

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 26.08.2019

PRONOUNCED ON : 26.09.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.Nos. 345 & 346 of 2016

and

CMP NO. 6331 of 2016

1. Palanivel (died)
2. Anjalidevi
3. Nedumaran
4. Pennarasi

...Appellants in both the appeals/
Defendant in OS No.175/12 &
Plaintiff in OS No.31/12

Appellants 2 to 4 brought on record as legal heirs of the deceased sole appellant viz., Palanivel vide Court order dated 29.01.2019 made in CMP Nos. 9669 & 9672/2018 in S.A.Nos 345 & 346 of 2016.

Vs.

Sambandam

...Respondent in both the appeals/
Plaintiff in OS No.175/12 &
Defendant in OS No.31/12

Prayer: Second Appeals filed under Section 100 of Civil Procedure Code, against the judgment and decree passed in A.S.Nos. 57 and 59 of 2014 dated 20.11.2015 on the file of the Court of Principal Subordinate Judge, Mayiladuthurai in conforming the judgment and decree passed in O.S.Nos. 31 and 175 of 2012 dated 15.09.2014 on the file of the court of Principal District Munsif, Mayiladuthurai.

For Appellants : Mr. A. Muthukumar

For Respondent : Mr. S. Sounthar

COMMON JUDGMENT

Second Appeal Nos.345 and 346 of 2016 are directed against the judgment and decree dated 20.11.2015 passed in A.S.Nos. 57 and 59 of 2014 on the file of the Principal Subordinate Court, Myladuthurai, confirming the judgment and decree dated 15.09.2014 passed in O.S.Nos 31 and 175 of 2012 on the file of the Principal District Munsif Court, Myladuthurai.

2. The second appeal No. 345 of 2016 has been admitted on the following substantial question of law.

"Whether the suit is bad for non joinder of necessary parties namely the other sharers of the suit properties?"

3. The Second Appeal No.346 of 2016 has been admitted on the following substantial questions of law.

1. When the plaintiff is admittedly co-owner of the suit properties and he suffered a decree for partition, whether the suit for recovery of possession without impleading the other co-owners is maintainable in law particularly when the defendant is admittedly not a trespasser?

2. Whether the suit is bad for non joinder of necessary parties namely the other sharers of the suit properties?

4. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

5. For the sake of convenience, the parties are referred to as per their rankings in the trial court.

6. O.S.No.175 of 2012 has been laid by the plaintiff against the defendant for the recovery of possession. O.S.No.31 of 2012 has been laid by the defendant against the plaintiff for the relief of permanent injunction.

7. Briefly stated, according to the plaintiff, he had subjected the suit property belonging to him by way of the mortgage in favour of the defendant and it is stated that, in all, the plaintiff has to pay a total sum of Rs.1,35,000/- to the defendant and on payment of the same, the defendant is liable to hand over the possession of the suit property to the plaintiff and on the other hand, it is put forth that the defendant had falsely laid the claim that he is the cultivating tenant in respect of the suit property and also claimed to have paid a sum of Rs.1,75,000/- to the plaintiff for the purchase of the suit property and as the defendant is liable to hand over the possession of the suit property to the plaintiff on receipt of the mortgage amount, as above stated, and furthermore, according to the plaintiff, as the mortgage in question has not been registered as per law, the suit has not been laid for redemption of mortgage as such and on the other hand, has been laid for the possession of the suit property by repaying the amount of mortgage to the defendant and hence the suit.

8. The defendant resisted the plaintiff's suit denying the mortgage transaction projected by the plaintiff and according to the defendant, if the mortgage transaction pleaded by the plaintiff is true, the only remedy available to the plaintiff is to prefer the suit for redemption of mortgage and not for the recovery of possession and that the suit laid by the plaintiff is liable to be dismissed and also put forth the case that he is enjoying the suit property as the cultivating tenant under the plaintiff and also would plead that he had paid a sum of Rs.1,75,000/- as sale consideration for the suit property to the plaintiff and would also state that as the partition suit is pending between the family members of the plaintiff, the plaintiff is not entitled to recover the possession of the suit property and hence, according to the defendant, the suit laid by the plaintiff is liable to be dismissed and on the other hand, the suit laid by him seeking for the relief of permanent injunction has to be acceded to.

9. The plaintiff resisted the defendant's suit in O.S.No.31 of 2012 contending that the plea of the defendant that he is enjoying the suit property as the cultivating tenant is false and also disputed the claim of the defendant that he has paid a sum of Rs.1,75,000/- towards the sale consideration and according to the plaintiff, the defendant is liable to receive the mortgage debt and hand over the possession of the suit property and accordingly prayed for the dismissal of O.S. No.31 of 2012 laid by the defendant.

10. In support of the plaintiff's case, P.Ws.1 to 4 were examined and Exs.A1 to A10 were marked. On the side of the defendant, D.W.1 was examined and Exs.B1 to B3 were marked. Ex.X1 was also marked.

11. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the courts below were pleased to grant the relief in favour of the plaintiff as prayed for in O.S.No.175 of 2012 and also directed the plaintiff to deposit a sum of Rs.1,35,000/- within one month from the date of decree for obtaining the recovery of possession of the suit property and accordingly disposed of the suit and dismissed the suit laid by the defendant in O.S.No.31 of 2012. Impugning the same, the present second appeals have been preferred by the defendant.

12. The suit has been laid by the plaintiff for the recovery of possession. As could be seen from the pleas set out by the respective parties, in both the suits, it is found that the plaintiff has laid the suit against the defendant based on his title to the suit property. In fact, the plaintiff in O.S.No.175 of 2012 after adverting to the mortgage transaction would also plead that the defendant has falsely put forth the plea of cultivating tenant for the retention of the suit property endlessly without any basis and also stated that he had falsely pleaded that he had paid the

sale consideration of the suit property, only with a view to grab the suit property belonging to the plaintiff and accordingly, asserting the title over the suit property, the plaintiff is found to have come forward with the abovesaid suit for the recovery of possession. However, the mortgage transaction put forth by the plaintiff being not registered as per law, it is found that the plaintiff has not laid the suit for the redemption of mortgage and the consequential recovery of the possession of the suit property from the defendant and on the other hand, is found to have laid the suit for the recovery of possession after discharging the mortgage debt of the defendant and accordingly it is found that on a reading of the entire averments contained in the plaint, the suit has come to be laid by the plaintiff not based on the mortgage as such, but only on the basis of his claim of title to the suit property.

13. The defendant resisted the abovesaid suit of the plaintiff contending that he is in the occupation of the suit property as the cultivating tenant and also would plead that he had paid the sale consideration for the suit property amounting to Rs.1,75,000/- and disputed the plea of mortgage projected by the plaintiff and accordingly also pleaded that inasmuch as the partition lis is pending between the members of the plaintiff's family qua the suit property, the plaintiff, as such, is not entitled to seek the relief prayed for. On similar lines, the defendant has sought for the relief of permanent injunction against the plaintiff in O.S.No.31 of 2012.

14. The pleading has been defined under Order VI Rule 1 stating that the pleading shall mean plaint or written statement. Considering the pleas set out by the plaintiff as well as the defendant in their respective lis, in all, it is found that as above pointed out, the plaintiff though would put forth the mortgage transaction between the parties for putting the defendant in the possession of the suit property, however, the mortgage pleaded by the plaintiff not having been registered in accordance with law, it is found that on that score, the plaintiff would not be entitled to maintain the suit for redemption of the mortgage. The plaintiff being also aware of the same, also has averred in the plaint that accordingly he has based his claim of recovery of possession of the suit property based on title and thereby also pleaded that the defendant with a view to squat in the suit property, has falsely taken the plea of tenancy arrangement under him without any basis as well as falsely pleaded that he has paid the sale consideration for the suit property with a view to grab the suit property from him unlawfully and accordingly, putting forth the case that it is he who has a valid claim of title to the suit property and on that basis claimed the recovery of possession of the same from the defendant. Therefore, as held by the courts below, when the defendant has

failed to establish his claim of cultivating tenant qua the suit property and also failed to establish that he has paid the sale consideration of Rs.1,75,000/- towards the suit property, in such view of the matter, it is seen that the defendant's possession of the suit property could only be by way of the arrangement as put forth by the plaintiff and not otherwise. However, as above pointed out, based on the mortgage transaction projected by the plaintiff, the plaintiff is precluded from laying the suit for redemption of mortgage as the mortgage pleaded by him is not registered. In such view of the matter, as held by the courts below, the plaintiff, even otherwise would be entitled to claim the recovery of possession of the suit property on the basis of his title and in this connection, the courts below are found to have relied upon the decision of the Apex Court reported in AIR 1974 SC 689 (Kolathoor Variath and another vs. Pairaprakottoth Cheriya Kumhammad Haji). In the abovesaid decision, the Apex Court has held that where a plaintiff cannot regain possession on the basis of an oral mortgage as it cannot be proved in the court of law for want of registration, it is open to him to recover the possession on the strength of his title and the above position of law has been outlined in the decision by the Apex Court as follows:

"Transfer of Property Act (1882), Section 59 - Oral Mortgage with possession - Remedy of mortgagor.

Where a plaintiff cannot regain possession on the basis of an oral mortgage as it cannot be proved in a court of law for want of registration, it is open to him to recover possession on the strength of his title."

15. Considering the pleas set out by the plaintiff in his suit (O.S.No.175 of 2012), when it is found that the plaintiff has asserted title over the suit property and also put forth that the defendant is attempting to squat in the suit property endlessly or grab the suit property unlawfully one way or the other, in such view of the matter, the plaintiff being found to be entitled to maintain the suit based on the strength of his title considering the position that the mortgage transaction pleaded by him is unenforceable for want of registration, in such view of the matter, the courts below are found to be justified in upholding the claim of recovery of possession of the suit property by the plaintiff based on the abovesaid decision of the Apex Court.

16. The defendant both in the written pleas filed in O.S.No.175 of 2012 as well as in his suit in O.S.No. 31 of 2012 has clearly admitted the title of the plaintiff in respect of the suit property and accordingly would plead that he is only the cultivating tenant qua the suit property under the plaintiff and also would claim that he had paid the sale

consideration to the plaintiff qua the suit property. Therefore, when by way of such pleas, the defendant having found to have clearly admitted the title of the plaintiff over the suit property and when his admission is found to be unequivocal and comprehensive and when the defendant has not projected any other pleas for claiming retention over the suit property, in such view of the matter, as above pointed out, when the defendant has failed to establish his claim of tenancy arrangement under the plaintiff in respect of the suit property as well as his right of purchase of the same from the plaintiff as put forth by him, in all, it is seen that the defendant's occupation of the suit property is only by way of the mortgage transaction projected by the plaintiff and not otherwise. In such view of the matter, the defendant cannot now turn around and contend that the plaintiff is not the owner of the suit property on the footing that the partition suit is pending amongst the members of the plaintiff's family qua the suit property.

17. From the materials placed on record, it is found that the partition suit is pending amongst the members of the plaintiff's family over the suit property. But, when the defendant had, as above pointed out, clearly admitted the plaintiff's claim of title to the suit property without any doubt, in such view of the matter, it is seen that the defendant cannot be allowed to go against his pleading and contend that the plaintiff is not the owner of the suit property on the strength of the partition suit pending amongst the members of the plaintiff's family. As contended by the plaintiff's counsel, even assuming that the partition suit is pending amongst the members of the plaintiff's family qua the suit property, till the partition has been validly effected one way or the other, as contended by him, the plaintiff, as a co-owner should only be construed as the co-owner of the entire suit property and in such view of the matter, the plaintiff's status as the co-owner of the suit property cannot be allowed to be disputed by the defendant and in such view of the matter, it is found that the suit laid by the plaintiff as the co-owner for the recovery of the possession of the suit property from the defendant is maintainable as the same could be construed as having been laid on behalf of the other co-owners and in such view of the matter, the argument of the defendant's counsel that the plaintiff is not entitled to maintain the suit for recovery of possession without impleading the other co-owners, etc., as such, cannot be accepted in any manner. As rightly contended by the plaintiff's counsel, until and unless the suit property is partitioned as per law, the plaintiff is deemed to be owning every part of the suit property along with others and it cannot be said that he is only the part owner or fractional owner of the property and in such view of the matter, it is found that the defendant cannot be allowed to defeat the plaintiff's suit on the footing that the other co-owners

should also be made parties to the lis, particularly, as abovenoted, when the defendant has, without any demur or doubt, admitted the title of the plaintiff over the suit property and also that he had purchased the suit property from the plaintiff as well as claimed himself to be the cultivating tenant of the suit property under the plaintiff. However, when as above pointed out, the defendant has miserably failed to establish his abovesaid pleas and liable to surrender the possession of the suit property to the plaintiff as prayed for, in such view of the matter, the courts below are found to be justified in granting the reliefs in favour of the plaintiff as prayed for.

18. The plaintiff's counsel, in support of his contentions, placed reliance upon the decision reported in (2009) 10 Supreme Court Cases 223 (FGP Limited vs. Saleh Hooseini Doctor and another). The defendant's counsel in support of his contentions placed reliance upon the decisions reported in

1. (1994) 1 SCC 1 (S.P. Chengalvaraya Naidu (dead) by Lrs. vs. Jagannath (dead) by Lrs. and others)
2. 1990-2-.L.W. 378 (N. Rangarajan vs. Lakshmi Krishnan and 6 others)
3. AIR 1980 Madras 212 (M. Manoharan Chetti and others vs. C.Coomaraswamy Naidy and Sons)

The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the case at hand.

19. For the reasons aforesaid, considering the facts and circumstances of the case, the plaintiff being entitled to maintain the suit for recovery of possession of the suit property from the defendant, in such view of the matter, there is no need on the part of the plaintiff to implead the other co-owners as sought to be put forth by the defendant and when the defendant is unable to sustain his retention of the suit property any further, accordingly, the courts below are found to be justified in granting the relief of recovery of possession of the suit property from the defendant by directing the plaintiff to pay the sum of Rs.1,35,000/- to the defendant. The substantial questions of law formulated in both the second appeals are accordingly answered against the defendant and in favour of the plaintiff.

20. In conclusion, both the second appeals fail and are accordingly dismissed with costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CCC)

//True copy//

Sub Assistant Registrar

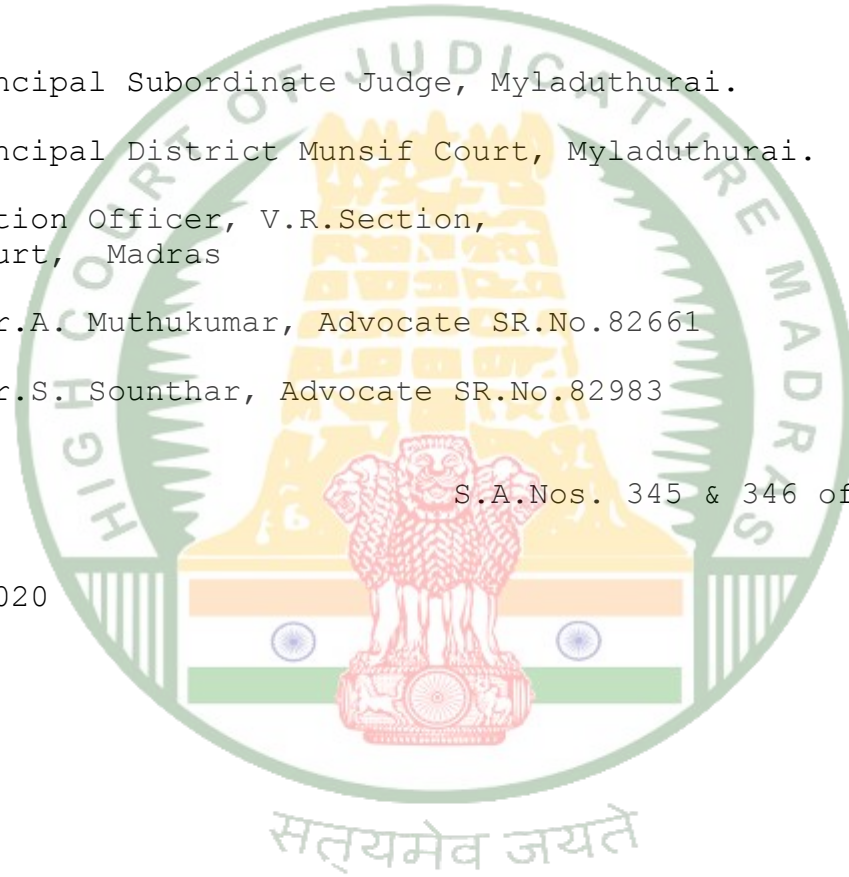
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Copy to

- 1.The Principal Subordinate Judge, Myladuthurai.
 - 2.The Principal District Munsif Court, Myladuthurai.
 - 3.The Section Officer, V.R.Section,
High Court, Madras
- +1cc to Mr.A. Muthukumar, Advocate SR.No.82661
- +1cc to Mr.S. Sounthar, Advocate SR.No.82983

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