



S.A.No.237 of 2005

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.01.2023

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.237 of 2005

1.Solaiammal
2.Gnanasekhar
3.Babu

... Appellants

Vs.

1.Pattu (Died)
2.Annamalai
3.Gowri
4.Padmavathi (Deceased)
5.Murali
6.Radha
7.M.Kumaresan
8. K.Shankar
9.K.Balaji

... Respondents

[Respondents 2 to 6 brought on record as lrs of the deceased 1st respondent vide court order dated 23.01.2013 made in memo dated 16.11.2012 in SA.No.237 of 2005]

[Respondents 7 to 9 brought on record as lrs of the deceased 4th respondent vide court order dated 20.11.2018 made in CMP.No.57 of 2013 in SA.No.237 of 2005 (SMSJ)]



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PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 07.01.2005 in A.S.No.18 of 2004 on the file of the Subordinate Court, Shankari confirming the judgment and decree in O.S.No.20 of 1998 dated 22.10.2003 on the file of the District Munsif Court, Shankari.

For Appellants : Mr.T.R.Rajaraman

For Respondents : Mr.C.A.Ramanar C.A.Ramanar

for Mr.N.Manokaran [R.7 to R.9]

: R.1 & R.4 [Died]

: R.2, 3, 5 & 6 [Mr. C.A.Ramanar takes notice]

JUDGMENT

The defendants in a suit OS.No.20 of 1998 on the file of the District Munsif, Shankari are the appellants before this Court. The parties for the ease of understanding are referred to in the same rank as before the Trial Court. The facts which have culminated in the filing of the above Second Appeal are herein below set-out.

2. The plaintiff had filed the suit for a permanent injunction restraining the defendants, their men, agents, servant or power of attorney from interfering with the suit A-Schedule property either in the form of a trespass



or encroachment and, restraining the defendants from in any manner alienating or putting up any construction in the suit property and for recovery of possession of the B-Schedule property. The A-Schedule property constituted the larger extent and the B-Schedule property was a portion of the A-Schedule property.

3. It is the case of the plaintiff that the schedule mentioned properties are his absolute properties, the plaintiff having purchased the same under a registered sale deed dated 13.06.1957 for a valuable consideration. On 03.04.1958, the plaintiff had sold the entire property purchased by him to one Venkatachala Baktar and the same was once again re-conveyed to the plaintiff under a registered sale deed dated 25.09.1959. Therefore, the plaintiff is the absolute owner of the suit schedule property.

4. It is the case of the plaintiff that the 1st defendant is the widow of his elder brother, Arunagiri and the defendants 2 and 3 are the sons of Arunagiri. They were in permissive possession and occupation of the B-Schedule property. Since the defendant who were earlier residing at Erode had suffered a huge loss in their business, they had returned to Edappadi in or about 1989



and out of his empathy for his elder brother, the plaintiff had permitted him and his family to occupy the B-Schedule property. In the year 1990, the said Arunagiri passed away and once again out of mercy he had permitted the defendants to continue in possession of the property. However, the defendants took advantage of their being in possession of the property and tried to get the house tax transferred into their names in respect of the portion in their occupation and had got a different door number assessed to the B-Schedule property. The plaintiff would submit that he had purchased the vacant land on which he had put up the construction and the door number assessed was 49. The plaintiff would submit that he had mortgaged the property for obtaining a loan on 13.06.1957 and 25.09.1959 and it was he who had cleared the entire loan amount.

5. The plaintiff would submit that the defendants are only in permissive occupation of the B-Schedule property. In the light of the conduct of the defendants in attempting to trespass into the A-Schedule property and trying to raise construction in the B-Schedule property, the plaintiff was constrained to file the above suit. It is also the case of the plaintiff that on 07.01.1998, the defendants had attempted to remove the tiled roof, which was prevented by



the plaintiff.

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6. The defendants had filed a written statement inter alia denying the contention that they are in permissive occupation of the property. It is their case that the plaintiff and Arunagiri along with their younger brother Arumugam constituted a Joint Hindu Family. It was out of the joint family funds that the property was purchased in the name of the plaintiff. The three sons had put up the construction out of a common funds and therefore the plaintiff could not claim exclusive right to the suit schedule property. It is also the further case of the defendants that on 22.09.1980 the property was divided in the presence of the Panchayatdars and a Muchalika to this effect had been executed. The husband of the 1st defendant and the younger brother, Arumugam were together entitled to a 1/3rd share of the built up portion and the vacant site on the east and the plaintiff was entitled to the remaining 2/3rd built up portion and land on the western side of the property. The brothers had also agreed to discharge the common debt to an extent of Rs.4,000/- which was due to the Handloom Weavers Co-operation, Salem. The plaintiff was to pay 2/3rd amount and the other two were required to pay 1/3rd of the



loan amount. It is the case of the defendants that the loan was also discharged in the above ratio.

7. After the death of Arunagiri, the 1st defendant had applied to Edappadi Municipality for name transfer for their portion on the east. After due inquiry, the tax/document was also transferred in the name of the 1st defendant and a new Door Number 48/C was allotted for the portion in the occupation of the defendants. Therefore, it is the contention of the defendants that the plaintiff had no right whatsoever in the B-Schedule property and allegations to the contrary contained in the plaint was absolutely false. Therefore, they sought to have the suit dismissed.

8. An additional written statement was filed by the 1st defendant which was adopted by the 2nd and the 3rd defendants, after the plaintiffs 2 to 7 had been impleaded on the death of the plaintiff. In the Additional written statement, they would submit that the newly added plaintiffs were out of possession of the suit property and therefore were not entitled to seek the relief as legal representatives of the deceased plaintiff. Further, they had also



put the newly impleaded parties to strict proof that they were the legal representatives of the deceased plaintiff.

9. The learned District Munsif, Shankari had framed the following issues which is translated from the vernacular as follows:-

- a) *Does the Court have the jurisdiction to try the suit?*
- b) *Whether adequate Court fees have been paid by the plaintiff?*
- c) *Whether the suit A and B schedule properties are in the exclusive possession of the plaintiff?*
- d) *Whether the plaintiff is entitled to the decree for permanent injunction as sought for?*
- e) *What other reliefs the plaintiff is entitled to?*

Additional Issues:-

“Whether the claim of the recovery of possession of the B-Schedule property from the defendants by the plaintiff was valid ? ”



10. The plaintiff had examined two witnesses and marked Ex.A.1 to A.16. Similarly, the defendant had also examined two witnesses and marked Ex.B1 to B5.

11. Ultimately, the learned District Munsif on considering the evidence on record proceeded to decree the suit by granting an injunction in respect of A- Schedule property and a recovery of possession in respect of the B- Schedule property. Aggrieved by the said judgment and decree the defendants had filed A.S.18 of 2004 on the file of the Sub Court, Shankari. The learned Sub Judge by her judgment and decree dated 07.01.2005 dismissed the appeal and confirmed the Judgement and Decree of the Trial Court.

12. Aggrieved by the said Judgement and Decree the defendants have filed the Second Appeal. The above Second Appeal has been admitted on the following Substantial questions of law:-

1) When the exclusive title of the plaintiff is disputed in the written statement, is the suit without declaration maintainable?

2) Is the learned Subordinate Judge right in rejecting



EX.B-1, especially when the original was filed before the Appellate Court and the plaintiffs are precluded from contesting the admissibility as per the Evidence Act?

3) Is the learned learned Subordinate Judge right in rejecting the plea under Ex.B-1, especially when documents were produced by the defendant to show that Door No.48-C stood registered in his name both in the property registered and also in the Electricity Department?

13. Mr.T.R.Rajaraman, the learned counsel appearing on behalf of the appellants/defendants would rest his case on the contention that the plaintiff despite coming to know of the fact that the name transfer had been done and new Door Number given had not taken any steps whatsoever to challenge the same. During the cross examination of P.W.1, the P.W has admitted to the said fact and had also admitted knowledge of the same. He would further contend that though a serious objection has been raised with reference to the plaintiff's right to the property, the plaintiff had not taken any steps to amend the prayer to include the relief of declaration and without any issue being framed in this regard, the Trial Court has erred in declaring the plaintiff's title



to the property. He would also rely upon the following judgments in support of his case. i) ***(2018) 18 SCC 330 - Jharkhand State Housing Board Vs. Anirudh Kumar Sahu and Others***, ii) ***(2019) 17 SCC 692 - Jharkhand State Housing Board Vs. Didar Singh and Another*** iii) ***(2008) 4 SCC 594 - Anathula Sudhakar Vs. P.Buchi Reddy and Others***.

13. Per contra, Mr.C.A.Ramanar, the learned counsel appearing on behalf of the respondent/plaintiff would submit that the 1st defendant as D.W.1, herself has clearly admitted that the 1st plaintiff and the husband of the 1st defendant and Arumugam did not have any ancestral funds. In her cross examination, she has categorically admitted the said statement. That apart, D.W.2, the other brother, Arumugam who had been summoned to give evidence with reference to the Muchalika has not been able to talk cogently about the said deed. That apart, he would submit that the deed in question was not registered though the division of property is claimed to be *in praesenti* in the said deed.



14. He would submit that both the Courts below have extensively considered the evidence and have proceeded to decree the suit. With reference to the argument that the plaintiff has not sought to have a decree for declaration, the plaintiff would submit that the defendants have admitted the purchase of the property in the name of the plaintiff and their only grievance is that the funds for the purchase of the property had come from a Joint Family nucleus. Unfortunately, the defendants have not been able to prove the same. Therefore, he would submit that this Court sitting in the Second Appeal under Section 100 of the CPC should not upset the finding of fact.

15. Heard the counsels on either side.

16. The plaintiff has come to Court with a case that the property in question has been purchased under Ex.A.1 in the name of the deceased plaintiff. This fact has not been denied by the defendants. The defendants would only contend that the property though purchased in the name of the plaintiff belonged to all as the source of income for the purchase of the above property was the joint family funds. However, the defendant who has pleaded joint family funds has not been able to prove the same. On the contrary,



D.W.1 has got into the box and in her cross examination on 25.02.2003 has stated that her husband did not have any ancestral property. Once such an admission is made then it naturally follows that the property is the absolute property of the deceased plaintiff. Since the property stands in his name, the Muchalika pleaded by the defendants has been denied by the plaintiff. A perusal of the same would clearly show that the document is one *in praesenti* and the same has not been registered. Further, the revenue records have been mutated in the name of the plaintiff which would clearly show the possession of the property as well as the fact that the sale in favour of the deceased plaintiff is a valid document which conveys title to him.

17. The Courts below have considered the issue of title only on account of the fact that the defendants have claimed title to the property. Such a plea has been taken to counter the plea raised by the plaintiff that he had put the defendants in permissive occupation of the property and they have set up an individual title to the property. However, on a perusal of the documents produced, the title of the plaintiff on the face of the same stands established. The defendants had been living in Erode and later shifted to the native village only on account of financial loss in their business. In these circumstances,



they have been put in possession by the plaintiff. Being as permissive occupant the defendants are bound to hand over possession as and when demanded by the true owner of the property. The defendants have not only refused to hand over possession but have also asserted title to the property stating that the three brothers are entitled to the suit property. However, no steps have been taken by the defendants to partition the property which would also go to show that the property belongs to the plaintiff.

18. The plaintiff has relied upon the judgment reported in **(2008) 4 SCC 594 - Anathula Sudhakar Vs. P.Buchi Reddy and Others.** in support of his contention that if the title is denied there must be a prayer for declaration. However, in the judgment of the Hon'ble Supreme Court reported in **(2018) 18 SCC 330 - Jharkhand State Housing Board Vs. Anirudh Kumar Sahu and Others** the learned Judges have observed as follows:-

" 6. We have heard the learned counsel on either side and perused the material available on record. We are very much surprised at the way the suit was dealt with by the courts below contrary to the pleadings and contrary to the settled legal position. In the plaint, plaintiff has clearly averred that as the defendants are interfering with his possession, the necessity



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arose to file the suit for permanent injunction and particularly sought the prayer for permanent injunction. The trial court has framed several issues and held all the issues in favour of the plaintiff including the issue with regard to title but granted only the relief of injunction. The trial court has given several findings with regard to the title and observed that plaintiff has got right and title to the property. Even the first appellate court has also made specific observation with regard to title and gave a clear finding that plaintiff has asked for declaration. The High Court mechanically confirmed the judgment and decree of the courts below without appreciating both the legal and factual aspects.

7. We have given our anxious consideration and we are of the considered opinion that the courts below misconstrued the pleadings and went on a premise that the suit is for declaration of title when the same is for bare injunction and in a way declared the title of the plaintiff. Even before this court plaintiff filed the counter and stated that his suit is only for the relief of injunction. The learned counsel has also submitted that the relief sought is only for injunction. The copy of the plaint filed before us also strengthens the same. The judgment and decree under appeal deserves to be set aside and accordingly appeal is allowed. It was brought to our notice that plaintiff is continuing with the possession of the property during the pendency of the litigation. In view of the same we deem it appropriate to direct



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the parties to maintain status quo for a period of 3 months and if so advised, to avail the remedy available under law."

19. Therefore, a mere statement in the written statement denying title does not make it mandatory for the plaintiff to prove his title particularly when the documents under which the plaintiff claims a right is admitted by the defendants. In these circumstances, the Substantial Question of law No.1 is answered against the defendants. The Appellate Court has rightly rejected Ex.B.1 which is the alleged Muchalika as the same is not admissible in evidence being an unregistered document evidencing a partition, therefore, Substantial Question of law No.2 is also answered against the defendants. The transfer of tax receipts in the name of the defendants and the sub division of the Door Number had taken place only on the strength of Ex.B.1 since the very documents in not admissible and is objected to by the plaintiff, any right claimed on the basis of Ex.B.1 has to necessarily be rejected. Therefore, the Substantial question of law No.3 is also answered against the defendants. Consequently, the Second Appeal is dismissed. No costs.

02.01.2023



S.A.No.237 of 2000

Index : Yes/No
Internet : Yes/No
Neutral Citation : Yes/No
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To

- 1.The Subordinate Court, Shankari.
- 2.The District Munsif Court, Shankari.

P.T. ASHA, J,

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