



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 29.10.2021

CORAM :

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)Nos.550 and 551 of 2008

WEB COPY

In S.A. (MD)No.550 of 2008 : -

Narendra Kumar Johar ... Appellant / Appellant / Defendant

-Vs-

A.Shahjahan ... Respondent / Respondent / Plaintiff

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree passed in A.S.No.170 of 2004 on the file of the Principal Sub Court, Trichirappalli dated 07.12.2007 confirming O.S.No.1938 of 1996 on the file of the Principal District Munsif, Trichirappalli, dated 10.09.2004.

In S.A. (MD)No.551 of 2008 : -

Narendra Kumar Johar ... Appellant / Appellant /
3rd Party Appellant

vs.

1.A.Shahjahan ... Respondent / Respondent / Plaintiff

2.Mohammed Yussuf

3.Abdul Jabar

4.Abdul Malik

5.Nazeem Begum

6.A.Nawabjan

7.Sarbunnissa

8.Yasmeen ... Respondents / Respondents / Defendants

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree passed in A.S.No.248 of 2005 on the file of the Principal Sub Court, Trichirappalli dated 07.12.2007 confirming O.S.No.1479 of 1994 on the file of the II Additional District Munsif, Trichirappalli, dated 05.03.2003.

For Appellant : Mr.Jahangir Baba (in both Appeals)

For R1 : Mr.T.S.R.Venkataramana(in both Appeals)

For R5 : no appearance (in SA(MD).551 of 2008)



For R2 to R4, R6 to R8 : Ex parte (in SA(MD).551 of 2008)

COMMON JUDGMENT

These second appeals arise out of two suits for permanent injunction. The plaintiff in both the suits is one and the same. The defendants alone are different. The suit property is also one and the same. There is no dispute that the suit property originally belonged to T.B.M.Ameerjan /father of the plaintiff Thiru.Shahjahan.

2.The case of the plaintiff was that his father executed the settlement deed dated 05.05.1989 in his favour and also handed over possession of the suit property. The plaintiff has been in possession and enjoyment of the suit property ever since. The plaintiff's father was in relationship with one woman by name Zuleka Bi and that through her, he had begotten sons and daughters. At their instance, the plaintiff was facing interference with his possession and enjoyment. Therefore, he filed O.S.No.1479 of 1994 on the file of the District Munsif Court, Trichirappalli for restraining his father and other defendants born to him through the said Zuleka Bi from doing so. In the said suit, the first defendant Ameerjan filed written statement denying the execution of the settlement deed. During the pendency of the suit, he passed away and an ex-parte judgment and decree dated 03.03.2003 came to be passed in O.S.No.1479 of 1994.

3.After the institution of O.S.No.1479 of 1994, the plaintiff's father had executed a sale deed dated 15.02.1995 in favour of the appellant Thiru.Narendra Kumar Johar. Since the plaintiff apprehended interference with his possession and enjoyment at the hands of the subsequent purchaser, he filed another suit in O.S.No.1938 of 1996. The defendant filed written statement controverting the plaint averments. The plaintiff Shahjhan examined himself as P.W.1 in O.S.No.1938 of 1996 and marked Ex.A1 to Ex.A7. Narendra Kumar Johar examined himself as D.W.1 and marked Ex.B1 to Ex.B6. After a consideration of the evidence on record, the trial court by judgment and decree dated 10.09.2004 decreed the suit as prayed for. The appellant herein filed A.S.No.170 of 2004 against the judgment and decree made in O.S.No.1938 of 1996 and A.S.No.248 of 2005 against the judgment and decree made in O.S.No.1479 of 1994. The first appellate court dismissed both the appeals on 07.12.2007. The appeals were disposed of by separate judgments. Questioning the judgment and decree made in A.S.No.170 of 2004 arising out of O.S.No.1938 of 1996, S.A.(MD)No.550 of 2008 has been filed. Questioning the judgment and decree made in A.S.No.248 of 2005 arising out of O.S.No.1479 of 1994, S.A.(MD)No.551 of 2008 has been filed.



4.The second appeals were admitted on the following substantial questions of law:-

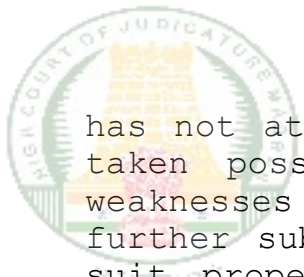
"1.Whether the lower appellate court was right in holding that a suit for injunction is maintainable without a prayer for setting aside the sale deed ?

2.Whether the lower appellate court is right in holding that one kist receipt dated 1.1.1995 is enough to prove possession of the plaintiff when possession and enjoyment is claimed on the basis of the deed 05.05.1989 and the trial opened in the year 2004?

3.Whether the lower court is right in holding that the suit is maintainable when the title of the plaintiff is denied and the suits are for bare injunction?"

5.Heard the learned counsel appearing for the appellant and the learned counsel appearing for the plaintiff.

6.The learned counsel appearing for the appellant submitted that the plaintiff's father himself had specifically denied having executed the deed of settlement dated 05.05.1989- Ex.A2. A gift deed requires to be attested by two witnesses. The plaintiff had failed to examine any of the witnesses. Therefore, the gift deed is to be eschewed out of consideration as it has not been proved in the manner known to law. The appellant Narendra Kumar Johar has set up his own title. He projected the sale deed executed in his favour by the plaintiff's father. Since a title dispute has been raised, the plaintiff could not have continued to maintain a suit for injunction simpliciter. Such a suit is clearly not maintainable. The learned counsel relied on the decision reported in **2008 (4) SCC 594 (Anathula Sudhakar Vs. P.Buchi Reddy(dead) by LRs and others)** and the one reported in **2021 SAR (Civ) 995 (Kayalulla Parambath Moidu Haji Vs. Namboodiyil Vinodan)**. He would further state that the plaintiff is none other than the son of the executant of the gift deed. Therefore, the plaintiff should also have satisfied the mandate set out in Section 111 of the Indian Evidence Act, 1872. In the case on hand, he had failed to do so; in all fairness, the plaintiff could have impleaded the appellant in O.S.No.1479 of 1994 itself; except the kist receipt of the year 1995, no other document has been filed by the plaintiff to show his possession; a person seeking relief of injunction must show that he was in possession of the suit property not only on the date of filing of the suit but also throughout. The learned counsel submitted that mere production of patta is not sufficient as the revenue records can neither create nor extinguish title. His central contention is that since the entire case of the plaintiff is anchored on the gift deed executed by his father, he was obliged to establish all the three ingredients of Hiba namely declaration of intention, acceptance and delivery of possession. In this case, the plaintiff



has not at all proved that under the gift deed, the plaintiff had taken possession. The plaintiff cannot take advantage of the weaknesses that may be found in the case of the defendant. He would further submit that merely because the defendant had purchased the suit property from the father of the plaintiff after filing of O.S.No.1479 of 1994, his sale deed can neither be considered as void nor invalid. It has been consistently held that purchase during the pendency of a suit will have to abide by the result of the litigation. He would further contend that the decision rendered in O.S.No.1479 of 1994 cannot have any binding effect on the subsequent suit instituted against the appellant. Mere marking of the earlier decree or the photocopy of the settlement deed in the subsequent suit would not really fulfil the requirement of law. So submitting, he called upon this Court to frame additional substantial questions of law and answer the same in favour of the appellant and set aside the judgments and decrees passed by the courts below and dismiss the suits filed by the plaintiff.

7.Per contra, the learned counsel appearing for the contesting respondent / plaintiff submitted that the impugned judgments and decrees do not call for any interference.

8.I carefully considered the rival contentions and went through the evidence on record. The primary question that I have to consider is whether on account of the failure to seek the relief of declaration, the suits filed by the appellant herein are maintainable. The leading decision on the subject is the one reported in **2008 (4) SCC 594 (Anathula Sudhakar Vs. P.Buchi Reddy (dead) by LRs and others)**. In paragraph No.21 of the said decision, it was held as follows:-

"21.To summarise the position in regard to suits for prohibitory injunction relating to immovable property is as under:

(a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may

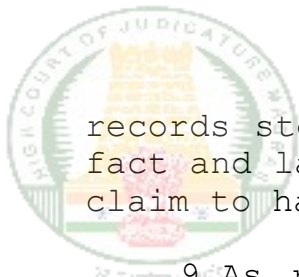


without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title. Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straight forward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration. Merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case."

In **T.V.Ramakrishna Reddy Vs. M.Mallappa (2021 SAR (Civ) 1009)**, it was observed that in **Anathula Sudhakar**, the Supreme Court in unequivocal terms had held that where the plaintiff's title is not in dispute or under a cloud, a suit for injunction could be decided with reference to the finding on possession. Merely because the defendant questions the plaintiff's title, that would not necessarily mean that the plaintiff's title is in dispute or under a cloud. The defendant will have to *prima facie* create a doubt in the mind of the court that the plaintiff's claim of title is under a serious cloud. In the case on hand, the defendant had not set up an independent title. He claims through the plaintiff's father T.B.M.Ameerjan. The case of the plaintiff is that T.B.M.Ameerjan had executed a settlement deed in his favour on 05.05.1989. The appellant herein who was examined as D.W.1 in O.S.No.1938 of 1996 admitted in the cross examination that he did not obtain any encumbrance certificate or legal opinion. He also stated that he believed the assurance as held out by his vendor namely Ameerjan and purchased the suit property. He also admitted that he did not verify in whose name patta, adangal, kist receipts and other revenue



records stood. In these circumstances, no complicated question of fact and law relating to title had really arisen as both the parties claim to have derived title from one and the same person.

9.As rightly pointed out by the learned counsel appearing for the plaintiff, Section 48 of the Transfer of Property Act, 1882 would get attracted. Section 48 of the Act is as follows:-

"48.Priority of rights created by transfer:- Where a person purports to create by transfer at different times rights in or over the same immovable property and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created."

10.The gift deed executed in favour of the plaintiff is prior in point of time and therefore, the sale deed executed in favour of the appellant would be subject to the settlement deed earlier executed in the name of the plaintiff. Therefore, I hold that the suits for injunction are maintainable even without seeking any declaratory relief.

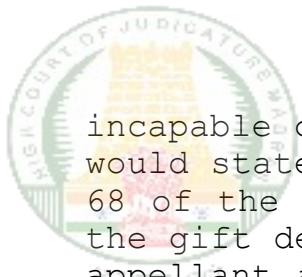
11.Of-course, the plaintiff is obliged to establish that the gift deed was duly executed in his favour. The learned counsel for the appellant would submit that the plaintiff failed to satisfy the requirement set out in Section 68 of the Indian Evidence Act, 1872. Section 68 reads as follows:-

"68.Proof of execution of document required by law to be attested:-

If a document is required by law to be attested, it shall not be used as evidence until one attesting witness atleast has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence.

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied. "

12.The contention of the learned counsel appearing for the appellant is that the gift deed is required to be attested by two witnesses and therefore, it could not be used in evidence until one attesting witness is called for the purpose of proving its execution. It is not the case of the plaintiff that the attestors had passed away or were not subject to the process of the Court or

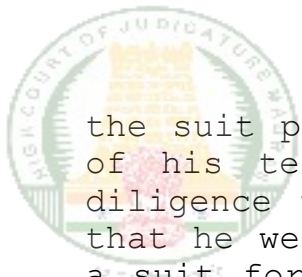


incapable of giving evidence. The learned counsel for the appellant would state that the plaintiff cannot rely on the proviso to Section 68 of the Indian Evidence Act. This is because, the execution of the gift deed had been specifically denied by his own father and the appellant also had relied on such denial by the plaintiff's father. In this regard, the learned counsel relied on the decision reported in **2000 SAR (Civil) 824 (Rosammal Issetheenammal Fernandez (dead) by LRs & others Vs. Joosa Mariyan Fernandez & others)**.

13.Though this contention is formidable, I am of the view that the decision reported in **2000 SAR (Civil) 824 (Rosammal Issetheenammal Fernandez (dead) by LRs & others Vs. Joosa Mariyan Fernandez & others)** may not apply to the facts of this case. This is primarily for the reason that the suit document relates to a mahomedan gift. While Section 123 of the Transfer of Property Act states that the gift of immovable property must be effected by a registered instrument signed by or on behalf of the donor and attested by atleast two witnesses, Section 129 of the Transfer of Property Act states that nothing in chapter VII of the Transfer of Property Act shall be deemed to affect any rule of Mahomedan law. It is too well settled that a Mahomedan gift can be orally made. This is particularly for the reason that Section 68 of the Indian Evidence Act opens with this phrase 'if a document is required by law to be attested'. A Mahomedan gift is not a document that requires to be attested. While a general gift deed is required by law to be attested, a Mahomedan gift is not required by law to be attested. That is why I hold that Section 68 of the Indian Evidence Act will not apply to Mahomedan gifts. The gift deed executed in favour of the plaintiff in this case is a registered document. Therefore, presumption of validity under Section 60 of the Registration Act, 1908 will also apply in his case. I have already held that the suit for injunction without seeking any declaratory relief is very much maintainable.

14.The only point that has to be seen is who is in possession of the suit property. The plaintiff had also obtained patta in his name. The said document was marked as Ex.A3. He had also filed kist receipt. The fact remains that the kist was accepted by the revenue authority in the name of the plaintiff. These documents are more than sufficient to establish the plaintiff's possession over the suit property. The courts below have concurrently found that the plaintiff has been in possession of the suit property. Exercising jurisdiction under Section 100 of C.P.C., I do not deem it fit and appropriate to interfere with such a concurrent finding. The substantial questions of law are answered against the appellant.

15.The learned counsel for the appellant would strongly contend that the plaintiff should have been thrown out at the threshold for having indulged in suppression of material facts. I cannot appreciate this contention. It is the appellant who had purchased



the suit property during the pendency of the suit. A mere reading of his testimony would show that he had not exercised the due diligence that is expected of a prudent buyer. He himself states that he went entirely by the assurance held out by the vendor. In a suit for injunction, the plaintiff has to indicate as to how he traces his title and as to how he is in possession of the suit property. The plaintiff is not expected to set out every fact relating to the property. Therefore, I do not find any merit in the contention of the appellant's counsel that the plaint suffers from suppression of material facts. There is again no merit in the plea of non-joinder. After the plaintiff came to know about the purchase of the property by the appellant, he filed an independent suit against the appellant. In the said plaint, he had stated about the pendency of the earlier suit. Nothing stopped the appellant from impleading himself in the earlier suit filed by the plaintiff. I do not find any merit in the contentions of the learned counsel appearing for the appellant.

16.Both the second appeals are dismissed. No costs.

Sd/-

Assistant Registrar(P & A)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

skm

Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

- 1.The Principal Sub Judge, Trichirappalli.
- 2.The Principal District Munsif, Trichirappalli.
- 3.The II Additional District Munsif, Trichirappalli.

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+2 CC to M/s.T.S.R.VENKATARAMANA, Advocate (SR-33260[F] dated 29/10/2021)

S.A.(MD)Nos.550 and 551 of 2008

29.10.2021

KMK(CO)

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