threat of dispossession, plaintiff must sue for declaration of title and consequential injunction. Where title of plaintiff is under cloud or in dispute and he is not in possession or not able to establish possession, necessarily, plaintiff will have to file suit for declaration, possession injunction. A cloud is said to raise over a person's title when there is some defect in his title to property or when some prima facie right of third party over it, is made out or shown. But persons having clear title and possession suing for injunction, should not be driven to more cumbersome remedy of suit for declaration, merely because some meddler vexatiously makes claim.

(iii) Relying on the judgment reported in 2014 (5) CTC 801

[N.Kaliamoorthy and others v. Vairavan Chettiar], the learned counsel for the appellants contended that without claiming the relief of declaration, the respondent cannot maintain the suit for recovery of possession.

13. Per contra, the learned Senior Counsel for the respondent contended that respondent has purchased the property from Palanisamy under Ex.A5 sale deed dated 07.02.2006 and traced title of his vendor besides filing sale deeds Exs.A1 to A4. The appellants examined Palanisamy as DW2 who categorically deposed that he did not execute any sale deed after purchase till he sold the property to the respondent. The appellants relied on Exs.B8 to B10 to substantiate their case that respondent's vendor sold the property to third parties and on the date of sale in favour of the respondent, his vendor did not have title to the suit property. The learned Judge on erroneous consideration of Exs.B8, B9 and B10 dismissed the suit holding that the respondent did not produce any encumbrance certificate to prove that his vendor did not sell the property during the period between 29.04.1981 to 07.02.2006. Against the said judgment, the respondent filed A.S.No.142 of 2010.

13(a) In the said First Appeal, the respondent filed I.A.No.563 of 2014 to grant leave to the petitioner and receive three documents as additional documents. The respondent sought for permission to file two encumbrance certificates from 01.05.1965 to

31.12.1986, 01.01.1986 to 30.01.2014 and compromise petition and order in I.A.No.484 of 2013 in O.S.No.144 of 2008 on the file of Sub Court, Coimbatore. The said application was allowed and three documents were marked as Exs.A10, A11 & A12 before the First Appellate Court. The learned First Appellate Judge, considering all the materials in proper perspective has allowed the First Appeal and there is no error of law in the said judgment. It is not correct to state that that the First Appellate Judge allowed the appeal on the ground that the appellants did not prove their title. On the other hand, the appeal was allowed as respondent proved his title and proved that his vendor did not execute any sale deed, except in favour of the respondent. The appellants have admitted the title of respondent's vendor as well as the sale of suit property to respondent. In such circumstances, there is no necessity to seek declaration of title.

13(b) As far as M.P.No.2 of 2015 is concerned, the respondent has filed counter and made various contentions on merits. The learned Senior Counsel for the respondent contended that the documents now sought to be marked are public documents and were available even before filing of the suit. The appellants have

not given any reason for not filing the above documents during trial or before the First Appellate Court when the respondent filed and marked Exs.A10, A11 and A12. Appellants have not given any reason for not filing the above documents and prayed for dismissal of the Second Appeal.

13(c) In support of his contention, the learned Senior Counsel for the respondent relied on Para 17 of the same judgment relied on the learned counsel for the appellants in **2008 (6) CTC 237** cited supra, wherein it has been held as follows -

17. To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under :

(a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for

consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either specific, or implied as noticed in Annaimuthu Thevar (supra)]. Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.

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Substantial questions of law 1 & 2 :-

14. The respondent filed suit for possession of 'B' Schedule property and for mandatory injunction. According to the respondent, he purchased the property from one Palanisamy by sale deed dated 07.02.2006 which was marked as Ex.A5. The said

Palanisamy purchased the property by sale deed dated 29.04.1981 Ex.A4 from M/s.Sujini Textiles. The contention of the appellants that the vendor the respondent Palanisamy, after purchasing the property under Ex.A4, sold the property to third parties and when he sold the property by Ex.A5 to the respondent, he did not have any title to the said property. To prove their case, the appellants examined Palanisamy as DW2. Palanisamy deposed that he did not sell the 'A' schedule property to anybody from the date of his purchase as alleged by the appellants. The appellants relied on Exs.B8, B9 & B1 to substantiate their case that Palanisamy did not have title when he sold the property to the respondent. These three documents are documents relating to earlier suits alleged to have filed by Palanisamy and judgment in CMA No.50 of 2017 filed by the respondent and one Gopalakrishnan.

15. The learned Trial Court dismissed the suit on the ground that the appellants proved that as per Exs.B8, B9 & B10 sale by DW2 Palanisamy and that respondent did not produce encumbrance certificate from 29.04.1981 to 07.02.2006 to show that his vendor did not sell the suit property to any third parties. In the First Appeal, the respondent produced two encumbrance certificates from

01.05.1965 to 30.01.2014. The learned First Appellate Judge, considering these documents marked as Exs.A10 & A11, held that there was no transaction by respondent's vendor Palanisamy alienating the suit property to third parties except to respondent by Ex.A5 sale deed dated 07.02.2006. Before the First Appellate Judge, appellants did not seek permission to file any document to disprove that encumbrance certificates marked as Exs.A10 & A11 produced by the respondent are not correct encumbrance certificates and they do not reflect alienation made by Palanisamy. The appellants filed counter and opposed the same. The said application was allowed by order dated 19.12.2014 and appellants did not challenge the same and hence the said order has become final.

16. The learned First Appellate Judge, considering the pleadings, oral and documentary evidence and judgment of the Trial Court held that the respondent has proved his title to the suit property and respondent's vendor had title when he sold the property to the respondent and appellants have not proved Exs.B8, B9 & B10. In the Second Appeal, appellants are now seeking permission to file encumbrance certificate, sale deed and release

deed alleged to have been executed by Palanisamy in favour of third parties. As per Order XLI Rule 27 CPC, a party to an appeal can produce additional documents only when the said party satisfies the court all the conditions stated in Order XLI Rule 27 (1)(a) (aa) and (b). The appellants in the affidavit filed in support of M.P.No.2 of 2015, have not stated the reason for not producing the documents now sought to be marked either before Trial Court or before First Appellate Court. Even when the respondent filed and marked additional documents Exs.A10, A11 & A12 by filing I.A.No.563 of 2014, the appellants did not take any steps to file present documents to rebut the contentions of the respondent. The appellants have not made out any case to permit them to file and mark documents mentioned in the petition. Hence, M.P.No.2 of 2015 is dismissed as appellants have not satisfied the conditions of Order XLI Rule 27 CPC.

17. The Trial Judge dismissed the suit on the ground that the respondent failed to produce encumbrance certificate. The respondent has filed I.A.No.563 of 2014 and after obtaining permission before the learned First Appellate Judge, filed and marked Exs.A10, A11 & A12, encumbrance certificates and order in

Compromise Petition. In the encumbrance certificates, there is no transaction done by Palanisamy alienating the suit property to third parties except to the respondent. From Exs.A10 & A11, it is clear that Palanisamy had title to the suit property when he sold the suit property to the respondent. The learned First Appellate Judge has also given reason for allowing the appeal holding that the appellants failed to prove Exs.B8, B9 & B10. There is no error of law in the said reasoning. The respondent has produced sale deed Ex.A5 dated 07.02.2006 and proved that he purchased the 'A' schedule property measuring 2.23 cents and that 'B' schedule property measuring 20¼ cents forms part of 'A' schedule property. The respondent has let in evidence to substantiate his case. The respondent has let in oral and documentary evidence to prove his case. The learned First Appellate Judge allowed the Appeal holding that respondent proved his purchase of suit property. A reading of the judgment of learned First Appellate Judge reveals that First Appeal was allowed on respondent proving his case. For the above reasons, the substantial questions of law are answered against the appellants.

18. In the result, this Second Appeal is dismissed. The judgment and decree dated 19.12.2014 made in A.S.No.142 of 2010 is confirmed. No costs. Consequently, connected Miscellaneous Petitions are closed.

28.04.2018

Index : Yes

Speaking order/Non-Speaking order

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To

1. The III Additional District & Sessions Judge, Coimbatore.
2. The III Additional Subordinate Judge, Coimbatore.

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V.M.VELUMANI,J.

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**Pre-delivery Judgment in
Second Appeal No.1025 of 2015**

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