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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.07.2021

PRONOUNCED ON : 06.09.2021

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

S.A.NO.1020 OF 2014

AND

M.P.NO.1 OF 2014

(Through Video Conferencing)

1. M.Chandrasekar ... 1st Appellant/4th Defendant

2. M.Lakshmi Devi ... 2nd Appellant/5th Defendant

.Vs.

1. K.Subramani ... 1st Respondent/Plaintiff

2. Simhachalam ... 2nd Respondent/1st Defendant

3. Munirathanam Naidu ... 3rd Respondent/2nd Defendant

4. Sakkubaiammal ... 4th Respondent/3rd Defendant

PRAYER:-

This Second Appeal filed under Section 100 of the Code of the Civil Procedure, against the Judgment and Decree dated 27.01.2014 in A.S.No.50 of 2013, on the file of the Subordinate Court, Tirutani, reversing the Judgment and Decree dated 30.07.2013 in O.S.No.240 of 2008 on the file of the Principal Munsif Court, Tirutani.

For Appellants : Mr.G.Poonkundran

For R1 & R2 : Mr.S.Udayakumar

For R3 & R4 : No Appearance



J U D G M E N T

This Second Appeal has been filed by the 4th and 5th defendants in O.S.No.240 of 2008. They are aggrieved by the impugned Judgment and Decree dated 27.01.2014 passed by the Subordinate Judges Court, Tiruttani (hereinafter referred to as Appellate Court) in A.S.No.50 of 2013.

2. By the impugned judgment and decree, the Appellate Court has allowed the aforesaid appeal filed by the 1st respondent-plaintiff against the judgment and decree dated 30.7.2013 in O.S.No.240 of 2008.

3. The Trial Court had earlier dismissed O.S.No.240 of 2008 filed by the 1st respondent-plaintiff by its judgment and decreed dated 30.7.2013.

4. The 1st respondent was the plaintiff in O.S.No.240 of 2008 before the Trial Court. The 2nd respondent in this appeal was the 1st defendant in the said suit. The 3rd and 4th respondents in this appeal were the 2nd and 3rd defendants. The 3rd and 4th respondents herein are the parents of the appellants, who were the 2nd and 3rd defendants in O.S.No.240 of 2008.

5. For the sake of clarity, the ranks of the parties in O.S.No.240 of 2008 will be referred since several court proceedings interlaced with the facts and circumstances of the case.

6. O.S.No.240 of 2008 was filed by the plaintiff for a permanent injunction to restrain 2nd to 5th defendants from interfering with the peaceful possession and enjoyment of the suit schedule property.

7. The plaintiff had earlier entered into Ex.A3 sale agreement dated 15.6.1996 with the 1st defendant for sale of the suit schedule properties. Later, the 1st defendant also executed Ex.A4 sale deed dated 25.6.2007.

8. The agreement in Ex.A3 dated 15.06.1996 was executed by the 1st defendant in favour of the plaintiff during dependency of an earlier proceeding in O.S.No. 1286 of 1987.

9. O.S.No.1286 of 1987 was filed by the appellants herein (plaintiffs therein/4th and 5th defendants in O.S.No.240 of 2008) for a declaration that they were the owners of the suit schedule property and for directing the defendant nos. 1 to 3 in O.S.No.240 of 2008 to put the appellants (4th and 5th defendants



in O.S.No. 240 of 2008) in possession of the suit property failing which through the process of the court.

10. O.S.No.1286 of 1987 was decreed Vide Ex.B1 dated 30.06.1997. After, O.S.No.1286 of 1987 was decreed, the appellants herein (4th and 5th defendants in O.S.No. 240 of 2008) also filed O.S.No.17 of 1998 against the plaintiff herein and the 1st defendant in O.S.No.240 of 2008. O.S.No.17 of 1998 was exparte decreed on 04.01.2006.

11. O.S.No.17 of 1998 was filed for permanent injunction to restrain the plaintiff and the 1st defendant in O.S.No.240 of 2008 (1st and 2nd respondent herein) from removing the earth from the suit properties by digging pit and causing damage to the suit schedule property and thereby making the suit land unfit for cultivation.

12. This Second Appeal was admitted on 11.11.2014 on the following substantial questions of law : -

i. Whether the suit is hit by the Principle of Lispendens?

ii. Whether Order 41 Rule 21 of Civil Procedure Code has been followed by the Lower Appellate Court before arriving at the decision of reversing the judgment?

iii. Whether the observation of the Lower Appellate Court that based on the consideration that the defendant has to prove his case"? Which is contrary in normal parlance of law?

13. Facts on record also indicate that pursuant to the Judgment and Decree passed in O.S.No.1286 of 1987 dated 30.6.1997, the 2nd and the 3rd defendants in O.S.No.240 of 2008 (appellants parents) 3rd and 4th respondents herein filed E.P No.36 of 2006 proceedings for delivery of possession of the suit schedule property.

14. E.P.No.36 of 2006 in O.S.No.1286 of 1987 was filed for delivery of possession of suit schedule property. While E.P.No.36 of 2006 was pending before the court, the 1st defendant filed CRP No.34179 of 2008 which was dismissed on 05.09.2017. Further, appeal in S.L.P.No.35144 of 2017 by the plaintiff also came to be dismissed on 11.01.2018 by the Hon'ble Supreme Court.

15. E.P.No.36 of 2006, the plaintiff (1st respondent herein) had filed in E.A.No.58 of 2007 under Section 47 of C.P.C.



However, E.A.No.58 of 2007 was later withdrawn.

16. Aggrieved by the judgment and decree dated 30.06.1997 in O.S.No.1286 of 1987, the 1st defendant (vendor) had also filed A.S.No.100 of 1997 (renumbered as A.S.No.66 of 2001). This appeal was however allowed to be dismissed on 03.06.2003 for want of prosecution by the 1st defendant in O.S. No.240 of 2008.

17. Thus, Ex.A3 sale agreement dated 15.6.1996 was signed during pendency of the suit in O.S.No. 1286 of 1987 and Ex.A4 sale deed dated 25.6.2007 was executed after O.S.No. 1286 of 1987 was decreed on 30.6.1997, and shortly after O.S.No. 17 of 1998 was purportedly decreed exparte on 4.01.2006.

18. The facts on record also indicate that the 1st defendant, who executed the sale agreement Ex.A3 dated 15.6.1996 in favour of the plaintiff and had later executed a sale deed in Ex.A4 dated 25.6.2007 had earlier filed O.S.No. 234 of 1966.

19. O.S.No.234 of 1966 was filed by the 1st defendant against one Bathala Govindappa Naidu, 2nd and the 3rd defendants (the parents of the appellants herein) in O.S.No. 240 of 2008.

20. O.S.No.234 of 1966 was filed for a declaration that the 1st defendant was the owner of the half share in the suit schedule property along with several other properties pursuant to a sale deed in Ex.A12 dated 29.07.1954 executed by the 2nd defendant in favour of the 1st defendant represented by his mother. The 1st defendant was a minor at the time of execution of Ex. A12 dated 29.07.1954.

21. O.S.No.234 of 1966 was originally dismissed by the Trial Court by a judgment and decree dated 31.1.1971. Against the said judgment and decree dated 31.1.1971, the 1st defendant (in O.S.No.240 of 2008) had filed A.S.No.154 of 1971. Though the copy of the judgment and decree dated 31.1.1971 was not filed, a copy of the suit register was filed in Ex.A.24. The said appeal was allowed in favour of the 1st defendant by a judgment and decree dated 24.9.1973.

22. Further appeal to the High Court and the Supreme Court by the 2nd and 3rd defendants (appellant's parents in O.S.No.240 of 2008) appears to have been dismissed. However, copies of these orders have not been filed. The appellant also did not file any documents to substantiate their right over the suit schedule property.



23. It is also noticed that still earlier O.S.No.62 of 1955 was also filed by one GaliKanniamma against the 2nd defendant (appellant's father). Former had purportedly obtained an order of attachment. Subsequently, the said suit was also purportedly decreed. Again, a copy the decree in O.S.No. 62 of 1955 was not filed.

24. The decree so obtained was purportedly assigned in favour of Bathala Govindappa Naidu, who was the 3rd defendant in O.S.No.234 of 1966 and had allegedly took possession of the property in E.A.No.295 of 1959 in O.S.No.62 of 1955. Later, the said Bathala Govindappa Naidu had also allegedly settled the property on 30.4.1962 in favour of the 2nd and 3rd defendants in O.S.No.240 of 2008 (appellant's parents/3rd and 4th respondents herein). However, copy of the said settlement deed has not been filed.

25. The 1st defendant and the plaintiff claim rights over the suit schedule property on the strength of Ex.A.12 - Sale deed dated 29.7.1954 executed by the 2nd defendant in favour of the 1st defendant in his capacity as the guardian and maternal uncle of one minor Chilakamma, the daughter of late.Mr.Sanjeevi Naidu. It is a registered document vide Document No.2138 of 1954.

26. It is the case of the 4th and 5th defendants in O.S.No.240 of 2008 (appellants herein) that it was not open for the 1st defendant (2nd respondent herein) to have sold the suit schedule property to the plaintiff (1st respondent) in the teeth of judgment and decree dated 30.6.1997 in O.S.No.1286 of 1987 and the judgment and decree in O.S.No.17 of 1998. It was further submitted that there was no case made out for injunction as prayed for in O.S.No.240 of 2008 and that the entire sale was hit by lis pendens.

27. It was further submitted that decree in O.S.No.1286 of 1987 was binding on the parties herein whereas decree in O.S.No.234 of 1966 was not binding on the appellants as they were not parties to the said proceedings.

28. Defending the impugned Judgment and Decree, the learned counsel for the 1st respondent (plaintiff) submits that the ownership of the property had attained penalty as early as 31.01.1971 in O.S.No.234 of 1966.

29. It is further submitted that the 2nd respondent vendor (1st defendant) took possession of the suit scheduled properties through the Court and therefore, the decision of the First



Appellate Court need not to be disturbed. In this connection, the learned counsel for the 1st respondent/plaintiff relied on the following decision of the Hon'ble Supreme Court and that of this Court:-

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i. Sri Thimmaiah Vs. Shabira and others, (2008)
5 MLJ 479 (SC)

ii. S.K.Balaguru Pandian Vs. S.K.Murugesu Nadar
and another, 2010 (7) MLJ 180

iii. Anathula Sudhakar Vs. B.Buchi Reddy and
Others, AIR 2008 SC 2033.

30. I have considered the arguments advanced by the learned counsel for the appellants (4th and 5th defendant in O.S.No.240 of 2008) and the learned counsel for the 1st and 2nd respondents (the plaintiff and the 1st defendant in O.S.No.240 of 2008). The appellants, parents who are arrayed as 3rd and 4th respondents (2nd and 3rd defendants) have remained ex-parte.

31. The facts as narrated above indicate that several proceedings came to be initiated in respect of the suit schedule property. However, the facts also indicate that the 2nd respondent herein (the 1st defendant in O.S.No.240 of 2008) had become the owner of the suit schedule property with the execution of Ex.A12 dated 29.7.1954 by the 2nd defendant, the father of the appellants herein.

32. The rights over the suit schedule property in favour of the 2nd respondent herein (the 1st defendant in O.S.No. 240 of 2008) stood further concluded and established by a judgement and decree dated 24.09.1973 in A.S.No.154 of 1971 which had reversed the judgement and decree dated 31.01.1971 of the Trial Court in O.S.No.234 of 1966.

33. Though the copies of judgement and decree in respective these proceedings have not been filed, the appellants have not disputed the same. They have merely stated that the judgment and decree passed by the Appellate Court in A.S.No.154 of 1971 on 24.9.1973 reversing the judgment and decree in O.S.No. 234 of 1966 dated 31.1.1971 was not binding on them as they were not party to the said proceeding.

34. The judgment in O.S.No.234 of 1966 dated 31.1.1971 as reversed by the appellate Court in A.S.No.154 of 1971 on 24.9.1973 is binding on the appellants.



35. Further appeal filed by the appellant's parents, namely 3rd and 4th respondents herein (2nd and 3rd defendants in O.S.No.240 of 2008) before this Court in S.A.No. 157 of 1974, was dismissed for default. They had also filed C.M.P No. 11667 of 1976. The said miscellaneous petition to set aside the dismissal of S.A.No.157 of 1974 and the said petition was also dismissed on 10.12.1976.

36. Further appeal filed before the Hon'ble Supreme Court in Civil Appeal No.2122 of 1978. The said appeal was also dismissed by the Hon'ble Supreme Court on 24.11.1981. Thus, the subsequent suit filed by the appellants in O.S.No.1286 of 1987 which was decreed on 30.6.1997 and exparte judgement and decree in O.S.No.17 of 1998 in the collateral proceedings are of no consequence against a real owner of the property.

37. The fact also establish that the 1st defendant was in possession of the suit schedule property which the 1st appellant as DW1 admitted during cross examination that he has not taken possession of the suit schedule property. Therefore, there was no bar for the 1st defendant to sell the suit schedule property to the plaintiff. The facts also indicate that the 1st defendant was put in possession of the suit schedule property inasmuch as EP was filed for delivery of possession by the appellant's parents (2nd and 3rd defendant /3rd and 4th respondents) in E.P.36 of 2006 in O.S.No.1286 of 1987.

38. Further, the appellants have not established how they got the rights over the suit schedule property independently in the teeth of Ex.A12 dated 29.7.1954 barring the judgment and decree in O.S. No.1286 of 1987 and O.S.No.17 of 1998.The facts indicate that the appellants (4th and 5th defendants) were not in possession of the suit schedule property.

39. Though O.S.No.1286 of 1987 was filed by the appellants (4th and 5th defendants) against the 1st defendant and their parents namely 2nd and 3rd defendants in O.S.No.240 of 2008 and O.S.No.17 of 1998 against the 1st defendant and the plaintiff in O.S.No.240 of 2008 respectively, the appellants have not produced any documentary or oral evidence to substantiate their possession of the suit schedule property.

40. Thus, the First Appellate court has come to a correct conclusion that the plaintiff (the 2nd respondent herein) was entitled for the relief in O.S.No.240 of 2008. That apart, the records indicate that the appellants who were the contesting respondents before the First Appellate court were heard. They were not set-exparte. Therefore, allusion to order 41 Rule 21



of the Civil Procedure Code is without any basis. Therefore, the present appeal is liable to be dismissed and therefore, the substantial questions of law raised in this appeal is to be answered against the appellants. Accordingly, this second appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(T & P)

//True Copy//

Sub Assistant Registrar

kkd

To

1. The Subordinate Judge,
Tirutani.
2. The Principal District Munsif,
Tirutani.

Copy To:-

The Section Officer,
V.R. Section,
High Court, Madras.

+1cc to Mr.S.Udayakumar, Advocate, S.R.No.44961
+1cc to Mr.G.Poonkundran, Advocate, S.R.No.45339

S.A.NO.1020 OF 2014

MG(CO)
PBS/15/11/2021