

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.03.2019
PRONOUNCED ON : 22.05.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.113 of 2013

Nedunchezian

... Appellant/Respondent/Plaintiff

Vs.

Ponni

... Respondent/Appellant/Defendant

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 25.06.2012 passed by the Principal Sub-Court, Mayiladuthurai made in A.S.No.47 of 2011 reversing the judgment and decree of Principal District Munsif, Mayiladuthurai dated 30.11.2010 made in O.S.No.131 of 2009.

For Appellant : Mr.S.Sounthar

For Respondent : Mr.A.Muthukumar

JUDGMENT

This Second Appeal has been filed by the plaintiff against the judgment and decree passed by the Principal Sub-Judge, Myladuthurai in A.S.No.47 of 2011 reversing the judgment and decree dated 25.06.2012 passed by the Principal District Munsif, Myladuthurai in O.S.No.131 of 2009 dated 30.11.2010.

2. The appellant herein had filed a suit in O.S.No.131 of 2009 on the file of the Principal District Munsif, Myladuthurai, for recovery of possession of the suit property and for mesne profits. The learned Principal District Munsif, Myladuthurai, by the judgment and decree dated 30.11.2010 had partly decreed the suit and directed the defendant to deliver vacant possession of the suit property within 30 days and in so far as the mesne profits is concerned, the suit was dismissed. Aggrieved by the same, the defendant had filed an appeal in A.S.No.47 of 2011 on the file of the Principal Sub-Judge, Myalduthurai. The learned Principal Sub-Judge, Myladuthurai, by the judgment dated 25.05.2012 had allowed the said appeal and set aside the judgment and decree passed by the trial court and

dismissed the suit. Feeling aggrieved, the plaintiff has filed the present second appeal.

3. For the sake of convenience, the parties are referred to as described before the trial court.

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

(a) Originally, the suit property and other properties belonged to the plaintiff's father Govindan. The plaintiff's father was employed in Indian Postal Service and during his service, he obtained loan from his department and constructed a house in the suit property and enjoyed the same. The loan was discharged and subsequently, he retired from service. The plaintiff's father had gifted the suit property to the plaintiff under a registered settlement deed dated 18.02.2008 and from that date onwards, the plaintiff is enjoying the suit property. The defendant is the plaintiff's sister. She is employed in RMS as Head Sorter. Her husband Kumar is in foreign shores. The defendant had also purchased a house in the same Dhandapani Chetty street in Sitharkadu village. Prior to the purchase of the said house, the defendant had her residence at Moovalur. As her husband is in foreign shores and as there is no male help for her, the defendant approached plaintiff's father and informed him that she is experiencing lot of hardship in staying alone at Moovalur and therefore, requested to permit her to reside in the suit property.

(b) Accordingly, the plaintiff's father permitted the defendant to stay in the suit property with a condition of surrender of possession whenever called upon. The defendant also agreed for the same and occupied the suit property as a permissive occupier. Subsequently, the defendant also had purchased a house abutting the suit property. But the defendant, for the reasons best known to her had not occupied the said house purchased by her but continued to occupy the suit property. The suit property is an old dilapidated sarpu portion in which she made arrangements to put up a new construction and hence the plaintiff requested the defendant to vacate the suit property. The defendant instead of complying with the said demands, had started to give troubles to the plaintiff and his father in all ways. The defendant had also filed a complaint before the Judicial Magistrate No.1, Mayiladuthurai in C.C.No.262 of 2008 under Section 12 of the Protection of Women from Domestic Violence Ac. The plaintiff is contesting the said case. Hence the plaintiff had issued a lawyer's notice dated 27.12.2006 calling upon the defendant to surrender vacant possession of the suit property. The defendant after receipt of the said notice, had sent a reply through her counsel dated 31.01.2009 on false allegation. Hence the plaintiff was

constrained to file the above suit for recovery of possession and for mesne profits.

5. The averments made in the written statement are in brief as follows:

(a) It is true that the plaintiff is the brother of the defendant. But the allegation that the plaintiff's father is the absolute owner of the suit property and he constructed the house in the suit property out of his own earnings is false. It is also not correct to say that the plaintiff's father had executed settlement deed on 18.02.2008 in favour of the plaintiff and by virtue of the said settlement deed, he became the absolute owner of the suit property. The suit property is the ancestral property of the plaintiff's father and hence the defendant is also entitled to get a share in the suit property. The defendant is residing in the suit property for more than 12 years in her own right. The plaintiff's father had no right to execute any settlement deed in favour of anyone. The said document has been created by the plaintiff to deprive the defendant of her due share in the suit property. The father of the plaintiff viz., Govindan got also two daughters (one is the defendant and another one daughter) and one son who is the plaintiff herein.

(b) It is true that the defendant is employed in RMS and her husband is in foreign shores, but it is not correct to say that the defendant was permitted by her father to occupy the suit property on humanitarian ground on a condition that she should vacate as and when called upon to do so. The defendant is residing in the suit property in her own right for more than 12 years. The plaintiff tried to evict the defendant by force from the suit property and hence the defendant had filed a complaint under the Protection of Women from Domestic Violence Act, 2005, in C.C.No.262 of 2008 on the file of the Judicial Magistrate No.1, Myladuthurai and the same is still pending. The plaintiff's notice has been suitably replied by the defendant. There is no cause of action for the suit and therefore, she prayed to dismiss the suit.

6. Based on the aforesaid averments, the learned District Munsif, had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as PW1 and also examined two more witnesses as PWs.2 and 3 and marked Exs.A1 to A6 as exhibits. On the side of the defendant, the defendant examined herself as DW1 and marked Exs.B1 to B2 as exhibits on her side.

7. The learned District Munsif after considering the materials placed before him found that the suit property is a self-acquired property of the plaintiff's father and he had

executed the settlement deed in respect of the suit property in favour of the plaintiff and by virtue of the said settlement deed, the plaintiff is the absolute owner of the suit property. He further found that the defendant's possession is only a permissive possession and as such, she has to vacate and surrender the suit property within 30 days from the date of decree. However, he dismissed the suit in respect of the mesne profits. Aggrieved by the same, the defendant had filed an appeal in A.S.No.47 of 2011 on the file of the Principal Sub-Judge, Myladuthurai, the learned Principal Sub-Judge, Myladuthurai, had allowed the said appeal and set aside the judgment and decree passed by the trial court and dismissed the suit. Feeling aggrieved, the plaintiff has filed the present second appeal.

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

"1. Whether the findings of lower Appellate Court that the Settlor of plaintiff has retained suit building portion and settled only the remaining portion in suit survey number is vitiated when there is no plea by respondent to support such finding?

2. Whether the findings of lower Appellate Court that the Settlor of plaintiff has retained suit building portion and settled only the remaining portion in suit survey number is vitiated by error apparent on face of record when respondent herself admitted that suit building was put up in the property purchased from Chinnaiyan?

3. Whether the findings of lower Appellate Court that the Settlor of plaintiff has retained suit building portion and settled only the remaining portion in suit survey number is vitiated by error apparent on face of record when alleged retained portion in occupation of defendant was not shown as boundary to subject matter of settlement?

4. Whether lower Appellate Court erred in stating that Tamilnadu Act 1/1990 is not applicable to Tamil nadu after Central Amending Act overlooking the binding precedents?"

9. The Substantial questions of law 1 to 4:

The learned counsel for the appellant/plaintiff has submitted that the first Appellate Court erred in reversing the well considered judgment of the trial Court. He further

submitted that the first Appellate Court failed to see that the defendant had admitted in her cross examination that the suit properties were purchased by the father from one Chinnaiyan under Ex.A6. He further submitted that the first Appellate Court having held that the suit property is the self acquired property of the father of the parties namely, Govindan, it ought to have dismissed the appeal. He further submitted that the first Appellate Court failed to consider that under Ex.A6, though it is stated that in S.No.496/1 two cents were purchased and in S.No.467/3 four cents were purchased with specific boundaries by the said Govindan, in Ex.A1 while settling the aforesaid property in favour of the plaintiff, in item No.II the extent has been wrongly mentioned as 5 cents instead of 6 cents, but the boundaries have been rightly given and in such a case, the principle of boundaries will prevail over the extent will apply.

10. He further submitted that it is not the case of the defendant that her father executed Ex.A1 settlement in favour of the plaintiff excluding the suit property and in such a case, the first Appellate Court should not have come to the conclusion that the plaintiff failed to prove that the suit property was also settled in his favour under Ex.A1. He further submitted that the defendant failed to prove that under what capacity she is in possession of the suit property and therefore when a suit is filed based on the title, the defendant is bound to surrender the vacant possession. He further submitted that the first Appellate Court without considering the evidence in proper perspective had allowed the appeal and set aside the judgment and decree passed by the trial Court and he prayed to allow the Second Appeal.

11. Per contra, the learned counsel for the respondent/defendant has submitted that the plaintiff in his cross examination has categorically admitted that the suit property is the ancestral property and as such, his father Govindan had no right to execute the settlement deed in respect of the entire property. He further submitted that the plaintiff admitted in his cross examination that one of the witnesses Punitha, his wife and another witness are working in his Computer Center and with the help of the said witnesses, he had created Ex.A1 settlement deed. He further submitted that the plaintiff has admitted in his cross examination that his father died due to illness and that itself shows that the said document Ex.A1 settlement was not executed by him with free consent and on his volition.

12. He further submitted that in Ex.A6 it is stated that the said Govindan had purchased 6 cents, under Ex.A1 only 5 cents were conveyed to the plaintiff and that the said one cent

might be the suit property and taking into consideration of the aforesaid facts, the first Appellate Court had rightly allowed the appeal filed by the defendant and set aside the judgment and decree passed by the trial Court and in the said factual findings, this Court cannot interfere and therefore, he prayed to dismiss the Second Appeal.

13. It is an admitted fact that the defendant is the own sister of the plaintiff. It is also an admitted fact that the defendant is in possession of the suit property. As per the plaint, the suit property is a tiled sarpu portion admeasuring 10x20 feet = 200 sq ft., situated in RS.No.496/1 within the following boundaries: West of Dhandapani Chetty Street, east and south of the plaintiff's property, north of the defendant's property.

14. Though in para No.5 of the written statement, the defendant has taken a plea that the description of the property given in the plaintiff is not a correct one, she has not given any details as to how the said description is not correct. Further in the previous paragraphs of the written statement, she has admitted that she is in possession of the suit property and she contended that the suit property is the ancestral property of their father namely, Govindan and as such she has also got a share in the suit property and hence, their father Govindan had no right to execute any settlement deed in favour of the plaintiff. She further averred that the settlement deed dated 18.02.2008 is not genuine and valid in law and it will not bind in law. She further stated that the said document has been created by the plaintiff to deprive her due share in the suit property.

15. Ex.A6 shows that under the said document, the father of both parties namely Govindan had purchased two cents in S.No.496/1 and 4 cents in S.No.496/3 with a tiled house situated therein. For both the aforesaid Survey numbers common boundaries have been given. In Ex.A1 two items have been mentioned. The first item is three cents situated in S.No.496/1 and 6 $\frac{3}{4}$ cents in S.No.467/3C. So, the total extent of first item is 9 $\frac{3}{4}$ cents. Further it is stated a terraced house measuring 700 sq.ft., is situated in the aforesaid area and for that 4 boundaries are also mentioned. Second item also contains 2 survey numbers, ie., three cents in S.No.467/3C and two cents in S.No.496/1 and the total extent is mentioned as 5 cents in both the Survey numbers. It is also stated in the aforesaid land, a country tiled house measuring 700 sq.ft., is also situated. Further for the properties mentioned in both the survey numbers common boundaries have been mentioned.

16. Taking into consideration the item one of the properties mentioned in Ex.A1 was already mortgaged by the said Govindan and his father Subramaniya Devar under Ex.A5 dated 11.06.1955, the first Appellate Court came to the conclusion that the said item is the ancestral property. Further the First Appellate Court has held that the properties which are mentioned in Item No.2 of Ex.A1 settlement deed were purchased by the said Govindan under Ex.A6 and hence, the said properties are self acquired properties of the said Govindan. Challenging the said findings, the defendant has not filed any cross objection.

17. At this juncture, it would be relevant to refer to the decision in Laxman Tatyaba Kankate and another Vs. Taramathi Harishchandra Dhattrak, (210) 7SCC 717 wherein, the Hon'ble Supreme Court in para No.24 has observed as follows:-

"24. It is a settled principle of law that before the first appellate court, the party may be able to support the decree but cannot challenge the findings without filing the cross-objections. As it appears from the record, the present appellants have neither filed cross-objections nor their appeal challenging the findings recorded by the learned trial court. In fact, the entire conduct of the present appellants shows that they have not only failed to prove their claim before the courts of competent jurisdiction but have even not raised proper pleas in their pleadings."

18. The aforesaid decision will squarely apply to this case. In this case the defendant has not filed any cross objection challenging the findings of the first Appellate Court that item No.2 of the properties mentioned in Ex.A1 settlement deed is the self acquired property of Govindan. Therefore, it is not open to the respondent/defendant to contend that the said property is the ancestral property of their father Govindan.

19. According to the plaintiff, since the defendant's husband is in foreign shores, and she was not having any male help for her, she approached her father and apprised that she is experiencing difficulty at Moovalur and therefore she requested their father to permit her to reside in the suit property and accordingly their father on humanitarian ground, permitted her to stay in the suit property with a condition to surrender whenever called upon and in pursuance of the said permission, she occupied the suit property. The defendant in her written statement has stated that she is residing in the suit property for more than 12 years in her own right. But she has not stated

as to how she got the right over the suit property.

20. She has admitted in her cross examination that she married in the year 1988 and in such a case, she has to explain, as to when she came into the possession of the suit property and under what capacity. She has not given any explanation in her written statement, but in her chief examination she has stated that since she is having right over the suit property her father permitted her to reside in the suit property. As already pointed out item No.2 of the properties mentioned under Ex.A1 settlement deed has been purchased by the said Govindan under Ex.A6 and as such the said item is his separate property and in such a case, he is entitled to execute the settlement deed in respect of the said property. Therefore, the contention of the defendant that she was permitted by her father to reside in the suit property only by considering her right over the suit property cannot be accepted. Under the said circumstances, the contention of the plaintiff that their father taking into consideration of the fact that the defendant is not having male support, he permitted her to reside in the suit property is more probable and acceptable.

21. Admittedly, under Ex.A6, the said Govindan had purchased 2 cents in S.No.496/1 and 4 cents in S.No.467/3 and totally 6 cents he had purchased. Further, common boundaries have been given to the properties mentioned in the aforesaid two survey numbers. Though in Ex.A1, in item No.2, in S.No.496/1 the same extent of two cents have been mentioned, in respect of S.No.463/3C, instead of mentioning 4 cents, it has been mentioned as 3 cents but the same boundaries which have been mentioned in Ex.A6 have been given in item No.2 of the properties mentioned in Ex.A1 also. So the principle of boundaries will prevail over the extent will apply.

22. It is also to be pointed out that if really the said Govindan intended to give the said one cent to her daughter (defendant), he would have mentioned the said fact in Ex.A1 itself. If he had intended to exclude the suit property under Ex.A1 settlement deed, he would have shown the suit property as one of the boundaries. But he has not done so. So, it is clear that the said Govindan had settled the entire property what he had purchased under Ex.A6 to the plaintiff under Ex.A1.

23. It is also to be pointed out that in Ex.A1 though the total extent is mentioned as 5 cents, instead of 6 cents, the entire extent of tiled house measuring 700 sq.ft., has been settled in favour of the plaintiff. So if at all as held by the first Appellate Court that one cent is not included in Ex.A1, that should be only the land and not the house property. Admittedly the suit property is a portion of house property.

Therefore, looking from any angle, it is clear that the suit property is also covered under Ex.A1 settlement deed.

24. As already pointed out, the defendant has not stated how the description of the suit property is defective. Under the said circumstances, the description of the properties given in the plaint has to be taken as correct. Therefore, there is no difficulty in identifying the suit property. Without taking into consideration of the aforesaid facts, the first Appellate Court has taken a view that one cent has been omitted in Ex.A1 settlement deed and the suit property may come within the said omitted one cent and hence, the plaintiff is not entitled to the relief of delivery of possession cannot be accepted and therefore, the findings of the first Appellate Court have to be set aside. Accordingly, the substantial questions of law are answered in favour of the appellant/plaintiff.

25. In the result, the Second Appeal is allowed. No costs. The judgment and decree passed by the first Appellate Court are set aside and the judgment and decree passed by the trial Court are restored. The defendant is directed to surrender vacant possession of the suit property to the plaintiff within two months from the date of receipt of a copy of this judgment.

s/d-
Assistant Registrar (CS V)

True Copy

Sub-Assistant Registrar

dna

To

1. The Principal Subordinate Judge
Mayiladuthurai.

2. The Principal District Munsif,
Mayiladuthurai.

3. The Section Officer,
VR Section,
High Court,
Madras.

+1 CC to Mr.A.Muthukumar, Advocate sr 44154.

S.A.No.113 of 2013

MR (CO)
SP (03/01/2020)