

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.07.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

S.A.No.684 of 2015
and M.P.No.1 of 2015

Kamala

.. Appellant/Plaintiff

Siddha Gounder

Vs.

... Respondent/Defendant

Second Appeal filed under Section 100 of C.P.C against the judgment and decree dated 02.12.2014 made in A.S.No.2 of 2012 on the file of I Additional Sub Court, Salem, reversing the judgment and decree dated 08.07.2011 made in O.S.No.655 of 2009 on the file of Principal District Munsif Court, Salem.

For Appellant : Mr.D.Shivakumaran

For Respondent : Mr.R.Nalliyappan

JUDGMENT

The Second Appeal is filed against the judgment and decree dated 02.12.2014 made in A.S.No.2 of 2012 on the file of I Additional Sub Court, Salem, reversing the judgment and decree dated 08.07.2011 made in O.S.No.655 of 2009 on the file of Principal District Munsif Court, Salem.

2.The appellant is plaintiff and respondent is defendant in O.S.No.655 of 2009 on the file of Principal District Munsif Court, Salem. The appellant filed said suit for declaration of title and for consequential injunction against the respondent from restraining him from interfering with the appellant's possession and enjoyment of the suit property and for permanent injunction restraining the respondent from disturbing the appellant by force or any other method otherwise by lawful means and interfering with the peaceful possession and enjoyment of the suit property. The respondent denied title of the appellant to the suit property. Initially, the appellant has filed the suit for injunction and then, she has amended the plaint by filing application and included the relief of declaration of

title to the suit property.

3. According to the appellant, her father Arumuga Gounder by registered settlement deed dated 20.05.1992 settled the suit property on her. From the date of settlement, the appellant is in possession and enjoyment of the suit property. The patta was changed in her name and she is paying all the taxes for her property. Her father died in the year 1999. In March 2007, the respondent, who is none other than her brother, illegally occupied the suit property and after Panchayat, he handed over the suit property to the appellant. Again on 20.04.2009, respondent occupied the suit property and after Panchayat, he has handed over the same to the appellant. The respondent is trying to take possession of the suit property, in the circumstances, appellant filed the suit for the above stated relief.

4. The respondent filed written statement and denied all the averments made in the plaint. He also denied that his father settled the property on the appellant and handed over possession to her. According to the respondent, appellant fabricated and forged the said document. The respondent only is in possession and enjoyment of the suit property and he is paying kisth. The respondent did not take possession illegally, as there is no necessity for the same. There was no Panchayat as alleged by the appellant. The respondent is in possession of the suit property for more than the statutory period, he has perfected his title and he is absolute owner of the suit property.

5. Based on the pleadings, the learned trial Judge framed necessary issues. Before the learned Judge, the appellant examined herself as P.W.1, examined her two sisters as P.W.2 & P.W.3 and attesting witness to the settlement deed as P.W.4 and marked six documents as Exs.A1 to A6. The respondent examined himself as D.W.1 and three other witnesses viz., Ganesan, Annamalai and Tamilarasu as D.W.2 to D.W.4 and marked eight documents as Exs.B1 to B8.

6. The learned trial Judge considering the pleadings, oral and documentary evidence, decreed the suit.

7. Against the said judgment and decree dated 08.07.2011 made in O.S.No.655 of 2009, the respondent has filed A.S.No.2 of 2012 on the file of I Additional Sub Court, Salem.

8. The learned First Appellate Judge framed necessary points for consideration. The learned First Appellate Judge independently considering the materials available on record, judgment of the Trial Court and arguments of counsel for the parties, allowed the First Appeal holding that the appellant

failed to prove the contents of the settlement deed, there is no explanation for not producing the original settlement deed and the learned trial Judge did not frame any issue with regard to declaration of title and did not give any finding.

9. Against the said judgment and decree dated 02.12.2014 made in A.S.No.2 of 2012 on the file of I Additional Sub Court, Salem, reversing the judgment and decree dated 08.07.2011 made in O.S.No.655 of 2009 on the file of District Munsif Court, Salem, the present Second Appeal is filed by the appellant/plaintiff.

10. At the time of admission, the following substantial questions of law have been framed:

"a. When a perusal of the judgment by the trial Court ex facie shows that the trial Court has elaborately discussed the plaintiff's right, title and possession and also the rival claim made by the defendant over the suit property under the issues namely "(1) Whether the gift settlement deed dated 20.05.1992 is true and valid? and (2) Whether the plaintiff has been in possession of the suit property is true and correct? and rendered a decree for declaration and injunction as prayed for, is the lower appellate Court correct in law in reversing the same, just because an issue "whether the plaintiff is entitled for declaration as prayed for" is not framed?.

b. When the plaintiff seeks the relief of declaration and permanent injunction on the strength of a registered deed of settlement and when the defendant pleads fraud and also sets up a plea of adverse possession, is the lower appellate Court correct in law in ignoring the legal requirement that the burden of proof to prove fraud is on the defendant?"

11. The learned counsel for the appellant contended that the trial Court framed issues with regard to settlement deed and consequential possession and enjoyment of the right of the appellant, which includes the right of the appellant for declaration of title. The First Appellate Court misdirected itself and reversed the judgment of the trial Court on misconception that no issue was framed in respect of declaration of title. The appellant has deposed that original settlement deed was lost, while whitewashing her house and she has produced the certified copy of the settlement deed, which is admissible in evidence. The First Appellate Court without considering the evidence of appellant/P.W.1, has erroneously held that the appellant failed to give an explanation for not producing original settlement deed. The First Appellate Court erred in holding that certified copy of the settlement deed cannot be marked as secondary evidence. The appellant has examined one of the attesting witnesses to the settlement deed as P.W.4 to prove

the valid execution by her father Arumuga Gounder and registration of the said settlement deed. The First Appellate Court without any valid reason rejected the evidence only on the ground that he is living in a different village. The appellant examined the sisters of the appellant and respondent as P.W.2 & P.W.3 and proved the execution and registration of the settlement deed and also her continuous possession in the suit property. The respondent has not filed any suit for declaration of his title and for possession or injunction, when the appellant has claimed title and possession based on the settlement deed. The appellant has proved that the settlement deed was acted upon and she is in possession by producing the documents by competent authority. In support of his contention, the learned counsel for the appellant has relied on the judgment reported in (2011) 4 SCC 240 (H.Siddique (dead) by legal heirs v. A.Ramalingam);

"7. On the contrary, Shri Rajiv Dutta, learned Senior Counsel appearing for the sole respondent has vehemently opposed the appeal contending that the respondent never executed the power of attorney in favour of his brother enabling him to transfer the suit property. Power of attorney had never been filed before the trial Court nor had it been proved. The photocopy of the same was shown to the respondent during the time of his cross-examination wherein he has admitted his signature thereon only. The respondent had never admitted its contents or genuineness of the same. Therefore, the power of attorney itself had not been proved in terms of Sections 65 and 66 of the Evidence Act, 1872 (hereinafter called "the 1872 Act") and, thus the question of proceeding further by the trial Court could not arise. More so, it is not probable that the appellant paid a sum of Rs.65,500/- instead of Rs.40,000/- as consideration fixed in the agreement to sell. The agreement dated 25.06.1979 contained Clause II according to which if the sale deed was not executed, the earnest money of Rs.5000/- received by the alleged power-of-attorney holder would be refunded to the purchaser together with the like amount of Rs.5000/- as liquidated damage for breach of contract. Thus, at the most, the appellant was entitled to receive a sum of Rs.10,000/- but the question of decreeing the suit could not arise. The appellant had been a tenant. He never paid any consideration. Earlier there has been a prior sale of one-third share in the same property (the share of the brother of the respondent) in favour of D.Narendra and the

appellant had filed the suit against him also claiming that the said part of the property could have been sold to him. The alleged payment of Rs.65,500/- or Rs.40,000/- as a sale consideration is nothing but misrepresentation by showing forged receipts prepared by the appellant in collusion with the son of the alleged power-of-attorney holder at the time of litigation with D.Narendra. The appeal lacks merit and is liable to be dismissed.

21.The said provisions provide guidelines for the appellate Court as to how the Court has to proceed and decide the case. The provisions should be read in such a way as to require that the various particulars mentioned therein should be taken into consideration. Thus, it must be evident from the judgment of the appellate Court that the Court has properly appreciated the facts/evidence, applied its mind and decided the case considering the material on record. It would amount to substantial compliance with the said provisions if the appellate Court's judgment is based on the independent assessment of the relevant evidence on all important aspects of the matter and the findings of the appellate Court are well founded and quite convincing. It is mandatory for the appellate Court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing for the evidence on those points. Being the final Court of fact, the first appellate Court must not record mere general expression of concurrence with the trial Court judgment rather it must give reasons for its decision on each point independently to that of the trial Court. Thus, the entire evidence must be considered and discussed in detail. Such exercise should be done after formulating the points for consideration in terms of the said provisions and the Court must proceed in adherence to the requirements of the said statutory provisions."

12.Per contra, the learned counsel for the respondent contended that Ex.A1 settlement deed is fraudulent and forged one. The appellant has not produced the original settlement deed and therefore, she was never in possession of the suit property. The respondent is only in possession and enjoyment of the suit property for more than the statutory period. The respondent has examined the witnesses to prove his possession and enjoyment of

the suit property. The trial Court without properly appreciating the evidence let in by the respondent, decreed the suit on erroneous reason. The learned trial Judge did not frame any issue with regard to declaration of title claimed by the appellant and judgment of the trial Court is vitiated for non framing necessary issues and giving a finding. The First Appellate Court has properly appreciated all the materials on record, validity of the settlement deed, rightly allowed the First Appeal filed by the respondent and prayed for dismissal of the Second Appeal.

13. Heard the learned counsel for the appellant as well as respondent and perused the materials available on record.

14. Substantial questions of law (a) and (b):

The appellant originally filed suit for injunction and subsequently, included the relief of declaration. The appellant is claiming title over the suit property based on the settlement deed executed by her father in her favour. She is claiming to be in possession of the suit property from the date of settlement deed. The learned trial Judge framed first two issues with regard to settlement deed and consequential possession. The parties were aware that these two issues relate to declaration of title of appellant and the appellant also let in evidence with regard to declaration of title as claimed by her. The appellant apart from examining herself as P.W.1 examined two sisters of both appellant and respondent as P.W.2 and P.W.3. They spoke about their knowledge that their father executed settlement deed in favour of the appellant, they were present at the time of execution and registration of settlement deed and handing over the possession of the suit property to the appellant. They were cross-examined by the respondent to discredit their evidence on the ground that they are inimical to the respondent. The learned trial Judge accepted the evidence of P.W.2 and P.W.3. The First Appellate Court did not accept the said evidence on the ground that they have some misunderstanding with the respondent on matrimonial issues. The reasoning of the First Appellate Court is not a valid reason.

15. Further, appellant has examined one of the attesting witnesses to the settlement deed as P.W.4. P.W.4 has categorically stated that when the settlement deed was prepared and read over to Arumuga Gounder, he being satisfied with the contents of the settlement deed, put his thumb impression in his presence and in the presence of other witness Marimuthu. After that both P.W.4 and Marimuthu put their signatures. P.W.4 also stated that he witnessed the registration. In his cross-examination, he has stated that for the past ten years only, he is residing in another village. Nothing was elicited in the cross-examination of P.W.4 to show that he was not residing in the village, when Arumuga Gounder has executed settlement deed.

The First Appellate Court failed to consider this portion of evidence of P.W.4 and rejected his evidence on the ground that P.W.4 is residing in some other village. Even if otherwise respondent has not proved that P.W.4 is stranger and even if P.W.4 was residing in another village, there is no prohibition for him to witness the settlement deed executed by Arumuga Gounder. The appellant has produced document to show that she is in possession and enjoyment of the suit property. On the other hand, respondent has not produced any acceptable evidence to show that he was in possession of the suit property from the date of death of his father. The respondent has some other property also and witnesses examined by the respondent did not depose that the respondent is in possession of the suit property. The respondent claimed title by adverse possession also. He has not substantiated the said claim by furnishing particulars, from which date he is in possession as owner to the knowledge of the appellant. The respondent has alleged fraud on the part of the appellant in getting the settlement deed in her favour. On the other hand, the appellant examined her two sisters as P.W.2 and P.W.3, witness to the settlement deed as P.W.4 and proved execution and registration of settlement deed and she is in possession of the suit property. The respondent failed to prove that appellant by playing fraud obtained the settlement deed in her favour.

16.It is well settled that non framing specific issue will not vitiate the judgment, if the parties have let in evidence in respect of the said issue also. In the present case, the parties have let in evidence with regard to declaration of title of the appellant and the trial Court elaborately considered the pleadings and evidence and granted decree of declaration of title to the appellant. The First Appellate Court without considering the well considered judgment of the learned trial Judge, has erroneously held that non framing issue with regard to declaration of title vitiate the judgment of the trial Court and rendered the judgment. For the above reason, judgment of the First Appellate Court is set aside and judgment of the trial Court is restored to file.

17.In the result, the Second Appeal is allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS VI)

//True copy//

Sub Assistant Registrar

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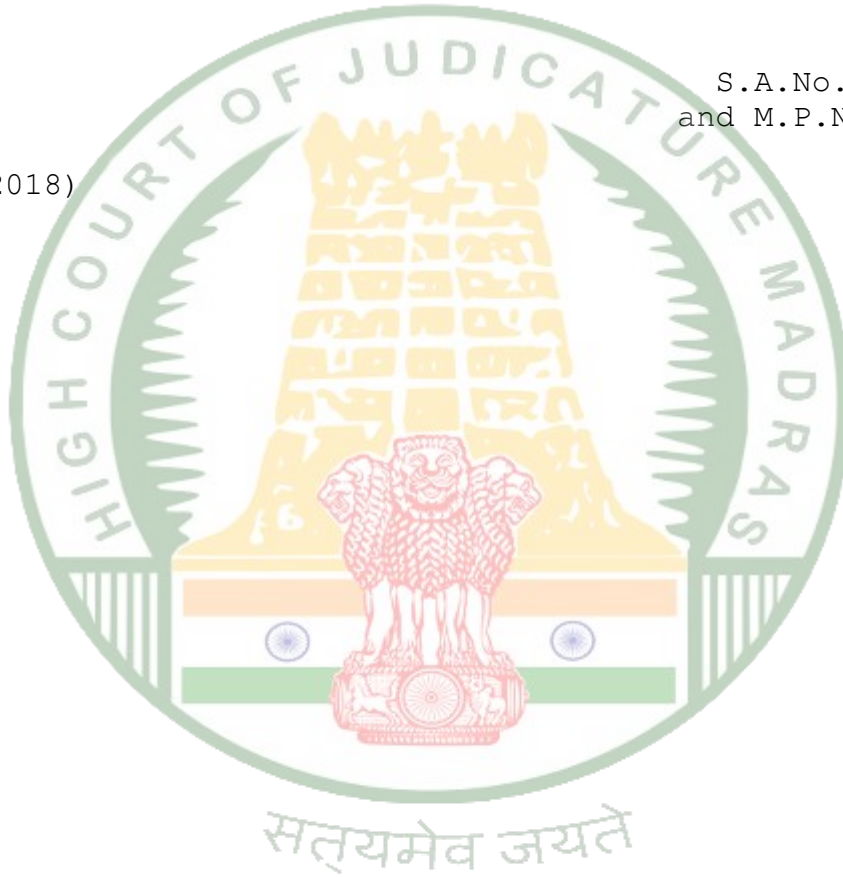
1.I Additional Subordinate Judge,
Salem.

2.The Principal District Munsif,
Salem.

+lcc to Mr.D.Shivakumaran Advocate SR.No.45795
+lcc to Mr.R.Nalliappan, Advocate SR.No.45612

S.A.No.684 of 2015
and M.P.No.1 of 2015

SS (CO)
GN (28/08/2018)



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