

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :13.02.2018

PRONOUNCED ON:23.02.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.1556 of 2003

and

C.M.P.No.14253 of 2008

Subramanian

...

Appellant

Vs.

1. Velayudham
2. Sathyanarayanan
3. Dr.S.Ramkumar
4. Rajaram
5. Murugan
6. Gurumurthy
7. Chellayya
8. Immanuel
9. Sivasubramanian
- 10.Kothandapani
- 11.The Executive Officer,
Ulundurpet Town Panchayat,
Ulundurpet.
- 12.Assistant Engineer (Operation & Maintenance),
Tamil Nadu Electricity Board,
Ulundurpet.
- 13.Assistant Executive Engineer,
(Operation & Maintenance),
Tamil Nadu Electricity Board,
Ulundurpet.

... Respondents/Defendants

Prayer:

Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree dated 10.10.2002 passed in A.S.No.7 of 2001 on the file of the Additional District Judge, Villupuram reversing the judgment and decree dated 06.11.2000 passed in O.S.No.303 of 1999 on the file of the Principal District Munsif Court, Ulundurpet.

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For Appellant : Mr.R.Gururaj
For RR12 and R13 : Mr.V.Viswanathan
For RR1 to R3, R7,R9 and R11 : No appearance
Set exparte
Vide order dated 13.02.2018
For RR4 to R6,R8 and R10 : Dismissed
Vide order dated 16.12.2009

J U D G M E N T

Challenge in this second appeal is made to the judgment and decree dated 10.10.2002 passed in A.S.No.7 of 2001 on the file of the Additional District Court, Villupuram reversing the judgment and decree dated 06.11.2000 passed in O.S.No.303 of 1999 on the file of the Principal District Munsif Court, Ulundurpet.

2. The parties are referred to as per the rankings in the trial court.

3. Suit for mandatory injunction .

4.The case of the plaintiff in brief is that the the suit property and other properties belonged to the plaintiff, the first defendant and Sithyan @ Kaliyan in common and on 13.03.1989, they had entered into a partition of their properties by way of a registered partition deed and accordingly it is the case of the plaintiff that the suit property had been allotted to his share in the "C" schedule of the partition deed and pursuant to the above said partition deed, the respective sharers have been enjoying their allotted properties and accordingly the plaintiff had taken possession of the properties allotted him and enjoying the same by obtaining patta and paying necessary tax etc., On account of his avocation, the plaintiff had been settled at Bombay and accordingly, deciding to lease out the suit property, accordingly, sought the assistance of his brother namely the first defendant for completing the construction of the shops in the suit property and it is the case of the plaintiff that out of the money sent by the plaintiff from Bombay, the first defendant put up shops in the suit property and in this connection, various communications had been made between the parties and likewise, it is stated that eight shops in the ground floor and three shops in the first floor were constructed in the suit property and accordingly, the defendants 2 to 10 had been let out the portions of the shops

constructed in the suit property and occupying the respective shops as the tenants thereof. While so, the plaintiff demanded the first defendant to settle the advance amount received by him from the tenants as well as the rent and though the first defendant had been assuring to settle the same, however, on some pretext or the other, postponed the payment and left with no other alternative, the plaintiff issued a legal notice on 15.06.1999 to the defendants calling upon them to attorn the tenancy of the shops in the suit property in his favour and pay the rent only to the plaintiff and not the first defendant and while so, the first defendant attempted to obtain the service connection and the assessment of the suit property in his name without any legal authority and inasmuch as, it is only the plaintiff, who has title to the suit property as above stated, it stated that the plaintiff has been necessitated to lay the suit for appropriate reliefs.

5.The case of the first defendant in brief is that the suit property originally belonged to Sithaiya Padayachi and he had settled the same in favour of his grandson Paramasivam S/o, Palani Padayachi and inasmuch as the settlee Paramasivam died during the life time of Palani and his wife Chellammal and as Palani died during the life time of Chellammal, Chellammal appointed the first defendant as her power agent on 10.04.1969 and entrusted the suit property and the suit property thus is in the possession and enjoyment of the first defendant and it is false to state that the suit property is the common property belonging to the plaintiff and the first defendant Sithyan @ Kaliyan and it is the first defendant who had put up the shops in the suit property out of his investment and accordingly let out the shops to the various tenants on the receipt of the advance and receiving the rent from them and inasmuch as the first defendant demanded the plaintiff to return the amount liable to the paid by the plaintiff, the plaintiff has laid the suit falsely and the electrical service connection and assessment of the suit property stands only in the name of the first defendant and hence the plaintiff is not entitled to obtain the reliefs claimed in the suit.

6.The defendants 2 to 10 have pleaded that they are occupying the shops in the suit property as the tenants thereof, after paying the advance amount to the first defendant and remitting the rent to the first defendant and the defendants 2 to 10 are ready to pay the rent and attorn the tenancy in favour of the lawful owner as determined by the Court and inasmuch the shops had been let out to them by the first defendant, they are paying the rent to the first defendant, presently the service connection had been obtained only in the name of the first defendant as well as the assessment had been effected in the name of the first defendant and accordingly, prayed for the

disposal of the plaintiff's suit appropriately.

7.The case of the 11th defendant in brief is that it is true that the plaintiff issued the legal notice dated 15.06.1999 and the first defendant approached the 11th defendant for assessing the tax in respect of the suit property in his name and accordingly assessed the tax in his name from 01.10.1988, on the basis of the documents placed by him and the 11th defendant is ready to abide by the decision of the Court in the matter and accordingly prayed for the disposal of the plaintiff's suit.

8.The case of the defendants 12 to 13 is that it is true that the plaintiff had issued legal notice and inasmuch the first defendant made a claim that he is the owner of the suit property and accordingly on the basis of the documents placed by him, the service connection was effected in his name and therefore the defendants 12 to 13 are ready to abide by the directions of the Court and accordingly prayed for the disposal of the plaintiff's suit.

9.In support of the plaintiff's case, P.Ws.1 to 3 were examined. Exs.A1 to A24 were marked. On the side of the defendants, D.Ws.1 and 2 were examined. Exs.B1 to B26 were marked.

10. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial court was pleased to decree the suit as prayed for. On appeal preferred by the first defendant, the first appellate court, on an appreciation of the materials placed, was pleased to set aside the judgment and decree of the trial court and by way of allowing the appeal preferred by the first defendant, dismissed the suit levied by the plaintiff. Impugning the same, the present second appeal has been laid.

11.At the time of admission of the second appeal the following substantial questions of law were formulated for consideration.

(i)Whether the first defendant is not estopped from questioning the partition deed dated 13.03.1989 (Ex.A1) being a party to it?

(ii)Whether the first appellate court was right in dismissing the suit on technical grounds that the prayer for recovery of possession was not asked?

(iii)Whether the plaintiff is barred from agitating regarding the amendment sought, since the amendment petition was dismissed?

(iv) Whether defendants 2 to 10 are estopped from denying plaintiff's title?

12. The plaintiff claims title to the suit property based on the partition deed dated 13.03.1989 marked as Ex.A1. The first defendant is the brother of the plaintiff. Now, according to the plaintiff, he, the first defendant and one Sithyan @ Kaliyan partitioned their properties by way of Ex.A1 deed and by way of the same, it is the case of the plaintiff that the suit property had been allotted to his share. It is further pleaded by the plaintiff that inasmuch as, he had settled at Bombay, on account of his avocation, he had put up the shops in the suit property through his brother i.e., the first defendant and accordingly, it is stated that the first defendant had put up the shops in the suit property from and out of the money sent by the plaintiff and let out the same to the various tenants and inasmuch as the first defendant failed to settle the advance and rent duly to the plaintiff and on the other hand, attempted to effect the assessment and the service connection in respect of the suit property in his name without any authority, according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

13. The first defendant has raised a plea that he had been entrusted the suit property by Chellammal and according to him, Chellammal had derived title to the suit property from Sithaya Padayachi and it is further stated that Sithaya Padayachi settled the suit property in favour of his grandson Paramasivam, S/o Palani Padayachi and as the settler Paramasivam and his father had died, it is stated that the Chellammal acquired title to the suit property and appointed the first defendant as her power agent and that he had put up the shops in the suit property and let out the same to the various tenants and accordingly, the suit property had been assessed in his name and it is he who had obtained the service connection of the suit property and the plaintiff without any valid title, laid the false suit and hence the suit is liable to be dismissed.

14. Prior to the institution of the suit, the parties had exchanged notices and it is further seen that even at that stage of the matter, the first defendant in particular, had challenged the claim of title to the property by the plaintiff as projected by him and this has been admitted by the plaintiff during the course of his evidence and accordingly, it is seen that the plaintiff is well put on notice, even prior to the institution of the suit, that the first defendant is challenging his title to the suit property. The position being above, in such view of the matter, it is found that the plaintiff should have primarily laid the suit seeking the reliefs of declaration of title in respect of the suit property and for possession before claiming

the other reliefs in respect of the suit property. Accordingly, it is found that in the suit also, the first defendant has filed the written statement opposing the claim of the plaintiff's title to the suit property vehemently and set up the title on himself as above stated and accordingly, it is found that even in the suit, challenge has been made to the claim of title to the suit property as put forth by the plaintiff.

15. The materials placed also disclose that it is only the first defendant who had let out the shops to the tenants i.e., the defendants 2 to 10 and accordingly, the defendants 2 to 10 had paid the advance amount and paying the rent only to the first defendant. It is further found that the tax-assessment of the suit property has been effected only in the name of the first defendant and it is only the first defendant who had obtained the service connection in the suit property. It is thus found that, as rightly determined by the first appellate court, it is only the first defendant who is in possession and enjoyment of the suit property, no doubt, through the tenants let out by him and accordingly, it is found that the first defendant has thrown a serious challenge to the plaintiff's claim of title to the suit property. As put forth by the first defendant in particular, as rightly found by the first appellate court, the plaintiff, in such circumstances, should have endeavored to amend the plaint for seeking the relief of declaration of title to the suit property and for other appropriate reliefs. However, it is found that very belatedly, after the evidence had been recorded, at the far end preferred an application to amend the plaint for the reliefs of declaration and possession and after contest the said application has come to be dismissed by the trial court. The plaintiff has not thrown any challenge to the said order of the trial court and it is found that the said order has become final. As above seen, the plaintiff though put on notice about the challenge made by the first defendant to his alleged the claim of title to the suit property, did not choose to lay the suit seeking the appropriate reliefs, particularly, the relief of declaration of title as regards the suit property. Accordingly, knowing the fate of his case, as rightly found by the first appellate court, at the last stage of the trial, the plaintiff made an attempt to amend the reliefs, however the same had come to be not accepted by the trial court. If really the plaintiff had any intention to prosecute the suit diligently and in accordance with law, particularly, in the light of the defence set out by the first defendant, on the dismissal of the application preferred by him for amending the plaint in I.A.No.1361 of 2000, he should have taken up the matter further to the higher forum by challenging the said order. However, inasmuch as the plaintiff has not been ready and willing to prosecute the suit diligently and in accordance with law, he

had kept mum and not thrown any challenge to the dismissal of his amendment application by the trial court. As above seen, even in the written pleas, the first defendant has stoutly repudiated the claim of title to the suit property by the plaintiff.

16. In the light of the above position, it is found that when the plaintiff's claim of title to the suit property has been seriously challenged by the first defendant as above discussed right from the inception and the first defendant had set up a title on himself in respect of the suit property and when the materials placed, disclose prima facie, that it is only the defendant, who is in possession and enjoyment of the suit property through the tenants and the tax assessment and service connection in respect of the suit property had also been effected only in the name of the first defendant as above pointed out, it is found that as rightly determined by the first appellate court, the suit claimed by the plaintiff barely for the relief of mandatory injunction without seeking the relief of declaration of title of the suit property and for recovery of possession is found to be not legally maintainable and on that ground alone, as rightly determined by the first appellate court, this lis preferred by the plaintiff is liable to be thrown out.

17. In this connection, the plaintiff's counsel placed reliance upon the decisions reported in AIR 1955 Supreme Court 481 Sahu Madho Das and others Vs. Mukand Ram and another, AIR 1989 Supreme Court 1809 [Corporation of the City of Bangalore Vs. V.M. Papaiah and another], AIR 1971 Supreme Court 2548 [Dattatraya Vs. Rangnath Gopalrao Kawathekar (dead) by his legal representatives and others]. The principles of law outlined in the above said decisions are taken into consideration and followed as applicable to the facts and circumstances of the present case at hand.

18. The contention is put forward by the plaintiff's counsel that the first appellate court should not have rejected the plaintiff's suit on the footing that he has failed to seek the reliefs of declaration and possession as regards the suit property and on the other hand, considering the import of the rulings relied upon by him, should have remitted the matter back to the trial court for enabling the plaintiff to continue the suit by way of seeking the reliefs of declaration and recovery of possession of the suit property. However, it is found that the above contention, does not merit acceptance as such, when it is noted that despite the firm stand of the first defendant all along challenging the claim of title to the suit property by the plaintiff right from the inception as above discussed, while instituting the suit itself, the plaintiff should have laid the

suit claiming appropriate reliefs particularly the reliefs of declaration of title and possession. That apart, on the defence set out by the first defendant in the written statement, immediately thereafter atleast, the plaintiff should have taken steps to amend the plaint for seeking the above said appropriate reliefs. On the other hand, it is found that the plaintiff at a very belated stage, on the conclusion of the recording of evidence, preferred by an application to amend the plaint for the reliefs of declaration and possession, however the same had come to be not entertained by the trial court. If the plaintiff is serious in pursuing his civil action as per law, on the dismissal of his amendment application, the plaintiff should have taken the matter further by way of challenge to the next higher forum for insisting the reliefs sought for by him in the amendment application. However, the plaintiff did not challenge the said order and this would only go to show that the plaintiff is not interested and diligent in prosecuting the case as per law and accordingly, proceeded to continue the suit as such with the reliefs already prayed for. Accordingly, it is found that the appellate court, considering the entire gamut of the issues involved in the matter, noting that the plaintiff has not laid the suit with appropriate reliefs and thereby determining that the suit laid by the plaintiff is not legally maintainable, accordingly on that footing, rejected the plaintiff's action. In such view of the matter, the contention put forth by the plaintiff's counsel that the first appellate court had erred in not remitting the matter back to the trial court for enabling the plaintiff to continue the suit further with appropriate reliefs as such cannot be countenanced. When it is noted that the plaintiff had not earlier taken the necessary steps with reference to the same and having taken the necessary steps at a belated stage, however, failed to prosecute the matter further in the manner known to law and in such view of the matter, no infirmity could be attributed to the approach of the appellate court in not remitting the matter back to the trial court and in rejecting the plaintiff's action in toto. Particularly, noting that the plaintiff is not interested and diligent to prosecute the suit properly as per law, by seeking appropriate reliefs.

19.As determined by the Supreme Court in the decision reported in 2008 (6) CTC 237 [Anathula Sudhakar Vs. P.Buchi Reddy (dead) by Lrs & Others], it is found that for the reasons afore stated the plaintiff should have laid the suit for the reliefs of declaration, possession and other reliefs deemed fit and the plaintiff having failed to seek for the said reliefs and instead had laid the suit only for the mandatory injunction, despite the stand of the first defendant, throwing the challenge to his claim of title to the suit property, the plaintiff has to suffer the consequences thereof and cannot complain that the court should extend a long rope in his favour to continue the

suit further with the appropriate reliefs as per the requirements of law. It is not the case of the plaintiff that he is ignorant of the defence set out by the first defendant throwing a stout challenge to the claim of his title of the suit property. In such view of the matter, as per the dictum laid by the Apex Court in the above cited decision, it is seen that the suit laid by the plaintiff only for the relief of mandatory injunction without seeking the reliefs of declaration of title and possession is bound to fail as not satisfying the legal requirements and in such view of the matter, it is found that the first appellate court had not dismissed the suit on technical grounds as alleged by the plaintiff and on the other hand, rightly holding that the plaintiff's suit has not been laid as per law, accordingly dismissed the plaintiff's suit and the plaintiff having failed to throw any challenge to the dismissal of his amendment application by the trial court, cannot be allowed to contend that the same should have been entertained by the first appellate court, when he has failed to exhaust his remedy with reference to the same in the manner known to law. The substantial questions of law Nos.2 and 3 framed in the second appeal are accordingly answered.

20. When the first defendant is found to have not accepted the partition deed marked as Ex.A1, and disputing the same from the inception and set up a title on himself in respect of the suit property, it is found that there is no question of estoppel on the part of the first defendant in challenging the partition deed marked as Ex.A1. Inasmuch as the defendants 2 to 10 were let into the shops put up in the suit property only by the first defendant and accordingly, they had raised the defence that the advance amount and the rent had been only paid to the first defendant and in such view of the matter, when till date the plaintiff has not established his claim of title to the suit property in any manner known to law and his title had not been declared by any competent court, it is found that there is no question of estoppel on the part of the defendants 2 to 10, as such, in defending the civil action laid by the plaintiff. The substantial questions of law Nos.1 and 4 formulated in the second appeal are accordingly answered.

21. At the end, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

mfa

To

1. The Additional District Judge,
Villupuram.
2. The Principal District Munsif,
Ulundurpet.

+lcc to Mr.R.Gururaj, Advocate, S.R.No.14639

+lcc to Mr.V.Viswanathan, Advocate, S.R.No.14216

S.A.No.1556 of 2003

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