

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 25.03.2019	Delivered on: 22.05.2019
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CORAM
THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.502 of 2013
and
M.P.No.1 of 2013

Ramasami ... Appellant/Appellant/
Defendant

Vs.

Vijaya ...Respondent/Respondent/
Plaintiff

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 04.02.2010, made in A.S.No.32 of 2008 on the file of the Additional District Judge, (Fast Track Court), Kallakurichi in confirming the judgment and decree dated 29.11.2005 made in O.S.No.355 of 2001 on the file of the First Additional District Munsif, Kallakurichi.

For Appellant : Mr.A.Gouthaman

For Respondent : Mrs.R.Meenal

JUDGMENT

This Second Appeal has been filed by the defendant against the judgment and decree passed by the Additional District Judge, (Fast Track Court No.III), Kallakurichi in A.S.No.32 of 2008 dated 04.02.2010 confirming the judgment and decree passed by the first Additional District Munsif, Kallakurichi in O.S.No.355 of 2001 dated 29.11.2005.

2. The respondent herein had filed a suit in O.S.No.355 of 2001 on the file of the First Additional District Munsif, Kallakurichi, for declaration of her title over the suit properties and permanent injunction to restrain the defendant, his men, etc., from interfering with her peaceful possession and enjoyment of the suit properties. The learned First Additional District Munsif, by the judgment dated 29.11.2005 had decreed the suit as prayed for without costs. Aggrieved by the same, the defendant had filed an appeal in A.S.No.32 of 2008 on the

file of the Additional District Judge, (Fast Track Court No.III), Kallakurichi. The learned Additional District Judge, by the judgment dated 04.02.2010 had dismissed the said appeal confirming the judgment and decree passed by the trial Court. Feeling aggrieved, the defendant 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:-

The suit properties originally belonged to the plaintiff's maternal grand mother Amaravathi. The said Amaravathi gifted the suit properties to the plaintiff under a registered settlement deed dated 22.06.1992. At the time of execution of the settlement deed, the plaintiff was a minor and hence, her father Pichapillai was shown as guardian in the said document. The said Pichapillai accepted the said gift on behalf of the plaintiff and from that date onwards, she has been in possession and enjoyment of the suit property. Patta was also granted in favour of the plaintiff. The fact remains so, that on 21.04.2001, the defendant attempted to trespass into the suit properties and also denied the title of the plaintiff. Hence, the plaintiff was constrained to file the above suit for declaration and permanent injunction.

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

The allegation that on 22.06.1992, the said Amaravathi had executed a settlement deed in favour of the plaintiff is false. The plaintiff is never in possession and enjoyment of the suit properties at any point of time. She is residing at Bangalore for a very long period. She does not know where the suit properties are situated. After the death of the defendant's mother, his father Pavadai lived with the plaintiff's maternal grand mother Amaravathi. They had lived as husband and wife. The said Amaravathi had filed a suit in O.S.No.34 of 2002 on the file of the First Additional District Munsif, Kallakurichi against the defendant herein and others and the said suit is still pending. Hence, the plaintiff is not entitled to file the present suit. The suit properties were in possession and enjoyment of the defendant's father Pavadai and after his death, the defendant succeeded to the suit properties and he is in possession and enjoyment of the same. Therefore, the defendant prayed to dismiss the suit.

6. Based on the aforesaid pleadings, the learned First Additional District Munsif, had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined herself as PW1 and she also examined three more witnesses as PW2 to PW4 and marked Exs.A1 to Ex.A19 as exhibits. On the side of the defendant, the defendant examined himself as DW1 and also examined two more witnesses as DW2 and DW3. He also marked Exs.B1 to Ex.B3 as exhibits.

7. The learned First Additional District Munsif, Kallakurichi, after considering the materials placed before her, found that in the oral partition took place between one Natesan and Pavadai, the suit properties were allotted to the share of Pavadai. She further found that after the death of the said Pavadai, his widow Amaravathi succeeded to the suit properties and she executed Ex.A1 settlement deed infavour of the plaintiff and in pursuance of the said settlement deed, the plaintiff is in possession and enjoyment of the suit properties. She further found that the contention of the defendant that her mother died and after her death, his father Pavadai lived with Amaravathi is false. She further found that the defendant's mother Chinnammal is alive and she was examined as a witness in O.S.No.571 of 2001 and in that suit, she deposed that her husband's name is Saminathan. Accordingly, she rejected the contention of the defendant and accepted the case of the plaintiff and decreed the suit as prayed for. Aggrieved by the same, the defendant had filed an appeal in A.S.No.32 of 2008 on the file of the Additional District Judge, (Fast Track Court No.III), Kallakurichi. The learned Additional District Judge, had dismissed the said appeal confirming the judgment and decree passed by the trial Court. Feeling aggrieved, the defendant has filed the present Second Appeal.

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

" Whether the Courts below were right in decreeing the suit, when it was admitted by the plaintiff that the suit property was originally purchased in the name of Natesan, as evidenced by Exs.A16 and 17, viz., oral partition, wherein, the suit properties were allotted to the share of Pavadai and the defendant was born through his first wife and Amaravathi was a second wife and the plaintiff is the grand daughter of Amaravathi through her daughter, by name Pachayammal and therefore, the defendant was

entitled to 1/3rd share in the property and Amaravathy was having 1/3rd in the suit properties?"

9. Heard, Mr.A.Goutham, the learned counsel for the appellant and Mrs.R.Meenal, the learned counsel for the respondent.

10. Substantial Question of law :

The learned counsel for the appellant/defendant has submitted that the Courts below failed to see that the plaintiff's maternal grand mother Amaravathi was not a legally wedded wife of Pavadai and she was only a concubine of Pavadai and as such, she is not having any right to execute Ex.A1 settlement deed in favour of the plaintiff. He further submitted that the Courts below ignoring the evidence of DW2 and DW3, had held that the defendant's mother Chinnammal is the wife of Saminathan. He further submitted that the evidence of DW2 and DW3 would clearly show that the said Saminathan died as a bachelor. He further submitted that since the plaintiff has filed the suit for declaration and permanent injunction, the burden is on her to prove her title and also that she is in possession of the suit property but, in this case, she has not established her title over the suit property and also her possession. He further submitted that without taking into consideration of all the aforesaid facts, the trial Court had decreed the suit and the first Appellate Court also mechanically confirmed the same and therefore, he prayed to allow the second appeal and set aside the judgments and decrees passed by the Courts below and dismiss the suit.

11. In support of the aforesaid contentions, the learned counsel for the appellant relied upon the decision in Union of India (UOI) and others Vs.Vasavi Co-operative Housing Society Limited and others, MANU/SC/0001/2014 = AIR 2014 SC 937.

12. Per contra, the learned counsel for the respondent / plaintiff has submitted that in Ex.A2 patta dated 01.06.1985 itself, it is stated that the said Amaravathi is the wife of Pavadai. She further submitted that in the written statement, the defendant has stated that he is the son of Pavadai and after the death of his mother, the said Amaravathi lived with his father Pavadai as a concubine, but in his evidence he has admitted that his mother's name is Chinnammal and she is alive and as such, the contention of the defendant that after the death of his mother, Amaravathi lived with his father Pavadai as a concubine is false. She further submitted that in Ex.A18 and A.19, the defendant's mother Chinnammal has admitted that she

is the wife of Saminathan. She further submitted that the plaintiff proved her title and possession of the suit property through oral and documentary evidence and taking into consideration of the aforesaid facts, the trial Court had rightly decreed the suit and the same has been confirmed by the first Appellate Court and in the said factual concurrent findings, this Court cannot interfere and therefore, she prayed to dismiss the second appeal.

13. It is seen from the evidence of PW1 and DW1 that one Karuppan had three sons namely, Natesan, Pavadai and Saminathan. The said Natesan had purchased the suit properties and other properties under Exs.A16 and Ex.B1. Out of the aforesaid three brothers, Saminathan died issueless and thereafter, Natesan and Pavadai had orally partitioned the aforesaid properties and in the said partition, the suit properties were allotted to the share of Pavadai and subsequently, the said Pavadai also died.

14. According to the plaintiff, her maternal grand mother Amaravathi is the legally wedded wife of Pavadai and after the death of the said Pavadai, Amaravathi succeeded to the property as his widow and patta was also granted in her name and subsequently, she executed Ex.A1 settlement deed dated 22.06.1992 in favour of her. The defendant had stated in his written statement that he is the son of Pavadai. He further stated that after the death of his mother, the plaintiff's maternal grand mother Amaravathi lived with his father Pavadai as a concubine and as such, she is not entitled to execute Ex.A1 settlement deed in favour of the plaintiff. But the defendant, while examining himself as DW1 had admitted that her mother's name is Chinnammal and she is alive. So, it is clear that the defendant had falsely stated in his written statement that after the death of his mother, the said Amaravathi lived with his father as a concubine.

15. The plaintiff mainly relied upon Ex.A2, A18 and A19 to show that the said Amaravathi is the wife of Pavadai and that the defendant's mother Chinnammal is the wife of Saminathan. Ex.A2 is the patta dated 03.06.1985 granted in the name of Amaravathi in respect of the suit properties. In the said document, it is stated that the said Amaravathi is the wife of Pavadai. To controvert the same, the defendant has not produced any documentary evidence to show that his mother Chinnammal is the legally wedded wife of Pavadai and that the said Amaravathi is only a concubine. Ex.A18 is a certified xerox copy of the deposition of the said Chinnammal in O.S.No.571 of 2001 on the file of the First Additional District Munsif, Kallakurichi,

wherein, she has admitted that she is the wife of Saminathan. Ex.A19 is the Lawyer's notice dated 12.06.2001 issued on behalf of the said Chinnammal. In the said notice also, she has admitted that she originally married to one Saminathan and that the said Saminathan died issueless and thereafter she married to Pavadai. Therefore, the contention of the defendant that the said Saminathan died as bachelor is also false. Since, the defendant's mother had admitted in Ex.A18 and A19 that she was originally married to Saminathan, the burden is upon the defendant to prove that his mother legally wedded to the said Pavadai. Absolutely, there is no evidence to that effect.

16. In Union of India (UOI) and others Vs. Vasavi Co-operative Housing Society Ltd and others (cited supra), the Hon'ble Supreme Court in para Nos.14 and 15 has observed as follows:-

"14. At the outset, let us examine the legal position with regard to whom the burden of proof lies in a suit for declaration of title and possession. This Court in Maran Mar Basselios Catholicos Vs. Thukalan Paulo Avira reported in MANU/SC/0181/1958 : AIR 1959 SC 31 observed that "in a suit for declaration if the plaintiffs are to succeed, they must do so on the strength of their own title." In Nagar Palika, Jind Vs. Jagat Singh, Advocate MANU/SC/0260/1995 : (1995) 3 SCC 426, this Court held as under:

the onus to prove title to the property in question was on the plaintiff. In a suit for ejectment based on title it was incumbent on the part of the Court of appeal first to record a finding on the claim of title to the suit land made on behalf of the plaintiff. The Court is bound to enquire or investigate that question first before going into any other question that may arise in a suit.

15. The legal position, therefore, is clear that the plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title and that could be done only by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendants have proved their case or not. We are of the view that even if the title set up by the

defendants is found against, in the absence of establishment of plaintiff's own title, plaintiff must be non-suited."

17.

With regard to the aforesaid proposition of law there is no quarrel. In this case, through Ex.A2, the plaintiff has proved that her maternal grand mother Amaravathi is the legally wedded wife of Pavadai. Further, she has proved her possession through Ex.A3 to Ex.A14. Further, she has proved through Ex.A18 and Ex.A19 that the defendant's mother Chinnammal is alive and that she admitted that she is the wife of Saminathan. Further, the defendant's mother had categorically admitted in Ex.A19 that the plaintiff's husband is in exclusive possession of the entire family properties and that itself would show that the plaintiff and her husband are in possession of the suit properties. Therefore, the plaintiff has positively proved her case. Therefore, the aforesaid decision will not help the appellant/defendant.

18. As already pointed out that in Ex.A19 notice, the defendant's mother had categorically admitted that originally she had married one Saminathan and the said Saminathan died issueless and thereafter, she married the brother of the said Saminathan namely, Pavadai and through him Ramasamy (defendant) and two daughters were born. So, it is clear that even as per the own admission of the defendant's mother, it was only she, who married the said Pavadai, after the death of her husband Saminathan. But suppressing the aforesaid fact, the defendant had pleaded in his written statement that after the death of his mother, the plaintiff's maternal grand mother Amaravathi lived with his father Pavadai as concubine. It appears that only for the purpose of, eventhough his mother was alive, he had taken a plea in the written statement that his mother is dead.

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19. It is also to be pointed out that Ex.A15 would show that the defendant's mother Chinnammal had filed a suit in O.S.No.571 of 2001 on the file of the First Additional District Munsif, Kallakurichi, against the plaintiff's husband Selvaraj, the plaintiff, her maternal grand mother Amaravathi and two others for partition of half share in the suit property and other properties. The said suit was dismissed for default on 07.04.2004. During cross examination of DW1, DW1 has stated that the said Saminathan did not marry. He further stated that her mother Chinnammal is the legally wedded wife of Pavadai and he is having records to show that his mother is the legally wedded wife of Pavadai, but he has not produced the said records

before the Court. He further admitted that his mother had filed a suit for partition and her mother had issued Ex.A19 lawyer's notice.

20. He further admitted that his mother is alive and she is in his village but he said that he is not going to examine her as a witness. It was suggested that if she is examined as a witness, truth will come out and hence, she was not examined, even thereafter, the defendant has not chosen to examine his mother as a witness. Further, the suit, which was filed for partition by the defendant's mother was dismissed for default. The conduct of the defendant and his mother would show that if she conducted the said suit, the fact that she is not a legally wedded wife of Pavadai would come out and that must be the reason for allowing the suit for dismissal without prosecution and also the reason for not examining her as a witness in the present suit.

21. In order to prove her possession, the plaintiff has produced the patta which stands in the name of her maternal grand mother dated 03.06.1985 and marked as Ex.A2, the patta issued in her name and marked as Ex.A3. Further she has produced kist receipts and marked as Ex.A4 to Ex.A10 and A12 to A14. To controvert the aforesaid evidence, the defendant has not produced any patta or kist receipts. He has produced only the sale deeds which stand in the name of Natesan. From the said sale deeds it cannot be said that he is in possession and enjoyment of the suit properties.

22. As already pointed out that in Ex.A19 notice, the defendant's mother had stated that the plaintiff's husband is occupying the entire family properties and he has not allowed her to cultivate the land. Therefore, it is clear that the plaintiff and her husband alone are in possession of the suit properties. The trial Court taking into consideration of all the aforesaid facts had rightly decreed the suit and the same has been confirmed by the first Appellate Court and in the said concurrent factual findings, this Court cannot interfere. Accordingly, the substantial question of law is answered against the appellant/defendant.

23. In the result, the Second Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-

Asst.Registrar (CS V)

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Sub Asst. Registrar

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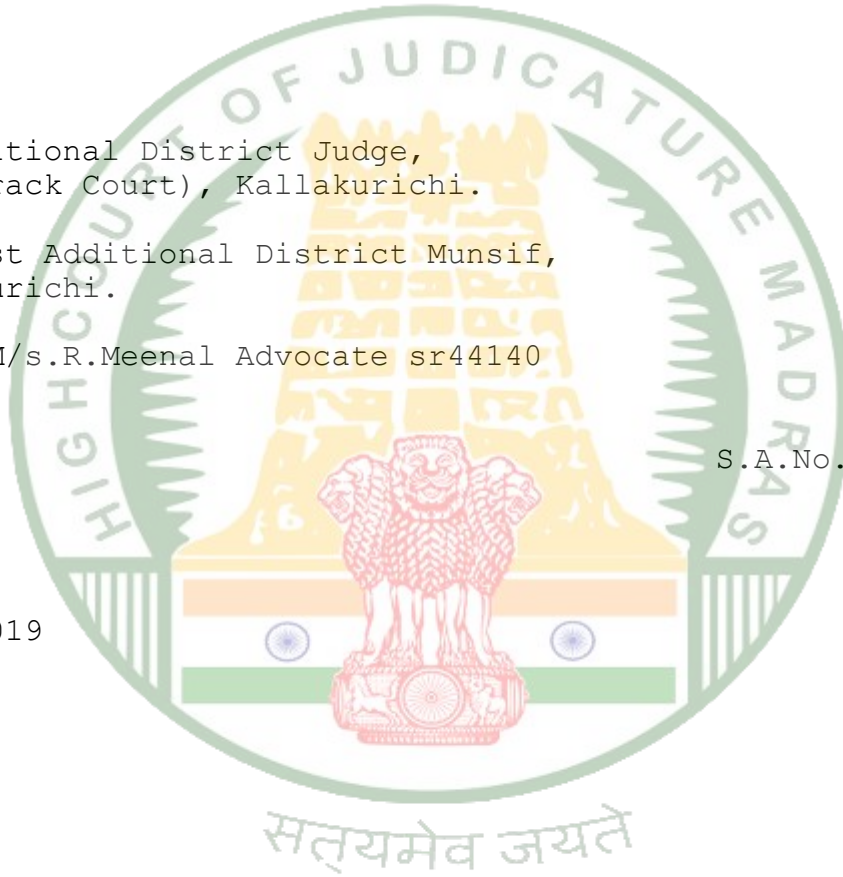
1.The Additional District Judge,
(Fast Track Court), Kallakurichi.

2.The First Additional District Munsif,
Kallakurichi.

+1 cc to M/s.R.Meenal Advocate sr44140

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