

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 13.03.2019

Delivered on: 18.03.2019

Coram

The Honourable Mr.Justice P.RAJAMANICKAM

S.A.No.1300 of 2001

1.Rasiya

2.Naseer Khan

3.(Mohammed Khan)

(3rd Appellant Transposed as 2nd respondent
vide order of Court dated 06.07.2018 made
in C.M.P.No.11157 of 2018 in
S.A.No.1300 of 2001.

....Appellants

Versus

1.Ameer Bi

2.Mohammed Khan

....Respondents

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure to against judgment and decree dated 20.03.2000, passed by the VIII Additional Judge, City Civil & Sessions Court, Chennai in A.S.No.711 of 1988 setting aside the judgment and decree dated 28.09.1988, passed by the VI Assistant Judge, City Civil & Sessions Court, Chennai in O.S.No.2258 of 1984.

For Appellants : Mr.D. Ravichandran

For First respondent : Mr.V.G.Sureshkumar

For Second respondent: set exparte

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This second appeal has been filed by the legal representatives of the deceased plaintiff, against the judgment and decree passed by the VIII Additional Judge, City Civil Court, Chennai, in A.S.No.711 of 1988 dated 20.03.2000 reversing the judgment and decree passed by the VI Assistant Judge, City Civil Court, Chennai in O.S.No.2258 of 1984 dated 28.09.1988.

2.The original plaintiff namely Tmt.Ameena Bi, had filed a suit in O.S.No.2258 of 1984, on the file of the VI Assistant Judge, City Civil Court

a) to declare that she is the absolute owner of the land described in the plaintiff B-schedule with the 5 huts thereon marked in red lines in the sketch filed along with the plaint and to direct the defendants to deliver vacant possession of the same after removing the 3 huts, which were put up by the first defendant during the pendency of the earlier legal proceedings and

b) to direct the defendants 1 and 2 to pay a sum of Rs.3,600/- towards past mesne profits and future mesne profits at the rate of Rs.20/- per month for the 8 huts which are situated in the plaint B-schedule property till the delivery of possession of the above said property.

3. The learned VI Assistant Judge, City Civil Court, Chennai, by the judgment dated 28.09.1988 had decreed the said suit for declaration and delivery of possession and for past mesne profits. However, he directed for the separate enquiry in respect of future mesne profits and also directed the defendants to pay the suit cost. Aggrieved by the same, the first defendant had filed an appeal in A.S.No.711 of 1988 on the file of the VIII Additional Judge, City Civil Court, Chennai. She also filed two applications in C.M.P.Nos. 560 and 681 of 1998 under Order 41 Rule 27 of CPC, seeking permission of the First Appellate Court to produce certain documents as additional evidence; and CMP.No.1203 of 1998 under Order 41 Rule 2 of CPC to permit her to raise additional grounds of appeal. During the pendency of the said appeal, the first respondent/plaintiff namely Tmt.Ameena Bi died and hence, her legal representatives had been impleaded as respondents 2 to 4. The respondents in the said appeal had filed an application in CMP.No.12 of 1999 under Order I Rule 10 of CPC to implead one Anwar Basha as one of the respondents in the said appeal. They also filed CMP.Nos.333 of 1998 and 13 of 1999 under Order 41 Rule 27 of CPC seeking permission of the first appellate Court to file certain documents as additional evidence. The learned VIII Additional judge, City Civil Court, Chennai, by the judgments and orders dated 20.03.2000 had allowed C.M.P.Nos.333 and 1203 of 1998 and marked Exs.A35, A36, B8 and B9. He dismissed C.M.P.Nos.560 and 681 of 1998, 12 of 1999 and 13 of 1999. Finally, he allowed the said appeal and set aside the judgment decree passed by the Trial Court and dismissed the suit. Feeling aggrieved, the legal representatives of the original plaintiff have filed the present second appeal.

4. For the sake of convenience, the parties are referred to as described before the Trial Court.

5. The averments made in the plaint are, in brief, as follows:

a) the plaintiff had purchased the suit A-Schedule property admeasuring 2688 sq.ft from one Muthaiah under a registered sale deed dated 12.09.1974. At the time of the said purchase, the plaintiff was occupying the said land as a tenant under her vendor and put up 5 huts on the western portion of the said land in or about September 1976. The first defendant along with the defendants 2 and 4 to 7 attempted to occupy one of the huts and caused damage to the property and hence the plaintiff was obliged to file a suit in O.S.No.1459 of 1977, on the file of the City Civil Court, Chennai, for the relief of permanent injunction restraining the defendants 1, 2 and 4 to 7 from causing damage to the property and interfering with her rights. The said suit was decreed, but in appeal in A.S.No.106 of 1981 filed by the said defendants the decree was set aside and the suit was dismissed. The plaintiff had filed a second appeal before this Court in S.A.No.63 of 1983.

b) In the course of the proceedings aforesaid, the first defendant claimed that she had leased out an extent of 1290 sq.ft, out of the land belonging to the plaintiff, under a registered lease deed dated 31.12.1974 in favour of the second defendant together with the 6 huts thereon, for a period of 5 years commencing from 1975. The first defendant had no manner of right, title or interest in any portion of the extent of 1290 sq.ft. which is more particularly described in schedule 'B' of the plaint and which forms part of the property described in schedule 'A' of the plaint. The first defendant who is occupying one of the huts in the B-schedule property is collecting rents from the other defendants who are in unauthorized occupation of the other 7 huts put upon the B-schedule property. The 5 huts, all in a row, on the western portion of the B-Schedule property, marked in red lines in the sketch annexed with the plaint belong to the plaintiff and the other 3 huts marked in the plan had been put up by the first defendant during the pendency of the legal proceedings aforesaid. Hence, the defendants are liable to pay past mesne profits of Rs.3,600/- and future mesne profits at Rs.20/- per month per hut for all the 8 huts till the date of delivery of possession of the B-schedule property. The lease deed dated 31.12.1974 executed by the first defendant in favour of the 2nd defendant is void, invalid and unenforceable.

c) The plaintiff is in possession of the remaining extent of 1,398 sq.ft of land forming part of the A-schedule mentioned property. The plaintiff sent a lawyer's notice dated 23.07.1983 to the defendants 1 and 2 calling upon them to deliver vacant possession of the B-Schedule Property. After receipt of the said notice, the first defendant had sent a reply through her lawyer dated 18.08.1983 with false averments. The plaintiff had filed the above suit without prejudice to her rights and claims put forward in the suit in O.S.No.1457 of 1977 and which is now pending in S.A.No.63 of 1983 on the file of the High Court, Madras. Since, the defendants 1 and 2 did not come forward to deliver vacant possession of the suit B-schedule property, the plaintiff was constrained to file the above suit for the relief for declaration; delivery of possession and for mesne profits.

6. The averments made in the written statement filed by the first defendant are in brief as follows:-

a) Since the subject matter of the dispute relating to the suit is already seized by the High Court in S.A.No.63 of 1983, the present suit is not maintainable. The plaintiff brought out the sale dated 12.09.1974 in respect of the land comprised in survey No.1791/19, which is in possession and the enjoyment of the first defendant, by practicing fraud and taking advantage of the fact that at that time, the first defendant's husband passed away and she was helpless and bereaved. The plaintiff had made use of advance amount of Rs.1,500/- paid by the first defendant's husband namely late Sulaiman to the land owner Muthaiah Chettiar, who had agreed to sell the land to the said Sulaiman. Since the plaintiff was the mother of the said Sulaiman's first wife, Zainab Bee, she was residing in the portion of the property with the permission of the said Sulaiman. On the demise of the said Sulaiman, the plaintiff acted dishonestly and fraudulently. The first defendant's husband namely Sulaiman had put up several huts upon the land more than 3 decades prior to his death and was residing in one of those huts while, he had let out other huts. As such, the said Sulaiman had right and benefit under the Tamilnadu City Tenant's Protection Act. Only on recognition of his said occupation right, the said Muthaiah Chettiar had agreed to sell land to the said Sulaiman. Before he could pay the balance of price and complete the sale in his favour, the said Sulaiman passed away. After the death of said Sulaiman, the plaintiff represented to Muthaiah Chettiar, that she was the heir of her son-in-law and this misled and in collusion with her husband Sathar Khan, who was then alive, the plaintiff fraudulently obtained the sale deed in her name, by paying the balance amount. As such, the sale deed dated 12.09.1974 is a fraud

document and the same is not binding upon the first defendant and her children.

b) the first defendant had succeeded along with her children to the estate of her husband Sulaiman and hence she has also become entitled to the benefits of the Tamil Nadu City Tenants Protection Act. Since the plaintiff had filed a frivolous suit in O.S.No.1459 of 1977, the first Additional City Civil Court, Chennai, allowed the appeal in A.S.No.106 of 1981 holding that the plaintiff had no right what so ever in the plaint Schedule property and dismissed the suit. It is incorrect to say that this first defendant has no manner of right or title over the suit B-schedule property. As a lawful owner of the suit B-schedule property, the first defendant is entitled to lease out the same to third parties and collect rent from the tenants. The plaintiff is not entitled to get any relief in the suit and therefore, the first defendant prayed to dismiss the suit.

7. Based on the aforesaid pleadings, the learned VI Assistant Judge, City Civil Court, Chennai, had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined herself as P.W.1 and also examined two more witnesses as P.W.2 and P.W.3. She also marked Ex.A1 to A34 as exhibits. On the side of the first defendant, the first defendant examined herself as D.W.1. She also examined one more witness as D.W.2. She had marked Ex.B1 to B6 as exhibits.

8. The learned VI Assistant Judge, City Civil Court, Chennai, after considering the materials placed before him decreed the suit for declaration, delivery of possession and for past mesne profits. However, he directed a separate enquiry under Order 20 Rule 12 of CPC in respect of future mesne profits. Aggrieved by the same, the first defendant had filed an appeal in A.S.No.711 of 1988 on the file of the VIII Additional Judge, City Civil Court, Chennai and also filed C.M.P.Nos.560 and 681 of 1998 to receive additional documentary evidence and C.M.P.No.1203 of 1998 to receive additional appeal grounds. During the pendency of the said appeal, the original plaintiff died and hence her legal representatives were impleaded as respondents 2 to 4. The respondents had filed C.M.P.Nos. 333 of 1998 and 13 of 1999, seeking permission of the first appellate Court for filing certain documents as additional documentary evidence and C.M.P.No.12 of 1999 to implead one Anwar Basha as one of the respondents. The learned VIII Additional Judge, City Civil Court, Chennai, by the judgment and order dated 20.03.2000 had allowed the C.M.P.Nos.333 and 1203 of 1998, and marked Exs.A35, A36, B8 and B9. However, he dismissed the other C.M.Ps. Feeling aggrieved, the legal representatives of the original plaintiff had filed the present second appeal.

9. This Court, at the time of admitting the second appeal has formulated the following substantial questions of law:

"1)Whether the Lower Appellate Court erred in law in failing to consider that though the Appellant had sold under Ex.B8 bulk of the suit property, it is incumbent in law for the vendor, the Appellant to have his title declared and give quiet possession to his purchaser and as such his suit is maintainable?

2)Whether the Lower Appellate Court erred in law in misconstruing Ex.B8 and dismissing the suit for recovery of possession when there is a recital in Ex.B8 that vacant possession was not delivered to the purchaser?

3)Whether the Lower Appellate Court erred in law in failing to consider the liberty given by this Hon'ble Court in the order dated 21.03.1997 made in C.M.P.No.11306/1995 in S.A.No.1983?'"

10. This Court by the order dated 28.11.2018 has directed the Trial Court (VI Assistant Judge, City Civil Court, Chennai) to record evidence in respect of Exs.A35, A36, B8 and B9 and send back the records to this Court. Accordingly Exs.A35, A36, B8 and B9 were sent to the Trial Court and the Trial Court had recorded additional oral evidence. One Naseer khan was examined as P.W.4 and D.W.1 was recalled and examined further and thereafter the Trial Court has sent back the deposition of the aforesaid witnesses along with Exs.A35, A36, B8 and B9.

11. Heard Mr.D. Ravichandran, learned counsel for the appellants and Mr.V.G. Sureshkumar, learned counsel for the first respondent.

12.Substantial Questions of Law 1 to 3:

The learned counsel for the appellants has submitted that the plaintiff had purchased 2688 sq.ft., of land under Ex.A1 sale deed dated 12.09.1974 from one Muthaiah and the said property has been described in the plaint as A-Schedule property. He further submitted that in the said property, the plaintiff had put up 5 huts and enjoyed the same. He further

submitted that since the defendants 1,2 and 4 to 7 attempted to occupy one of the huts, the plaintiff was obliged to file a suit in O.S.No.51 of 1977 on the file of the City Civil Court and the said suit was decreed, but on appeal in A.S.No.106 of 1981, the said decree was set aside and the suit was dismissed. He further submitted that the plaintiff had filed a second appeal in S.A.No.63 of 1983, before this Court and in the said second appeal, the plaintiff had filed C.M.P.No.11306 of 1985 seeking permission of the Court, to withdraw the suit in O.S.No.1459 of 1977 with liberty to obtain relief in O.S.No.2258 of 1984 and the said C.M.P was allowed on 21.03.1997 and as against the same, the first defendant herein had filed S.L.P, before the Hon'ble Supreme Court and the same was dismissed and as such, the suit in O.S.No.2258 of 1984 is maintainable. He further submitted that after considering the aforesaid facts, the Trial Court had rightly decreed the suit but the first appellate Court had reversed the judgment and decree of the Trial Court relying upon Ex.B8 sale deed dated 20.05.1982. He further submitted that even though the plaintiff had sold 1204 sq.ft., under Ex.B8 sale deed, the plaintiff being the original owner, she is bound to protect the interest of the purchaser. He further submitted that the total extent of the suit B-schedule property is 1290 sq.ft., whereas under Ex.B8, the plaintiff had sold only 1204 sq.ft and the remaining area is only with the plaintiff and on that ground also, the plaintiff is entitled to maintain the suit. He further submitted that D.W.1 also admitted in her cross examination that under Ex.B8, the plaintiff had sold only half of the property and therefore he prayed to allow the second appeal and set aside the judgment and decree passed by the first appellate Court and restore the judgment and decree passed by the Trial Court.

13. Per contra, the learned counsel for the first respondent has submitted that under Ex.B8, the plaintiff had sold the suit B-schedule property to one Anwar Basha on 20.05.1982 and suppressing the said fact she had filed the above suit on 06.02.1984 to declare that she is the absolute owner of the suit B-schedule property and for delivery of possession. He further submitted that the first respondent/first defendant came to know about the fact that the plaintiff had already sold the B-schedule property to one Anwar Basha, only during pendency of the first appeal and hence she had filed an application to receive a registration copy of the said sale deed as additional documentary evidence. He further submitted that the first appellate Court after hearing both sides, allowed the said application and the said sale deed was marked as Ex.B8. He further submitted that based on the said document, the first appellate Court came to the conclusion that the plaintiff had no

cause of action for filing the said suit and accordingly allowed the appeal and set aside the judgment and decree passed by the Trial Court and dismissed the suit. He further submitted that as per Ex.A1, the plaintiff had purchased 2688 sq.ft and out of which, she had sold 1204 sq.ft under Ex.B8 to one Anwar Basha and that is why when the D.W.1 was examined on 08.01.2019, she has stated that under Ex.B8 only a half of the property has been sold and that does not mean that the plaintiff had sold only half of the property which is mentioned in plaint B-Schedule Property. He further submitted that after filing petition by the first defendant to receive a registration copy of the said sale deed as additional documentary evidence, the appellants had filed C.M.P.12 of 1999 to implead the purchaser namely Anwar Basha as one of the respondents, but the first appellate Court had dismissed the said application. He further submitted that the first appellate Court after taking into consideration of the fact that the plaintiff had filed the above suit suppressing the fact that she had already sold the B-schedule property to one Anwar Basha and hence she is not entitled to get the discretionary relief of declaration of title and consequently it had dismissed the suit and in the said factual findings this court cannot interfere and therefore he prayed to dismiss the second appeal.

14. It is an admitted fact that the plaintiff had filed a suit in O.S.No.1459 of 1977 against the defendants 1,2, and 4 to 7 herein for the relief of permanent injunction. The said suit was decreed by the Trial Court. As against the same, the defendants therein had filed an appeal in A.S.No.106 of 1981 on the file of the first Additional Judge, City Civil Court and the same was allowed and consequently, the decree passed by the trial court in O.S.No.1459 of 1977 was set aside and the suit was dismissed. Aggrieved by the same, the plaintiff had filed a second appeal in S.A.No.63 of 1983 before this Court. During pendency of the said second appeal, the plaintiff had filed a suit in O.S.No.2258 of 1984 on the file of the VI Assistant Judge, City Civil Court, Chennai. Subsequently, the original plaintiff died and hence her legal representatives had been impleaded and they had filed an application in C.M.P.No.11306 of 1985 in S.A.No.63 of 1983 seeking leave of the Court to withdraw the Suit in O.S.No.1459 of 1977, with liberty to obtain relief in O.S.No.2258 of 1984. This Court, by the order dated 21.03.1997 had allowed the said C.M.P.No.11306 of 1985. A certified copy of the order passed in the said C.M.P has been marked as EX.A35. As Against the said order, the first defendant/first respondent herein had filed S.L.P before the Hon'ble Supreme Court and the same was dismissed. A copy of the order passed in the S.L.P has been marked as Ex.A36. So, in view of the liberty granted by this Court in C.M.P.No.11306 of 1985,

the dismissal of the earlier suit in O.S.No.1459 of 1977 is not a bar for maintaining the suit in O.S.No.2258 of 1984.

15. It is seen from Ex.B8 (Registration copy of the sale deed) that the plaintiff had sold 1204 sq.ft with specific boundaries to one Anwar Basha on 20.05.1982 and only thereafter on 06.02.1984, the plaintiff had filed the suit in O.S.No.2258 of 1984 to declare that she is the absolute owner of the B-Schedule property; to deliver possession and for mesne profits. The learned counsel for the appellants has submitted that the suit B-schedule property contains 1290 sq.ft., whereas under Ex.B8 1204 sq.ft alone sold to one Anwar Basha and the remaining 86 sq.ft is only with the plaintiff and as such the plaintiff is entitled to maintain the suit. The boundaries given for the suit B-schedule property and boundaries given under Ex.B8 sale deed are one and the same. If the principle that the boundaries will prevail over measurements is applied, it has to be construed that the entire plaint B schedule property had been sold under Ex.B8. Further, if really the plaintiff had retained any extent in B schedule property, she should have pleaded the same in the plaint. In the plaint, she did not whisper anything about the Ex.B8 sale deed at all. She filed the suit as if she is the absolute owner of entire B schedule property. Only after filing of Ex.B8 sale deed by the first defendant before the first appellate court, as an after thought, the appellants have contended that the plaintiff had not sold the entire extent of B schedule property. Therefore, the said contention has to be rejected.

16. As per Section 34(4) Specific Relief Act, 1963, granting relief for declaration is purely discretion of the Court and as such, the person who is seeking discretionary relief, should come to the Court with clean hands. As already pointed out that the plaintiff had sold B-Schedule property on 20.05.1982 itself to one Anwar Basha and suppressing the said fact, she had filed the suit claiming that she is the absolute owner of the suit B-Schedule property. Therefore, she is not entitled to get any relief from the Court. The first appellate Court, after taking into consideration of the aforesaid facts, has rightly allowed the appeal and set aside the judgment and decree passed by the Trial Court and dismissed the suit. In the said factual findings, this Court cannot interfere. Accordingly, the substantial questions of law are answered against the appellants.

17. In the result the second appeal is dismissed. No costs.

Sd/-
Assistant Registrar (CS-IV)

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Sub Assistant Registrar

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To

1. The VIII Additional Judge, City Civil & Sessions Court, Chennai.
2. The VI Assistant Judge, City Civil & Sessions Court, Chennai.
3. The Section Officer, VR Section, Madras High Court.

+1cc to Mr.D.Ravichander, Advocate SR.No.25468

+1cc to Mr.V.G.Sureshkumar, Advocate SR.No.25320

S.A.No.1300 of 2001

CNR (CO)
GMY (09/04/2019)



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