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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.03.2022

CORAM

THE HONOURABLE MR. JUSTICE N. ANAND VENKATESH

S.A.No.1230 of 2012
and C.M.P.No.3264 of 2022

Sampath ... Appellant/Appellant/Plaintiff

Vs.

Baby ... Respondent/Respondent/Defendant

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the Judgment and Decree dated 30.08.2012 passed in A.S.No.55 of 2011 on the file of the Sub Court, Dharmapuri confirming the Judgment and Decree dated 21.09.2011 passed in O.S.No.228 of 2009 on the file of the District Munsif, Dharmapuri.

For Appellant : Mr.G.Vasudevan

For Respondent : Served
No Appearance

JUDGMENT

The plaintiff is the appellant in the Second Appeal.

2.The case of the plaintiff is that the suit property was originally owned by his grandmother. She executed a Settlement Deed dated 19.09.2022, marked as Ex. A1 and settled the properties in favour of the plaintiff and the children of one Nandan and Seenu. The further case of the plaintiff is that there was an understanding between the parties and the plaintiff was in exclusive possession and enjoyment of the suit property which is a vacant land.

3.The grievance of the petitioner is that the defendant who is the adjacent owner, without any right, title, or interest, attempted to trespass into the suit property with the help of henchmen. Hence, left with no other alternative, the



plaintiff filed the suit seeking for the relief of permanent injunction.

4.The defendant filed the written statement and denied the very right and title of the plaintiff over the suit property and he also denied the factum of possession of the plaintiff. The defendant has taken a stand that his mother Muniyammal was the owner of the property and a separate patta was given in the year 1992 in her favour under the Natham Nilavari Thittam. The further case of the defendant is that his mother had also put up a thatched house in the suit property and the entire family was residing there. That apart, some attempt was made by the relatives of the plaintiff to interfere with the possession and enjoyment of the property and hence, a suit was filed by the mother of the defendant in O.S.No.121 of 2002 and there was an order of interim injunction in her favour and ultimately, the suit itself was decreed in favour of Muniyammal. The defendant has thereby denied the very right of the plaintiff in the suit property and had sought for the dismissal of the suit.

5.Both the Courts below on considering the facts and circumstances of the case and after appreciating the oral and documentary evidence, concurrently held against the plaintiff and the suit was dismissed. Aggrieved by the same, the plaintiff has preferred this Second Appeal.

6.Heard the learned counsel for the appellant and carefully perused the materials available on record and also the findings rendered by both the Courts below.

7.In the present case, the plaintiff has attempted to establish his right over the suit property through a Settlement Deed. Both the Courts below have concurrently found that the defendant had denied the Settlement Deed and hence, the plaintiff ought to have proved the Settlement Deed in accordance with Section 68 of the Evidence Act. However, the plaintiff failed to examine the attesting witness. Therefore, both the Courts below found that the Settlement Deed itself has not been proved by the plaintiff.

8.Both the Courts below have also concurrently found that the defendant has specifically denied the right and title of the plaintiff in the suit property and in spite of the same, the plaintiff had sought for the relief of bare injunction without seeking for the relief of declaration of title. This finding rendered by both the Courts below was given after appreciating the oral and documentary evidence in extenso. This Court is not



able to find any perversity in the finding rendered by both the Courts below in this regard. Both the Courts below have also independently dealt with the merits of the case based on the documents available on record and it was found that the Settlement Deed itself has not been proved and the title over the property has not been proved and the plaintiff has also not proved the possession over the suit property. Both the Courts categorically found that the suit property is in exclusive possession and enjoyment of the defendant.

9. In the considered view of this Court, this Court does not find any reasons to interfere with the findings of both the Courts below, since there is no perversity in those findings. In any event, no substantial questions of law are involved in the Second Appeal.

10. During the pendency of the Second Appeal, the appellant has filed a petition in CMP No.3624 of 2022 under Order XXIII Rule 1 seeking for the leave of this Court to withdraw the suit and to file a fresh suit on the same cause of action.

11. In the considered view of this Court, the Court can grant such a permission only where there is a formal defect which does not affect the merits of the case. In the present case, both the Courts below have dealt with the merits of the case and rendered findings. One of the grounds that has been put against the appellant is that he did not seek for the relief of declaration of title. The appellant did not deem it fit to amend the plaintiff then and there when the suit was pending. When both the Courts have held against the appellant and thereby, a right has been vested in the defendant, the appellant cannot be permitted to wriggle out of the same by filing a petition to withdraw the case with a leave to file a fresh suit on the same cause of action. Useful reference can be made to the judgement of the Hon'ble Supreme Court in V.Rajendran and Ors. vs. Annasamy Pandian (D) thr. L.Rs. Karthyayani Natchiar reported in 2017 1 CTC 762 wherein, the Hon'ble Supreme Court has held as follows:

9. Order XXIII Rule 1(3) CPC lays down following grounds on which a Court may allow withdrawal of suit. It reads as under:

"Rule.1. Withdrawal of suit or abandonment of part of claim.-



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(3) Where the Court is satisfied.-

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

As per Order XXIII Rule 1(3) CPC, suit may only be withdrawn with permission to bring a fresh suit when the Court is satisfied that the suit must fail for reason of some formal defect or that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit. The power to allow withdrawal of a suit is discretionary. In the application, the plaintiff must make out a case in terms of Order XXIII Rule 1 (3) (a) or (b) CPC and must ask for leave. The Court can allow the application filed under Order XXIII Rule 1 (3) CPC for withdrawal of the suit with liberty to bring a fresh suit only if the condition in either of the clauses (a) or (b) that is, existence of a formal defect or sufficient grounds. The principle under Order XXIII Rule 1 (3) CPC is founded on public policy to prevent institution of suit again and again on the same cause of action.

10. In K.S. Bhoopathy and Ors. vs. Kokila and Ors. (2000) 5 SCC 458, it has been held that it is the duty of the Court to be satisfied about the existence of formal defect or sufficient grounds before granting permission to withdraw the suit with liberty to file a fresh suit under the same cause of action. Though, liberty may lie with the plaintiff in a suit to withdraw the suit at any time after the institution of suit on establishing the formal defect or sufficient grounds, such right cannot be considered to be so absolute as to permit or encourage abuse of process of Court. The fact that the plaintiff is entitled to abandon or withdraw the suit or part of the claim by itself, is no licence to the plaintiff to claim or to



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13. In the result, the Second Appeal stands dismissed. Considering the facts and circumstances of the case, there will be no order as to costs.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

Sub Assistant Registrar

ssr

To

1. The Sub Judge,
The Sub Court, Dharmapuri.

2. The District Munsif, Dharmapuri.

Copy to:
The Section Officer,
V.R. Section,
High Court, Madras.

+1cc to Mr. G. Vasudevan, Advocate SR.No.17638

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and C.M.P.No.3264 of 2022

RSV (CO)
CB(19/04/2022)