

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.03.2018

PRONOUNCED ON : 11.04.2018

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.755 of 2004

1.N.Devaraj
2.Thangamani
3.D.Ambedkar

...Appellants/Appellants/defendants
Vs.

1.Amaravathi
2.Rathna

...Respondents/Respondents/Plaintiffs

Prayer :-

Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 25.09.2001 passed in A.S.No.119 of 2000 on the file of the First Additional District cum Chief Judicial Magistrate Court, Salem, confirming the Judgment and Decree dated 27.04.2000 passed in O.S.No.1848 of 1996 on the file of the First Additional District Munsif Court, Salem.

For Appellants : Mr.S.Kaithamalai Kumaran
For Respondents : Ms.J.Lavanya
for M/s.S.K.Nachimuthu

JUDGMENT

This second appeal is directed against the Judgement and Decree dated 25.09.2001 passed in A.S.No.119 of 2000 on the file of the First Additional District Judge cum Chief Judicial Magistrate Court, Salem, confirming the Judgment and Decree dated 27.04.2000 passed in O.S.No.1848 of 1996 on the file of the First Additional District Munsif Court, Salem.

2. Parties are referred to as per their rankings in the trial Court.

3. Suit for permanent injunction.

4. The case of the plaintiffs, in brief, is that the first plaintiff is the wife and the second plaintiff is the daughter of the first defendant and the second defendant is the concubine of the first defendant and the third defendant is the son of the defendants 1 & 2. The suit property was purchased jointly in the

name of the first plaintiff and the first defendant out of their earnings by way of a registered sale deed on 28.03.1969 from one Babu Rao and the name of the first defendant has been included in the sale deed nominally and since the date of purchase, it is only the plaintiffs, who are in possession and enjoyment of the suit property without any hindrance and the first defendant was leading a wayward life and resultantly, he had been developed illegal intimacy with the second defendant and following the same, Panchayat has been convened and pursuant to the Panchayatars' decision, the first defendant executed a release deed dated 24.05.1974 in favour of the first plaintiff by receiving Rs.1,000/- from the first plaintiff, relinquishing his $\frac{1}{2}$ right in the suit property and since the execution of the said release deed, it is only the first plaintiff, who has got absolute title, possession and enjoyment of the suit property and the above said original sale deed dated 28.03.1969 and the release deed dated 24.05.1974 had been deposited with the bank for availing loan for the son-in-law of the first plaintiff viz., Xavier for his chappel business and the first defendant deserted the plaintiffs and living with the defendants and on the ill advise of the defendants 2 & 3, the first defendant as well as the other defendants started interfering with the possession and enjoyment of the plaintiffs in respect of the suit property and in this connection, the parties exchanged notices and despite the same, the defendants continued to interfere with the possession and enjoyment of the plaintiffs in respect of the suit property and also threatened to murder the first plaintiff and the first plaintiff executed a registered Will dated 22.07.1996 in favour of the her daughter viz., the second plaintiff in respect of the suit property and on coming to know of the same, the defendants with the rowdy elements started to interfere with the plaintiffs' possession and enjoyment of the suit property and hence, left with no other alternative, according to the plaintiffs, they had been necessitated to lay the suit for appropriate reliefs.

5. The case of the defendants, in brief, is that the suit laid by the plaintiffs is not maintainable either in law or on facts and the first plaintiff is not the legally wedded wife of the first defendant and the second plaintiff is his daughter and in fact, the first plaintiff joined with the first defendant, after her husband Jayamani deserted her and thereafter, the plaintiffs were living under care and custody of the first defendant and only the second defendant is the legally wedded wife of the first defendant and the 3rd defendant is their son and the suit property had been acquired from Babu Rao, the husband of the first defendant's sister and he had purchased the said property belonging to the family of the first defendant nominally and it is only the first defendant and his sister, who

had put up the building thereon and thereafter, Babu Rao executed a sale deed in the name of the first defendant and since at that point of time, the first plaintiff was living with the first defendant and in fact, the first plaintiff though did not contribute any sum for the acquisition of the suit property, by way of the sale deed dated 28.03.1969, the first plaintiff has been nominally included in the sale transaction and it is false to state that the defendants attempted to interfere with the plaintiffs' possession and enjoyment of the suit property and in that connection, the panchayat was held and that, the first defendant executed a release deed dated 24.05.1974 in favour of the first plaintiff. The abovesaid release deed projected by the plaintiffs is a forged and created document and the plaintiffs cannot lay any claim by way of the said document and no consideration has been passed under the said document and it is only a sham and nominal document and never acted upon. The first plaintiff cannot lay absolute right over the suit property on the basis of the abovesaid release deed. It is only the defendants, who are in possession and enjoyment of the suit property and the plaintiffs have come forward with the suit at the instigation of Xavier as against whom, the first defendant had preferred a civil suit in O.S.No.493 of 1996 and also obtained interim injunction against the said Xavier, only thereafter, at his instigation, the present suit has come to be laid by the plaintiffs and the plaintiffs has never been possession and enjoyment of the suit property at any point of time and the first plaintiff is not entitled to execute a Will in respect of the suit property in favour of the second plaintiff and the second plaintiff has no locus standi to file the suit on the basis of the Will, particularly, when the first plaintiff is alive and the first defendant permitted the first plaintiff to reside in the suit property, however, the second plaintiff and her husband Xavier has no right or title in respect of the suit property and it is only the first defendant, who is managing the suit property and there is no cause of action to lay the suit and the suit is liable to be dismissed.

6. In support of the plaintiffs' case, PWs 1 to 4 were examined and Exs.A1 to A23 were marked. On the side of the defendants, DWs1 & 2 were examined and Exs.B1 to B7 were marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the Courts below were pleased to accept the plaintiffs' case and accordingly, granted the decree as prayed for. Aggrieved over the same, the present second appeal has been laid.

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

" (i) Whether the Courts below are right in accepting Ex.A2 the Release Deed, when its execution is denied by the 1st defendant and the execution of the said document has not been proved as contemplated under Section 68 of the Indian Evidence Act?

(ii) Whether the Courts below are justified in granting a decree for injunction against a co-owner?"

9. The suit being laid simplicitor for permanent injunction, accordingly, it is seen that, as rightly determined by the Courts below, it is unnecessary to decide the relationship between the parties involved in the suit. The first plaintiff claims to be the wife of the first defendant. However, the same is disputed by the first defendant. According to the plaintiffs, the second defendant is the concubine of the first defendant. However, according to the first defendant, only the second defendant is his legally wedded wife. It is admitted that the second plaintiff and the third defendant are born to the first defendant, but considering the nature of the reliefs sought for, the abovesaid dispute between the parties viz-a-vis their relationship is not required to be adjudicated as such.

10. Materials placed on record go to disclose that the suit property has come to be acquired from one Babu Rao both by the first plaintiff and the first defendant by way of a registered sale deed dated 28.03.1969, the copy of which, has been marked as Ex.A1. The purchase of the suit property from Babu Rao by way of Ex.A1 has not been disputed by the first defendant. According to the plaintiffs, the name of the first defendant has been nominally included in the abovesaid sale transaction and however, according to the first defendant, the name of the first plaintiff has been nominally included in the abovesaid sale transaction. Be that as it may, on a perusal of Ex.A1, as rightly determined by the Courts below, it is found that the said document has come to be jointly executed in favour of the first plaintiff as well as the first defendant for a valid consideration alleged to have been paid by both of them and accordingly, it is found that as rightly determined by the Courts below, by way of Ex.A1, both the first plaintiff as well as the first defendant are the owners of the property acquired under the said sale transaction. Accordingly, it is found that

as rightly determined by the Courts below, the evidence adduced by the respective parties contrary to the recitals found in the said document not being admissible in law, as such, it is found that as per Ex.A1 sale transaction, both the first plaintiff and the first defendant had acquired joint ownership over the suit property comprised therein and thus, it is found that each are entitled to half share in the suit property.

11. Now, according to the plaintiffs, following the relationship of the first defendant with the second defendant, dispute arose between the parties and following the panchayat held, it is stated that the same culminated in the execution of the release deed by the first defendant in favour of the first plaintiff regarding his $\frac{1}{2}$ share in the property acquired by way of Ex.A1 and it is thus stated by the plaintiffs that the first defendant, by way of the abovesaid release deed dated 24.05.1974, had released his $\frac{1}{2}$ right in the suit property in favour of the first plaintiff by receiving the consideration of Rs.1,000/- and the copy of the above said release deed has been marked as Ex.A2. The first defendant has disputed the execution of the release deed Ex.A2 and according to him, at the first instance, the said document is a forged and created one and at the second instance, he would state that the abovesaid release deed is a sham and nominal document and not acted upon. It is thus found that the first defendant has taken contradictory defence as regards Ex.A2, the release deed. Ex.A2 is a registered document and as regards, the Panchayat held between the parties and the culmination of the same in the execution of the release deed marked as Ex.A2, we have the evidence of the Panchayatar examined as PW4 and PW4 has tendered evidence as regards the execution of the release deed by the first defendant. Further, even though, no reference about the release deed is found in the encumbrance certificate produced by the defendants marked as Ex.B3, however, the same is reflected in the encumbrance certificate produced by the plaintiffs marked as Ex.A23. Accordingly, it is found that the encumbrance certificate marked as Ex.A23 covering a period of more than 14 years and from the entries found therein, it is seen that the release deed Ex.A2 has been also shown to be the transaction pertaining to the suit property. PW1 the first plaintiff has tendered evidence in a clear and acceptable manner about the execution of the release deed by the first defendant in her favour and the passing of the consideration for the same as pleaded.

12. In this connection, it is contended by the defendants' counsel that the defendants, particularly, the first defendant having denied the execution of the release deed, it is for the plaintiffs to establish the authenticity of the same by examining one of the attestors of the said document as

contemplated under Section 68 of the Indian Evidence Act and the plaintiffs having not resorted to the abovesaid course, it is his contention that Ex.A2 should not be relied upon as a true document. However, as rightly determined by the Courts below, Ex.A2 release deed being a registered document and when the same is also seen to be reflected in the encumbrance certificate marked as Ex.A23 and further, when it is found that the first plaintiff examined as PW1 has tendered clear evidence as regards the same and further, when it is also seen that as per the recitals found in Ex.A2 release deed, the first defendant has admitted that it is only the first plaintiff, who had put up the structure in the suit property out of her own funds and in addition to that, when it is found that the first plaintiff or her son-in-law Xavier had deposited the abovesaid release deed as well as the sale deed marked as Ex.A1 for obtaining loan from the bank, which transaction had also been reflected in the encumbrance certificate marked as Ex.B3 as well as Ex.A23 and further, it is also noted that though the defendants would claim that the plaintiffs are not in the possession and enjoyment of the suit property, however, has admitted that the first plaintiff is residing in the suit property, but they would claim that she is residing in the suit property with the permission of the first defendant and in addition to that, when it is noted that it is only the first plaintiff, who is in possession and enjoyment of the suit property by putting up the structure thereon as abovenoted and also paying house tax receipt, obtaining electricity connection and paying electricity charges etc., which could be evidenced from the documents marked on the side of the plaintiffs and when it is further seen that there is no document at all, worth acceptance, placed by the defendants to show that they are in possession and enjoyment of the suit property at any point of time, particularly, after the execution of Ex.A2 release deed and when it is further noted that the documents of possession produced by the defendants marked as Exs.B5 & B6 are not established to be related to the suit property and also noting the fact that the first defendant had chosen to deny his signature available in the vakalat, suit summon etc., as rightly opined by the Courts below, serious doubt arise as to the genuineness of the denial of the execution of the release deed by the first defendant and considering the fact that the first plaintiff is the joint owner of the property acquired by way of Ex.A1 and when the same is also found to be disputed by the first defendant without any basis and that apart, when it is also noted that on the same lines, the first defendant has, at the first instance, disputed the execution of the release deed, however, unable to conceal the true facts, it is seen that later, he has also taken the defence that Ex.A2 is a sham and nominal document and not intended to be acted upon, accordingly, it is found that the first defendant unable to deny the execution of the release deed Ex.A2 as such, particularly,

in the light of the abovesaid clear factors, the first defendant was forced to admit the execution of the release deed as such by taking the defence that the document is a sham and nominal document and never intended to be acted upon and by way of the said defence, it is made clear that the first defendant has indeed admitted the execution of the release deed Ex.A2, he having taken the defence that the said document is only a sham and nominal document and not acted upon, as rightly argued, the burden is heavy upon the defendants, particularly, the first defendant to establish the abovesaid defence. However, there is no valid material as such placed by the defendants to show that Ex.A2 release deed had not been acted upon. As above seen, no material as such has been placed by the defendants to hold that they are in possession and enjoyment of the suit property, particularly, after the execution of Ex.A2. On the other hand, it is found that it is only the plaintiffs, who are in possession and enjoyment of the suit property as could be determined from the documents placed by the plaintiffs. In addition to that, to establish that Ex.A2 release deed had been acted upon, it is found that the first plaintiff along with her son-in-law had deposited the said document also with the bank for securing the loan, as above seen, which transaction is reflected in the encumbrance certificates placed in the matter. Further, PW3 has also tendered evidence about the same and it is thus found that inasmuch as Ex.A2 release deed had been acted upon, accordingly, it is found that the first plaintiff claiming absolute title to the suit property on the basis of the same, deposited the said document also with the bank for the purpose of availing loan for her son-in-law Xavier, therefore, the contention that Ex.A2 release deed has not been acted upon on the ground that it is a sham and nominal document as such cannot be countenanced in any manner.

13. In the light of the above position, considering the fact that Ex.A2 is a registered document and also admitted by the first defendant as such by taking the defence that it is only a sham and nominal document and never acted upon, which defence has not been established by the defendants in any manner and when it is found that the defence of the defendants, particularly, the first defendant that he had not executed Ex.A2 release deed is found to be not a genuine one, for the reasons aforestated, on an overall analysis of the materials placed, it is found that the Courts below are justified in coming to the conclusion that pursuant to Ex.A2, release deed, it is only the plaintiffs, who had acquired absolute title to the suit property and accordingly, it is found that the defendants are unable to place any material worth acceptance to show that they are in possession and enjoyment of the suit property as the owners thereof.

14. In view of the abovesaid position, the contention put forth by the defendants' counsel that Ex.A2 has not been established as per law on the footing that one of the attestors to the same has not been examined by the plaintiffs as contemplated under Section 68 of the Indian Evidence Act as such cannot be accepted. When it is found that Ex.A2 release deed has been accepted by the first defendant himself by way of the defence taken in the matter with reference to the same as above discussed and determined, in the light of the above position, it is found that the Courts below are justified in coming to the conclusion that Ex.A2 release deed has been executed by the first defendant in favour of the first plaintiff in respect of his half share in the suit property and accordingly, it is seen that the first plaintiff has established her absolute title to the suit property by way of Ex.A2 release deed. As above seen, the first plaintiff is already owing $\frac{1}{2}$ right in the suit property by way of Ex.A1 sale transaction. Materials placed on record go to show that it is only the first plaintiff, who had put up the structure in the suit property and accordingly, it is seen that the house tax, Electricity connection etc., stands only in the name of the first plaintiff and not in the name of the first defendant.

15. A contention has been raised before the Courts below that the structure in the suit property was there even at the time of the execution of Ex.A1 sale transaction. However, when as per Ex.A1 deed, the property comprised therein is only a vacant site, as rightly determined by the Courts below, the documents Exs.B1 & B2 pressed into service by the defendants by themselves would not militate against the sale transaction covered under Ex.A1 and the defendants having admitted the sale transaction Ex.A1, cannot be allowed to tender evidence contrary to the recitals contained therein and accordingly, it is rightly held by the Courts below that Exs.B1 & B2 would not serve the establishment of the defence projected by the defendants in any manner.

16. The counsel for the defendants contended that the defendants having disputed the title of the first plaintiff in respect of the suit property and despite the same, the plaintiffs having not sought the relief of declaration in respect of the suit property, according to him, the suit laid by the plaintiffs simplicitor for bare injunction is not maintainable and in this connection, he relied upon the decision reported in 2008 (6) CTC 237 (Anathula Sudhakar Vs. P.Buchi Reddy (Dead) by LRs. & others). Disputing the above contention

of the defendants' counsel, it is argued by the plaintiffs' counsel, when as per Ex.A1 sale transaction, the first plaintiff is already owning $\frac{1}{2}$ right in the suit property and when by way of Ex.A2 release deed, the first plaintiff had acquired the remaining $\frac{1}{2}$ right in the suit property and when the execution of Ex.A2 has not been seriously disputed by the first defendant as such and further, when the possession of the suit property has also not been seriously contended or challenged by the defendants as such and when the plaintiffs have placed ample materials to establish their possession and enjoyment of the suit property and when the defendants have not placed any material to hold that they had been in possession and enjoyment of the suit property at any point of time, it is stated that the plaintiffs being in lawful and peaceful possession of the suit property to the knowledge of the defendants, in such view of the matter, the plaintiffs are entitled to project their possession by laying a suit simplicitor for bare injunction and in such view of the matter, it is further contended that there is no need to seek the relief of declaration of title as such in respect of the suit property. The above argument put forth by the plaintiffs' counsel seems acceptable and considering the reasons aforesated, particularly, when the defendants have not seriously disputed the release deed marked as Ex.A2, in the light of the defence raised by them, as regards the said transaction and as above discussed and when it is found that the plaintiffs have clearly established their possession and enjoyment of the suit property and when there is no material at all placed by the defendants to show that they have a valid title to the suit property or that the suit property is in their possession and enjoyment at any point of time, in such view of the matter, it is noted that the plaintiffs are not necessitated to lay the suit for declaration of title to the suit property and accordingly, it is seen that the suit laid by the plaintiffs simplicitor for bare injunction is maintainable. That apart, as rightly determined by the Courts below, even in a suit for bare injunction, claim of title could be gone into incidentally, only to prima facie determine, whether the plaintiffs had established their claim of title. Insofar as this case is concerned, considering the above facts and also the materials placed by the plaintiffs wholly, the first plaintiff has prima facie established her claim of title to the suit property and that apart, the plaintiffs have clearly established that it is only they, who are in possession and enjoyment of the suit property and in such view of the matter, it is found that the Courts below are justified in protecting the plaintiffs' possession and enjoyment of the suit property by granting the relief of permanent injunction. For the reasons aforesated, the substantial questions of law formulated in this second appeal are accordingly answered in favour of the plaintiffs and against the defendants.

In conclusion, the second appeal fails and accordingly, is dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CS VIII)

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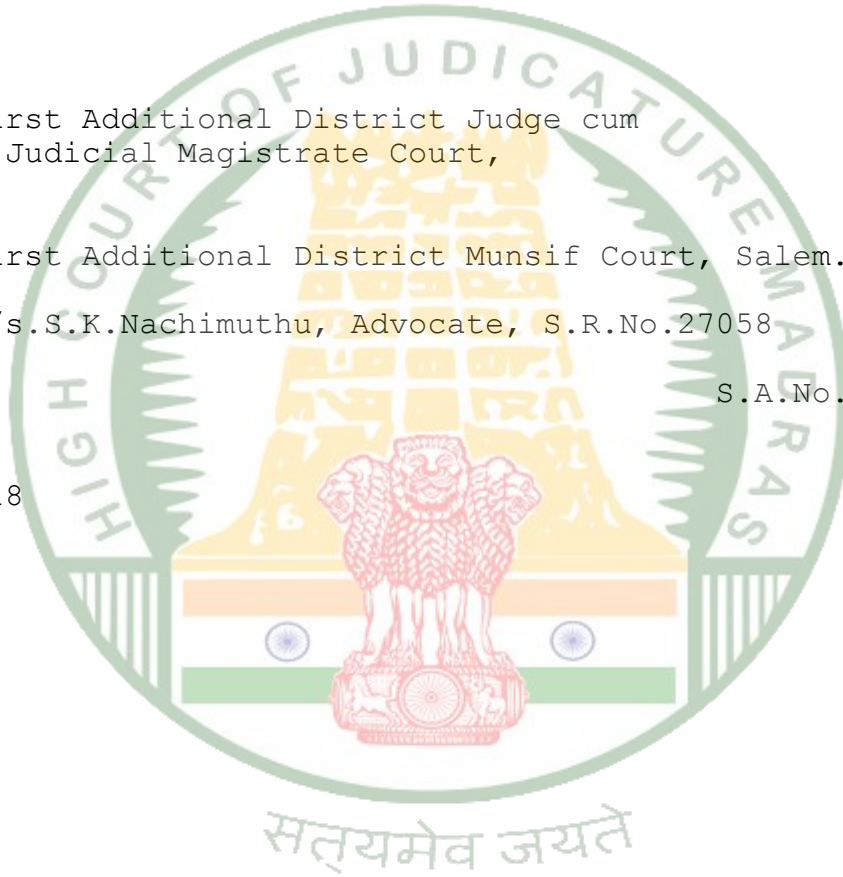
To

1. The First Additional District Judge cum Chief Judicial Magistrate Court, Salem.
2. The First Additional District Munsif Court, Salem.

+1cc to M/s.S.K.Nachimuthu, Advocate, S.R.No.27058

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