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IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 07.02.2022
PRONOUNCING ORDERS ON : 09.02.2022

Coram:

THE HONOURABLE JUSTICE MR.N.ANAND VENKATESH

S.A.No.514 of 2012

T.K.Balasubramanian
S/o.Kulunthan

..Appellant/Appellant/Plaintiff

..Vs..

Rajeswari
D/o.Samikannu

..Respondent/Respondent/Defendant

Prayer: Second Appeal filed Under Section 100 of the Code of Civil Procedure against the Judgment and Decree passed in A.S.No.132 of 2010 dated 31.01.2012 on the file of the Court of Additional Subordinate Judge, Mayiladuthurai in confirming the Judgment and Decree passed in O.S.No.223 of 2009 dated 13.07.2010 on the file of the Court of Principal District Munsif, Mayiladuthurai.

For Appellant : Mr.A.Muthukumar

For Respondent : Mr.S.Sounthar

JUDGMENT

The plaintiff is the appellant in this Second Appeal. The case of the plaintiff is that he is the owner of the suit property and he purchased the same by virtue of a sale deed dated 13.8.1989. Thereafter the plaintiff had constructed a two-storeyed building and the house tax was also assessed in his name.

2.The further case of the plaintiff is that he married the defendant in the year 1996 and there were two children out of the said wedlock. At the time of filing this suit, the daughter was aged about 12 years and the son was aged about 10 years. Unfortunately the marriage was dissolved by a decree of divorce dated 8.8.2007 in H.M.O.P.No. 43 of 2007.



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3. It is stated that there are three portions in the suit property. Two portions are in the ground floor and one portion is in the first floor. Even after the marriage was dissolved, the defendant continued to occupy the first floor of the suit property. It seems that the presence of the defendant was giving rise to certain untoward incidents. A legal notice was issued to the defendant to vacate and handover possession of the first floor that was occupied by her. Since the defendant did not act upon this notice, the suit came to be filed for the relief of mandatory injunction directing the defendant to vacate the first floor of the suit property and to handover possession to the plaintiff.

4. The defendant filed the written statement and took a defence that she was residing in the property along with her children and she is taking care of them. The defendant has claimed right of residence in the suit property and has also questioned the maintainability of the suit for non-joinder of necessary and proper parties since the children were not added as parties in the suit.

5. Both the courts below on considering the facts and circumstances of the case and also the oral and documentary evidence, concurrently held in favour of the defendant and dismissed the suit. Aggrieved by the same, the present Second Appeal has been filed before this Court.

6. The following substantial questions of law were formulated by this Court:

a) Whether the defendant who was the erstwhile wife of the plaintiff and whose marriage was annulled by a judgment passed by a competent Court, has a right to hold on to a property which belongs to the plaintiff husband in her capacity as the divorced wife ?

b) Whether the suit is bad for non-joinder of the children of the appellant who were also in occupation of the suit property along with the divorced wife?

7. The learned counsel for the appellant submitted that the defendant lost her status as the wife of the appellant immediately after the decree for divorce was passed by a competent court and the marriage stood dissolved. The learned counsel further submitted that the defendant does not have any legal right to continue to occupy the property since the decree of divorce did not grant her any right of residence nor any maintenance was ordered in her favour. The learned counsel further submitted that the defendant filed a petition to condone



the delay in setting aside the ex-parte decree of divorce and the same was dismissed and it was subsequently confirmed by this Court in C.R.P. No. 2821 of 2012 , by order dated 16.8.2017.

8. It was further submitted that the plaintiff is the natural guardian for the children and the plaintiff wanted to maintain the children in the same property. Therefore, they have nothing to do with the present dispute and the children are neither necessary nor a proper party in the present proceedings. The learned counsel in order to substantiate his submissions, relied on the judgment of the Hon'ble Supreme Court in Ranjit Kaur Vs. Major Harmohinder Singh and Others reported in (2012) 3 MLJ 831 (SC).

9. Per contra, the learned counsel for the respondent submitted that the present suit was filed seeking for the relief of mandatory injunction simpliciter. Therefore equity plays a vital role in the present case and both the courts below rightly applied this principle and dismissed the suit filed by the plaintiff. The learned counsel submitted that there is no corresponding legal duty on the part of the respondent to surrender possession to the appellant since she has entered the property as a legally wedded wife and her possession cannot be construed to be that of a licensee or a person in permissive occupation. The learned counsel submitted that no substantial question of law is involved in the present case and both the courts below have properly appreciated the oral and documentary evidence and dismissed the suit and there is absolutely no ground to interfere with the same in the Second Appeal.

10. This Court has carefully considered the submissions made on either side and the materials available on record.

11. This Court will take up the second substantial question of law for consideration. This pertains to the non-joinder of the children as party to the proceedings. A party can be impleaded in a suit only if his or her presence is required for complete and effectual adjudication of the dispute involved in the suit. A necessary party is one whose presence is absolutely necessary and without whose presence the issue cannot be effectively and completely adjudicated upon. A proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceedings.

12. In the present case, the children are neither necessary nor proper parties to the proceedings. The plaintiff is not seeking for the eviction of the children and in fact, the plaintiff is the natural guardian of the children whom he wants to maintain in the same property. The plaintiff is only seeking



for the eviction of the divorced wife from the suit property. Therefore, the non-impleading of the children cannot have the effect of non-joinder of parties and the suit is not affected on this ground.

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13. The most crucial issue involved is the first substantial question of law that requires to be answered by this Court. The learned counsel for the appellant has relied upon Ranjit Kaur case referred supra. The relevant portions relied upon by the learned counsel for the appellant are extracted hereunder:

"9. It is not in dispute that the decree of divorce passed by the Additional District Judge, Ropar has become final. It is also not in dispute that the petition filed by the appellant under Section 125 of the Code of Criminal Procedure for grant of maintenance was dismissed by the court concerned and in the decree of divorce, no provision was made for maintenance of the appellant including the right of residence in the suit property. Therefore, it is not possible to find any fault with the order passed by the lower appellate court, whereby injunction granted by the trial court against alienation of the suit property was vacated and there is no warrant for this Court's interference with the impugned order insofar as it confirms this part of the order passed by the lower appellate court.

10. However, we find merit in the arguments of the learned Senior Counsel for the appellant that the High Court was not justified in vacating the restraint order passed by the trial court against the dispossession of his client. The learned counsel is right in his submission that even though in the decree of divorce, the appellant has not been given a right of residence and her occupation of the suit property can be treated as unauthorised, Respondent 1 cannot evict her except after following the procedure established by law. The material placed on record shows that the appellant had entered into the property as the wife of Respondent 1. Therefore, even though, after passing of the decree of the divorce she may not have a legal right to continue to remain



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wife would not be on a footing higher or larger than that of the tenant himself. In other words, such a wife would be entitled to raise all such pleas and claim trial thereon, as would have been available to the tenant himself and no more. So long as by availing the benefit of the provisions of the Transfer of Property Act and rent control legislation, the tenant would have been entitled to stay in the tenancy premises, the wife too can continue to stay exercising her right to residence as a part of right to maintenance subject to compliance with all such obligations including the payment of rent to which the tenant is subject. This right comes to an end with the wife losing her status as wife consequent upon decree of divorce and the right to occupy the house as part of right to maintenance coming to an end.

33. We are also of the opinion that a deserted wife in occupation of the tenanted premises cannot be placed in a position worse than that of a sub-tenant contesting a claim for eviction on the ground of sub-letting. Having been deserted by the tenant-husband, she cannot be deprived of the roof over her head where the tenant has conveniently left her to face the peril of eviction attributable to default or neglect of himself. We are inclined to hold – and we do so – that a deserted wife continuing in occupation of the premises obtained on lease by her husband, and which was their matrimonial home, occupies a position akin to that of an heir of the tenant-husband if the right to residence of such wife has not come to an end. The tenant having lost interest in protecting his tenancy rights as available to him under the law, the same right would devolve upon and inhere in the wife so long as she continues in occupation of the premises. Her rights and obligations shall not be higher or larger than those of the tenant himself. A suitable amendment in the legislation is called for to that effect. And, so long as that is not done, we, responding to the demands of social and gender justice, need to mould the relief and do complete justice by exercising our jurisdiction under Article 142 of the Constitution. We hasten



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to add that the purpose of our holding as above is to give the wife's right to residence a meaningful efficacy as dictated by the needs of the times; we do not intend nor do we propose the landlord's right to eviction against his tenant be subordinated to the wife's right to residence enforceable against her husband. Let both the rights coexist so long as they can.

34. We have dealt with all the abovesaid aspects of the law as it was urged on behalf of the landlord, Respondent 1 that SmtAchala, the appellant has no right to contest or defend herself in these proceedings nor a right to file and prosecute this appeal as there is no privity of contract between the appellant and landlord and the appellant is neither a tenant nor so recognised ever by Respondent 1 landlord. We cannot agree. We feel that the appellant was rightly – in the facts and circumstances of the case – permitted by the High Court to be joined as a party to the proceedings. She was also rightly allowed to contest the suit and deposit the rent in the court for payment to the landlord for and on behalf of the tenant-husband.

35. So far as a deserted wife, whose status as wife has not come to an end by a decree of divorce or by decree for annulment of marriage, is concerned, we have made the position of law clear as above. However, the case of a divorced wife stands on a little different footing. Divorce is termination of matrimonial relationship and brings to an end the status of wife as such. Whether or not she has the right of residence in the matrimonial home, would depend on the terms and conditions in which the decree of divorce has been granted and provision for maintenance (including residence) has been made. In the event of the provision for residence of a divorced wife having been made by the husband in the matrimonial home situated in the tenanted premises, such divorced wife too would be entitled to defend, in the eviction proceedings, the tenancy rights and rights of occupation thereunder in the same manner in which the tenant-husband could have done and certainly not



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higher or larger than that. She would be liable to be evicted in the same manner in which her husband as tenant would have been liable to be evicted."

16. A careful reading of the above judgments explicitly makes it clear that a wife will have the right to continue her right of residence as a part of right to maintenance. However, this right comes to an end with the wife losing her status as wife consequent upon the decree of divorce. Unless, the terms and conditions of the decree of divorce provides for maintenance and/or right of residence, the wife loses the right to occupy the house. It must be borne in mind that the Hon'ble Supreme Court consciously deals with the status of a divorced wife and holds that divorce is termination of matrimonial relationship and it brings to an end the status of wife as such.

17. In the present case, the decree of divorce has become final. The decree does not provide for payment of any maintenance and/or right of residence. Hence on the dissolution of marriage, the respondent loses her status as a wife and consequently she also loses her right to occupy the property.

18. This Court will next deal with the issue of mandatory injunction which according to the learned counsel for respondents cannot be granted on the ground of equity. In India, as in England, the grant of injunction is always a matter for the discretion of the Court in every case. The grant of mandatory injunction stands in a slightly different footing from those governing grant of permanent injunction which are prohibitory in nature. The right to obtain a mandatory injunction may be lost on the ground of acquiescence or where the relief, if granted, would be nugatory or the person seeks for such a relief with a substantial delay without showing due diligence in applying to the court for the relief or in other words lack of promptness on the part of the plaintiff. A Court can also deny the relief of mandatory injunction if it will result in perpetuating a wrong. Even triviality of damage to the plaintiff can be a ground to reject the relief of mandatory injunction.

19. The learned counsel for the respondent was harping upon the point that there is no corresponding obligation for the respondent to surrender possession. Section 2(a) of the Specific Relief Act defines the term obligation as follows: "Obligation



includes every duty enforceable by law."Obligation is a tie or bond which obliges one to do or suffer something. The definition under the Act clearly excludes all imperfect obligations such as moral, social and religious obligations as the performance of these obligations cannot be enforced by law. On a careful reading of the definition, the obligation enforceable by law will arise out of:

a) Obligations arising out of the Law of Contract or the Law of Torts.

b) Obligations arising out of Trust or Obligations arising under a statute.

20. In the present case, the appellant is the owner of the property and there is no dispute with regard to this fact. Hypothetically, let us take the case of a husband who tries to bring a suit for eviction of his wife from a property. If such a suit is filed, he may not be able to sustain such a relief since there is an obligation cast upon him to provide a household for his wife. This right of residence is enforceable by law and therefore, the husband has to comply with this statutory requirement. Hence, he will not be able to seek for such a relief and the wife will not be under the obligation to handover possession of the property.

21. This scenario completely changes once the woman loses her status as a wife by virtue of a decree of divorce granted by a Competent Court. That is the reason why at the time of granting divorce, necessary protection is given to the woman in terms of maintenance, residence etc., to ensure that she is not thrown to the streets. The dissolution of marriage brings an end to the relationship and the umbilical cord from the marital relationship gets completely cut-off.

22. In the present case, the obligation on the part of the respondent to vacate and handover the property arises due to the simple fact that she is no more the wife of the appellant and she has not been given the right of maintenance or residence at the time of passing the decree of divorce. Since the respondent is not protected by any contract or order or any statute, the appellant gets the right to seek for possession of the property in his capacity as the owner of the property. The continuation of possession by the respondent at the best can only be termed as a permissive possession.



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23. The learned counsel for the respondent submitted that both the Courts below have exercised their discretionary power on the ground of equity. Equitable rights are not referable to the free favour and free will of the Court and it is based upon established principles. The exercise of a discretionary power cannot be an unruly horse that should be left to the whims and fancies of the Court. The Court has to apply the principles of equity to the facts of a given case and it cannot be operated as a one size fits all doctrine.

24. In the present case, the equity claimed by the respondent is her status as the erstwhile wife of the appellant. Yet another ground of equity that is claimed by the respondent is that she is taking care of the children in the portion of the property under her occupation. Insofar as the first ground on which the respondent is seeking equity, she has already lost her status as a wife and at the best, she can only call herself as the erstwhile wife of the appellant. Therefore this cannot be an equitable ground to deny the relief sought for by the appellant.

25. Insofar as the second ground of equity namely the respondent taking care of the children is concerned, at the relevant point of time, the appellant was the natural guardian of the children. There was absolutely no material before the Court as to who was taking care of the children and who was providing for the maintenance of the children. The specific stand taken by the appellant is that he is only seeking for the eviction of the respondent and not the children. Unfortunately, both the Courts below did not focus much on this ground of equity raised on the side of the respondent. Both the Courts below were merely looking at this issue from the point of view of nonjoinder of necessary/proper parties. It is too difficult for this Court at this stage to apply the principles of equity on the ground of taking care of the children since the children today have already attained majority and the daughter must be aged about 25 years and the son must be around the age of 23 years. Therefore the equity on this ground pales into insignificance at the time of deciding the present Second Appeal in the year 2022. This subsequent development with regard to the children attaining majority has a significant impact while considering this ground of equity at this point of time. As on today, the necessity of the mother taking care of two grown up children may not fit in as an equitable ground as was available at the time of institution of the proceedings.

26. An attempt was made by this Court to refer the parties for mediation and it seems that an offer was made by the appellant to sell the property and to give a share to the



children born out of the first marriage, children born out of the second marriage, to the respondent as well as to the appellant. In the given circumstances, this is the best that could have been done with the available property. However the respondent seems to have rejected this offer and the respondent is sticking to her original stand namely that she will continue to hold on to the property. This Court feels that respondent lost a good opportunity to settle the dispute amicably.

27. In view of the above discussion, this Court holds that the respondent does not have the right to continue with her possession in the suit property and the appellant is entitled for the relief sought for in the suit. The first substantial question of law is answered accordingly.

28. The upshot of the above reasoning leads to the conclusion that the appellant is entitled for the relief sought for in the suit. Both the substantial questions of law are answered in favour of the appellant.

29. In the result, the judgments and decrees passed by the Courts below are hereby set aside and this Second Appeal is allowed. Considering the fact that the respondent has been in possession of the property for considerably a long time, 9 months time is granted to the respondent to vacate and handover the property to the appellant. Considering the facts and circumstances of the case, the parties shall bear their own costs. Consequently, connected miscellaneous petition is closed.

s/d-
Assistant Registrar

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Sub-Assistant Registrar

KP

To

1.The Additional Subordinate Court,
Mayiladuthurai.



2.The Principal District Munsif Court
Mayiladuthurai.

+1 CC to Mr.S.Sounthar, advocate sr 8521

+1 CC to Mr.A.Muthukumar, Advocate sr 8159.

S.A.No.514 of 2012

SJ(CO)
SP(19/04/2022)