

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.02.2020

CORAM:

THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM

S.A.NOS.192 & 193 OF 2016

&

C.M.P.NOS.4335 OF 2016 & 4046 OF 2017

Vijaya

.. Appellant in both
Second Appeals/Plaintiffs

Versus

1.Kumar
2.Sadasivam

.. Respondents in both
Second Appeals/Defendants

Prayer:-

Second Appeals are filed under Section 100 of Civil Procedure Code against the Judgment and Decree dated 28.11.2014 made in A.S.Nos.18 and 19 of 2011, on the file of II Additional District Court, Chidambaram, confirming the Judgment and Decree dated 16.11.2005 made in O.S.No.29 of 2004, on the file of District Munsif-cum-Judicial Magistrate, Port Novo.

For Appellant in
both Second Appeals : Mr.T.Girish

For Respondents in
both Second Appeals : Mr.R.Manickavel for R1

सत्यमेव जयते
C O M M O N J U D G M E N T

The unsuccessful defendant in O.S.No.29 of 2004, on the file of District Munsif-cum-Judicial Magistrate, Port Novo is on appeal. The suit was instituted for declaration to declare that the plaintiff's family Manager has absolute title to the suit property and for permanent injunction, restraining the defendants from in any manner interfering with their possession and enjoyment of the property.

2. It is the case of the plaintiff that the suit property originally belonged to one Subramaniya Gurukal, who defaulted to pay the loan availed from the Parangipettai Co-operative

Society. Therefore, the property was brought for public auction. In the said auction, his great grandfather Munusami Mudaliar was the highest bidder and purchased the suit property on 30.04.1934 and it was delivered to him on 25.07.1934. Since then, the plaintiff's great grandfather was in possession and enjoyment of the property. After the demise, the plaintiff's family members were in possession and enjoyment over the same. It is the further case of the plaintiff that the suit property is natham land and the tiled house put up therein got collapsed, hence the electric service connection No.315 was disconnected on 03.09.1990. Thereafter, the property has been kept vacant.

3. The plaintiff would claim that his father-Pachayappa Mudaliar and his brothers jointly mortgaged the property in dispute to one Ramanatha Naidu on 19.05.1959, since the mortgage was not discharged, the mortgagee instituted the suit O.S.No.283 of 1971, on the file of District Munsif, Chidambaram. Subsequently, the plaintiff's father repaid the mortgage amount on 25.12.1971 and redeemed the property. It is alleged that the first defendant's husband Vinayaka Moorthy, who is in Police service, is his neighbour and adjacent owner and by creating a fake sale deed dated, 05.12.2002, attempted to encroach the schedule mentioned property. Hence, the suit.

4. In the written statement filed by the defendants, the entire allegations made in the plaint were disputed and denied. It is stated that first defendant's husband, vide sale deed dated 05.12.2002, purchased the suit property from one Sadasivam and on that basis mutation in the revenue record had taken place on 23.01.2003. It is further stated that the property in the sale deed, dated 25.07.1934 and the mortgage deed dated 19.05.1959 are not the disputed property. The description, boundaries and the extent of the property are not correct and there was no tiled house in the suit property as alleged and it is only a vacant site. The plaintiff and his predecessors were never in possession over the suit property and prayed for dismissal of the suit.

5. On the basis of the above pleadings, the trial Court framed necessary issues. On the side of the plaintiff, three witnesses, P.Ws'.1 to 3 were examined and Exs.A1 to A19 were marked. On the side of the defendants, D.Ws' 1 to 4 were examined and Exs.B1 to B9 were marked. The Second defendant was set ex-parte in the suit on 15.11.2005.

6. Upon consideration of the oral and documentary evidence, the trial Court partly decreed the suit, granting decree for declaration of title, but rejected the prayer of permanent injunction. Aggrieved over the same, the plaintiff and defendant preferred Appeals in A.S.No.19 and A.S.No.18 of 2011

respectively. The appellate Court having found that the property is with the defendant, moulded the relief and directed the first defendant to vacate and deliver vacant possession to the plaintiff. The appeal of the defendant was dismissed. Assailing the decision, the present appeals have been filed.

7. These appeals were admitted on the following substantial questions of law:-

"(a) Whether the Lower Appellate Court is having the power to grant decree for possession which is not prayed for in the plaint?

(b) Whether the Lower Appellate Court is having the power to grant decree of possession when the plaint was not amended and no Court Fee is paid for that relief?"

8. It is urged by Mr.T.Girish, learned counsel for the appellant that Ex.A1 sale deed is nothing to do with the suit schedule property, however, this appeal are not filed challenging the declaratory relief granted by the Courts below, but the main grievance is that the lower appellate Court having held that there is no reason to interfere with the trial Court Judgment, ought not to have granted decree for possession, which is not prayed for. Hence, the findings of the Courts below are perverse and they are liable to be set aside.

9. Per contra Mr.R.Manickavel, learned counsel for the first respondent would submit that both the Courts have concurrently held that Ex.B1, dated 15.12.2002 is a fake document and the executant of the sale Deed, Sadaisvam is a non-existent person and the document was executed fraudulently committing forgery and impersonation. It is further submitted that the Court has got every power to mould the relief and the appellate Court by moulding the relief, directed to hand over possession to the respondent / plaintiff, hence no warrant of interference is required. Thus, canvassing the reasons, assigned by both the courts below, it is prayed, that the appeals should be dismissed.

10. Heard the learned counsel on either side and perused the materials available on record.

11. In the matter on hand, in the light of the submission made by the learned counsel for the appellant and the substantial questions of law formulated, this Court is not called upon to decide the declaratory relief granted in the suit and the only issue that arises for consideration is to whether the appellate Court has got jurisdiction/power to mould the

relief and grant a decree, which was not sought for in the suit. According to the appellant, the lower appellate Court exceeded its jurisdiction by granting decree for recovery of possession, which the plaintiff has not at all prayed for. According to the respondent, the relief of possession is nothing but a relief of general nature and it can be granted in appropriate cases.

12. It is to be noted that admittedly when the suit was instituted the suit property was a vacant site, however, it appears that during the pendency of the suit, the defendant / appellant had put up a hut and therefore, no such relief of possession could have been sought for by the plaintiff at the time of filing of the suit. The said dispute arose only at the stage of arguments. Therefore, the appellate Court has held that if the matter is sent back to the trial Court for amendment of plaint, unnecessary delay would happen and by following the Judgment of the Hon'ble Supreme Court in Kedar Nath Agarwal (dead) and another Vs. Dhandaraji Devi [2005 1 LW 766] granted relief of recovery of possession.

13. A similar issue came up for consideration in Hindalco Industries Ltd. vs. Union of India (UOI) and Ors [1994 (2) SCC 594] and the Hon'ble Apex Court has held as follows:-

" 7. It is settled law that it is no longer necessary to specially ask for general or other relief apart from the specific relief asked for. Such a relief may always be given to the same extent as if it has been asked, for provided that it is not inconsistent with that specific claim which the case raised by the pleadings. The court must have regard for all the relief and look at the substance of the matter and not its forms. It is equally settled law that grant of Declaration relief is always one of discretion and the court is not bound to grant the relief merely because it is lawful to do so. Based on the facts and circumstances the court may on sound and reasonable Judicial Principles grant such declaration as the facts and circumstances may so warrant. Exercise of discretion is not arbitrary. If the relief asked for is as of right, something is included in his cause of action and if he establishes his cause of action, the court perhaps has been left with no discretion to refuse the same. But when it is not as of right, then it is one of the exercise of discretion by the court. In that event the court may in given circumstances grant which includes 'may refuse' the relief. It is one of exercising judicious discretion by the court. Same consideration would apply to the causes under the Act and the Tribunal has such discretion. The Tribunal, while keeping justice,

equity and good-conscience at the back of its mind, may when compelling equities of the case oblige them, shape the relief consistent with the facts and circumstances established in the given cause of action. Any uniform rigid rule, if be laid, it itself turns out to be arbitrary. If the Tribunal thinks just, relevant and germane, after taking all the facts and circumstances into consideration, would mould the relief, in exercising its discretionary power and equally would avoid injustice."

14. In *Om Prakash Gupta vs. Ranbir B. Goyal* [2002 (2) SCC 256], the Hon'ble Apex Court has held as follows:-

"11. The ordinary rule of civil is that the rights of the parties stand crystallised on the date of the institution of the suit and, therefore, the decree in a suit should accord with the rights of the parties as they stood at the commencement of the lis. However, the Court has power to take note of subsequent events and mould the relief accordingly subject to the following conditions being satisfied: (i) that the relief, as claimed originally has, by reason of subsequent events, become inappropriate or cannot be granted; (ii) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties; (iii) that such subsequent event is brought to the notice of the Court promptly and in accordance with the rules of procedural law so that the opposite party is not taken by surprise. In *Pasupuleti Venkateswarlu v. The Motor & General Traders* - MANU/SC/0415/1975 : [1975]3SCR958 this Court held that a fact arising after the lis, coming to the notice of the Court and having a fundamental impact on the right to relief or the manner of moulding it and brought diligently to the notice of the Court cannot be blinked at. The Court may in such cases bend the rules of procedure if no specific provision of law or rule of fairplay is violated for it would promote substantial justice provided that there is absence of other disentitling factors or just circumstances. The court speaking through Krishna Iyer, J. affirmed the proposition that court can, so long as the litigation pends, take note of updated facts to promote substantial justice. However, the court cautioned: (i) the event should be one as would stultify or render inept the decretal remedy. (ii) rules of procedure may be bent if no specific provision or fairplay is violated and there is no other special circumstance

repelling resort to that course in law or justice, (iii) such cognizance of subsequent events and developments should be cautions, and (iv) the rules of fairness to both sides should be scrupulously obeyed."

15. In Govindaraj vs. Ramadoss [2011 (3) CTC 433], this Court has observed as follows:-

"21. No doubt, a plain reading of that precedent would connote and denote that without filing any cross appeal, the findings of the lower court cannot be challenged before the higher forum. However, there are certain exceptions recognised by the Hon'ble Apex Court itself to consider certain facts under Order 41 Rule 33 of CPC.

22. This is a partition suit. It cannot be denied that there should not be any piece-meal partition and the court also should see to it that multiplicity of proceedings are protected. I recollect and call up the maxims:

1. Boni iudicis est ampliari jurisdictionem - It is the part of a good judge to enlarge (or use liberally) his remedial authority or jurisdiction.

2. Boni iudicis est ampliari justitiam - It is the duty of a good judge to enlarge or extend justice.

3. Boni iudicis est lites diremere, ne lis ex lite oritur, et interest reipublicae ut sint fines litium. It is the duty of a good judge to prevent litigations, that suit may not grow out of suit, and it concerns the welfare of a state that an end be put to litigation.

All these three maxims would unambiguously and unequivocally highlight and spotlight the fact that a Judge is expected to decide the lis finally without paving the way for off shoot litigation thereafter. As such, in the interest of justice, necessarily interference in the judgments and decrees of both the courts below is warranted by invoking Order 41 Rule 33 of CPC.

23. This is a fit case, wherein, such power has to be invoked because from the available facts, both the courts below failed to grant relief appropriately and legally in respect of item Nos. 1 to 3 of Schedule

I of the suit properties. It cannot be gain said that the Plaintiff and the Defendant are the only legal heirs of Varada Gounder and for Varada Gounder's deceased daughters, viz., Kuppammal and Vaduvambal, who died issue less, only Varada Gounder's heirs would be the legal heirs, in which case, in respect of item Nos. 1 to 3 of Schedule I of the suit properties also, the Plaintiff and the Defendant are the legal heirs and both the courts should have included those items also for partition, which they owing to misconception failed to do so. It is also not the case of the Defendant that he is having any exclusive right over those three items of the Schedule I of the suit properties under any other capacity. He placed reliance on Ex.B6- Will, which was turned down and rejected by both the courts below and as against which, no substantial question of law also has arisen.

24. The Defendant claimed right over item Nos. 1 to 3 of the Schedule I of the suit properties only under Vaduvambal's Will Ex.B6, which was rejected by both the courts below, after analysing the facts and figures, relating to it. The suspicious circumstances also were highlighted by both the courts below and held that Vaduvambal could not have executed the Will Ex.B6 genuinely.

25. The learned Counsel for the Plaintiff drew the attention of this Court to the following portion of the Will Ex. B6 Vernacular (Tamil) Portion Deleted for which, the learned Counsel for the Defendant in all fairness would agree to the factual position that Vaduvambal's husband died even in the year 17.08.1984 as revealed from the written statement of the Defendant himself and in such a case, the aforesaid recital in Ex.B6 should not have arisen and that itself is indicative of the fact that all is not well with the said Ex.B6 and both the courts below appropriately and correctly rejected the genuineness of Ex.B6, warranting no interference in the second appeal. The item Nos. 1 to 3 of Schedule I of the suit properties, undoubtedly devolved upon the Plaintiff and Defendant equally.

26. Accordingly, the substantial question of law Nos. 3 and 4 are decided to the effect that both the courts below were not justified in rejecting the share of the Plaintiff in item Nos. 1 to 3 of Schedule I of the suit properties on the only ground that the Plaintiff claimed those properties also for partition

that he is the legal heir of Varada Gounder and not as the legal heir of deceased Varada Gounder's deceased daughters, viz., Kuppammal and Vaduvambal. This is an appropriate case where Order 41 Rule 31 of Code of Civil Procedure is bound to be invoked and accordingly invoked.

27. In the result, while allowing the second appeal in part, the preliminary decree passed by both the courts below is modified to the effect that item Nos. 1 to 3 of Schedule I of the suit properties also should be included in the partition at the same rate of half share each in favour of the Plaintiff and the Defendant."

The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the facts and circumstances in the present cases.

16. Rule 7 of Order VII CPC authorises the Courts to grant general or other relief, which it may think just and necessary, though the same had not been sought for. For better appreciation Rule 7 is extracted hereunder:-

"7. Relief to be specifically stated.- Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement."

17. It is relevant to mention that the Hon'ble Supreme Court in KEDAR LAL v. HARILAL, [A.I.R. 1952 SUPREME COURT 47], held that the Court would be slow to throw out a claim on a mere technicality of pleading when the substance of the thing is there and no prejudice is caused to the other side however clumsily or inartistically the plaint may be worded and that in any event, it is always open to a Court to give a plaintiff such general or other relief as it deems just to the same extent as if it had been asked for, provided that occasions no prejudice to the other side beyond what can be compensated for in costs.

18. In the instant case, it is apposite to note that the respondent / plaintiff has been declared as title holder of the property in dispute and his right to the property is not challenged in these appeals. It is not disputed that when the suit was instituted, it was a vacant land, however, pending suit a hut was put up by the defendant / appellant in the suit

schedule property. A close scrutiny of the plaint shows that it is specifically averred that the plaintiff is entitled to recover possession from first defendant. Therefore, by stretch of imagination, it can be contended the appellant / defendant is taken aback in view of the decree granted by the appellate Court. In order to do substantial and complete justice to the parties and to avoid another litigation and to save the precious time of the Courts and parties, the appellate Court, in my view, rightly moulded the prayer and granted relief to the respondent / plaintiff. The decisions referred supra support the view taken by the first appellate Court.

19. In such view of the matter, the substantial questions of law formulated in the second appeals are answered against the appellant/defendant and in favour of the plaintiff/first respondent.

20. In fine, the Second Appeals fail and the same are dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(MDU)

//True Copy//

Sub Assistant Registrar

r n s

To

1. The II Additional District Court,
Chidambaram.
2. The District Munsif-cum-Judicial Magistrate,
Port Novo.
3. The Section Officer,
VR Section, High Court,
Madras-104.

+1cc to Mr.R.Manickavel, Advocate, S.R.No.15429

S.A.Nos.192 & 193 of 2016 &
C.M.P.Nos.4335 of 2016 & 4046 of 2017

RR(CO)
CS/15/12/2020