



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 27.11.2020	Pronounced on: 01.12.2020
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Coram::

THE HONOURABLE Dr. JUSTICE G.JAYACHANDRAN

S.A.No.838 of 2008

Ananda Siva Samba Sakhti,
W/o.Parthiban,
No.33, Veeran Koil Street,
Komathanmedu Village,
Bahoor represented by her
Power Agent Parthiban.

...Appellant/Appellant/
Plaintiff

/versus/

Kasturi,
W/o.Late Sambasivam,
No.109, Jaya Vilas,
Cuddalore Main Road,
Mudhaliarpeta,
Puducherry.

... Respondent/Respondent/
Defendant

Prayer: Second Appeal is filed under Section 100 of C.P.C, praying against the judgment and decree dated 29.02.2008 made in A.S.No.94 of 2005 on the file of the Principal Subordinate Judge, Puducherry by confirming the judgment and decree dated 17.10.2005 passed in O.S.No.329 of 2002 on the file of the III Additional District Munsif, Puducherry.

For Appellant : Mrs.Chitra Sampath,
Senior Counsel,
for Mr.T.S.Baskaran

For Respondent : Mr.Prakash Adiapadam

J U D G M E N T

(The case has been heard through video conference)

The Appellant herein is the plaintiff in O.S.No.329 of 2002 on the file of District Munsif Court at Pondicherry. The suit is filed for a). Permanent injunction restraining the defendant from interfering the peaceful possession and enjoyment of the suit property and b). For mandatory injunction against the defendant directing her to hand over the key of the locked house of the suit property. After full Trial the suit was dismissed by the Trial Court. On further Appeal in A.S.No.94/2005 before the Principal Sub-Court at Pondicherry, the Trial Court judgment was confirmed. Hence, the present second appeal.

2. This Court, on considering the grounds raised in the Second Appeal formulated the following substantial question of law for consideration:-

"Whether the judgment and decree is perverse on account of its rejection of the prayer for mandatory injunction on the ground that the appellant has not proved the factum of possession of the property overwhelming the plaint averments as well as the evidence adduced on the side of the appellant ? "

3. The brief facts of the case is that, the suit subject property initially owned by one Jayalakshmi @ Nagammal. She purchased the property from one Rama Counder through a registered sale deed dated 06.05.1942. During her life time, she executed a gift deed on 28.08.1963. As per the gift deed, the suit property was settled in favour of her two sons for life and then, to their male heirs and in case of no male heirs, to their female heirs. The plaintiff is the grand daughter of Jayalakshmi born to her elder son Durai @ Ekkambaram. The defendant is the widow of Jayalakshmi second son Chinnathambi @ Sambasivam. The elder son of Jayalakshmi, Durai had only 2 daughters and no male child and her younger son Chinnathambi @ Sambasivam died issueless. On the death of Chinnathambi @ Sambasivam, the property got vested absolutely with the 2 daughters of Durai @ Ekkambaram. The plaintiff Ananda Siva Samba Sakthi and her sister Ananda Sundra Lakshmi, entered into

a partition in respect of the suit property and got it registered on 18.08.1999. According to the partition, the ground portion of the suit property was allotted to the plaintiff and the first floor portion allotted to the sister Ananda Sundra Lakshmi.

4. The suit is filed for the relief mentioned above, alleging that, the defendant on 20.12.2000 with the help of hirelings trespassed into the suit property and removed the utensils and household articles, locked the ground portion described in 'A' schedule and went. A complaint to the police in this regard was lodged on the next day. The complaint was registered by the Police after direction of the High Court. The defendant, who agreed to hand over the key during the enquiry by the police, later refused to hand over the key of the locked portion in spite of several requests. Pre suit notice dated 14.02.2002 was sent to the defendant to hand over the key. The defendant received it on 16.02.2002, but refused to hand over the key of the ground floor portion, hence the suit.

5. Denying the plaint averments, the defendant contested the suit stating that, she is entitled for a share in the property of Jayalakshmi @ Nagammal along with her other legal heirs. The gift deed of Jayalakshmiammal even assumed to be true, the right of Jayalakshmiammal to gift is restricted only to 1/8th share according to the principle of 'Quotus Disponet' prevailing during the relevant point of time. As a consequence, the partition between the sisters on 18.08.1999 for the entire property is non est in law and unenforceable. Against this defendant, the plaintiff along with others have instituted a partition suit in O.S.No.243 of 1999, pending on the file of Additional Sub-Court, Pondicherry, in respect of several properties including the property in the present suit. Therefore, this suit is hit by doctrine of lis-pendence. The defendant continue in possession of the suit property. Hence, the plaintiff is not entitled for the relief.

6. Issues framed and findings of the Trial court:

Issue No. 1:- Whether the suit is hit by doctrine of lispendence?

Though, the present suit property is shown as 'D' schedule in the earlier suit in O.S.No.243/1999, no relief for partition has

been claimed in respect of the said 'D' schedule property so as to attract the doctrine of lis- pendence. The defendant has not substantiated her contention that the partition deed dated 18/08/1999 is hit by doctrine of lispence. Hence, this issue is determined in favour of plaintiff and as against the defendant.

Issue No. 2:- Whether the plaintiff is in possession and enjoyment of the suit schedule property as on date of the presentation of plaint ?

In O.S.No.243/1999 filed by the plaintiff, the 'A' schedule property is shown as the address for service on the defendant. The plaintiff having admitted that the defendant was residing in 'A' schedule property in the year 1999, there is no oral or documentary evidence adduced on the side of the plaintiff to substantiate that the plaintiff subsequently come into possession of 'A' schedule property. The plaintiff failed to prove her possession of the suit property as on date of plaint. Hence, this issue is determined in favour of the defendant and as against the plaintiff.

Issue No. 3:- Whether the plaintiff is entitled for permanent injunction as prayed for ? and

Issue No. 4:- Whether the plaintiff is entitled for mandatory injunction as prayed for?

Relief of injunction is available only to a person, who is found and proved to be in possession. But, in this case, the plaintiff has failed to prove her possession in respect of suit property. Since, issue No.2 is held against the plaintiff, the issue Nos. 3 and 4 are also determined against the plaintiff.

Issue No. 5:- To what relief, if any ?

In view of the findings of the issue Nos.2 to 4, the plaintiff is not entitled for judgment and decree prayed.

7. The above judgment of the Trial Court challenged before the Appellate Court in A.S.No.94 of 2005. Pending appeal, I.A.No.13 of 2007 filed to receive 44 additional documents.

8. The First Appellate Court dismissed the I.A on 29.02.2008, stating that, out of 44 documents sought to received as additional documents in the appeal, Document Nos. 1 to 28 are Electricity demand bills starting from the month of August 2000 till July 2006. The document Nos.29 to 44 relates to water consumption demand bills for the Quarterly period commencing from January - March 2001 and thereafter, till April-June 2006.

Except 4 Electricity bills and 4 water consumption demand notices, all other document are after 11.03.2002 the date of filing the suit. Even according to the plaint averment, the defendant has locked the 'A' schedule premises and taken away the key on 20.12.2000. Therefore, these documents will noway improve the case of the Appellant. Having held so, dismissed the Appeal Suit by confirming the Trial Court judgment and decree that the appellant is not in possession of the 'A' schedule property and therefore, not entitled for the relief of injunction. Whether the defendant have any life interest in the said portion has to decided in a separate suit and therefore, mandatory injunction relief also cannot be granted.

9. The Learned Senior Counsel for the appellant submitted that, the Courts below ought to decreed the suit considering the admission of the defendant in the cross examination that she is now residing at Mudaliarpet and not in the 'A' schedule property. The Courts below failed to consider the fact that, when the partition suit O.S.No.243 of 1999 was filed, the defendant was residing in the 'A' schedule property, but she took away all the utensils and left locking the premises on 20.12.2000. Ex.A-7, legal notice dated 14.02.2002 sent to her current address No.109, Jaya Vilas, Cuddalore Main Road, Mudaliarpet, Pondicherry, was received by her on 16.02.2002 and the postal acknowledgement card marked as Ex.A-8.

10. The Learned Senior Counsel for the appellant further submitted that, the title to the property vest with the appellant by virtue of the gift deed Ex.A-2 followed by the partition deed Ex.A-4. These documents are not challenged so far by respondent before any Court of law. While so, the Lower Appellate Court has perversely observed that, whether the respondent got life interest over the suit property or not, is to be decided in a separate suit and the partition between the appellant and her sister will not bind the respondent.

11. The Learned Counsel for the respondent submitted that, the suit framed as such is not proper and the Courts below rightly dismissed the suit for that reason. It is a fact admitted in the plaint that, the 'A' schedule portion is under lock and the respondent is in possession of the key. While the constructive possession is with the respondent, relief of injunction cannot be granted. Regarding the right in the 'A' schedule property, as the widow of Sambasivam and daughter in law of Jayalakshmi ammal, the respondent is agitating her right in the partition suit laid by Appellant and others. The property, in this suit is the 'D' schedule property in the previous suit for partition. Based on the gift deed of Jayalakshmi ammal, no partition is sought in respect of this property by the plaintiff. However, the genuineness of the gift deed is questioned by this respondent and without settling their claim in that suit, the appellant to create record and grab the property had filed this ill-framed suit. In the plaint, there are two schedules mentioned as 'A' and 'B'. In the ground portion of the property, which is the 'A' schedule property, the respondent along with her husband Sambasivam was living. After the demise of Sambasivam, the respondent due to her ill-health and due to the disturbance caused by the appellant, now living at Mudaliarpeta along with her relatives. Whereas, in the prayer portion, relief of permanent injunction and mandatory injunction for entire suit property is sought. The submission of the Learned Counsel for the Appellant that the Court should have moulded the relief will not apply to the present case since, the appellant has not proved possession over the 'A' schedule property.

12. On considering the pleadings, evidence and the reasoning given by the Courts below, this Court finds no perversity in the impugned judgment.

13. It is evident from the documents that the appellant was never in possession of 'A' schedule property. Even according to the appellant, the life interest in the suit property is given to the two sons of Jayalakshmiammal. The respondent as wife of Sambasivam who is younger son of Jayalakshmi living in the 'A' schedule property and continue to live in it. Admittedly, when the suit for partition filed in the year 1999, the respondent was residing in 'A' schedule property and suit summon was served to her at that address.

14. The appellant case is that, the respondent took away her belongings, locked the premises and left on 20.12.2000. Even assuming it to be true, it does not mean that the appellant is in possession or the respondent has to hand over the key to the appellant. By holding the key to the premises, the symbolic possession with the respondent is proved.

15. The partition suit O.S.No.243 of 1999 and the gift deed are connected intrinsically. The property in the present suit is shown under 'D' schedule of the partition suit. In a partition suit, there is no difference between plaintiffs and defendants. The appellant pleads that 'D' schedule property is separate property of Jayalakshmi and not included for partition. Same is disputed by the respondent. In such circumstances, the relief of mandatory injunction to hand over the property to the appellant will not arise till the term 'life interest' and 'legal heirs' used in Ex.A-1 tested.

16. Precisely, for the said reason, the First Appellate Court has rightly observed that the interest claimed by the respondent over the suit property has to be decided in a separate suit since the present suit is not properly framed, confirming the same, the substantial questions of law formulated is answered against the appellant.

17. In the result, the Second Appeal is dismissed. No order as to costs.

-s/d-

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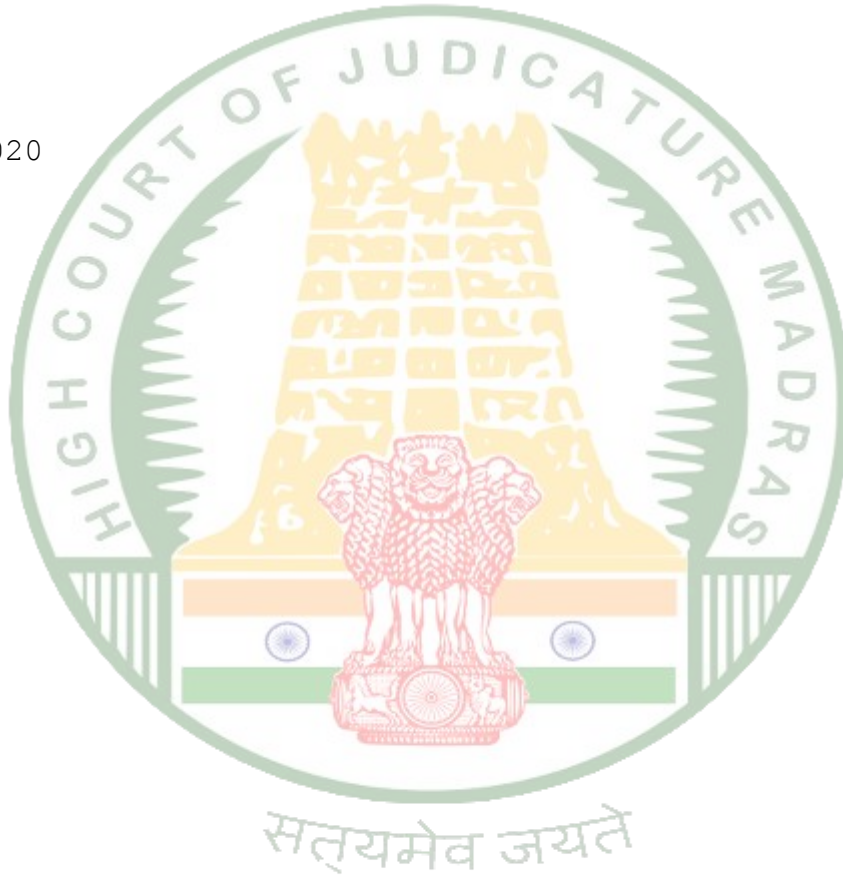
To:

- 1.The Principal Subordinate Judge, Puducherry
- 2.The III Additional District Munsif, Puducherry.
- 3.The Section Officer, V.R.Section, High Court, Madras.

+1 cc to M/s.T.S.Baskaran Advocate sr38369

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