

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.02.2022

CORAM:

THE HONOURABLE MR. JUSTICE N.ANAND VENKATESH

SA.No.174 of 2012
and MP No.1 & 2 of 2012

1. G.Rajan
2. Chezhiyan Appellants/Respondents/Defendants 1 & 2

Vs.

Jothi .. Respondent /Appellant /Plaintiff

Prayer: Second Appeal filed under section 100 of the Code of Civil Procedure to set aside the Judgment and decree dated 18.10.2011 made in A.S.No.15 of 2009 on the file of Subordinate Judge, Harur, reversing the decree and judgment dated 05.09.2007 passed in O.S.No.392 of 2000 on the file of the District Munsif Court, Harur and allow the second appeal.

For Appellant : Mr.C.Prabakaran

For Respondent : Mr.K.Nagarajan

JUDGMENT

The 1st and 2nd defendants are the appellants in this second appeal.

2. The respondent plaintiff filed a suit seeking for the relief of permanent injunction restraining the defendants from in any way interfering with the possession and enjoyment of the suit properties.

3. The case of the plaintiff is that the suit property originally belonged to her husband by virtue of a registered partition deed dated 07.10.1985 and as per the family arrangement. It is stated that the 1st defendant is the brother in-law of the plaintiff and the 2nd defendant is the son of the 1st defendant. The 3rd defendant is the mother in law of the plaintiff.

4. The further case of the plaintiff is that by virtue of the partition deed, valuable properties were allotted to the

share of the 1st defendant. Hence, apart from what was allotted under the partition deed, some more properties was also given in favour of the husband of the plaintiff as per the family arrangement. Thereafter, the patta was also given in the name of the husband of the plaintiff with respect to the suit property and the other revenue records also stands in his name. The plaintiff lost her husband in the year 2000 and he died leaving behind the plaintiff and her minor children

5. The grievance of the plaintiff is that the defendants were attempting to trespass into the suit property and were trying to take forcible possession of the property. Left with no other option, the suit was filed seeking for the relief of permanent injunction.

6. The 1st defendant filed a written statement. The case of the 1st defendant is that his brother Manokaran and his parents had jointly entered into a partition on 07.10.1985 and the same was reduced to writing and a registered partition deed was executed. As per the partition deed, the 1st defendant was allotted an extent of 2.64 acres and the deceased Manokaran was allotted an extent of 2.45 acres in various survey numbers. The further case of the 1st defendant is that each of the sharer started enjoying the properties that were allotted to them under the partition deed. It is stated that the plaintiff is claiming for a right over a property which was not even a subject matter of the partition deed and based on a patta that was granted in the name of her husband. The 1st defendant has taken a very specific stand that the plaintiff has not even explained as to how she is entitled for the suit property and hence, the 1st defendant has questioned the title of the plaintiff and has sought for the dismissal of the suit.

7. The Trial Court after appreciating the oral and documentary evidence and after taking into consideration the facts and circumstances of the case, categorically came to a conclusion that the plaintiff has not made out a case and dismissed the suit by judgment and decree dated 05.09.2007. Aggrieved by the same, the plaintiff filed an appeal before the Sub-Court, Harur in A.S.No.15 of 2009. At the time of final hearing, the Appellate Court also took into consideration the petition filed under Order 41 Rule 27 for Additional evidence and it was allowed and the Trial Court marked Ex.A4 to A8 and those documents were also taken into consideration at the time of deciding the appeal. Ultimately, the Appellate Court by judgment and decree dated 18.10.2011 allowed the appeal and set aside the judgment and decree of the Trial Court. Thereby, the suit filed by the plaintiff was decreed as prayed for. Aggrieved by the same, the defendants have filed the present second appeal before this Court.

8. The Second appeal was admitted and the following substantial questions of law were framed :-

1. Whether the Lower Appellate Court had failed to adopt the procedure contemplated under Order 41 Rule 28 of Civil Procedure Code for recording additional evidences in the appellate Stage?
2. Whether the non-adherence to the procedure contemplated under Order 41 Rule 28 of Civil Procedure Code shall make the finding of the lower appellate court regarding the title of the plaintiff, a perverse one?

9. Heard the learned counsel for the Appellant and the learned counsel for respondents. This Court has also carefully perused the materials available on record and the findings of both the Courts below.

10. In the present case, the defendants had directly questioned the title over the suit property on the ground that the suit property does not form part of the partition deed and the plaintiff has not even explained as to how her husband became entitled to the said property. The Trial Court on considering this issue, came to a very categorical conclusion that the defendants had created a cloud over the title of the plaintiff and hence, the plaintiff ought to have sought for the relief of declaration of title and the suit filed for bare injunction is not maintainable.

11. The Lower Appellate Court while considering this issue, had reversed the finding of the Trial Court on the ground that in a suit for bare injunction, the Court has to only look into the fact as to who is in possession of the property. Therefore, the Appellate Court proceeded to rely upon Ex.A3 and the additional documents marked as Ex.A4 to A8. By relying upon these documents, the Lower Appellate Court found that the plaintiff is in possession of the suit property and therefore held that she is entitled for the relief of permanent injunction.

12. It is an admitted case that the suit property does not form part of the partition deed that was marked as Ex.A1. Even the Appellate Court has given a finding to that effect. The case of the plaintiff is that there was some family arrangement through which the suit property was allotted to the husband of the plaintiff. The reason given by the plaintiff is that her husband was given a lesser extent of property and the 1st defendant was given a larger extent of a valuable property and in order to compensate the same, the suit property was given to the husband of the plaintiff through the family arrangement.

13. The Lower Appellate Court failed to appreciate the fact that the suit property was an agricultural land totally measuring an extent of 6.52 acres. If really the husband of the plaintiff was compensated for having been given a lesser extent, while executing the partition deed, there was absolutely no reason to allot such a large extent of property in his favour. It must be borne in mind that the husband of the plaintiff was allotted 2.45 acres and the 1st defendant was allotted 2.64 acres. For the short fall of 19 cents, it is quite unbelievable that an extent of 6.52 acres was given by way of a family arrangement. This fact has not been properly pleaded or proved by the plaintiff and the plaintiff has not explained as to how the title is derived. This becomes crucial since the defendants are questioning the title over the property which are agricultural lands. Hence, where the defendants are creating a cloud over the title, as rightly held by the Trial Court, the plaintiff ought to have sought for the relief of declaration of title and the suit for bare injunction is not maintainable. To that extent, the Appellate Court was not right in reversing the findings of the trial Court.

14. The appellate Court also failed to take note of Ex.B3, which is the proceedings of the Revenue Divisional Officer. The plaintiff was claiming a right over the suit property by relying upon the patta issued under Ex.A3. This patta was challenged by the defendants before the concerned authority. An enquiry was conducted and ultimately, an order was passed under Ex.B3. By virtue of the same, a recommendation was made for the cancellation of the patta granted in favour of the husband of the plaintiff with respect to the suit property and it was kept pending subject to the result of the suit. It must be borne in mind that Ex.A3 itself came into existence after the filing of the suit in the year 2000. Therefore, not much reliance can be placed on Ex.A3. This fact was considered by the Trial Court and the Appellate Court lost sight of the proceedings of the RDO and the fact that Ex.A3 was obtained after the filing of the suit.

15. The Lower Appellate Court while reversing the findings of the Trial Court with respect to the possession over the suit property, did not properly consider the findings of the Trial Court and state as to why it is differing from the findings of the Trial Court. This is a mandate that is expected to be fulfilled under Order 41 Rule 31 of CPC and the Appellate Court did not fulfill this mandate and the findings of the Appellate Court is liable to be interfered on this ground also.

16. The last issue is with regard to the substantial questions of law that have been framed at the time of admission. It is seen that the plaintiffs had filed a petition under Order 41 Rule 27 of CPC for additional evidence during the pendency of

the appeal and Ex.A4 to A8 have been marked. These documents have also been relied upon by the Lower Appellate Court. While taking these documents on file, the Lower Appellate Court failed to follow the procedure under Order 41 Rule 28 of CPC, wherein the Appellate Court was expected to record additional evidence. This is more so since the defendants are questioning the very possession of the plaintiff in the suit property.

17. The law on this issue is now well settled and this Court in [K.M.Thangavel and others Vs. K.T.Udaya Kumar and another] reported in 2014 2 CTC 113 has explained about the procedure while dealing with the application for additional evidence. This mandatory procedure has not been followed by the Appellate Court and the findings of the Appellate Court are liable to be interfered on this ground also. The substantial questions of law are answered accordingly.

18. In view of the above discussion, this Court has absolutely no hesitation to interfere with the findings of the Lower Appellate Court and the Substantial questions of law are also answered in favour of the appellants. Accordingly, the judgment and decree of the Trial Court in O.S.No.392 of 2000 is hereby restored and as a result, the suit filed by the plaintiff stands dismissed. The second appeal is allowed. Considering the facts and circumstances of the case, there shall be no order as to costs. Consequently, the connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS-IX)

//True copy//

Sub Assistant Registrar

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To

1. The Subordinate Judge, Harur.

2. The District Munsif, Harur

Copy To:-

The Section Officer

VR Section, High Court, Madras.

+1cc to Mr.C.Prabakaran, Advocate SR.No.13151

SA.No.174 of 2012

PM(CO)

GMV(28/03/2022)