



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 17.03.2022

CORAM

THE HONOURABLE MR. JUSTICE G.R. SWAMINATHAN

S.A. (MD)No.845 of 2010

1. A.Muthuvel (Died) ... Appellant / Respondent /
Defendant

2. Parasakthi

3. Rajeshkumar

(Appellants 2 and 3 are *suo motu* impleaded as LR.
of the deceased sole appellant vide Order dated 07.03.2022)
... Appellants

Vs.

1. J.Bhuvaneswari

2. Rajeswary ... Respondents / Appellants /
Plaintiffs

3. Sugumar

4. Raja

5. Sumitha ... Respondents
(Converted as Muslim and
renamed as Zerine Fathima)

(R-3 to R-5 were *suo motu* impleaded as LR.
of the deceased sole appellant vide Order
dated 07.03.2022)

Prayer: Second appeal filed under Section 100 of C.P.C., against the Decree and Judgment dated 05.08.2008 made in A.S.No.27 of 2007 on the file of the Principal Subordinate Judge, Kumbakonam, allowed in part of the Decree and Judgment dated 30.11.2006 made in O.S.No.108 of 2006 on the file of the Additional District Munsif, Valangaiman at Kumbakonam.

For Appellants : Mr.P.Thiagarajan

For Respondents : Mr.H.Lakshmi Shankar,
for Mr.T.V.Sivakumar.

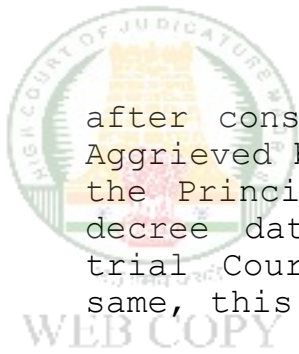


J U D G M E N T

The defendant in O.S.No.108 of 2006 on the file of the Additional District Munsif Court, Valangaiman at Kumbakonam filed this second appeal.

2. During the pendency of the second appeal, he passed away and his wife and son have come on record. The suit was filed by one Bhuvaneswari and Rajeswary seeking the relief of recovery of possession and permanent injunction. The suit property is a mortgaged land measuring 96 cents comprised in R.S.No.309/1, Keelamaruthuvakkudi Village, Thiruvidadaimurudur Taluk. The case of the plaintiffs was that the suit property originally belonged to one Ponnammal and following her demise and that of her husband Kaliyaperumal, the property devolved on her children. Ponnammal had three sons and one daughter. The daughter died without any issue. Likewise the son Singaram also died without any issue. Though one of the sons of Ponnammal, namely, Singaram died later, he was alive when the suit was filed. The plaintiffs in the suit are the daughters born to the elder son Dharmalingam. Dharmalingam was no more, when the suit was filed. The case of the plaintiffs is that the suit property belonged in common to Dharmalingam branch, Singaram and Muthuvel. Singaram did not evince any interest in the suit property. The defendant who entered the suit property claimed to be a lessee under Muthuvel. Following the demise of Muthuvel on 09.01.2006, the plaintiffs issued notice dated 18.03.2006 calling upon the defendant to vacate the suit property and hand over the possession. The defendant issued reply stating that he had already entered into a sale agreement with Muthuvel and that he had paid a sum of Rs.40,000/-, out of sale consideration fixed at Rs.43,200/-. Since the defendant declined to comply with the plaintiffs' request, the suit came to be filed. The defendant filed written statement controverting the plaint averments. The defendant raised quite a few pleas. According to him, the deceased Ponnammal owned three items of property and that in a oral partition among the children, the suit property was allotted to the younger son Muthuvel and that the said Muthuvel after receiving a sum of Rs.40,000/- executed an agreement. He also stated that he was already in possession of the suit property as a lessee and that he was to obtain sale deed from Muthuvel. Before he could so, Muthuvel passed away. The defendant raised a plea that since Singaram and the wife of Muthuvel have not been impleaded as parties, the suit was bad for non-joinder. The defendant also put forth his defence of part performance. Based on the divergent pleadings, the trial Court framed the necessary issues.

3. The second plaintiff Rajeswary examined herself as P.W.1 and one Karuppaiyan was examined as P.W.2. Ex.A.1 to Ex.A.6 were marked. The defendant examined himself as D.W.1 and four other witnesses were also examined. Muthamil Selvi who was described as the second wife of Muthuvel was examined as D.W.4. Ex.B.1 and Ex.B.2 were marked. The trial Court by judgment and decree dated 30.11.2006



after consideration of the evidence on record dismissed the suit. Aggrieved by the same, the plaintiffs filed A.S.No.27 of 2007 before the Principal Sub Court, Kumbakonam. By the impugned judgment and decree dated 05.08.2008, the first Appellate Court reversed the trial Court's decision and allowed the appeal. Aggrieved by the same, this second appeal came to be filed.

4. The second appeal was admitted on 15.12.2010 on the following substantial questions of law:-

" 1. Whether the lower Appellate Court committed an error in law in going into the question as to the genuineness of the signature of the executant found in Ex.B.1 Agreement, when the same was not disputed by the plaintiffs and on the other hand was admitted by the wife of the executant, who deposed as D.W.4?

2. Whether the suit for recovery of possession is not maintainable in the absence of a prayer for declaration of title, when the title is in dispute?

3. Whether the Courts below have committed an error in holding that the suit is not bad for non-joinder of necessary parties? "

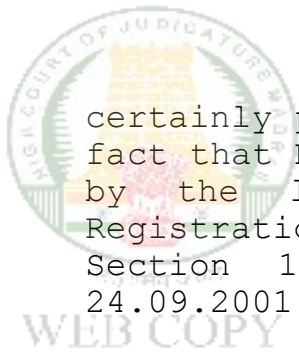
5. The learned counsel appearing for the appellants reiterated all the contentions set out in the memorandum of grounds and called upon this Court to answer the substantial questions of law in favour of the appellants and set aside the impugned judgment and decree and restore the decision of the trial Court.

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

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

8. The defendant resisted the suit by taking umbrage and shelter under Ex.B.1 dated 17.08.2003. Though the first appellate Court cast serious doubts on the genuineness of the executant found in Ex.B.1 and even though the learned counsel appearing for the respondents strongly called upon this Court to sustain the said findings, I will assume for a moment that Ex.B.1 was actually executed by Muthuvel, younger brother of Dharmalingam, father of the plaintiffs herein.

9. Now the first question that calls for consideration is whether on the strength of Ex.B.1 the defendant can plead the defence of part performance. There is no dispute that the defendant was already in possession of suit property, when Ex.B.1 was executed. Therefore, as a person who is in the possession of the

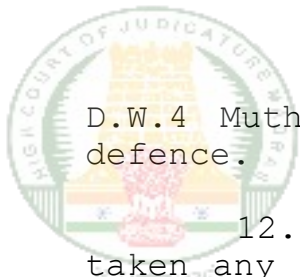


certainly plead part- performance. But what comes in the way is the fact that Ex.B.1 is an unregistered document. As rightly pointed out by the learned counsel appearing for the respondents, the Registration Act 1908 was amended by Central Act 48 of 2001 and Section 17 (1-A) came to be incorporated with effect from 24.09.2001. The said provision reads as under:-

" The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related laws (Amendment) Act, 2001 (48 of 2001) and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53-A."

10. Ex.B.1 is said to have executed on 17.08.2003. Since it was not registered, obviously, it will not have any effect for the purpose of Section 53A of the Transfer of Property Act and the aforesaid defence put forth by the appellants will have to be rejected.

11. Even according to the defendant / appellants herein, he claims title only through Muthuvel, younger son of Ponnammal. The primary defence is that Ponnammal had three items of property and that the suit item was allotted to Muthuvel in a partition and that Muthuvel was competent to deal with the same. This plea of partition will have to be established only by the defendant. The defendant had failed to establish the same. The revenue documents in respect of the suit property stand only in the name of Dharmalingam, father of the plaintiffs herein. Ex.A.1 chitta and Ex.A.2 patta reflect the name of Dharmalingam. Since Dharmalingam is the elder son, it is possible that the revenue documents reflect only his name and not that of the younger siblings. If that be the argument, it belies the theory of partition. If partition had actually taken place and the property had been allotted in favour of the younger son, certainly mutation would have taken place and the name of the younger son would have been reflected. No such evidence is forthcoming. Therefore, I have to necessarily proceed on the premise that the suit property belonged to the children of Ponnammal as a whole. Of course Singaram was alive and he also had a share in the suit property. Yet non-impleading of Singaram will not render the suit defective. It is well settled that even a co-owner can maintain the suit for eviction or recovery of possession against third parties. Therefore, maintainability of the suit cannot be questioned. Since Ex.B.1 is an unregistered document, the defendant has virtually no defence against the paramount title holder. Of course the faint argument put forth by the defence that Muthuvel had a second wife and that she testified in support of the defendant. But then, she herself is a party to the suit in question. Mere examination of



D.W.4 Muthamil Selvi as witness will not in any way bolster the defence.

12. Looked at from any angle, since the defendant had not taken any registered sale deed from Muthuvel, the defendant had not derived any interest or title over the suit property. The plaintiffs were not obliged to seek any relief of declaration. The Hon'ble Supreme Court in the decision reported in **(2008) 4 SCC 594 (Anathula Sudhakar V. P.Buchi Reddy)** held that if cloud is cast on the plaintiff's title, the plaintiff is obliged to seek the relief of declaration. In this case, the title of the plaintiffs has not come under any cloud. Therefore, failure to seek declaration will not in any way affect the maintainability of the suit. The substantial questions of law are answered against the appellants.

13. The impugned judgment and decree is confirmed. This second appeal is dismissed. No costs.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

PMU

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

1. The Principal Subordinate Judge, Kumbakonam.
2. The Additional District Munsif,
Valangaiman at Kumbakonam.
3. The Record Keeper, V.R.Section,
Madurai Bench of Madras High Court, Madurai. (2 copies)

+1 CC to M/s.P.THIYAGARAJAN, Advocate (SR-12823[F] dated 17/03/2022)

+1 CC to M/s.T.V.SIVAKUMAR, Advocate (SR-12914[F] dated 18/03/2022)

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