



S.A(MD).No.4 of 2013

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 11.07.2022

CORAM: JUSTICE N.SESHASAYEE

S.A(MD).No.4 of 2013
and M.P(MD).No.1 of 2013

Balasubramanian

.... Appellant/Respondent/Defendant

Vs

Marimuthu

Rep. by his Power Agent Rajendran ... Respondent/Appellant/Plaintiff

Prayer :Second Appeal is filed under Section 100 of Code of Civil Procedure, against the judgment and decretal order passed by the Additional Subordinate Judge, Thanjavur made in A.S.No.123 of 2010 dated 10.10.2011 reversing the judgment and decree passed by the District Munsif Court, Thanjavur made in O.S.No.26 of 2007 dated 26.08.2010.

For Appellant : Mr.G.Karnan

For Respondent : Mr.T.A.Ebenezer



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JUDGMENT

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1. The respondent herein had laid a suit in O.S.No.26 of 2007 for declaration of his title and for recovery of possession of the suit property. The suit came to be dismissed by the trial Court. Aggrieved by the said decree, the plaintiff preferred A.S.No.123 of 2010 before the Additional Subordinate Court, Thanjavur. On re-appraisal of the evidence before it, the first appellate Court chose to partly decree the suit. Now, it is the turn of the defendant to approach this Court with this appeal. For narrative convenience, the parties may be referred to by their rank before the trial Court.

2. The suit property is described as comprising 4.38 acres of dry agricultural land in S.No.123/1C of Marungulam Village in Thanjavur District. According to the plaintiff, his father Samikannu had purchased a total extent of 4.38 acres under Ext.A.1 to Ext.A.3, sale deeds dated between 05.12.1943 and 06.08.1952. S.No.123/1C is stated to have an extent of more than 54 acres. Along with the plaintiff's father, there were 24 persons, who had title to the property and joint patta came to be issued in their favour. Earlier, the plaintiff had laid O.S.No.300 of 1999 for bare



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injunction against the present defendant, and this suit came to be dismissed on the ground that the plaintiff has not proved his possession. This was futilely challenged by the plaintiff in the first appeal in A.S.No.88 of 2005. Having lost in those two suits, the plaintiff has now instituted a suit for declaration of his title over 4.38 acres and for recovery of possession.

3. Refuting the plaintiff's case and relying very heavily on O.S.No.300 of 1999, the defendant pleads that the plaintiff's father Samikannu and the defendant's father Ponnusamy were brothers. They had another brother, namely Rajagopal. These three brothers entered into a partition, in which the properties covered under Ext.A.1 to Ext.A.3 were also made a subject matter. Under the partition, the entire 4.38 acres in S.No.123/1C came to be allotted to the share of Ponnusamy. This is evidenced by Ext.B.1, dated 26.03.1953, an indecipherable, handwritten list of an oral partition. It had been found in O.S.No.300 of 1999 that the plaintiff neither has title nor possession of the property.

4.1 The dispute went to trial and before the trial Court, the plaintiff did not enter the box, but his power of attorney cum son-in-law examined himself



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as P.W.1 and he also examined two other witnesses as P.W.2 and P.W.3.

The plaintiff had produced Ext.A.1 to Ext.A.17. For the defendant, he examined himself as D.W.1 and besides, he examined D.W.2 to D.W.5. The defendant on his part had produced Ext.B.1 to Ext.B.18.

4.2 On appreciating the evidence, the trial Court dismissed the suit. A significant limb of the line of reasoning of the trial Court was the non-examination of the plaintiff. Indeed, it drew adverse inference against the plaintiff. When the matter reached the first appellate Court at the instance of the plaintiff, the first appellate Court made short the scope of the dispute. Here, it is necessary to introduce that the plaintiff had executed at least three sale deeds, the first is Ext.B.16, dated 03.08.1973 in favour of his uncle Ponnusamy, then Ext.B.17, dated 29.05.1977 to the very defendant and lastly Ext.B.18, dated 20.02.1982 in favour of defendant's brother Sambandamurthy. Under Ext.B.16, the plaintiff sold 1.0 acre, whereas under Ext.B.17 and Ext.B.18 he had sold two acres and 36.5 cents respectively. In all he had sold 3.365 acres out of his holding of 4.38 acres. This leaves a balance of 1.015 acres. The first appellate Court intended to grant a decree for this extent, but appeared to have committed an error in



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arithmetic when it translated its intent into a decree. This is now under challenge.

5. This appeal was admitted for considering the following substantial questions of law:

1. Whether the suit is barred by order II Rule 2 Civil Procedure Code, since, the plaintiff have lost earlier suit in which he has not claimed, as claimed in the present suit?

2. Whether the lower appellate Court is correct in holding that the defendant has not proved his case, when the plaintiff himself not proved his case as per his pleading?"

6. The learned counsel for the defendant/appellant heavily harped on Order II Rule 2 of the Code of Civil Procedure, and contended that the plaintiff cannot seek a declaration of title after losing his suit for injunction in O.S.No.300 of 1999. In fitness of things when he faced opposition to his title, he ought to have filed a suit for declaration and he could not segment it. In other words the point raised is not one of limitation in filing the suit



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for declaration, but in not seeking a relief of declaration. There are two factors that the Court cannot ignore. First, the plaintiff indeed had proved that he was entitled to 4.38 acres under Exts.A1 to A3. It also stands established that under Ext.B.16 to Ext.B.18, he had sold a total extent of 3.36 acres. Sy.No.123/1C has a larger extent of 54 acres, and it is not known what exactly is the extent available in S.No.123/1C. If the entire 4.38 acres belonging to the plaintiff falls within S.No.123/1C, then he would be one of the co-owners of this 4.38 acres along with the defendant. Admittedly, S.No.123/1C is not stated to have been further sub-divided. If the defendant is in possession of the specific plot of 3.36 acres out of 4.38 acres, then he cannot assert title to any extent in excess of 3.36 acres unless he pleads and proves prescription of title by adverse possession. And here, the defendant rushing for cover under Order II Rule 1 cannot be appreciated. It is procedural defence and not on substantial aspect on right to property. The plaintiff's earlier suit in O.S.300/1999 was for bare injunction for which the plaintiff only needs to establish the lawfulness of his possession and no more.

7. In conclusion, this Court does not find any merit in the appeal. Having



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said that inasmuch as the suit is for the property to an extent of 1.015 acre has to be delivered to the plaintiff, it necessarily implies that the plaintiff may have to go for another suit for demarcation. The plaintiff is now free to obtain delivery of his 1.015 acre and he is at liberty to institute a suit for demarcation, if so required.

8. Accordingly, this Second Appeal is partly allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

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Index : Yes/No
Internet: Yes/No
Rmk

To:

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

N.SESHASAYEE,J.,

Rmk



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