

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.12.2019

CORAM

THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM

A.S.NO.462 OF 2018

Vanasatchi

.. Appellant/Plaintiff

Vs.

Subramanian

.. Respondent/Defendant

Prayer :

First Appeal filed against the Judgment & Decree dated 24.01.2018 passed in O.S.No.21 of 2013 on the file of the District Judge, Family Court, Pondicherry.

For Petitioner : Mr.K.S.Karthik Raja

For Respondent : Non-appearance

O R D E R

The appeal suit is directed against the judgment and decree passed in O.S.No.21 of 2013 dated 24.01.2018.

2. The suit was instituted by the appellant for permanent injunction restraining the defendant, his agents, men or any one claiming through him from disturbing the appellant without recourse of law and for costs of the suit.

3. The appellant/plaintiff states that the respondent/defendant is her husband. The suit property was given under Government Free Patta vide L.G.R.No.1077 of 1995 dated 09.10.1995 to the plaintiff and the defendant jointly. The appellant/plaintiff and the respondent/defendant have got two issues namely one Ramabathiran and Jayanthi. The grandson, one Theerthamalaiyan, son of the plaintiff's daughter Jayanthi, is taking care of the livelihood of the plaintiff till date. The plaintiff states that she borrowed a sum of Rs.5,00,000/- from the said grandson Theerthamalaiyan and built a house on 23.05.2011, and living in the suit schedule property. The defendant/respondent is living away from the plaintiff and is not living with the plaintiff for more than 10 years. The

appellant/plaintiff states that the respondent/defendant has not taken care of the appellant, and her grandson alone is helping the plaintiff in her old age. On 24.01.2012, the plaintiff was admitted in Sri Manakula Vinayagar Medical College and Hospital at Puducherry, for a major operation in her Ovary. Thereafter, she was discharged on 30.03.2012. The medical expenses for the operation were also met by the plaintiff's grandson Theerthamalaiyan. The plaintiff, due to the old age, is very much relied on her grandson's family, since her husband, the defendant, is not taking care. Therefore, she must be permitted to continue in the suit schedule property, as the property was given jointly in favour of the plaintiff and the defendant under the scheme of Government LGR free patta. The appellant/plaintiff states that the respondent/defendant is frequently making efforts to evict her from the suit property, claiming that he is also the joint owner of the suit property. At her old age, she cannot go elsewhere and she is being taken care by her grandson and the medical expenses are also met out by him. In view of the fact that the respondent/defendant has been disturbing the peaceful possession of the property, she was constrained to institute the civil suit for permanent injunction.

4. The respondent/defendant disputed the contention in the plaint by stating that the plaintiff was living separately for about 30 years and the contention of the respondent/defendant that he was forcibly thrown out of the house by the plaintiff, through her grand son/Mr.Theerthamalaiyan. The house was built by the defendant from his own source along with loan by the Government of Puducherry and therefore, Mr.Theerthamalaiyan, trespassed and encroached into the suit property. Under those circumstances, the defendant made a prayer before the Trial Court that he should be put in possession by evicting the said Mr.Theerthamalaiyan, and his family from the defendant's home.

5. By way of reply, the plaintiff denied the allegations that the contentions in the written statement are false and Mr.Theerthamalaiyan had not encroached or trespassed into the suit property. The plaintiff has stated that the defendant was living away from the home for more than 10 years and had not taken care of the plaintiff at her old age. The grandson/Mr.Theerthamalaiyan and his family is taking care of the plaintiff and therefore, the contentions in the written statement are false.

6. The trial Court framed the issues as to whether the plaintiff is entitled for the relief of permanent injunction over the suit property as prayed for? Whether the defendant is entitled for mandatory injunction as against Mr.Theerthamalaiyan directing him to vacate the house and put the counter claimant/defendant in possession of the suit property as sought for in the defendant's counter claim? And Whether the plaintiff is

joint owner of the suit property? Whether it is true that one Theerthamalaiyan had trespassed and encroached into the suit property?

7. The plaintiff was examined as P.W.1 and Exs.A1 to A4 were marked on behalf of the plaintiff side. The defendant was examined as D.W.1 and Ex.B1 to Ex.B13 were marked as documents on the defendant's side.

8. In respect of additional issue No.1, whether the plaintiff is the joint owner of the suit property? the Trial Court adjudicated the issues with reference to the documents and evidence. The findings of the Trial Court reveals that "On perusal of Ex.A1 copy of patta in LGR.No.1077 of 1995 issued by the Government of Puducherry in the name of the plaintiff and defendant. The plaintiff and defendant were admitted that the said patta was issued in their names". Accordingly, the Trial Court arrived at a conclusion that the plaintiff and the defendant are the joint owners of the suit property. Further, it is admitted that in the evidence of P.W.1 and D.W.1, one Mr.Theerthamalaiyan, is the grandson of the plaintiff and the defendant, is in possession and enjoyment of the suit property.

9. With reference to additional issue No.2, the Trial Court found that both the plaintiff and defendant have admitted that the said Theerthamalaiyan, is residing in the suit property along with his family members and it was found that the plaintiff and the defendant are never been in the possession and enjoyment of the suit property. Under those circumstances, the Trial Court arrived at a conclusion that one Theerthamalaiyan had trespassed and encroached into the suit property without any consent or lawful permission of the defendant or plaintiff.

10. As far as the issue No.1 is concerned, the Trial Court made a finding that the grandson of the plaintiff and the defendant, Mr.Theerthamalaiyan had not been impleaded as a party in the suit. However, both the plaintiff and the defendant admitted that the said Theerthamalaiyan is in possession and enjoyment over the suit property, but the defendant has paid tax to the suit property and it is established under Ex.B.13. The Trial Court found that the plaintiff who alone was not in possession of the suit site on the date of filing of the suit, but the defendant was also the co-owner of the suit property. Thus the claim of the plaintiff is failed and accordingly, the suit has to be dismissed.

11. With reference to issue No.2, the Trial Court found that the suit property is owned by both plaintiff and defendant, and one Theerthamalaiyan is a trespasser and encroacher into the suit property. Thus, the Trial Court arrived at a conclusion that the said Theerthamalaiyan is liable to vacate the suit

property and hand over the possession to the defendant. However, the said Theerthamalaiyan has not been impleaded as a party in the suit and therefore, no relief can be granted against Mr.Theerthamalaiyan. The Trial Court, while rejecting the relief of permanent injunction, granted the relief as against Mr.Theerthamalaiyan to vacate the suit property and put the possession of the suit property to the defendant within three months from the date of judgment. This Court is of the considered opinion that the Trial Court in issue No.2 categorically arrived at a conclusion that Mr.Theerthamalaiyan is a trespasser and encroacher into the suit property and he is liable to vacate the suit property and possession is to be handed over to the defendant. Admittedly, the suit property jointly is in the name of the plaintiff and the defendant. Thus, both the plaintiff and the defendant are entitled for the suit property.

12. Under those circumstances, the Trial Court cannot pass an order to hand over the possession of the suit property only to the defendant. The plaintiff and the defendant are the wife and husband. Undoubtedly, the wife has got a right to live in the property, and more so, the property is in joint ownership. The patta was granted in favour of both the plaintiff and defendant. Therefore, both of them have got a right, and more so, the defendant cannot seek a relief to restrain the plaintiff from vacating the suit schedule premises. The plaintiff has also got an equal right in the suit property. However, Mr.Theerthamalaiyan, who is the grandson, has no right over the suit property. Therefore, the Trial Court rightly arrived at a conclusion that Mr.Theerthamalaiyan is a trespasser and encroacher into the suit property and he is liable to be vacated. However, Mr.Theerthamalaiyan has not been impleaded as a party in the civil suit. Even in the counter claim filed by the defendant in the suit, Mr.Theerthamalaiyan has not been impleaded as a defendant. Therefore, no relief can be granted against Theerthamalaiyan by the Trial Court to that extent, the relief granted by the Court below cannot be sustained. If at all the plaintiff or defendant has chosen to vacate Mr.Theerthamalaiyan, then, they have instituted a fresh suit for the purpose of vacating of Mr.Theerthamalaiyan and seeking possession by impleading him as a party to the suit. Under those circumstances, the relief of mandatory injunction granted by the Trial Court is perverse, admittedly, Mr.Theerthamalaiyan is not a party to the suit and therefore, no relief can be granted against him. The relief of permanent injunction granted against Mr.Theerthamalaiyan, without impleading him as a party in the suit, cannot be sustained. Thus, liberty is to be granted to both plaintiff or defendant to sue Mr.Theerthamalaiyan, for the purpose of eviction and to hand over the possession.

13. As far as the present appeal suit is concerned, this

Court do not find any perversity or infirmity in respect of finding that Mr.Theerthamalaiyan is a trespasser and encroacher into the suit schedule property. However, the relief of mandatory injunction granted by the Trial Court is perverse on account of the reason that Mr.Theerthamalaiyan has not been impleaded as a party in the civil suit and moreover, he is a necessary party as admittedly, he is in possession and enjoyment of the suit schedule property. Therefore, the plaintiff or defendant, jointly or independently, granted with the liberty to institute a fresh suit for appropriate relief against Mr.Theerthamalaiyan, by impleading him as a party in a civil suit, if they have chosen to do so. However, the present suit is concerned, this Court is of the opinion that the mandatory injunction granted as against Mr.Theerthamalaiyan, cannot be sustained. As far as the relief sought for in the present appeal suit is concerned, the permanent injunction was not granted.

14. This being the factum, the judgment and decree dated 24.02.2018 passed in O.S.No.21 of 2013 is set aside and A.S.No.462 of 2018 stands allowed. However, the appellant as well as the respondent, jointly or independently, granted with liberty to pursue their remedy by impleading Mr.Theerthamalaiyan as a party and by instituting a suit in this regard, if they have chosen to do so. No costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

ssb

To

The learned District Judge,
Family Court, Pondicherry.

Copy To

The Section Officer,
VR Section, High Court,
Madras-104.

A.S.No.462 of 2018

BR(CO)
CS/10/05/2021