



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 21.10.2019
PRONOUNCED ON : 14.11.2019

CORAM

WEB COPY

THE HONOURABLE MRS. JUSTICE NISHA BANU
S.A(MD)Nos.387 and 592 of 2012
and
M.P(MD)No.1 of 2015

S.A(MD)No.387 of 2012:

1.Kuppusamy

2.T.Shankar

... Appellants /
Appellants / Defendants

Vs.

Uthirachy Madam, Nachiyar Kovil,
by its local power agent Gopalan,
S/o.Venkatraman, Madavilagam Street,
Nachiyar Kovil, Kumbakonam.

... Respondent /
Respondent / Plaintiff

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree, dated 23.11.2010, passed in A.S.No.20 of 2008 by the learned Additional Subordinate Judge, Kumbakonam, and to set aside the judgment and decree, dated 11.10.2007, passed in O.S.No.126 of 2007 by the learned Additional District Munsif, Valangaiman at Kumbakonam.

For 1 st appellant	... Mr.A.Uthaman
For 2 nd appellant	... No appearance
For respondent	... No appearance

S.A(MD)No.592 of 2012:

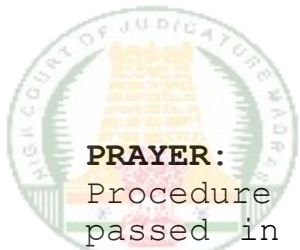
Mariyappan

... Appellant /
Appellant / Defendant

Vs.

Uthirapathi Madam, Nachiyar Kovil,
by its local power agent Gopalan,
S/o.Venkatraman, Madavilagam Street,
Nachiyar Kovil, Kumbakonam.

... Respondent /
Respondent / Plaintiff



PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree, dated 23.11.2010, passed in A.S.No.15 of 2008 by the learned Additional Subordinate Judge, Kumbakonam, and to set aside the judgment and decree, dated 29.06.2006, passed in O.S.No.23 of 2001 by the learned Additional District Munsif, Valangaiman at Kumbakonam.

For appellant ... Mr.A.Uthaman

For respondent ... No appearance

COMMON JUDGMENT

The judgments and decrees passed in O.S.Nos.126 of 2007 and 23 of 2001 by the learned Additional District Munsif, Valangaiman at Kumbakonam and modified in A.S.Nos.20 and 15 of 2008 by the learned Additional Subordinate Judge, Kumbakonam, are being challenged in these second appeals.

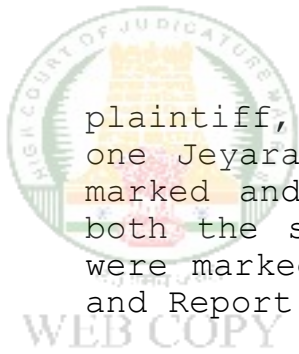
2.The respondent / plaintiff in both the appeals had instituted O.S.No.126 of 2007 and 23 of 2001 on the file of the trial Court for the reliefs of declaration, recovery of possession, arrears of rent, compensation and also for *mesne* profits, wherein the present appellants have been shown as defendants.

3.For better appreciation and understanding, the parties are referred to as per their ranking in the suits.

4.According to the plaintiff, the suit schedule properties originally belonged to the plaintiff mutt. The defendants are the tenants. In spite of repeated demands, they failed to make payment of monthly rent and further failed to vacate the suit properties. Therefore, the plaintiff issued legal notices to vacate the same. They gave reply notices denying the title of the plaintiff. The plaintiff contended that the suit properties are also required for their own use. Hence, the plaintiff filed the suits for the reliefs of declaration, recovery of possession, arrears of rent, compensation and also for *mesne* profits.

5.According to the defendants, the plaintiff has no right, title and possession over the suit properties. A part of the land, in which, the suit properties were put up, is a highway poramboke. Therefore, the suits are bad for non-joinder of necessary parties. In the description of the suit properties, the plaintiff did not specify the survey number, which would be fatal to the plaintiff's case. Thus, they prayed to dismiss the suits.

6.Before the trial Court, O.S.No.126 of 2007, was taken up along with connected suit in O.S.No.88 of 2006. On the side of the



plaintiff, the power agent of the plaintiff was examined as PW1 and one Jeyarama Udayar was examined as P.W.2 and Exs.A1 to A19 were marked and on the side of the defendants, the first defendant in both the suits were examined as DW1 and D.W.2 and Ex.D.1 and D.2 were marked. Advocate Commissioner's Report, Plan, Surveyor's Plan and Report were marked as Exs.C.1 to C.6.

7.The suit in O.S.No.23 of 2001 was taken up along with connected suits in O.S.Nos.20 and 22 of 2001. On the side of the plaintiff, the power agent of the plaintiff was examined as PW1 and three other witnesses were examined as P.W.2 to P.W.4 and Exs.A1 to A30 were marked and on the side of the defendants, the defendant was examined as DW1 and Ex.D.1 was marked. One Kuppusamy was examined as C.W.1 and Exs.X.1 to X.19 were marked. Advocate Commissioner's Report and Plan were marked as Ex.C.1 and C.2.

8.The trial Court has decreed the suits partly in respect of the portions mentioned as 'I' and A' in green colour in the Commissioner's Reports, situated in Survey No.259/7 and dismissed the suits in respect of the portions which have been mentioned in red colour, situated in Survey No.259/31. Aggrieved by the same, the defendants in the suits filed appeals. The first appellate Court, after hearing both sides and upon reappraising the evidence available on record, modified the Judgments and decrees passed by the trial Court and ultimately decreed the suits in toto. Challenging the said judgments and decrees passed by the first appellate Court, the defendants in both the appeals have filed these second appeals.

9.At the time of admission, in S.A(MD)No.592 of 2012 the following substantial questions of law were framed for consideration:

"1)When the lower Appellate Court is right in law in granting a relief in favour of the respondent under Order 41 Rule 33 CPC who did not prefer any appeal (or) cross appeal against the dismissal portion of the suit regarding remaining portion of the suit property and let the portion of the decree becomes final?

2)Is the learned Appellate Court is having jurisdiction to modify the decree in the absence of cross appeal by the respondent / plaintiff?

3)Whether the learned Appellate Court is erred in concluding the title of the respondent in S.No.259/31, when the Government is not the party to the above suit to decide adjudication?

10.Despite notice being served on the respondent and the respondent has appeared through a counsel in the earlier hearings, there is no representation on behalf of the respondent either in person or through counsel. There is no representation on behalf of the respondent in S.A(MD)No.387 of 2012 also.



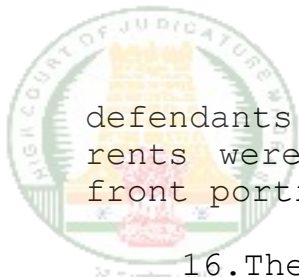
11.The learned counsel appearing for the first appellant in S.A (MD)No.387 of 2012 and the appellant in S.A(MD)No.592 of 2012 submitted that the plaintiff did not specify the survey number of the suit properties in the plaints and did not claim title for Survey No.259/7. The defendants have put up constructions in Survey No.259/31, which belongs to the highways poromboke. Since the plaintiff did not file any appeal or cross appeal, the first appellate Court has erroneously decreed the suits in toto. The Highways Department was also not arrayed as a party in the suits. Thus, he prayed to allow these second appeals.

12.Heard the learned counsel appearing for the first appellant in S.A(MD)No.387 of 2012 and appellant in S.A(MD)No.592 of 2012 and perused the records carefully.

13.The plaintiff is a mutt. The plaintiff has marked the patta, chitta, adangal and tax receipts standing in the name of the plaintiff mutt, to substantiate the right and title over the suit properties.

14.The plaintiff contended that the sites of the buildings absolutely belong to the plaintiff mutt and the same were leased out to the defendants and in order to substantiate the same, the plaintiff had filed tax assessment bills standing in the name of the plaintiff mutt. According to the defendants, they occupied the suit schedule properties as tenants and put up constructions in the suit properties and that the mutt property is situate only in Survey No.259/7. But, the defendants have not produced any document to prove that the buildings were constructed by them in the suit properties. Therefore, the defendants have failed to show that the superstructures absolutely belonged to them and the plaintiff collected rent only for the sites. Hence, the plaintiff has established the ownership of the sites in Survey No.259/7 and the buildings, which are in occupation of the defendants.

15.According to the defendants, a portion of the buildings in Survey No.259/31 is situated in highways poromboke and therefore, the plaintiff cannot file a suit for ejectment of the defendants in respect of the buildings in Survey No.259/31. In the Trial Court, a Commissioner was appointed and he submitted his report and plan, stating that a portion of the building is situated in Survey No.259/7 and the remaining portion is situated in Survey No.259/31 and the same were also distinctly shown in two different colours in his plan. As already held, the defendants have not produced any document to substantiate that they put up constructions. The defendants in their written statements admitted that their occupancy of the suit properties, is in pursuance of the lease deed. Therefore, there is a owner and tenant relationship between the plaintiff and defendants and the plaintiff is entitled for eviction of the defendants in respect of the entire buildings. As the



defendants admitted the tenancy relationship and claim that the rents were collected illegally, they cannot make a plea that the front portion belongs to the highways poromboke.

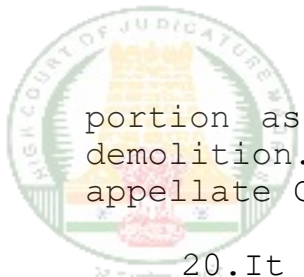
16.The appellants also contended that non-furnishing of survey number of the suit properties, would be fatal to the plaintiff. It is seen from the pleadings and evidences that the dispute is not with regard to the identity of the property. The defendants admitted the tenancy relationship in respect of the buildings situated in the suit properties, which are identified by four boundaries. Even assuming that the defendants have put up constructions, a portion of the construction would be situated in Survey No.259/7. Therefore, on considering the above facts, the first appellate Court has rightly granted the entire relief. Hence, the submission of the learned counsel for the first appellant in S.A (MD)No.387 of 2012 and the appellant in S.A(MD)No.592 of 2012, is of no merit.

17.The appellant in S.A(MD)No.592 of 2012 contended that though the plaintiff did not file cross appeal against the dismissal portion of the suit by the trial Court, the first appellate Court has erroneously decreed the suit in toto.

18.It is a settled principle of law that under Order XLI, Rule 33 of the Code of Civil Procedure, 1908, the appellate Court is having enormous power to pass a suitable Judgment or decree in an appeal. Order XLI, Rule 33 of the Code of Civil Procedure, 1908 reads as follows:

"Power of Court of Appeal.- The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection [and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees]".

19.Even from a cursory look of the said provision, it is made clear that the appellate Court is having enormous and also unfettered power to pass any decree or make any order which ought to have been passed. In the instant case, the defendants admitted the tenancy relationship in respect of the buildings situated in the suit properties, which are identified by four boundaries. Even assuming that the defendants have put up constructions, a portion of the construction would be situated in Survey No.259/7. The respondent / plaintiff contended that they are ready to give up that



portion as and when the Highways Department has come forward for demolition. Therefore, on considering the above facts, the first appellate Court has rightly granted the entire relief.

20.It is contended on the side of the appellants/defendants that a portion of the building is situated in Survey No.259/31, belongs to the highways poromboke and therefore, the suit is bad for non-joinder of necessary parties. Since the respondent / plaintiff contended that they are ready to give up that portion as and when the Highways Department has come forward for demolition and the appellants / defendants are not the owners of the same, the said contention is of no merit.

21.In view of the above discussions, this Court does not find any reason to interfere with the judgment and decree passed by the first appellate Court and the substantial questions of law formulated in S.A(MD)No.592 of 2012 are not at all relevant for the purpose of deciding the real issue involved in the present case. In view of the above, this Court is inclined to dismiss these appeals.

22.In the result, these second appeals are dismissed confirming the judgment and decree passed by the first appellate Court. The appellants / defendants are given one month time from today to vacate the suit properties. No costs. Consequently, connected miscellaneous petition is dismissed.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

Sub Assistant Registrar(CS)

smn

To

1.The Additional Subordinate Judge, Kumbakonam.

2.The Additional District Munsif, Valangaiman at Kumbakonam.

3.The Record Keeper, (2 Copies)

V.R. Section,

Madurai Bench of Madras High Court, Madurai.

+2 CC to M/s.P.THIAGARAJAN, Advocate (SR-98747 & 98749[F] dated 15/11/2019)

**Common Judgment made in
S.A(MD)Nos.387 and 592 of 2012
14.11.2019**

JMN(22.11.2019) 6P : 7C

<https://hcservices.ecourts.gov.in/hcservices/>