



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 07.01.2021

CORAM:

THE HONOURABLE MR.JUSTICE **R.SUBRAMANIAN**

S.A. (MD)No.718 of 2020

and

C.M.P. (MD)No.7351 of 2020

WEB COPY

Abdul Samadhu

... Appellant/Appellant/Defendant

versus

1. Varusai Mohideen

2. Fathima

3. Seyyed Appas

... Respondents/Respondent/Plaintiff

Second Appeal filed under Section 100 of the Civil Procedure Code, against the Judgment and Decree dated 11.02.2020 passed in A.S.No.70 of 2017 on the file of the Additional Sub Court, Tirunelveli, confirming the Judgment and Decree dated 07.09.2017 passed in O.S.No.221 of 2008 on the file of the Principal District Munsif, Tirunelveli.

For Appellant : Mr.M.P.Senthil

JUDGMENT

The defendant in O.S.No.221 of 2008 has come up with this Second Appeal, challenging a decree for permanent injunction restraining him from interfering with the plaintiffs' peaceful possession and enjoyment of the property.

2. A suit was laid by the first respondent claiming that the suit property originally belonged to one Mohamed Ibrahim Ammal, who settled it in favour of her daughters, namely, Pethammal @ Shekku Meerammal Beevi and Mohamed Pitchammal, under a Deed of Settlement, dated 12.11.1933. The half share of Pethammal devolved on her son, namely, Nayina Mohamed Marakkayar. The said Nayina Mohamed Marakkayar had three children, namely, Syed Mohamed Marakkayar, Samsu Mohideen Beevi and Sheriba Ammal Beevi. The first plaintiff had purchased the half share from the above persons and their heirs, under a sale deed, dated 02.06.1968. The other half share, which belonged to Mohamed Pitchammal, was settled by her on 29.08.1968 to one P.A.Pakkir Mohideen. The first plaintiff, after his purchase, had filed a suit for partition in O.S.No.142 of 1988, seeking a division of property and allotment of his half share. Though the suit was initially dismissed, on appeal in A.S.No.179 of 2000, a preliminary decree was passed, which was followed by a final decree on 26.07.2006. Pursuant to the final decree, the plaintiff filed an Execution Petition in E.P.No.149 of 2007 and had taken possession of the suit property, which was allowed to him under the final decree on 28.01.2008 through Court. Contending that the defendant has got nothing to do with the property and the defendant attempted to



interfere with his possession, the plaintiff filed the above suit.

3. The suit was resisted by the defendant contending that the plaintiff was never in occupation of the property. The delivery that was effected on 28.01.2008 was not an actual delivery and it was only a paper delivery. It was also claimed that the defendant was permitted by the heirs of P.A.Pakkir Mohideen, to be in occupation of the property and now, he is in possession of the property and not the heirs of P.A.Pakkir Mohideen.

4. At the time of trial, the plaintiff was examined as P.W.1. One Jamal Mohideen was examined as P.W.2. Exs.A1 to A6 were marked. On the side of the defendant, the defendant, Abdul Samadhu, was examined as D.W.1 and one Syed Ali Fathima was examined as D.W.2. Exs.B1 to B38 were marked.

5. The trial Court, upon consideration of the evidence on record, concluded that the first plaintiff has proved that he is in possession of the property. It was also concluded that all the documents produced by the defendant stood in the name of P.A.Pakkir Mohideen and the same will not establish the claim of the defendant that he has been in possession of the property. On the said finding, the learned trial Judge decreed the suit as prayed for. Aggrieved over the same, the defendant preferred an appeal in A.S.No.70 of 2017. The learned Appellate Judge, who heard the appeal upon reconsideration of the evidence, concluded that the findings of the trial Court do not call for interference. Upon such conclusion, the learned Appellate Judge dismissed the appeal.

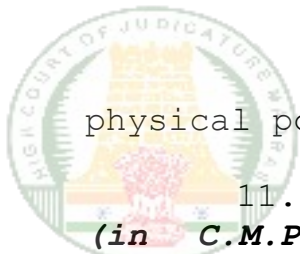
6. I have heard Mr.M.P.Senthil, learned counsel for the appellant.

7. Mr.M.P.Senthil, learned counsel for the appellant, would strenuously contended that the Appellate Court has overlooked the specific admission of P.W.1, wherein, he had accepted that the defendant is in possession of the property. He would also draw my attention to the non-consideration of his specific claim that the delivery effected on 28.01.2008 in E.P.No.149 of 2007 was only a paper delivery and not an actual delivery.

8. I have considered the submissions of the learned counsel for the appellant.

9. As regards the second contention, the defendant claims under P.A.Pakkir Mohideen, who suffered a decree for partition in O.S.No.142 of 1988 in execution of which the possession was delivered through Court in E.P.No.149 of 2007 on 28.01.2008.

10. It is a settled law that a party to the proceedings or a person claiming under such party, cannot contend that the delivery, effected in execution of a decree, is a paper delivery and actual



physical possession was not handed over.

11. This Court, in **C.Ramasami vs. Kuruva Boyan and others**, (in **C.M.P.Nos.15647 of 1990 and C.M.P.No.17116 of 1990 in S.A.No.1706 of 1990, dated 18.01.1991**) reported in 1991 (1) L.W. 244, held that it is not open to a party or a representative of the party to raise such contention. In view of the same, the second contention of the learned counsel stands rejected.

12. As regards the first contention, the learned Appellate Judge has considered that portion of evidence of P.W.1 and concluded that it would not amount to admission of possession of the defendant. I am unable to see any perversity in consideration of evidence on this aspect by the learned appellate Judge. Despite his best efforts, Mr.M.P.Senthil, learned counsel for the appellant, is unable to make out a question of law much less a substantial question of law in order to enable me to entertain this Second Appeal. Hence, the Second Appeal fails and it is accordingly dismissed without being admitted. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CSII)

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Sub Assistant Registrar(CS)

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To

1. The Additional Sub Court, Tirunelveli.
2. The Principal District Munsif, Tirunelveli.
3. The Record Keeper, (2Copies)
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.M.P.SENTHIL, Advocate (SR-511[F] dated 07/01/2021)

S.A. (MD) No.718 of 2020
07.01.2021

NS (CO)

KB (27.01.2021) 3P 6C

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