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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 01.11.2022

Pronounced on : 04.11.2022

CORAM : JUSTICE N.SESHASAYEE

S.A.(MD) No.530 of 2011
and M.P(MD)No.1 of 2011

1. A.Sandhiyagu
2. Amalorpavam Ammal
3. Joseph Lawrence

.. Appellants/Respondents/Defendants 1,2 & 5

Vs

1. A. Selvam (Died)
2. Arulanandu
3. Vethamuthu @ Manickam
4. Chitra

.. Respondent/Appellant/Plaintiff

.... Respondents 2 & 3/Defendants 3 & 4
.. 4th Respondent/Lr of R1/Plaintiff

(R4 is brought on record as LR of the deceased 1st Respondent Vide Court order dated 23.06.2022 made in CMP (MD) Nos. 2115 to 2117 of 2022 in SA (MD) No. 530 of 2011 by NSSJ)

Prayer:- Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 03.06.2009 passed in A.S.No.544 of 2004 on the file of the Additional Subordinate Judge, Dindigul reversing the judgment and decree passed in O.S.No.655 of 2001 dated 22.07.2003 on the file of the II Additional District Munsif, Dindigul.



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For Appellants : Mr.K.Raghul Priyan
for Mr.Sahaya Philomin Raj

For Respondents : R1 – Died

: RR2 & 3 – Dismissed

: No appearance for R4

JUDGMENT

The defendants 1,2 & 5 in O.S.No.655 of 2001 on the file of the II Additional District Munsif, Dindigul, are the appellants herein. The suit was laid for declaration of plaintiff's title and for injunction. The suit was dismissed by the trial court and in an appeal preferred by the plaintiff in A.S.No.544 of 2004, he was successful. Hence, this Second Appeal.

2.1 The facts are:

- The dispute is over the site measuring 220 sq.ft in T.Sy.No.1399 with a residential building thereon. The property originally belong to certain Mariammal. She had purchased it Vide Ext.A.1 sale deed dated 15.05.1931.
- After the demise of Mariammal, the suit property and others devolved on her children which included certain Savariammal. While so, Savariammal



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had laid O.S.No.574 of 1974 for partition against her siblings. This ended in Ext.A.2 compromise decree dated 04.10.1974. In this compromise, the suit property and few other properties came to be allotted to the share of Savariammal.

- On 26.05.1992 under Ext.A.4, the plaintiff claims to have purchased the suit property from Savariammal.
- Savariammal had 3 sons. They are the defendants 1, 3 and 4. Of the three, the 4th defendant had laid O.S.No.397 of 1992 for partition against his mother and brother. This suit was laid on 06.03.1992.
- In the suit, Savariammal was arrayed as the third defendant. She had filed her written statement (Ext.A.5). A preliminary decree came to be passed in Ext.A.6 dated 25.08.1993. The decree informs that the second defendant in the suit remained ex-parte. The only contesting third defendant/ Savariammal, the vendor of the plaintiff, was dropped.
- While so, on 17.10.1994, Vide Ext.B.18 sale deed, the fourth defendant had sold his share of the property to the defendants 1 and 2. It may be stated that the second defendant is the wife of the first defendant. The fifth defendant in the present suit is their son.



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- It is in these circumstances, the plaintiff had laid O.S.No.1592 of 1996.

That suit was dismissed for default as could be seen from Ext.B.14 and Ext.B.15, the decree and the certified copy of the decree.

2.2 Subsequently, the plaintiff has laid the present suit for identical reliefs that he had sought in the earlier litigation. The plaintiff would plead in the present suit that after institution of O.S.No.1592 of 1996, the defendants have approached him and conveyed to him that they would abide by the execution of Ext.A.4 sale deed in his favour, and they might continue their possession of the house as tenants and then he did not prosecute it. As the defendants continued to challenge the title, the present suit came to be laid.

3.1 In the written statement, the defendants 1 and 2 admit that the suit property indeed belonged exclusively to Savariammal, but they disputed Ext.A.4 sale deed under which the plaintiff claims title. They also denied the plaintiff's allegation that the defendants are the tenants under the former. The present suit is laid only to defeat the delivery of property pursuant to the final decree proceedings in O.S.No.397 of 1992. They also make a reference to a panchayat said to have



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taken place on 15.02.1985, and the decision was recorded in a *mutchalica* which appears to have been the foundation for the suit which the 4th defendant had filed in O.S.No.397 of 1992. While so, the plaintiff had filed the first suit in O.S.No. 1592 of 1996 for declaration of his title and for associated ancillary relief of injunction. In spite of that, delivery was effected in E.P.No.239 of 1996 in O.S.No.397 of 1992 on 19.09.2000. This apart, Savariamammal had executed a gift deed in favour of the fifth defendant Vide Ext.B.19 dated 31.12.1991 as concerning the western portion of the suit property.

3.2 Turning to the cause adduced by the plaintiff for non-prosecution of O.S.No. 1592 of 1996 which he had earlier filed, these defendants plead that after the said suit was filed, consultation took place based on the *panchayat mutchalica* referred to above and also all the subsequent events and this resulted in a decision that the plaintiff would not prosecute O.S.No.1592 of 1996. It is in these circumstances, the plaintiff did not prosecute O.S.No.1592 of 1996. Hence, the present suit is not maintainable on the same cause of action.

4. The dispute went to trial. Before the trial court, the plaintiff examined himself



as P.W.1 and also examined another independent witness as P.W.2. For the defendants, the first defendant examined himself as D.W.1. While the plaintiff has produced Exts.A.1 to A.12, the defendants have produced Exts.B.1 to B.20. On appreciating the evidence before it, the trial court chose to dismiss the suit.

5. The trial court has held that Ext.A.4 sale deed had not taken effect since the plaintiff had not taken possession of the property as he had admitted in his evidence that the defendants 1 and 2 were in occupation of the portion of the suit property both prior to Ext.A.4 and also subsequent thereto. Secondly, the trial court finds that the reasons adduced by the plaintiff for not prosecuting O.S.No. 1592 of 1996 has not been established, and in particular he has not established that the defendants have become his tenants.

6. Aggrieved by the same, the plaintiff preferred the first appeal in A.S.No.544 of 2004. The first appellate Court however did not concur with the reasoning of the trial court and the first appellate Court has found that Ext.A.4 sale deed is validly executed and since the plaintiff was not a party to O.S.No.397 of 1992 instituted by the fourth defendant for partition, the decree would not bind the plaintiff. This is now the turn of the defendants 1,2 and 5 to come forward with the present



Second Appeal.

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7. This Second Appeal is admitted for considering the following substantial questions of law:

i) If the courts below correct in saying that dismissal of earlier suit for default on the part of the plaintiff will not stand as a bar in filing another suit for same relief against the same parties and hence is not barred by Res judicata?

ii) Whether the First Appellate Court is correct in saying that the defendants are in possession of the suit property as tenants when the plaintiff has filed the suit against the possession in the year 1992 itself and let it in default?

8. The learned counsel for the appellants raised three points:

- That the plaintiff had earlier filed O.S.No.1592 of 1996 for an identical relief and that was dismissed for default Vide Ext.B.14 and Ext.B.15, the certified copies of the judgement and decree. Under Order IX Rule 9 C.P.C, the plaintiff is barred from instituting a fresh suit on the same cause of action. Here, the plaintiff has artificially introduced a new circumstance



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when he pleads that during the pendency of O.S.No1592/1996, there was a meeting between these defendants and the plaintiff in which they had conceded the latter's title and agreed to be his tenants. This he has not proved.

- Secondly, the plaintiff has sought for injunction when even according to him the defendants are in possession. While the character of possession may be in dispute, still the fact remains that the defendants are admittedly in settled possession.
- The finding of the First Appellate Court that the decree in O.S.No.397 of 1992 would not bind the plaintiff is not correct. Ext.A.6, the decree passed in O.S.No.397 of 1992 shows that the suit was laid on 06.03.1992. Ext.A.4 sale deed was executed only on 26.05.1992. In other words, the plaintiff is a *pendente lite* purchaser, and he would be bound by the decree in O.S.No. 397 of 1992.

9. The last of the three points raised above does not impress the court much. Admittedly, the property belonged to Savariammal. And, the parties are Christians. O.S.No.397 of 1992 was filed by the fourth defendant herein against



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the defendants 1, 3 and his mother Savariammal for partition. It appears that the foundation for this suit was rooted in a *panchayat mutchalica* dated 15.02.1985, but this document was not tested as that suit never went for trial. The plaintiff in that suit (the 4th defendant in the present suit) by a design chose to obtain a consent decree, by dropping the only contesting defendant, namely his mother Savariammal, the vendor of the plaintiff, from the party array, with the present first defendant who was also the first defendant in that suit consenting to pass the decree. Savariammal had another son and he was impleaded as the second defendant and he chose to remain exparte. In short no decree on merit was passed in O.S.No.397 of 1992. What kind of a decree is this? It should not be ignored that the personal law of Christians does not provide for any right by birth to seek partition of a coparcenery estate as in Hindu Law. The decree therefore is essentially a sham document, and the circumstances and the manner it has come into existence is a testimony on how judicial process can be abused. Now, even in the present suit, the *panchayat mutchalica* referred to by the defendants was not produced. Here this court records that this court does not agree with the reasoning of the first appellate court on this aspect but substitutes its reason to arrive at the same conclusion.



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10. Turning to the first of the other two points argued by the learned counsel, even the defendants admitted in their written statement that subsequent to the filing of O.S.No.1592 of 1996 and execution of Ext.B.19 settlement deed by Savariamammal in favour of the fifth defendant, there was some negotiation between the parties and that the plaintiff had chosen not to prosecute O.S.No. 1592 of 1996 only pursuant to the agreement arrived therein, and with this pleading the pendulum now begins to oscillate in favour of the plaintiff for it makes evident that the non-prosecution of O.S.No.1592 of 1996 is not due to the plaintiff's default but is pursuant to certain decision taken between the parties.

11. This underscores the fact that during the pendency of O.S.1592/1996 there indeed had taken place a meeting between the parties and some decision appears to have been arrived at. But on what transpired in that meeting was that the parties were partially at variance and partially in agreement. Where they are in agreement was on the decision of the plaintiff not to prosecute O.S.1592/1996 and where they were at variance was the reasons behind it. If the ordinary



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course of human conduct is a guide that the court cannot ignore, it is nigh difficult to believe that the plaintiff who admittedly had purchased the property, not free of cost but on payment of consideration, will easily submit to a decree in O.S. No.397/1992, which, as stated earlier, is devoid of procedural fairness and justness and sourced straight out of a strategy to abuse judicial process. The more probable aspect is that the defendant might have conceded to the title of the plaintiff. But has it resulted in a tenancy as between the plaintiff and the contesting defendants? Here, and here alone the plaintiff fails as he did not establish it. To conclude this point, this court finds that the present suit is not entirely founded on the same cause of action as in O.S.No.1592 of 1996 and hence the present suit is not barred under Order XI Rule 9 CPC.

13. Turning to the last of the points which the counsel for defendants argued, it now stands as an admitted fact that the defendants are in settled possession of the suit property, and hence there cannot be any decree for injunction. Consequently, the defendants taste partial success. This would mean that the defendants can be dispossessed only by a separate suit for recovery of property.



14. In conclusion, this appeal is partially allowed and the decree of the first appellate court granting prohibitory injunction to the plaintiff alone will stand modified and as to the rest the decree of the first appellate court in A.S.No.544 of 2004 on the file of the Additional Subordinate Judge, Dindigul, will stand confirmed. No costs. Consequently, connected miscellaneous petition is closed.

04.11.2022

Internet: Yes/No

Index : Yes/No

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To

1. The Additional Subordinate Judge, Dindigul
2. The II Additional District Munsif, Dindigul.
3. The Section Officer, VR Section,
Madurai Bench of Madras High Court, Madurai.



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N.SESHASAYEE,J.

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Pre-delivery Judgment in
S.A.(MD) No.530 of 2011
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