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SA.Nos.249 and 1188 of 2007

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.12.2023

CORAM

THE HON'BLE Mr.JUSTICE **C.KUMARAPPAN**

S.A.Nos.249 and 1188 of 2007

and

MP.Nos.1, 2 of 2007 & CMP.No.10802 of 2021

S.A.No.249 of 2007

M.Paramasivam

... Appellant

- Vs -

N.Lakshmanan

... Respondent

Second Appeal is filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 17.10.2005 made in A.S.No.43 of 2005 on the file of Principal Sub-Ordinate Judge of Salem, confirming the judgment and decree dated 06.12.2004 and made in O.S.No.348 of 1998 on the file of the I Additional District Munsif Court, Salem and to set aside the same.

For Appellant : Mr.J.Saravanel

For Respondent : Mr.D.Shivakumaran



SA.Nos.249 and 1188 of 2007

S.A.No.1188 of 2007

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Paramasivam

... Appellant

- Vs -

1. Alamelu (died)
2. Saraswathi
3. Meenakshi
4. Lakshmi

... Respondents

Second Appeal is filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 30.06.2006 and made in A.S.No.44 of 2005 on the file of Additional Subordinate Judge, Salem, confirming the judgment and decree dated 06.12.2004 and made in OS.No.151 of 1997 on the file of the I Additional District Munsif Court, Salem.

For Appellant : Mr.J.Saravanel

For Respondent : Mr.D.Shivakumaran for R3 & R4
R2-Served-No Appearance
R1-Died

COMMON JUDGMENT

In respect of the same suit property, the appellant has filed a suit in O.S.No.151 of 1997 against his father's second wife Smt.Alamelu. It appears that Smt.Alamelu sold the property to one Mr.N.Lakshmanan. The said subsequent purchaser Mr.N.Lakshmanan has filed a suit against the instant appellant in O.S.No.348 of 1998. Both the suits have been disposed of by



SA.Nos.249 and 1188 of 2007

two separate judgments, but simultaneously on 06.12.2004. The appeal arising out of O.S.No.151 of 1997 was disposed of in A.S.No.44 of 2005 vide judgment dated 30.06.2006. Against which, S.A.No.1188 of 2007 was filed.

2. In respect of the suit filed by the subsequent purchaser Mr.N.Lakshmanan, the instant appellant has filed another Appeal in A.S.No.43 of 2005 that was disposed of on 17.10.2005. Against which, the SA.No.249 of 2007 was filed.

3. Though the plaintiff in O.S.No.348 of 1998 is a third party, he derived title from Smt.Alamelu, who is the defendant in O.S.No.151 of 1997, and the facts and issues involved are interconnected, this Court deems it appropriate to take up both the appeals and disposed the same on a common judgment.

4. The instant appellant is the plaintiff in O.S.No.151 of 1997 and the the defendants are the respondents in S.A.No.1188 of 2007. Similarly, the plaintiff in O.S.No.348 of 1998 is the respondent in S.A.No.249 of 2007.

5. For ready reference, the parties will be referred according to their respective status before the Trial Court and for easy understanding, 'O.S.No.151 of 1997' will be referred to as '1st suit' and 'O.S.No.348 of 1998'



SA.Nos.249 and 1188 of 2007

will be referred to as '2nd suit'.

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6. The brief facts, which give rise to the instant Second Appeals are that; in the 1st suit, the plaintiff contended that the suit property was originally belongs to the plaintiff Mr.Paramasivam and his father Mr.Muthu Gounder and that the defendants in the 1st suit are the second wife of Mr.Muthu Gounder and his children through the first defendant Smt.Alamelu. It is the submission of the plaintiff that there was a partition between the plaintiff Mr.Paramasivam and his father Mr.Muthu Gounder on 09.06.1989, in which A schedule property was allotted to his father Mr.Muthu Gounder, and B schedule property was allotted to Mr.Paramasivam. The father of the plaintiff Mr.Muthu Gounder, after deriving his absolute right through the partition, has executed two settlement deeds in favour of the first defendant Smt.Alamelu. It is the further submission of the plaintiff Mr.Paramasivam that, the said settlement deed has not been acted upon and that Mr.Muthu Gounder has been living along with the plaintiff and that before his death, he has executed a Will dated 10.03.1996. Therefore, the plaintiff contended that by virtue of the Will dated 10.03.1996, he is the absolute owner of the suit property. Hence, prayed for a declaration and for a consequential injunction.

7. The said suit was resisted by the first defendant Smt.Alamelu by



SA.Nos.249 and 1188 of 2007

WEB COPY

contending that by virtue of the settlement deed dated 09.06.1989, she is the absolute owner of the property and that she has been in actual possession and enjoyment over the same. This defendant would further submit that the alleged Will dated 10.03.1996 is a rank one forgery and that Mr.Muthu Gounder did not execute any Will. As such, prayed to dismiss the suit.

8. It appears that during the pendency of the said suit, the said Smt.Alamelu viz., the first defendant in the 1st suit has sold the property to the plaintiff in the 2nd suit on 19.03.1998. After the purchase by the plaintiff in the 2nd suit, the plaintiff of the 1st suit Mr.Paramasivam has interfered with his possession. Hence, the plaintiff in the 2nd suit (Mr.Lakshmanan) has filed a suit for permanent injunction. In the 2nd suit, Mr.Paramasivam, who is the defendant therein has filed a written statement by reiterating the averments made in the plaint of the 1st suit.

Evidence and Documents:-

9 (a). In the 1st suit [O.S.No.151 of 1997], before the Trial Court, the plaintiff has examined 5 witnesses as PW1 to PW5, and marked as many as 7 documents as Exs.A1 to A7. On behalf of the defendants, 4 documents have been marked as Exs.B1 to B4 and one witness has been examined as DW1. As a Court document, Exs.C1 and C2 have been marked.



SA.Nos.249 and 1188 of 2007

(b). Similarly, in the 2nd suit [O.S.No.348 of 1998], before the Trial Court, the plaintiff examined 3 witnesses as PW1 to PW3 and marked 23 documents as Exs.A1 to A23. On behalf of the defendant, 22 documents have been marked as Exs.B1 to B22 and 3 witnesses have been examined as DW1 to DW3.

Findings of the Court below:-

10. The Trial Court, after framing issues, has disbelieved that the Will propounded by the plaintiff Mr.Paramasivam. Hence, the Trial Court dismissed the suit. However, in the suit filed by Mr.Lakshmanan, in view of the dismissal of the previous suit, the 2nd suit was decreed by granting an injunction in favour of the Mr.Lakshmanan. Aggrieved with the said order, Mr.Paramasivam preferred two appeals in A.S.Nos.44 of 2005 and 43 of 2005 respectively. Both the appeals have been disposed of by dismissing the appeals vide two separate judgments by two different learned Judges 30.06.2006 and 17.10.2005 respectively. Aggrieved with the same, the plaintiff in the 1st suit and the defendant in the 2nd suit, Mr.Paramasivam preferred these two Second Appeals.



SA.Nos.249 and 1188 of 2007

11. It appears that during the pendency of the instant appeals, the appellant has also filed an application under Order XLI Rule 27 CPC for receipt of the additional documents in CMP.No.10802 of 2021.

Substantial Question of Law:-

12 (a). At the time of admission of S.A.No.1188 of 2007 on 27.11.2007, this Court has formulated the following substantial question of law:-

“Whether a Settlement Deed, which has not been acted upon get precedent over a subsequent Will executed by the owner of the property during his life time?”

(b). Similarly, in S.A.No.249 of 2007 on 07.03.2007, this Court has formulated the following substantial question of law:-

“1. Whether the suit for mere Injunction is sustainable when there is dispute regarding title?

2. Whether the suit for injunction filed by the respondent herein is maintainable when the suit filed by the Appellant herein for declaration and Injunction did not reach finality since A.S.No.44 of 2005 is pending before the Sub-Court, Salem?”



SA.Nos.249 and 1188 of 2007

Submission of either side counsel:-

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13. The learned counsel for the appellant in both the Second Appeals would vehemently contend that the appellant herein has propounded a Will dated 10.03.1996 and that, to prove such Will, he has examined the attestors. Therefore, the Trial Court as well as the First Appellate Court ought to have declared his right. It is the further contention of the learned counsel for the appellant that notwithstanding his right over the property, by filing necessary documents, he has proved his possession over the suit property. Therefore, the dismissal of the 1st suit and the decree passed in the 2nd suit are contrary to law. The learned counsel would further contend that the First Appellate Court granted injunction to Mr.Lakshmanan only on the ground that the suit filed by the appellant Mr.Paramasivam was dismissed. It is the contention of the learned counsel for the appellant that such finding is erroneous. It was also further contended by the learned counsel for the appellant that the order passed by the First Appellate Court in A.S.No.43 of 2005 is contrary to Order XLI Rule 31 and would contend that the findings are not based upon the oral and documentary evidence. Hence, prayed to interfere with the concurrent findings.



SA.Nos.249 and 1188 of 2007

WEB COPY

14. Per contra, the learned counsel for the respondent in both the appeals would contend that in O.S.No.151 of 1997, the plaintiff has approached for the relief of declaration and a consequential injunction. Therefore, when the plaintiff has not proved his right over the property, he cannot have the relief of injunction. It is the further contention of the learned counsel for the respondent that the plaintiff Mr.Paramasivam has not at all proved his possession. Whereas Mr.Lakshmanan has filed all the Revenue records and also the sale deed executed by Smt.Alamelu, through which he has established his possession. Hence, prayed to dismiss both the Second Appeals.

15. I have given my anxious consideration to either side submissions.

Analysis of the submissions:-

16. In order to decide both the Second Appeals, it is incumbent upon this Court to go into the legality of the finding in respect of the title over the suit property. According to Mr.Paramasivam/plaintiff, he became the owner of the suit property by virtue of the Will. At the same time, the plaintiff Mr.Paramasivam admitted that the suit property and other properties were belongs to the plaintiff and his father Mr.Muthu Gounder, and both of them



SA.Nos.249 and 1188 of 2007

have partitioned the property under Ex.A1. The property covered under Ex.A1 is the A schedule property, and was allotted to Mr.Muthu Gounder through Ex.A1-partition deed. It is equally admitted by the plaintiff Mr.Paramasivam about the existence of a settlement deed dated 09.06.1989 executed by his father Mr.Muthu Gounder in favour of Smt.Alamelu, who is the defendant in the 1st suit. The said Smt.Alamelu admittedly is none other than the second wife of Mr.Muthu Gounder.

17. It is further admitted by Mr.Paramasivam that the property settled in favour of Smt.Alamelu is the property in Ex.A1-partition deed, which was allotted to Mr.Muthu Gounder. The plaintiff Mr.Paramasivam has also categorically admitted that the suit property is the absolute property of Mr.Muthu Gounder viz., his father. Once the property is the absolute property of Mr.Muthu Gounder, then he is entitled to transfer the title according to his wish.

18. Here, the plaintiff Mr.Paramasivam though admits the existence of Exs.B1 and B2-Settlement Deed in favour of Smt.Alamelu, his contention is that the same was obtained by Smt.Alamelu by playing fraud, undue influence and coercion. He further stated that, on came to know about such undue influence, there was a panchayat in their family and that Smt.Alamelu



SA.Nos.249 and 1188 of 2007

was given a sum of Rs.25,000/- and on receipt of the said amount, Exs.B1 and B2-Settlement deeds has not acted upon and has been enjoyed by Mr.Muthu Gounder as an absolute property. Therefore, Mr.Paramasivam did not disputed the execution of the settlement deed (Exs.B1 & B2), but only contended that it was obtained by way of coercion and undue influence. Even for argument sake, if such an argument is accepted, then the settlement deed (Exs.B1 and B2) become only voidable. Therefore, as long as the said document is not set aside, the same would bind the parties. However, to declare such settlement deed as void, to put it in other words, to avoid the settlement deeds, the plaintiff has not filed any suit for declaration.

19. It is a settled principle of law that unilateral cancellation of the settlement is invalid. Here, there is not even any document available evidencing such cancellation. Therefore, this Court is of the firm view that by virtue of Exs.B1 & B2, the defendant of the 1st suit Smt.Alamelu became the absolute owner of the suit property as early as on 09.06.1989. In view of such settlement deed, the title of said Mr.Muthu Gounder is divested. Therefore, Mr.Muthu Gounder has no right, title or authority over the suit property to execute any Will much less the Will dated 10.03.1996. Hence, this Court is of the view that the finding of fact recorded by both the Courts



SA.Nos.249 and 1188 of 2007

below that Mr.Muthu Gounder did not have any right to execute a Will is based on sound legal principles. There is also a finding of fact that Ex.A6-Will, which stands in the name of the plaintiff has not been proved in a manner known to law. Therefore, this Court has no iota of doubt as to the tenability of finding recorded by the Trial Court as well as the First Appellate Court that the plaintiff in the 1st suit Mr.Paramasivam is not entitled for a declaration. The same is well merited.

20. At this juncture, the learned counsel for the appellant/plaintiff Mr.Paramasivam would invite the attention of this Court about the Revenue records, which stands in his name and would contend that he has been in settled possession. Therefore, contended that the settled possession has to be protected and the same should not be disturbed, except under due process of law. In this regard, the learned counsel for the appellant relied upon the judgment of the Hon'ble Supreme Court in ***Rame Gowda (Dead) by LRs Vs. M.Varadappa Naidu (Dead) by LRs. and another*** reported in (2004) 1 SCC 769. The relevant portion of the said judgment are paragraphs 4 and 5 and the same read as follows:-

“4. It is contended by the learned counsel for the defendant-appellant that the suit filed by the plaintiff was based on his title. The suit itself was defective inasmuch as declaration of title was not



SA.Nos.249 and 1188 of 2007

WEB COPY

sought for though it was in dispute. Next, it is submitted that if the suit is based on title and if the plaintiff failed in proving his title, the suit ought to have been dismissed without regard to the fact that the plaintiff was in possession and whether the defendant had succeeded in proving his title or not. We find no merit in both these submissions so made and with force.

5. Salmond states in Jurisprudence (12th Edn.),

“few relationships are as vital to man as that of possession, and we may expect any system of law, however primitive, to provide rules for its protection.... Law must provide for the safeguarding of possession. Human nature being what it is, men are tempted to prefer their own selfish and immediate interests to the wide and long-term interests of society in general. But since an attack on a man's possession is an attack on something which may be essential to him, it becomes almost tantamount to an assault on the man himself; and the possessor may well be stirred to defend himself with force. The result is violence, chaos and disorder.” (at pp. 265-66)

*“In English law possession is a good title of right against anyone who cannot show a better. A wrongful possessor has the rights of an owner with respect to all persons except earlier possessors and except the true owner himself. Many other legal systems, however, go much further than this, and treat possession as a provisional or temporary title even against the true owner himself. Even a wrongdoer, who is deprived of his possession, can recover it from any person whatever, simply on the ground of his possession. Even the true owner, who takes his own, may be forced in this way to restore it to the wrongdoer, and will not be permitted to set up his own superior title to it. He must first give up possession, and then proceed in due course of law for the recovery of the thing on the ground of his ownership. The intention of the law is that every possessor shall be entitled to retain and recover his possession, until deprived of it by a judgment according to law.” (Salmond, *ibid.*, pp. 294-95)*

“Legal remedies thus appointed for the protection of possession even against ownership are called possessory, while



WEB COPY



SA.Nos.249 and 1188 of 2007

those available for the protection of ownership itself may be distinguished as proprietary. In the modern and medieval civil law the distinction is expressed by the contrasted terms petitorium (a proprietary suit) and possessorium (a possessory suit).” (Salmond, ibid., p. 295)”

21. But, this Court is not persuaded with the submissions made by the learned counsel for the appellant on the simple reason that the plaintiff in the 1st suit Mr.Paramasivam sought the relief of injunction only as a consequential relief to the declaration. Even, on perusal of the plaint, he paid Court fee under Section 25(b) of the Tamil Nadu Court Fees and Suit Valuation Act. Section 25(b) is in respect of declaration and consequential injunction. Therefore, when a plaintiff come forward with a suit for declaration and consequential injunction, it goes without saying that, unless he proves the title, he is not entitled for an injunction. Both the Trial Court as well as the First Appellate Court have rightly came to the conclusion that since the plaintiff Mr.Paramasivam is not entitled for the relief of declaration, hence the relief of injunction was negated. Therefore, this Court could not find any infirmity or perversity over the finding recorded by the First Appellate Court in A.S.No.44 of 2005 arising against the judgment and decree in O.S.No.151 of 1997. In view of the above detailed discussion, the substantial question of law in S.A.No.1188 of 2007 is answered in favour of



SA.Nos.249 and 1188 of 2007

the respondent. Hence, S.A.No.1188 of 2007 is liable to be dismissed.

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22. Coming to the another Second Appeal in SA.No.249 of 2007 arising out of O.S.No.348 of 1998, the learned Trial Judge has found that both the plaintiff and the defendants in the 2nd suit have attempted to prove their possession through the respective documents. However, if we look at the document which has been filed by the plaintiff in the 2nd suit with the background of the above finding that Mr.Paramasivam is not the owner of the suit property, then by following the principles of “possession follows title” the relief granted in favour of the subsequent purchaser Mr.N.Lakshmanan cannot be found faulted.

23. At this juncture, the learned counsel for the appellant would invite the attention of this Court in respect of the additional documents filed in CMP.No.10802 of 2021 and would contend that the additional documents would clinchingly prove their settled possession. This Court is not persuaded with the submissions made by the learned counsel for the appellant on the simple reason that though there was a criminal case, there were some FIRs and in pursuance of that, a charge sheet has been laid against the plaintiff of the 2nd suit Mr.N.Lakshmanan, and the defendant in the 1st suit, are all the year 2005, admittedly subsequent to filing of the suit. It is settled principle of



SA.Nos.249 and 1188 of 2007

law that Order XLI Rule 27 of CPC is applicable only upon three instances provided in the provisions. For ready reference, Order XLI Rule 27 of CPC is extracted hereunder:-

“27. Production of additional evidence in Appellate Court. -

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

1[(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.”



SA.Nos.249 and 1188 of 2007

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24. The documents which sought to be produced are not come within the above 3 parameters. But the learned counsel would contend that the receipt of the document would serve the substantial cause. However, the above argument advanced by the learned counsel for the appellant could not be countenanced, since the plaintiff of the 1st suit wanted to protect his possession only based upon his title. Whereas his title was disbelieved and found that the title vested with Smt.Alamelu and subsequently, with Mr.N.Lakshmanan. Therefore, this Court is of the firm view that the plaintiff cannot have any remedy under Order XLI Rule 27 of CPC, which could be exercised only under exceptional circumstances. Here this Court could not find any reason to positively consider the CMP.No.10802 of 2021. Therefore, there are no merits in the CMP.

25. In view of the above detailed submissions, the finding recorded by the Trial Court and the First Appellate Court in O.S.No.348 of 1998 and A.S.No.43 of 2005 is also well merited. Under Section 100 of CPC, this Court can interfere only when the substantial question of law exists and cannot interfere since because there is a possibility of another view. Therefore, this Court is of the firm view that the finding of fact recorded by



SA.Nos.249 and 1188 of 2007

the Trial Court as well as the First Appellate Court in both the suits are based on the documents and evidence, and this Court could not find any reason to deviate from the said finding. In view of above discussion, all the substantial questions of law in both the Second Appeals are answered in favour of the respondents.

26. In the result, both the Second Appeals and CMP.No.10802 of 2021 are dismissed. There shall be no order as to costs. Consequently, connected Miscellaneous Petitions are also closed.

13.12.2023

kmi

Index : Yes

Speaking Order : Yes

NCC : Yes/ No

To

1. The Principal Sub-Ordinate Court,
Salem.
2. The Additional Subordinate Court,
Salem.
3. The I Additional District Munsif Court,
Salem.



WEB COPY



SA.Nos.249 and 1188 of 2007

C.KUMARAPPAN, J

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S.A.Nos.249 and 1188 of 2007

13.12.2023