



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : **30.11.2021**

CORAM

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

S.A(MD)No.746 of 2021

and

C.M.P(MD)No.10018 of 2021

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Majitha Begum

... Appellant/Appellant/Plaintiff
Vs.

1.Razia Begum

2.Rahamathunnissa

3.Jamal

4.Rabia Begam

5.Idayathullah

6.Liyakath Ali

... Respondents/Respondents/
Defendants 2 to 7

Prayer : Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree, dated 22.07.2021 passed in A.S.No.120 of 2017, on the file of the Principal Subordinate Court, Tiruchirappalli, confirming the judgment and decree dated 30.06.2017 passed in O.S.No.467 of 2011 on the file of the I Additional District Munsif Court, Tiruchirappalli.

For Appellant : Mr.P.Thiyagarajan
For Respondents : Mr.D.Senthil

JUDGMENT

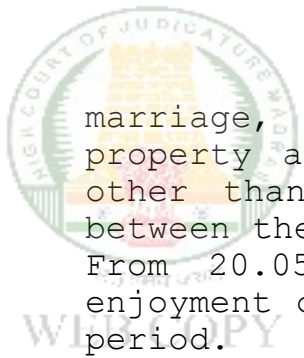
The concurrent Judgments and decrees passed in O.S. No.467 of 2011 by the I Additional District Munsif Court, Tiruchirappalli, and in A.S.No.120 of 2017, by the Principal Subordinate Court, Tiruchirappalli, are being challenged in the present second appeal.

2. The appellant / plaintiff has instituted a suit in O.S. No.467 of 2011, on the file of the trial Court for the relief of permanent injunction, wherein, the present respondents have been shown as the defendants 2 to 7.

3. For the sake of convenience, the parties are referred to herein, as their own ranking as before the Trial Court.

4.The Case of the plaintiff is as follows :

(i) Originally the suit property belonged to one Mohamed Ali who had two sons namely, Sultan Mohideen and Mohamed Shahib and one daughter namely Shareefa Bibi. The said Sultan Mohideen died leaving behind his daughters Salma Bibi, Fathima Bibi and son Sheik Mohideen, who is the first defendant. During the year 1952, Salma Bibi got married one Mohamed Ibrahim. Ever since the date of



marriage, Salma Bibi and her husband were living in the suit property and they had one son namely, Dhowlath Ali, who is none other than the husband of the present plaintiff. The marriage between the plaintiff and the Dhowlath Ali took place on 20.05.1982. From 20.05.1982 onwards. The plaintiff is in possession and enjoyment of the suit schedule property for more than the statutory period.

(ii). In the meanwhile, Salma Bibi filed a suit against his brother namely, the defendant in O.S.No.540 of 1996 on the file of the District Munsif, Trichirappali, seeking for the relief of partition claiming her share in the entire property of their family, including the suit property. During the pendency of the suit, Salma Bibi died and therefore, the present plaintiff was impleaded as the second plaintiff in the above said suit. However, the said suit was dismissed. Aggrieved against the said judgment in O.S.No.540 of 1996, the plaintiff has preferred an appeal before the Subordinate Court, Trichirappali in A.S.No.92 of 2004 and the same was also dismissed on 07.07.2009. The plaintiff remains in possession of the suit property adverse to the interest of the defendant even from the date of her marriage. The possession of the plaintiff over the suit property is open, exclusive, un rebutted and hostile against the defendant. Even though the previous suit was filed by Salma Bibi claiming share over the suit property, but the present suit has been filed by the plaintiff to safeguard her settled possession over the suit property. On 20.09.2021, the defendant attempted to interfere with the peaceful possession and enjoyment of the suit property. Hence, the suit was filed for permanent injunction.

5. Resisting the claim made by the plaintiff, the defendants filed written statement along with counter claim for recovery of possession. The relationship between the parties are admitted. Subsequent to the dismissal of the suit filed by the plaintiff's mother-in-law and plaintiff for partition in respect of the suit property, the plaintiff could not claim any right over the property by way of adverse possession, which is nothing but clear abuse of process of law. The plaintiff, as a power agent of her husband Dhowlath Ali, had already filed a suit in O.S.No.991 of 1972 for partition of her husband's share in the property of Mohamed Ali and got divorce. The said properties are being situated adjacent to the suit property. Whereas, the plaintiff asked the defendant for sometime to vacate the suit property and the defendant also conceded her request. In the suit in O.S.No.991 of 1972, the share of the plaintiff and Ainool Marjan was jointly allotted in respect of the property, which is adjoining to the suit property. Since the property allotted to the plaintiff is a vacant land, the plaintiff requested the defendants to allow her to reside in the suit property, till she puts up construction in her share. Therefore, the defendants permitted the plaintiff to reside in the suit property. On the other hand the plaintiff has now come forward with



possession. Therefore, the permission given by the defendants is withdrawn and sought for the relief of recovery of possession.

6.The reply statement filed by the plaintiff to the counter claim filed by the defendant is as follows :

The counter claim is not maintainable either under law or on facts. The suit in O.S.No.540 of 1996 is no way connected to the cause of action for the present suit and the defendant himself admitted the possession of Salma Bibi and the present plaintiff in respect of the suit property in the previous litigation. The plaintiff is in peaceful possession and enjoyment of the suit property even from 25.09.1982, adverse to the interest of the defendant. Therefore, the plaintiff prescribed title over the suit property on the basis of adverse possession and hence, prayed for dismissal of the counter claim.

7. Before the trial Court, on the side of the plaintiff, the plaintiff examined herself as P.W.1 and Exs.A1 to A29 were marked. On the side of the defendants, the fifth defendant examined herself as D.W.1 and Exs.B.1 to B.4 were marked.

8. On the basis of the rival pleadings on either side, the trial Court, after framing necessary issues and after evaluating both the oral and documentary evidence, has dismissed the suit and granted the relief in favour of the respondents/defendants 2 to 7.

9. Aggrieved by the Judgment and decree passed by the trial Court, the plaintiff, as appellant, had filed an Appeal Suit in A.S. No.120 of 2017. The first appellate Court, after hearing both sides and upon reappraising the evidence available on record, has dismissed the appeal and confirmed the Judgment and decree passed by the trial Court and decreeing the counter claim of recovery of possession directing the present plaintiff to deliver the possession of the suit property within a period of two months from the date of judgment. Challenging the said concurrent Judgments and decrees passed by the Courts below, the present second appeal has been preferred at the instance of the plaintiff, as appellant.

10.The learned counsel appearing for the appellant submits that the suit has been filed for the relief of permanent injunction restraining the defendants from any way interfering with the possession and enjoyment of the plaintiff in respect of the suit property on the basis of her settled possession and admitting the title by adverse possession, the lower Court has erroneously dismissed the suit on the basis that the plaintiff has sought for the relief of declaration of title and for consequential injunction and the counter claim of recovery of possession is clearly barred under Article 65 of the Limitation Act. He would further submit that according to the defendants, the permitted the plaintiff to occupy the suit schedule property, but miserably failed to plead permission is given and when such permission is



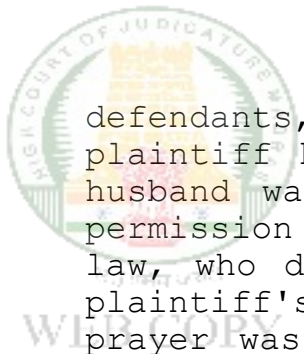
recalled. When there are litigations between the parties, it can be easily presumed that the parties are in strained relationship and the alleged permissive occupation alleged in the counter claim ought not have been possible. The courts below failed to see that the earlier suit for partition, at the instance of plaintiff's mother-in-law Salma Bibi is continue by the present plaintiff after the death of her mother-in-law on the basis of Hiba in her favour and in the earlier suit for partition it has been held that the plaintiff's Mother-in-Law Salma Bibi is entitled to get a share, but the said suit dismissed solely on the basis that the Hiba is not made as required under law.

11. The learned counsel appearing for the respondents / defendants 2 to 7 would vehemently oppose the Second Appeal contending that the well considered Judgments of the Courts below need not be interfered with, as there is no question of law at all involved in this Second Appeal and prayed for dismissal of the appeal.

12. I have heard the learned counsel appearing for the appellant / plaintiff and the respondents / defendants 2 to 7 and carefully perused the materials on records.

13. The undisputed facts are that the suit property is being situated at Tiruchirappalli Town, bearing T.S.No.435. The plaintiff is residing in the house, which being situated in the suit property. Originally, the suit property belonged to one Mohamed Ali, who had two sons namely, Sultan Mohideen and Mohamed Shahib and one daughter Shareefa Bebi. The said Sultan Mohideen had two daughters viz., Salma Bibi and Fathima Bibi and one son namely, Sheik Mohideen. The daughter of Sultan Mohideen namely, Salma Bebi got married with one Mohamed Yusuf and out of their wed lock, they have son viz., Dhowlath Ali, who is none other than the husband of the plaintiff. After the demise of Mohamed Yusuf, the said Salma Bibi got second marriage with one Mohamed Ebrahim. The daughter of Mohamed Ali viz., Shereefa Bebi had two sons namely, Mohamed Yusuf and Shamsudeen. The said Mohamed Yusuf is the husband of Salma Bibi and father-in-law of the present plaintiff. One Ainoon Marjan is the daughter of Shamsudeen.

14. The plaintiff claiming property through her mother-in-law, who had filed a suit in O.S.No.540 of 1996 on the file of the II Additional District Munsif, Tiruchirappalli, for partition against the first defendant and during the pendency of the suit, the said Salma Bibi executed a Hiba in respect of her share over the properties in favour of his daughter-in-law namely, the plaintiff and subsequently, she died pending suit and therefore, the plaintiff pursued the suit for partition against the first defendants by virtue of 'Hiba' executed by Salma Bibi. According to the



defendants, the plaintiff is only the permissive occupant. As the plaintiff being a relative, she has been given permission, as her husband was residing in foreign country and there is no date of permission given. She claiming her occupancy through her mother-in-law, who died during the suit proceedings. As it is seen that the plaintiff's mother-in-law had filed a suit for partition and that prayer was negatived by the trial Court as well as the appellate Court, the plaintiff cannot claim possession on the basis of adverse possession. The trial Court has also found that may be she is in possession of the property, but not adverse possession.

15. Mere filing a suit for bare injunction, is not maintainable, as the prescribed title by way of adverse possession was not proved. The plaintiff's predecessor i.e., mother-in-law, sought for partition and she had executed a 'Hiba' and she stepped into the shoes of mother-in-law claiming right over the property could not be accepted, as the said claim of partition has been negatived by the Courts below and now she cannot seek for an alternative claim of right by adverse possession. The adverse possession has to be proved clearly. To claim adverse possession, the plaintiff must show that she had animus possidendi to hold the land adverse to the true owner. The assertion of the title against the interest of true owner must be clear and unequivocal. In order to claim title by way of adverse possession, the person must show that she was in possession over the property for more than a period of 12 years in openly, continually.

16. That being the case, the plaintiff even though submitted that she is in the property from the year 1952 onwards, the mother-in-law of the plaintiff viz., Salma Bibi was in the possession and enjoyment over the suit property. Subsequently, the plaintiff has been in the possession over the suit property from the year 1982 onwards. On the other hand, the said Salma Bibi filed the suit against the first defendant for partition in the year 1996 and subsequent to her demise, based on the alleged 'Hiba', executed by Salma Bibi, the present plaintiff pursued the case till the year 2019. The plaintiff filed the present suit in the year 2011 stating that she prescribed title over the suit property by way of adverse possession. No doubt, the plaintiff could claim that she has animus possidendi only subsequent to the previous litigation. The previous suit was ended in the year 2009 and the present suit was filed within two years. Now, the plaintiff cannot claim that she is having prescribed title over the suit property by way of adverse possession and the said contention of the plaintiff cannot be accepted.

17. The claim of *res judicata* made by the defendants was negatived by the Courts below stating that in the earlier suit, it was pleaded as co-sharer and sought for partition in respect of the suit property, but in the subsequent suit, she claimed title by way of adverse possession. Therefore, this Court comes to a categorical



conclusion that the the suit is not barred by *res judicata*, as rightly held by the Courts below.

18.This Court is also not inclined to interfere with the findings, regarding the declaration of the property, when the plaintiff is claiming right over the property by claiming adverse possession, first plaintiff has admitted the title of the opponent. The plaintiff admits the title of the defendants, when she seeks only for the relief of bare injunction against the true owner, the person who is in possession over the property can maintain the suit for injunction against any person other than the true owner. The suit for bare injunction simpliciter is not at all maintainable against the person, who is having better title than the plaintiff. Therefore, the plaintiff should have sought for the relief of declaration of title instead of suit for permanent injunction simpliciter.

19. The defendants filed counter claiming title over the suit property and the plaintiff remains in the possession and enjoyment of the suit property as permissive occupier. At the same time, the plaintiff admitted the title of the defendant in respect of the suit property and attempted to claim title by way of adverse possession and failed in her attempt and therefore, the trial Court has inferred that the plaintiff is in the possession over the suit property as a permissive occupier. The permissive character of possession can be inferred from attending circumstances.

20. In view of the forgoing discussions, this Court is of the view that the Courts below has rightly held that the plaintiff is only a permissive occupant, when she already claims as co-sharer of the property and later on claims title by way of adverse possession, which is not proved by her and when there is a failure on the part of the plaintiff to prove her title, the substantial question of law, as sought in the Memorandum of Second Appeal, need not be gone into. This Court is not inclined to interfere with the findings of the Courts below. Therefore, the second appeal is liable to be dismissed at the time of admission stage itself.

21.In the result, the Second Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

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To

- 1.The Principal Subordinate Court,
Tiruchirappalli
- 2.The I Additional District Munsif Court,
Tiruchirappalli.
- 3.The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai. (2 COPIES)

+1 CC to M/s.D.SENTHIL, Advocate (SR-36654[F] dated 01/12/2021)

+1 CC to M/s.P.THIYAGARAJAN, Advocate (SR-36900[F] dated 01/12/2021)

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