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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.08.2021
PRONOUNCED ON : 21.01.2022

CORAM:

THE HONOURABLE MR.JUSTICE A.A.NAKKIRAN

SA.No.64 of 2017
CMP.Nos.992 & 7902 of 2017

(Through Video Conferencing)

Mohideen Abdul Salam @ M.Abdul Salam

...Appellant/Plaintiff

Vs

Mohamed Hassan

...Respondent/Defendant

Prayer:- This Second Appeal has been filed, under Section 100 of CPC, to set aside the judgement and decree, dated 16.08.2016, passed in AS.No.41 of 2014, by the Principal District Court, Cuddalore, confirming the judgement and decree, dated 27.08.2014, passed in OS.No.20 of 2011 by the Principal Sub Court, Cuddalore.

For Appellant :Mr.T.S.Baskaran
For Respondent :Mr.V.Jayaprakash Narayanan

JUDGEMENT

1.This Second Appeal has been filed, by the Plaintiff, against the judgement and decree, dated 16.08.2016, passed in AS.No.41 of 2014, by the Principal District Court, Cuddalore, confirming the judgement and decree, dated 27.08.2014, passed in OS.No.20 of 2011 by the Principal Sub Court, Cuddalore.

2.The case of the Plaintiff, in a nutshell, as set out, in the plaint is as follows:-

- a) One Sheik Hussain Sahib and Mohideen Sahib are the sons of one Basha Sahib, who died in 1963 and Ayisha Bi @ Ashabi, who died in 1982 and they inherited some properties at Natham Village. Sheik Hussain Sahib settled at Bombay. In 1976, Sheik Hussain Sahib came to Panruti and got his share of nanja and punja lands at Natham village by a



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registered partition deed, dated 07.02.1976 and went to Bombay and settled permanently there. Since then they have been in possession and enjoyment of their respective properties. Mohideen Sahib died on 15.08.1993, leaving behind him his two sons viz. Mohideen Abdul Salam, the Plaintiff and his younger brother Abdul Razak and his wife Maimunabi, as his legal heirs. Sheik Hussain Sahib died in 1984 intestate, leaving behind him his 4 sons, by name Mohamed Hassan, Shahul Hameed, Mohamed Yusuf and Zakir Hussain and 4 daughters, Alima Fathima, Balkis and Zubaidha. The sons and daughters of Sheik Hussain Sahib did not make any claim in the properties in TS.No.2018 or in TS.No.2017, at any point of time.

- b) During his life time, Mohideen Sahib put a house in TS.No.2017 and living with his family and also put a thatched shed in TS.No.2018. The patta stands in the name of Mohideen Sahib. Sheik Hussain Sahib and his sons and daughters, including the defendant herein, have been in possession and enjoyment of the said property for more than 27 years ever since 1976, thereby prescribed title by adverse possession. After the demise of Mohideen Sahib, his sons have been in exclusive possession and enjoyment of the property in TS.No.2018 and they divided the properties comprised in TS.No.2017 and TS.No.2018, by a registered partition deed, dated 20.02.1995, whereby the thatched shed, facing Appavu Padayatchi Street and the site facing Muthusubaidar Lane, both comprised in TS.No.2018, which is the A-Schedule property, were allotted to the share of the Plaintiff. Whereas, the thatched house facing Appau Padayatchi street, in which the family of Mohideen sahib lived together. The Abdul Salam and Abdul Razak have been in possession and enjoyment of their respective shares allotted to them.
- c) The Plaintiff had put up a shed in the suit property and rented out it for lease to one Selvaraj, on a monthly rent of Rs.25/- p.m. and the Plaintiff is paying the tax for the suit property. Thus, the Plaintiff and his predecessor-in-title have been in continuous uninterrupted peaceful possession and enjoyment of the suit property and perfected title by adverse possession. The defendant or his brothers and sisters are not entitled to make any claim over the suit property. The Plaintiff came to know that since in January 2011, the Defendant threatened to dispossess the family from the suit property, the suit had been filed, seeking for declaration of title of the Plaintiff to the suit property and for permanent injunction.



- 3.The case of the Defendant, as set out in the written statement, is that the Plaintiff and his mother Maimuna Beevi are living under one roof. The suit filed in OS.No.5 of 2001 filed by the Defendant against the mother of the Plaintiff for partition in respect of the suit property was decreed on 21.01.2001 and a final decree was also passed on 31.01.2008, allotting half share to the Defendant and the Defendant took delivery of the suit property in the said suit on 16.06.2010 through process of law. Hence, the suit is barred by the principles of res-judicata. Moreover, the alleged partition deed, dated 20.2.1995, based on which the Plaintiff claims right over the suit property, was cancelled by the cancellation deed dated, 04.01.2007. The payment of tax and electricity charges will not create any right in the suit property, as those are paid for some other property. The Defendant is in possession and enjoyment of the suit property from 16.06.2010. In such circumstances, the suit is liable to be dismissed.
- 4.Necessary issues were framed by the Trial Court. Before the Trial Court, on the side of the Plaintiff, Ex.A1 to Ex.A24 were marked and PW.1 and PW.2 were examined. On the side of the Defendant, Ex.B1 to Ex.B13 were marked and DW.1 and DW.2 were examined. The Trial Court had dismissed the suit, by the impugned judgement and decree. On the appeal, the lower appellate court had confirmed the judgement and decree of the Trial Court. Aggrieved against the same, this Second Appeal has been filed.
- 5.This Second Appeal was admitted, on the following substantial questions of law:-
- (a)Whether the Courts below were right in deleting Issue No.2 at the time of delivery of judgement without notice to the parties?
 - (b)Whether the judgement and decree of the Court below are vitiated for non-consideration of the written statement, oral evidence of DW.1 and the documents filed on behalf of the defendant being final court of facts?
- 6.This Court heard the submissions of the learned counsel on either side.
- 7.The learned counsel for the Appellant has submitted that the Defendant had merely claimed to have taken possession of his share through a court decree and that the Plaintiff is entitled to a decree as prayed for and that the court below failed to consider the documents of the defendant and his oral



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evidence and that when admittedly the defendant had not made any claim over the suit property, the courts below ought to have decreed the suit. The learned counsel would further submit that deletion of Issue No.2, pertaining to the defence of the defendant, by the Trial Court, at the time of delivering the judgement and decree, is against the principles of natural justice and the lower appellate court also did not consider it and that Ex.A2 to Ex.A4 patta copies and Ex.A7 to Ex.A14 Electricity bills, the Town Survey records, Ex.A15 and the copy of the ration card, Ex.A16 and Ex.A19 to Ex.A24 would prove the possession of the Plaintiff and in such circumstances, the impugned judgements of the courts below are vitiated.

8.The learned counsel for the Respondent would submit that since Ex.A6 partition deed, based on which, the Plaintiff claims title over the suit property, was cancelled under Ex.B4, which is also not disputed by the Plaintiff, the Plaintiff cannot claim any right over the suit property and that with regard to possession, Ex.A2 to Ex.A4 patta do not contain the name of the Plaintiff and that the payment of tax and electricity bills, Ex.A7 to Ex.A14 will not confer any right and that as the suit property had already been given possession to the Defendant in the earlier proceedings in OS.No.5/2001, the present suit is hit by the principles of res-judicata and in such circumstances, he would pray for dismissal of this Second Appeal.

9.This Court considered the rival submissions of the learned counsel on either side and also perused the materials available on record

10.The Trial Court had framed the following issues for trial:-

(1)Whether the suit property belongs to the Plaintiff?

(2)Is it true that the Defendant took possession of the property through process of law and is in possession as alleged?

(3)Whether the Plaintiff is entitled to the relief of declaration and injunction as prayed?

11.The Trial Court, while answering the Issue Nos.(1) and (3) against the Plaintiff, had struck off the Issue No.(2), invoking the power conferred under Order 14 Rule 5 of CPC, as it was of the view that the said issue was not necessary for determining the matters in controversy between the parties.



12. The Plaintiff claims title over the suit property based on Ex.A6, partition deed, as per which, the suit property was allotted to him. However, it is seen that the Ex.A6 was cancelled by Ex.B4, cancellation deed dated, 04.01.2007. Ex.B4 was not disputed in any manner. Except Ex.A6, there is no other document produced by the Plaintiff to prove his title to the suit property.

13. The suit was filed for declaration and injunction. A person, who seeks equitable relief, should come to the Court with clean hands. In this case, the Plaintiff had suppressed the cancellation of Ex.A6 partition deed. By virtue of Ex.B4, the Plaintiff cannot claim any right over the suit property. Further, the Plaintiff did not file any other document to show his title or possession over the suit property.

14. Further, the Plaintiff also claims title over the suit property by adverse possession. Admittedly, the suit property is a vacant land. The Plaintiff relied on Ex.A2 to Ex.A4 patta copies, Ex.A7 to Ex.A14 Electricity bills, the Town Survey records, Ex.A15 and the copy of the ration card, Ex.A16 and Ex.A19 to Ex.A24 to prove his possession. In Ex.A2 to Ex.A4, the name of the Plaintiff does not find a place. When admittedly the suit property is a vacant land and when it is not stated as if the suit property is provided with electricity connection, Ex.A7 to Ex.A14 electricity bills cannot be stated that they are relating to the suit property. The Ex.A15, Town Survey Register, stands in the name of Mohideen, S/o.Basha Sahib and Ex.A16 is the copy of the Family Ration Card of the plaintiff and there is no proof to show that Ex.A16 is relating to the suit property. Therefore, it is seen from Ex.A2 to Ex.A4, Ex.A7 to Ex.A16 filed by the Plaintiff that the possession of the Plaintiff is not established. The evidence of PW.1 and PW.2 also did not prove the possession of the Plaintiff. Considering the above aspects, it was concurrently held by the courts below that the Plaintiff has miserably failed to prove his title or possession by letting in valid evidence, both oral and documentary and accordingly, dismissed the suit.

15. In a suit for declaration of title, the Plaintiff has to positively prove his case regarding title and cannot rely upon any weakness of the Defendant or absence of any defence evidence of the Defendant to discharge the onus. Misplacing the burden of proof on a particular party and recording findings on that basis by courts vitiates its judgement. The Plaintiff has,



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first of all, to discharge the burden of proof so as to succeed in his case and then only, the burden could be shifted from the Plaintiff to disprove the case of the Plaintiff, as has been held in 2006 (4) CTC 524 (Anil Rishi v. Gurbaksh Singh) and 2011 (12) SCC 220 (Rangammal v. Kuppuswamy and another). It is settled principle of law that in respect of relief claimed by a Plaintiff, he has to stand on his own legs by proving his case. The onus is on the Plaintiff to positively establish his case on the best material available and he cannot rely on the weakness or absence of defence to discharge such onus. The said view is reiterated by this court in 1998-II-CTC-157 (V.Manakkan and five others Vs. Veera Perumal) and 2007-8-MLJ-620 (Govindarasami Naidu Vs. Shanmuga Nattar and another).

16. In this case, when the Plaintiff had asked for a declaratory decree, he must prove his title and possession, by his own evidence and he cannot take advantage of the weakness of the Defendant. The Plaintiff has not filed any document to prove that the suit property absolutely belonged to him and he is in possession and enjoyment of the same. Both the courts below have recorded findings on the materials placed on record, after proper appreciation of facts and the conclusions arrived at thereunder cannot be said to be erroneous in any manner. The conclusions arrived at by the courts below are reasonable and legal, besides being conclusions of fact and therefore, this court cannot interfere with the said concurrent findings, ignoring the mandatory provisions of Section 100 of CPC.

17. In this case, since it was held that the Plaintiff did not prove his case, by his own evidence, the Trial Court had thought it fit to strike off the Issue No.(2), which, in the opinion of this Court, is proper. Accordingly, the substantial question of law (a) is answered against the Appellant. Consequently and in the light of the above decisions, the substantial question of law (b) need not arise for consideration.

18. In fine, this Second Appeal is dismissed. No costs. Consequently, the connected MPs are closed.

Sd/-

Assistant Registrar

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Sub Assistant Registrar



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To

- 1.The Principal District Judge, Cuddalore
- 2.The Principal Subordinate Judge, Cuddalore
- 3.The Record Keeper, VR Section, High Court of Madras

+1 CC to Mr.V.Jayaprakash, Advocate sr 3540

+1 CC to Mr.T.S.Baskaran, Advocate sr 3512

SA.No.64 of 2017

RR(CO)
SP(04/03/2022)