

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :30.01.2019
Pronounced on :12.02.2019

CORAM

THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN

S.A.No.1756 of 2000

1.Duraisamy
2.Ramani Ammal
3.Sithes

... Appellants/Defendants

Vs.

1.C.Varadhammal (Deceased)
2.Adilakshmi
3.Leelavathi
4.Dhanam
5.Jaya
6.Ramani
7.Mallika
8.Indira

... Respondents/Plaintiffs

RR2 to 8 brought on record as LRS of the deceased sole Respondent vide order of court dated 05.12.2018 made in CMP.No.1631 of 2009 in S.A.No.1756 of 2000 (CVKJ)

PRAYER: The Second Appeal filed under Section 100 of CPC, against the judgment and decree of the Principal District Court, Salem in A.S.No.108 of 1999 dated 20.06.2000 reversing the judgment and decree of the I Additional District Munsif Court, Salem, in O.S.No.8 of 1995 dated 30.04.1999.

For Appellants 1 to 3 : Mr.D.Shivakumaran

For RR2 to R8 : Mr.I.Abrar Md.Abdullah

R1 : Died

JUDGMENT

The defendants in O.S.No.8 of 1995 on the file of the 1st Additional District Munsif Court, Salem, are the appellants herein.

2.O.S.No.8 of 1995 had been filed by the plaintiff C.Varadhammal against three defendants, her son Duraisamy, his wife Ramani Ammal and their son Sithes, seeking a judgment and decree for permanent injunction restraining the defendants from interfering with her peaceful possession and enjoyment of the suit properties. By judgment dated 30.04.1999, the learned 1st Additional District Munsif, Salem, dismissed the suit.

3.Challenging that judgment, the plaintiff then filed A.S.No.108 of 1999 before the Principal District Court, Salem. By judgment and decree dated 20.06.2000, the learned Principal District Judge, Salem, allowed the appeal.

4.Challenging the judgment of the First Appellate Court, the defendants have filed the present Second Appeal. The Second Appeal had been admitted on 08.03.2002, on the following two substantial questions of law:

"1.When the appellants(defendants) herein have stated in their written statement that the respondent(plaintiff) does not have title to the suit property and pointed out that the plaintiff ought to have filed a suit for declaration and injunction, can the suit for injunction be maintained inspite of the same?

2.When the appellants have proved their possession of the suit property on the basis of a family arrangement, is the Lower Appellate Court correct in reversing the finding of the trial court to that effect without any basis?"

O.S.No.8 of 1995 (1st Additional District Munsif Court, Salem):-

5.The plaintiff, C.Varadammal is the mother of the first defendant Duraisamy. The second defendant, Ramani Ammal is the wife of the first defendant. The third defendant, Sithes is their son. The plaintiff claimed to be the absolute owner of the suit property. There were four items of suit property namely, Door Nos.409 and 410 and Door Nos.395 and 396 in Pallapatti Village, Salem District. The plaintiff claimed that she had purchased a small house with vacant land on 17.08.1956 for valid consideration from Anthonisamy Chettiar. She then demolished the existing building and put up a pucca terraced building. She had also leased out the suit property to others lessee. She claimed to be residing in one portion of the suit property. She executed a Will in favour of the third defendant who is her grandson. She

cancelled the Will by a registered document dated 09.03.1990.

6.The plaintiff also has seven daughters. The first defendant was her son and the second defendant was her daughter-in-law and the third defendant was her grandson. The defendants went away from the family for the past 25 years. The plaintiff claimed that they have no right or title over the suit property. The plaintiff claimed that the defendants attempted to trespass into the suit property on 28.12.1994. She therefore filed the suit to protect her possession.

7.The first defendant filed a written statement, which was adopted by the second and third defendants. The claim of the plaintiff that she purchased a small house with vacant land from Anthonisamy Chettiar was denied. It was stated that the suit property was purchased out of the joint family funds and that the defendants was also entitled to the property. It was also denied that the plaintiff had constructed a pucca terraced building. The first defendant claimed that he alone built the building. It was also claimed that the defendants are residing in the second item of suit property which was the property constructed by them. The plaintiff was collecting rents from the property in Door Nos.409 and 410. The defendants claimed that there was a family arrangement and the property covered under Door Nos.395 and 396 of Suramangalam Main Road was allotted to the first defendant. The plaintiff had agreed that she would not revoke the Will executed in favour of the third defendant. The allegation of trespass was denied. It was claimed that there was no cause of action for filing the suit. It was therefore claimed that the suit should be dismissed.

8.On the basis of the above pleadings, the learned 1st Additional District Munsif, Salem, framed the following issues for trial:

- 1.Whether the plaintiff is entitled for the relief of permanent injunction as prayed for?
- 2.To what relief is the plaintiff entitled to?

9.During trial, the plaintiff C.Varadammal examined herself as PW1. She also examined Palanisamy Gounder as PW2. The first defendant examined himself as DW1 and also examined Solairaju as DW2. The plaintiff marked Exs.A1 to A3. Ex.A1 dated 17.08.1956 was the original sale deed in the name of the plaintiff. Ex.A2 were the house tax receipts. Ex.A3 was the voter's enumeration

card. The defendants marked Exs.B1 to B4. Ex.B1 was the electricity consumption card. Ex.B2 was the letter given for additional security deposit. Ex.B3(series) were the house tax receipts. Ex.B4 was the voter's enumeration card. An Advocate Commissioner had also been appointed and his report was marked as Ex.C1 and plan was marked as Ex.C2.

10.On the basis of the oral and documentary evidence, by judgment dated 30.04.1999, the learned 1st Additional District Munsif, Salem, observed that the suit property consisted of four items of Door numbers namely, 395, 396, 409 and 410 and that Door Nos.395 and 396 had been joint together and a terraced house had been constructed. It was also observed that the first defendant had expressed no objection for the plaintiff continuing to collect the rents for Door Nos.409 and 410. It was also found on the basis of Ex.A1 that the suit property was in the name of the plaintiff. It was also found that though the plaintiff had executed a Will in favour of the third defendant she had revoked the same. It was however found that the plaintiff had not proved possession of the terraced building. The learned 1st Additional District Munsif, also relied on the evidence of the Commissioner. Finally, the learned 1st Additional District Munsif found that there was no question of attempt to trespass into the suit property by the defendants. It was held that the plaintiff had failed to prove her exclusive possession and consequently, dismissed the suit.

A.S.No.108 of 1999 (Principal District Court, Salem):-

11.Challenging that judgment, the plaintiff then filed A.S.No.108 of 1999. This appeal came up for consideration before the learned Principal District Judge, Salem. By judgment dated 20.06.2000, the learned II Additional District Judge, framed points for consideration and reappraised the evidence. It was found that the suit property consisted of two items namely, Door Nos.409, 410 and Door Nos.395, 396. It was observed that the first defendant had admitted that the plaintiff was collecting rents from the tenants in Door Nos.409 and 410. It was therefore held that the plaintiff was in possession of Door Nos.409 and 410. The learned Principal District Judge, relied on the evidence of PW2 who also stated that the plaintiff was residing in Door Nos.395 and 396 in support of the evidence of plaintiff herself. It was also found that the first defendant did not attend the funeral of his own father and he was not in possession. The learned Principal District Judge, also found that the documents relied on by the defendants and by the 1st Additional District Munsif, Salem, did not establish the possession of the defendants. It was specifically found that the trial court had been misled by the report of the Commissioner.

It was observed that the Commissioner had not even gone inside the houses. He had relied on mere writings on the outside wall. The report of the Commissioner was rejected since, it had been established that the plaintiff was in possession. The learned Principal District Judge, allowed the appeal and set aside the judgment and decree of the Trial Court.

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12.As stated above, the defendants then filed the present Second Appeal. The Second Appeal had been admitted on 08.03.2002, on the following two substantial questions of law:

"1.When the appellants(defendants) herein have stated in their written statement that the respondent(plaintiff) does not have title to the suit property and pointed out that the plaintiff ought to have filed a suit for declaration and injunction, can the suit for injunction be maintained inspite of the same?

2.When the appellants have proved their possession of the suit property on the basis of a family arrangement, is the Lower Appellate Court correct in reversing the finding of the trial court to that effect without any basis?"

13.Pending the Second Appeal the respondent/plaintiff/C.Varadammal died and her legal representatives were brought on record as respondents 2 to 8.

14.For the sake of convenience, the parties would be referred as plaintiff and defendants.

15.The plaintiff is the mother and the first defendant was her son. She claimed protection from dispossession of the suit properties. The suit properties can be described as two items namely, Door Nos.409, 410 and also Door Nos.395, 396. With respect to Door Nos.409 and 410, it had been admitted by the first defendant that his mother, the plaintiff was collecting rents from the tenants. Consequently, her possession had been established. With respect to Door Nos.395 and 396, it is seen that they were actually a single house. The plaintiff claimed that she was in possession. The defendants claimed that they were in possession. As a fact, the learned Principal District

Judge, Salem, had made an observation in the course of the judgment in A.S.No.108 of 1999, that the first defendant had left the family and had not even attended the funeral of his own father. It was observed that the defendants were not in possession. It is to be noted that the defendants have not raised any ground in the Second Appeal challenging that finding of fact.

16. Be that as it may, pending the Second Appeal, the plaintiff unfortunately died. Consequently, her claim for possession may not strictly lie at the present moment. The fact as established by the First Appellate Court is that the defendants are not in possession. However, since the plaintiff died, the cause of action seeking to protect possession does not survive. Now the defendants have to contend with the rights of the second to eighth respondents who are his own sisters. It had been established as a fact that the suit properties were the exclusive properties of the plaintiff. This has been established as a fact by both the courts. It has been further established as a concurrent finding of fact that the defendants have not contributed either towards the purchase of the property or towards the construction of the property particularly, in Door Nos.395 and 396. It had also been established as a fact by both the courts below that the properties were not purchased and not subsequently constructed out of the joint family income or nucleus. In fact there was no joint family nucleus. Consequently, the plaintiff was the absolute owner of Door Nos.409 and 410 and Door Nos.395 and 396 which have been described in the suit schedule property. The first defendant is entitled only to an undivided 1/8th share in each one of the four items. He cannot claim exclusive title to anyone of the properties. His exclusive title has been negated by both the courts below. Even though, a question of law had been framed with respect to possession, I hold that, since the plaintiff/first respondent/C.Varadhammal/mother of the first defendant/first appellant/Duraisamy had died, that issue would not survive.

17. The first substantial question of law was whether the plaintiff should have filed a suit for declaration. It had been found by both the courts below that the defendants had raised a moonshine defense regarding purchase of properties from the funds of the joint family nucleus. The defendants have not established any relevant fact to justify that averment stated in the written statement. No documentary evidence has been filed to substantiate that claim. Consequently, I hold that the suit is not bad for non-seeking the relief of declaration.

18.The second substantial question of law was with respect to a family arrangement relating to the suit property. The family arrangement has not been produced in Court. A mere averment in the written statement cannot be the basis to render a finding in any judicial proceedings. Therefore, I hold that the First Appellate Court was correct in reversing the finding of the Trial Court.

19.In view of the reasons stated above, I hold that the Second Appeal has to be dismissed with costs of the second to eighth respondents. The judgment and decree of the learned Principal District Judge, Salem, in A.S.No.108 of 1999 dated 20.06.2000 is confirmed and the judgment and decree of the learned 1st Additional District Munsif, Salem, in O.S.No.8 of 1995 dated 30.04.1999 is set aside. The Second Appeal is dismissed with costs.

-s/d-

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

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To,

- 1.The 1st Additional District Munsif Court, Salem.
- 2.The Principal District Court, Salem.
- 3.The Section officer
VR Section, Madras High Court

+1 CC to Mr.D.Shivakumaran, Advocate sr 12946.

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CNR(CO)
SP(09/05/2019)

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