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IN THE HIGH COURT OF JUDICATURE OF MADRAS

DATED : 13.04.2018

CORAM:

THE HONOURABLE MR.JUSTICE V.M.VELUMANI

S.A.No.63 of 2015

& M.P.No.1 of 2015

1.A.Gajendra Prasad

2.A.Sudhakar

3.A.Dhanalakshmi

4.P.Parvathi

(Memo vide Sr.No.3592/18 dated 10.04.2018

is recorded. R3 died. 4th appellant is

recorded as legal heir of the deceased 3rd

Respondent

vide order of court dated 11.04.2018)

... Appellants/Respondents/Plaintiff

Vs.

1..K.Rajendran

2.K.Kannupayyan

... Respondents/Appellants/Defendants

3.Perumal (deceased)

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 31.10.2014 made in A.S.No.19 of 2012 on the file of the Principal District Judge, Krishnagiri in reversing the decree and judgement dated 06.04.2009 made in O.S.No.322 of 2007 on the file of the District Munsif, Krishnagiri.

For Appellants : Mr.M.A.Gouthaman

For Respondents: Mr.V.Nicholas(for R1 & R2)



JUDGMENT

The appellants are plaintiffs and the respondents are defendants in O.S.No.322 of 2007 before the District Munsif Court, Krishnagiri. The appellant filed the said suit against the respondents for permanent injunction restraining the respondents and their men from tress passing or from creating any sort of nuisance at the suit properties. According to the appellants, the suit property belonged to third respondent, who is the father of the third appellant and husband of 4th appellant. The third respondent had illegal relationship with many women. Due to illegal relationship with one Seetha, he got one son by name Murugan. The third respondent for his luxuries life sold and mortgaged the ancestral properties to many persons. The said Murugan is a mentally retarded person and he murdered his own mother (Seetha) and he is in Kilpauk Hospital (as a remand prisoner). At that time elders in the village convened a Panchayat on 17.01.2006. In view of the same, the third respondent executed a Settlement Deed on 18.01.2006 in favour of the third appellant/third plaintiff. Even before the said settlement deed, the third and fourth appellants are in possession and enjoyment of the suit property. The third respondent is fickle minded, loose character person and was very much affected by the murder of Seetha by his own son. In such circumstances, the third appellant settled the suit property in favour of appellants 1 and 2 on 24.07.2009 for getting educational loan for their higher studies. The appellants 1 and 2 are in possession and enjoyment of the suit property. The third and fourth appellants are helping them in their agricultural activities and hence, they were added as formal parties in the suit. The respondents 1 and 2 are close relatives of appellants and third respondent and taking advantage of third respondent's mental condition paid a paltry sum and got fraudulent and vexatious documents executed in their favour before the Sub Registrar, Bargur. However, the said document is not binding on the appellants and their properties. Appellants 3 and 4 filed a suit in O.S.No.116 of 1977 before the District Munsif Court, Krishnagiri seeking maintenance and a decree had also been passed on 07.10.1980 in their favour.

2. It is the further case of the appellants that the respondents 1 and 2 who are the third parties, claiming some imaginary right attempted to tresspass the suit property on 26.10.2007 and 27.10.2007 with some rowdy elements however, the appellants prevented them. But, they left warning that they would come again with a group of people and would tress pass into the property. The appellants filed the present suit for injunction in O.S.No.322 of 2007 before the District Munsif Court, Krishnagiri for the relief mentioned therein.



3. The second respondent filed written statement and the same was adopted by the first respondent and contended that they purchased the property for valuable consideration and they are in possession and enjoyment of the property right from the date of their purchase. There was no Panchayat held on 07.01.2006. The suit property is not an ancestral property of the third respondent. In the suit in O.S.No.115 of 1977 [wrongly mentioned as O.S.No.116 of 1997] filed by the appellants 3 and 4 vide decree dated 07.10.1980 no relief was granted to the third appellant. The appellants 3 and 4 never lived in the suit property and they are not in possession of the suit property. The plaintiffs filed the above suit with ulterior motive to give trouble to the peaceful possession and enjoyment of the respondents 1 and 2. Hence, prayed for dismissal of the suit.

4. The trial Court, based on the pleadings of the parties, framed two issues and during the course of trial, P.Ws.1 to 4 were examined on the side of the appellants and Exs.A.1 to A.3 were marked to prove their case. On the side of the respondents, D.W.1 to D.W.4 were examined and Exs.B.1 & B.2 were marked.

5. The trial Court based on the pleadings, oral and documentary evidence decreed the suit holding that the claim of the appellants is better than the claim of the respondents 1 and 2 and given a finding that the alleged tresspass made by respondents 1 and 2 into the suit property is believable. Against the judgement and decree, dated 06.04.2009 made in O.S.No.322 of 2007, the respondents 1 and 2 filed A.S.No.19 of 2012 before the Principal District Court, Krishnagiri.

6. In the Appeal, the respondents 1 and 3 filed interlocutory application in I.A.No.38 of 2013 to mark the sale deed dated 10.11.2008 executed by Murugan in favour of the second respondent. According to the respondents 1 and 2, the said document was sent for deciding the stamp duty payable to the Special Deputy Collector, Salem and only on 26.11.2009 the same was decided and sale deed was received only after 4 to 5 months.

7. The appellants filed counter in the said application i.e., I.A.No.38 of 2013 and contended that when the appeal was pending before the Sub Court in A.S.No.43 of 2009, the respondents 1 and 2 filed I.A.No.37 of 2011 for filing additional documents. Now, respondents 1 and 2 have filed the present application for the very same relief and it is their case that they are filing applications continuously to mark the documents which were not



mentioned in their written statement and those applications were filed only to drag on the proceedings. Hence, prayed for dismissal of the said applications.

8. The learned Appellate Judge allowed the said application and the sale deed dated 10.11.2008 was marked as Ex.B3.

9. The learned Appellate Judge framed necessary points for consideration and taking into account the exhibits B1 and B2 held that the suit for bare injunction without seeking relief of declaration of title, when the title is disputed is not maintainable. It is further held that the third respondent did not have title over the suit property when he executed Ex.A1, Settlement Deed dated 18.01.2006 in favour of the third appellant and settlement deed dated 12.09.2007 in favour of the first respondent. The suit properties belonged to Kanniyammal @ Seethammal and her son Murugan as per 'A' register marked as Ex.B2 and possession follows title. The appellants failed to prove their possession by any acceptable evidence.

10. Aggrieved by the said judgment and decree dated 31.10.2014 made in A.S.No.19 of 2012, the appellants have filed the present Second Appeal.

11. At the time of admission, this court framed the following substantial questions of law:

(i) Whether the First Appellate Court was right in reversing the decree and judgement of the trial Court by referring to a settlement deed of the year 1975 which has not been proved in evidence at all?

(ii) Whether the First Appellate Court was right in reversing the decree and judgement of the trial Court by simply relying on the sale deed dated 12.09.2007 (Ex.B.1), wherein, a reference has been made about the above settlement deed of the year 1975?"

12. Learned counsel appearing for the appellants would contend that the learned First Appellate Judge erred in law in holding that the third respondent settled the property in the year 1975 to Seethammal and her son Murugan and the said documents had never been produced and marked as exhibit either in the suit or in the first appeal. The learned judge erred in accepting the sale deed dated 10.11.2008 alleged to have been executed by Murugan in favour of the second respondent. The said document has not been proved in the manner known to law and appellants did not have any opportunity to dispute the genuineness of the said document. The learned Judge relied on exhibit B2, 'A' Register in respect of the suit property wherein the Seethammal and Murugan are shown as owners. Seethammal was



murdered by her son Murugan and the said Murugan was in Kilpauk Hospital (as a remand prisoner). The First Appellate Court failed to consider this aspect which shows neither Seethammal nor Murugan would have been in possession of the suit property based on the alleged settlement deed executed by the third respondent in the year 1975 in their favour. The First Appellate Court failed to consider exhibit A3, kist receipts which shows that the properties are standing in the name of the third respondent.

13. Per contra, the learned counsel appearing for the respondents 1 and 2 contended that the respondents have proved their title and possession by producing the sale deeds. As per exhibit B2, 'A' Registrar maintained by Village Administrative Officer the possession of the property was with Seethammal and Murugan and the respondents 1 and 2 are in possession as per the sale deed executed by the third respondent as well as Murugan. The appellants have not proved that they are the owners of the property and they are in possession of the suit property and the suit for bare injunction is not maintainable when title of the appellants is disputed by the respondents. Without seeking a declaratory relief in the said suit, the prayer is not maintainable.

14. Heard Thiru.M.V.Gouthaman, learned counsel appearing for the appellants and Mr.V.Nicholas, learned counsel appearing for the respondents.

15. Substantial questions of law 1 & 2:

From the materials on record, it is seen that the respondents 1 and 2 have disputed the title of the appellants. The respondents 1 and 2 claim title of the suit property based on the sale deed executed by the third respondent in favour of first respondent. The third respondent in the settlement deed, Ex.A1, executed in favour of third appellant as well as in the sale deed, Ex.B1, executed in favour of the first respondent has stated that the suit properties are ancestral properties and he was in possession of the suit property. Before the Trial Court, the respondents 1 and 2 did not file the sale deed dated 10.11.2008. During the cross examination of second respondent as D.W.2, he has stated that he has seen the settlement deed in favour of Seethammal and Murugan and that said document is not with him and he has stated that certified copy of the said settlement deed is not necessary document. The First Appellate Judge allowed the I.A.No.38 of 2013 and marked the sale deed dated 10.11.2008 as exhibit and relying on the said document, held that the respondents 1 and 2 are having title and possession follows title. The learned First Appellate Judge has not followed the procedure for marking the document in Appeal. The relevant provisions of CPC are Order XLI Rules 27, 28 and 29, which read as follows:



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" Order XLI Rules 27, 28 & 29

27. Production of additional evidence in Appellate Court.- (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Whenever additional evidence is allowed to be produced, by an Appellate Court, the court shall record the reason for its admission.

28. Mode of taking additional evidence.- Wherever additional evidence is allowed to be produced, the appellate court may either take such evidence, or direct the court from whose decree the appeal is preferred, or any other subordinate court, to take such evidence and to send it when taken to the appellate court.

29. Points to be defined and recorded :- Where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified."

16. When additional evidence is admitted, the other side should be given an opportunity to rebut the same. In the present case, even though the appellants have opposed the marking of the documents, the learned First Appellate Court allowed the interlocutory application and marked the document without following the procedure contemplated in the above rules. The First Appellate Judge failed to see the sale deed dated 10.11.2008, executed by Murugan in favour of the second respondent was subsequent to the filing of the suit i.e.,



31.10.2007. It is not the case of the respondents 1 and 2 either in the written statement or in the evidence that they acquired the title by virtue of sale deed dated 10.11.2008 executed by Murugan and they are in possession based on the said sale deed. On the other hand, the sale deed dated 12.09.2007, executed by the third respondent is in favour of the first respondent whereas the sale deed dated 10.11.2008 executed by Murugan is in favour second respondent.

17.The learned First Appellate Court erred in reversing the judgment of the trial court based on the settlement deed of the year 1975 which is not before the court below. In view of contradictory findings of the First Appellate Court, the judgment and decree of the courts below is set aside and suit is remitted back to the Trial Court.

18. For all the above reasons, both the substantial questions of law are answered in favour of the appellants. Accordingly, this Second Appeal is allowed. The judgements and decrees of Court below are set aside. The suit is remanded to Trial Court for denovo trial. It is open to the parties to let in either oral or documentary evidence. It is also left open to the appellants to file an application for amendment to include the relief of declaration if they desire or so advised. If any such application is filed, the Trial Court can consider the same on merits and pass orders in accordance with law. No costs. Consequently, connected miscellaneous petition is closed.

-s/d-

Assistant Registrar(CS-II)

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Sub-Assistant Registrar

To

1.The Principal District Judge,
Krishnagiri.

2. The District Munsif,
Krishnagiri.

3. The Record Keeper
VR Section, High Court, Madras.(2 copies)

+1 CC to Mr.V. Nicholas, Advocate sr 27647.

+1 CC to Mr.MA. Gowthaman, Advocate sr 28284.

S.A.No.63 of 2015

SP(01/06/2018)