

IN THE HIGH Court OF JUDICATURE AT MADRAS

Reserved on : 29.11.2018

Delivered on : 10.01.2019

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.133 of 2016

&

C.M.P.No.17371 of 2018

Munusamy

...Appellant/Appellant/Defendant

Vs

Duraibabu Mudailar

...Respondents/Respondent/Plaintiff

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure challenging the Judgment and Decree dated 23.06.2015 in A.S.No.27 of 2014 on the file of the Sub Court, Madurantakam in confirming the Judgment and Decree dated 16.09.2011 in O.S.No.228 of 2009 on the file of the District Munsif Court, Madurantakam.

For Appellant : Mr.V.Raghavachari

For Respondent : Mr.R.Thiagarajan

Judgment

The unsuccessful defendant in both the Courts below is the appellant before this Court. The parties are referred to in the same array as in the suit.

The plaintiff had filed the suit O.S.No.228 of 2009 on the file of the District Munsif, Madurantakam for the following relief:

Relief claimed

2."i)Direct the Defendant to vacate and surrender the possession of the houses in the Schedule mentioned property; on their failure to vacate and surrender the possession of the Defendant over the Schedule mentioned property through process of this Hon'ble Court and to pass such other orders.

ii)Pass a decree of Permanent injunction by restraining the Respondents/Defendants, their men, Agents, Servants, legal representatives and heirs from in any way making any construction in the schedule mentioned property.

iii)Direct the Defendant to pay the cost of the suit to plaintiff."

3.The plaintiff would contend that he is the absolute and exclusive owner of the suit schedule property having purchased the same under a registered sale deed dated 24.06.1977 from one Valliyammal wife of Dakshinamoorthi. The plaintiff would contend that he is a tailor by profession and out of his self earnings he had also purchased the property which is situated on the Southern side of the suit property once again from the said Valliyammal. The Revenue records stood mutated in the name of the plaintiff.

4.Considering the fact that the defendant was his younger brother he had permitted him to live in the suit property ten years prior to the filing of the suit. Service connection in respect of the houses stood in the name of the plaintiff, later, on the request of the defendant the plaintiff had given his no objection to enable the defendant to have the service connection given in his name. The plaintiff would contend that on the rear side of the two houses there is a vacant side. In the month of April 2009, the defendant had a major quarrel with the plaintiff and had used foul language prompting the plaintiff to file a complaint before Sub-Inspector of Police, Madurantakam. The Police had enquired into the complaint and before the Police authorities the defendant had agreed to vacate the suit property within a period of 6 months. Therefore the defendant was permitted to continue in residence. All of a sudden on 14.09.2009, the defendant had accumulated material for putting up construction in the rear side of the property and he had also started putting up construction. The defendant has no right to the suit schedule property as it belongs to the plaintiff. Considering the act of the defendant the plaintiff had come forward with the suit for the relief mentioned herein above.

Averments in the written statement

5.The averments contained in the plaint were denied as false. The Defendant would submit that the plaintiff did not have any means to purchase the suit property in the year 1977. It was also the defendant's case that his father along with the paternal grandmother of the plaintiff and defendant and their uncle and aunt had sold the property bearing door No.48, Kadaperi, Bajanai Koil Street on 31.03.1965 to one Ramu and out of the sale proceeds the plaintiff's father had purchased the suit property in the year 1977 in the name of the plaintiff since he was the only adult male member. The plaintiff was only a name lender and he did not have the means to purchase the suit property. The Purchase was made in the name of the plaintiff in order to avoid any future claim being made on the suit property by the brothers of the plaintiff and defendant's father. The defendant would further contend that since the property was purchased from the ancestral nucleus the defendant also had a share in the suit property and he intended to file a suit for

partition. The defendant therefore sought for dismissal of the suit. The learned District Munsif, Madurantakam had framed the following issues:

"1. Whether the defendant is in permissive possession of plaint schedule property?

2. Whether the plaintiff is entitled for recovery of possession?

3. Is the plaint schedule property is the joint family property?

4. Whether the plaintiff entitled for the relief of permanent injunction?

5. What are all the other reliefs and cost plaintiff is entitled for?"

6. The plaintiff had deposed as P.W.1 and one Ramu to whom the joint family property was sold in the year 1965 was examined as P.W.2. The plaintiff had marked Ex.A.1 and Ex.A.2 in support of his contentions. On the defendant's side, the defendant had examined himself as D.W.1 and one Manohar and Chella Muthu were examined as D.W.2 and D.W.3 respectively. The defendant had marked Ex.B.1 to Ex.B.4 in support of his contentions. The Advocate Commissioner was appointed to inspect the suit property and he had filed his report and plan which were marked as Ex.C.1 and Ex.C.2. On considering the evidence on record the learned District Munsif returned a finding that the defendant is only a permissive occupant of the suit schedule property and the property is not the joint family property but the self acquired property of the plaintiff. In view of the above finding the learned District Munsif had answered issue Nos.1 and 4 in favour of the plaintiff. Consequently, the suit was decreed as prayed for.

Appellate Court

7. Challenging the Judgment and Decree of the learned District Munsif, Madurantakam, the defendant had filed A.S.No.7 of 2014 on the file of the Sub Court, Madurantakam. The main contentions on which the appeal was filed was that the District Munsif had overlooked the presumption that all properties are joint family properties unless the contrary is proved and he has further contended that the learned District Munsif has failed to consider Ex.B.1 to Ex.B.4 which stand in the name of the defendant.

The Appellate Court had framed nearly eight points for consideration which are as follows:

i) Whether the property was the self acquired of the plaintiff?

ii) Whether it was joint family property? and

iii) Whether the defendant was in permissive occupation of the suit schedule property and the reliefs to which the plaintiff was entitled to?

iv)Whether the plaintiff is entitled for the remedy that the defendant vacated the premises and handed over possession of the suit property to the plaintiff?

v)Whether the plaintiff is entitled for a permanent injunction?

vi)Whether the Trial Court without considering the evidence and materials of the appellant/defendant has wrongly decided the case? Whether the Judgment and Decree of the Trial Court is liable to be quashed?

Vii)Whether the appeal is liable to be allowed?

Viii)To what other reliefs the parties are entitled to?

8.The learned Subordinate Judge, Madurantakam had confirmed the finding of the learned District Munsif, Madurantakam and dismissed the Appeal. Aggrieved by the same the above Second Appeal had been filed.

9.Originally notice was ordered by this Court by order dated 26.02.2016 in this appeal and later after the respondent had entered appearance and considering the relationship between the parties this Court by an order dated 21.10.2016 had directed the matter to be posted before the Mediation and Conciliation Centre. It appears that before the Mediation and Conciliation Centre it was only the plaintiff who had appeared and the appellant/defendant neither appeared in person nor was he represented. Therefore the Mediation and Conciliation Centre had sent back the matter to this Court with its report dated 01.02.2017. Thereafter the matter was being adjourned periodically and ultimately the matter was listed before this Court on 29.11.2018. Since the appeal was not admitted this Court has admitted the above appeal on the following Substantial Questions of law:

a)Whether the Courts below are correct in law in decreeing the suit for recovery of possession when the plaintiff's exclusive title to the property is disputed on the ground that the sale in favour of the plaintiff under Ex.A.1 was only with the joint family funds?

b)Whether the plea that the defendant was in permissive occupation of the property has been proved by the plaintiff?

Arguments of the Appellant/Defendant:

10.The appellant would raise the issue of maintainability of the suit since the title to the suit property was disputed. Mr.V.Raghavachari, learned counsel for the appellant would argue that the plaintiff was only the name lender and the reason for purchasing the property in his name was to avoid any future claims being made by the brothers of the father of the plaintiff and defendant. He would argue that both the defendant and their sister had been born in the suit property and it is wrong to state that he was permitted by the plaintiff to occupy the

property particularly when the defendant was only eight years old. The learned counsel would further draw this Court's attention to some of the evidence of the plaintiff as P.W.1 in his cross where he has made certain contradictory statements about the period when he had permitted the defendant to stay in the suit property. He would also point out that the admission of P.W.1 is that the plaintiff does not have any evidence to prove that he had permitted the defendant to reside in the suit property. He would also highlight the evidence of P.W.2 in his cross examination wherein P.W.2 would admit that the defendant has constructed upon the property which is purchased on 24.06.1977 from Valliyammal in the plaintiff's name. He would also draw the attention of this Court to the Ex.B.1 to Ex.B.4 to show that he is in possession and enjoyment of the property in question. The learned counsel would also contend that defendant has been in possession of the suit property much before the year 1999 and therefore the suit should be dismissed. The learned counsel would rely upon the Judgment of this Court in Fathuma and another Vs. K.S.Kadherkani reported in 1995-2-L.W.705 in support of his contention that there was no pre-suit notice prior to the filing of the suit therefore the suit is liable to be dismissed. The learned counsel would further rely upon the Judgement in D.Prakash Rathinam Vs. K.Ramalingam Pillai reported in 2014-3-L.W.169 in support of his arguments that when the title is denied the relief of declaration should also be included.

The arguments advanced on behalf of the respondent/plaintiff:

11.Mr.R.Thiagarajan, learned counsel appearing on behalf of respondent/plaintiff would contend that the defendant was put in permissive occupation of the suit property being the younger brother of the plaintiff. He would further submit that the case of the defendant is that the source of income for purchasing the above property was the sale of an ancestral property on 31.03.1965. Apart from this source the defendant as not pleaded any other source of income. However in his evidence the defendant has developed the arguments to include self exertions as another source for purchasing the property. The learned counsel would argue that both the Courts below have appreciated the evidence and come to the conclusion that the suit property was the self acquired property of the plaintiff and that he had put the defendant in permissive occupation of the premises, being his brother and it is only in the year 2009 when the defendant had attempted to assert independent rights over the property that the plaintiff had come forward to file the above suit.

12.The learned counsel would also rely upon the Judgement of the Honourable Supreme Court in Maria Margadia Sequeria

Fernandes and others Vs. Erasmo Jack De Sequeria (D) Tr.Lrs. and others reported in 2012-3-L.W.111 where the Honourable Supreme Court has laid down the various principles of law with reference to permissive occupation. The learned counsel would therefore contend that the case squarely falls within the parameters detailed in this Judgement. Therefore appellant/defendant does not deserve to have is appeal allowed.

13. Heard the parties and perused the records. The plaintiff has come forward with the case that he had used his self earnings to purchase the suit property in the year 1977. Ex.A.1 is the document under which the plaintiff has the purchased the suit property from one Valliyammal under the registered sale deed dated 24.06.1977. The reading of the said document would reveal that consideration for the purchase of the property was the loan of Rs.300/- given by the plaintiff to the said Valliyammal for enabling her to put up construction and the balance of Rs.300/- was paid before the Sub-Registrar. The schedule to the property would further reveal that the plaintiff had already purchased the properties situated north of the suit property from the said Valliyammal. The defendant on the other hand would come forward with a pleading in his written statement that the plaintiff and the defendant's paternal grandmother along with the plaintiff's father and his siblings (totally seven in number) had sold their ancestral property to one Ramu under a sale deed dated 31.03.1965 and the sale proceeds constituted the consideration for the purchase of the suit property. It is to be borne in mind that the suit property was purchased on 24.06.1977 which is nearly twelve years after the sale in favour of the Ramu. During his evidence the defendant would further elaborate in his oral evidence that from the sale proceeds received under a sale deed dated 31.03.1965, the self exertions of the plaintiff/defendant and their father also contributed to the purchase of the suit property. However the plaintiff has not provided any evidence to prove that the sale proceeds of the year 1965 was retained to purchase the suit property 12 years later. That apart it is also to be noted that there are seven vendors under the sale deed dated 31.03.1965 with each being entitled to an equal share in the proceeds. Therefore the defendant is under a bounden duty to prove that the amount that his father had derived as consideration constituted the amount given for purchasing the suit schedule property. In the absence of proof of the plaintiff's contentions that the suit property has been purchased from out of joint family funds it is held that the plaintiff had purchased the property out of his self earned income. Another point which has to be borne in mind is that while filing his written statement in the year 2009 the defendant had contended that he was going to file a suit for partition and the same has not been filed till date which in the opinion of the Court only

goes to show that the defendant is fully aware that he has no right, title or interest in the suit property. Therefore the first question of law is answered in favour of the plaintiff and the finding of the Courts below are confirmed.

14.The next issue for consideration is to, whether the defendant is in permissive occupation of the suit schedule property? It is seen from evidence of the defendant that when the suit property was purchased the defendant was only eight years old and the plaintiff by then had build up a reputation as a tailor and had been earning considerably well. The plaintiff has pleaded that he had put the defendant in permissive occupation of the suit property. The defendant adduced evidence that he is in possession of the suit property only on account of the fact that the suit property was purchased in the name of the plaintiff from out of the joint family funds and therefore he was in occupation of the property in his own right as a co-sharer. The Court having found that the defendant have not let in any evidence whatsoever to show that the suit property was purchased from the joint family funds his contention that he is in occupation as sharer would therefore fail.

15.Considering the relationship it would be a natural presumption that the defendant was put in permissive occupation by his brother. Once the defendant has misused the permission and tried to set up an independent right, title and interest to the property by attempting to put up construction the plaintiff is entitled to seek for recovery of possession. The Judgement of the Honourable Supreme Court in Maria Margadia Sequeria Fernandes and others Vs. Erasmo Jack De Sequeria (D) Tr.Lrs. and Others reported in 2012-3-L.W.111 lays down the principle that the Courts are not justified in protecting the possession of caretaker, servant or any person who wa allowed to live in the premises for sometime either as a friend, relative, caretaker or as servant. The defendant is under the category of a relative.

Considering the fact that he was only permitted to occupy the property the assertion of an independent right by the plaintiff itself disentitles him to be in possession of the property. Consequently the second substantial Question of law is also answered against the appellant/defendant. In the result, the Second Appeal stands dismissed however there shall be no order as to cost. Consequently, connected Civil Miscellaneous Petition is also closed.

Sd/-

Assistant Registrar (CS-IV)

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Sub Assistant Registrara

To

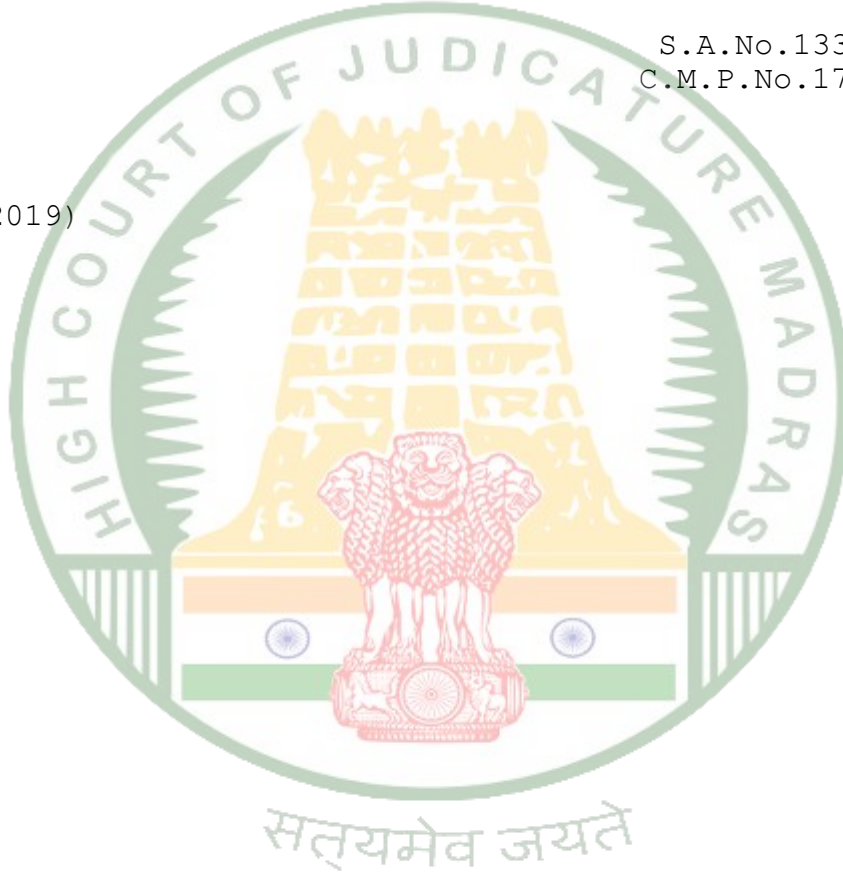
1.The Subordinate Judge,
Madurantakam.

2.The District Munsif,
Madurantakam.

+2cc to Mr.R.Thiagarajan, Advocate, S.R.No. 3058
+1cc to Mr.V.Raghavachari, Advocate, S.R.No. 2623

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AK (CO)
GN (04/02/2019)



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