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S.A.(MD)No.506 of 2010

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 29.03.2022

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A.(MD)No.506 of 2010

1.Amirtham

2.K.Meenakshi

3.G.Rajalakshmi

4.Sakunthala

5.Balashanmugam

6.Lalitha ... Appellants / Appellants 2 to 7 / Defendants 3 to 8

-Vs-

1.Balkis Beevi (died)

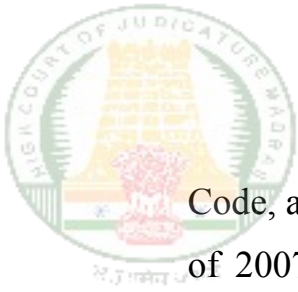
2.Fathima Beevi

3.V.S.Mani @ Subramanian ... Respondents / Respondents /
Plaintiffs 1 & 2 & 2nd Defendant

4.M.Jafira Irfana ... Respondent
(R4 was impleaded vide court order
dated 16.02.2022)

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure

<https://www.mhc.tn.gov.in/judis>



S.A.(MD)No.506 of 2016

Code, against the judgment and decree dated 21.04.2009 made in A.S.No.57 of 2007 on the file of the Principal Sub Judge, Dindigul confirming the judgment and decree dated 31.07.2007 made in O.S.No.287 of 1996 on the file of the District Munsif Court cum Judicial Magistrate Court, Vedasandur.

For Appellants : Mr.A.Arumugam
for M/s.Ajmal Associates

For R2 & R4 : Mr.M.P.Senthil

JUDGMENT

The defendants in O.S.No.287 of 1996 on the file of the District Munsif Court, Vedasandur are the appellants in this second appeal.

2.The suit was filed for the relief of declaration and permanent injunction. The defendants filed written statement controverting the plaintiff's averments. Based on the divergent pleadings, the trial court framed the necessary issues. On the side of the plaintiffs, four witnesses were examined. Ex.A1 to Ex.A6 were marked. On the side of the defendants, three witnesses were examined. Ex.B1 to Ex.B8 were marked. After consideration of the evidence on record, the trial court by judgment and



decree dated 31.01.2007 decreed the suit as prayed for. Aggrieved by the same, the defendants filed A.S.No.57 of 2007 before the Principal Sub Court, Dindigul. By the impugned judgment and decree dated 21.04.2009, the first appellate court confirmed the decision of the trial court and dismissed the appeal. Challenging the same, the second appeal came to be filed. The second appeal was admitted on 05.09.2012 on the following substantial questions of law:-

“1. Whether the courts below are legally wrong in relying on the deposition of the power agent of the plaintiffs, especially with respect to matters that took place before power deed was executed and whether such legally inadmissible evidence has rendered the judgment perverse under Section 100 of C.P.C and Order 3 Rule 1 CPC read with 2008 (1) MLJ Page 354?

2. Whether the patta granted during the pendency of the Rent Control Proceedings without notice to the person in possession is a document of title?”

After hearing the learned counsel on either side, the following additional substantial questions of law were also formulated on the last occasion:-

“3. Whether the plaintiffs could have maintained the suit for declaration and mandatory injunction without seeking any relief of recovery of possession?

4. Whether the plaintiffs had established their case over that portion of the suit property bearing door No.7A?”

3. The learned counsel appearing for the appellants reiterated all the contentions set out in the memorandum of grounds and called upon this Court to answer the substantial questions of law in favour of the appellants



and set aside the impugned judgment and decree and dismiss the suit in *toto*.

4.Per contra, the learned counsel appearing for the respondents submitted that the impugned judgment and decree do not call for any interference.

5.I carefully considered the rival contentions and went through the evidence on record.

6.The plaintiffs originally filed R.C.O.P.No.3 of 1992 before the Rent Controller, Dindigul. Mookan @ Subbaian / original defendant was the respondent therein. The plaintiffs put forth a case that Mookan @ Subbaian was a tenant in respect of the shops bearing Door Nos.7 and 7A, Aravakurichi Road. The defendant denied the title of the plaintiffs. Finding the denial to be bonafide, the Rent Controller dismissed R.C.O.P.No.3 of 1992 on 16.03.2014 and directed the petitioners therein / plaintiffs herein to move the jurisdictional civil Court. The pointed contention urged by the learned counsel appearing for the appellants is that the plaintiffs ought to have sought the relief of recovery of possession along with the prayer for declaration of title. Seeking only the consequential relief of mandatory injunction was not in order.



7.This contention urged by the learned counsel appearing for the appellants is sought to be rebutted by the learned counsel appearing for the respondents by placing reliance on the decision reported in **2017 2 LW 501 (Chandrasekaran Vs. Thagattur Anna Chatram Vinayagar Mutt, Thannerpandal)**. Following an earlier decision of the Hon'ble Supreme Court, the learned Judge had held that even though the suit prayer is couched in the form of mandatory injunction, in effect, the suit is one for possession. But then, in the said case, the defendants were clearly and unambiguously described as trespassers. In the case on hand, such a stand was never taken by the plaintiffs. As already pointed out, they had originally filed R.C.O.P by labelling Mookan @ Subbaian as their tenant. Following the stand taken by Mookan @ Subbaian, R.C.O.P came to be dismissed and the respondents herein were directed to move the jurisdictional civil court. Thereafter, the present civil suit was laid.

8. I went through the plaint averments. Mookan @ Subbaian had nowhere been described as trespasser. Therefore, on the own showing of the plaintiffs, the suit without including the relief of recovery of possession was not proper.



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9.The learned counsel appearing for the appellants drew my attention to Ex.A15. It can be seen therefrom that the row of shops bearing Door Nos.1 to 7 stand in the name of Fathima Beevi & Balkis Beevi, whereas Door No.7A stands in the name of Subbaiah / original defendant. The courts below have concurrently rendered a finding that the plaintiffs have title over the suit property. This concurrent finding is definitely correct as regards Door No.7. But even according to the plaintiffs, the defendant had encroached the road portion and annexed it to Door No.7 and made it as Door No.7A. Thus, on the own showing of the plaintiffs, they have no title over the portion described as Door No.7A. The courts below have omitted to note this aspect of the matter. Overlooking or omission to consider material evidence qualifies as a substantial question of law. The concurrent findings rendered by the court below are confirmed only as regards Door No.7. The finding of declaration in favour of the plaintiffs as regards Door No.7A is set aside. The third substantial question of law is answered in favour of the appellants. Since the prayer for mandatory injunction without seeking the prayer for recovery of possession is also not maintainable, the said decree is also set aside. The fourth substantial question of law is also answered in favour of the appellants.



10.The learned counsel appearing for the appellants placed reliance on the decision reported in (2008) 1 MLJ 354 (Sakunthala vs. Anandarajan) in support of his contention that the courts below could not have acted on the testimony of the power agent. The said decision in turn relies on the earlier decision of the Hon'ble Apex Court **(2005) 2 SCC 217 (Janki Vashdeo Bhojwani v. Indusland Bank Ltd)**. Since it was felt that there were conflict of opinion, the matter was referred for consideration of the larger bench. A three judges bench of the Hon'ble Apex Court answered the reference in **(2014) 11 SCC 790 (A.C.Narayanan vs. State of Maharashtra)**. It is well settled that a power agent can also be a witness. The only restraint is that he can depose only about those aspects about which he has personal knowledge. The case on hand has been disposed of on the strength of documents. No reliance has been placed on the testimony of the power of attorney at all. I therefore answer the first substantial question of law against the appellants.

11.Even though the learned counsel appearing for the appellants would strongly contend that the authorities erred in granting patta in favour of the plaintiffs in respect of Door No.7, they failed to challenge the same. In the present suit also, they have also not made any counter claim. I therefore answer the second substantial question of law against the appellants.



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12. In this view of the matter, the impugned judgment and decree is modified as follows:-

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(I) It is declared that the plaintiffs have title over that portion of the suit property bearing Door No.7.

(II) The declaration granted in favour of the plaintiffs in respect of Door No.7A is set aside.

(III) The decree for mandatory injunction granted in favour of the plaintiffs is also set aside. Whatever right which the plaintiffs have as per law, it is open to them to work it out.

13.The second appeal is partly allowed. No cost.

29.03.2022

Internet : Yes/No
Index : Yes/No
rmi/skm

To

1.The Principal Sub Judge, Dindigul.

2.The District Munsif Court cum Judicial Magistrate Court, Vedasandur.

Copy to : The Section Officer, Vernacular Records,
Madurai Bench of Madras High Court, Madurai.

G.R.SWAMINATHAN.J.,



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S.A.(MD)No.506 of 2010

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Judgment made in
S.A.(MD)No.506 of 2010
and
C.M.P.(MD)No.1258 of 2022

29.03.2022