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C.M.S.A.Nos.2 and 3 of 2014

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.08.2023

CORAM :

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

C.M.S.A. Nos. 2 and 3 of 2014
and
M.P. No. 1 of 2014

C.M.S.A. No. 2 of 2014

Savithri

... Appellant

Versus

Veerasamy (Deceased)

1.Lakshmi
2.Kunjithapdam
3.Mala

... Respondents

[Cause title accepted vide order
dated 19.12.2013 made in MP.No.1 of 2013
in CMSA.Sr.No.53288 of 2012]

Civil Miscellaneous Second Appeal filed under Order 21 Rules 99, 100 and 103 read with Section 100 of Civil Procedure Code to set aside the fair and decretal order made in E.A. No. 68 of 2009 in E.P. No. 5 of 2009 in O.S. No. 28 of 2006 dated 26.8.2011 on the file of the Subordinate Judge, Nagapattinam as confirmed in A.S. No. 39 of 2011 dated 27.02.2012 on the file of the District Judge, Nagapattinam.



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For Appellant : Mr. M. Venkadeshan

For Respondents : Mr.M.S.Palanisamy

C.M.S.A. No. 3 of 2014

Savithri

... Appellant

Versis

1.V.Kunjitapadam
2.Kanagalakshmi
3.Parimala
4.Mohan
5.Vasu

... Respondents

Civil Miscellaneous Second Appeal filed under Order 21 Rules 99, 100 and 103 read with Section 100 of Civil Procedure Code to set aside the fair and decretal order made in E.A. No. 75 of 2009 in E.P. No. 5 of 2009 in O.S. No. 28 of 2006 dated 26.8.2011 on the file of the Subordinate Judge, Nagapattinam as confirmed in A.S. No. 40 of 2011 dated 27.02.2012 on the file of the District Judge, Nagapattinam.

For Appellant : Mr. M. Venkadeshan

For Respondents : Mr.M.S.Palanisamy for R1
R2 to R4 – No appearance
R5 – Notice Unclaimed.

COMMON JUDGMENT

These appeals arise out of a common judgment and decree in

<https://www.mhc.tn.gov.in/judis> A.S.Nos.39 and 40 of 2011 on the file of the District Court, Nagapattinam,



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dated 27.02.2012, confirming the fair and decretal orders made in E.A.Nos.68 and 75 of 2009 in E.P.No.5 of 2009 in O.S.No.28 of 2006 on the file of the Subordinate Judge, Nagapattinam, dated 26.8.2011.

2. The case of the appellant/plaintiff is that originally, the suit properties belonged to one Ramasamy Chettiar and he was in absolute possession and enjoyment of the said properties for more than 100 years. Later it had devolved into his three sons viz., Govindaraj Chettiar, Manickam Chettiar and Marimuthu Chettiar, who were under a joint family. The appellant / plaintiff is the daughter of Govindaraj Chettiar and the defendant / Sowriraja Chettiar is the son of Marimuthu Chettiar. Further, the said Manickam Chettiar died in the year 1964 as a Bachelor. After the demise of Manickam Chettiar, the remaining two brothers namely Marimuthu Chettiar and Govindaraj Chettiar had become entitled to half undivided share each in the said properties.

2.1. Further case of the appellant is that the suit properties consisting of four shops, one house and its backyard ad-measuring 25 cents had been under the enjoyment of the family members of the Govindaraj Chettiar. The patta in respect of the suit properties stands in the name of the



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defendant-Sowriraja Chettiar, as he is the "Karthā" of the joint family. After demise of Govindaraj Chettiar, the appellant/plaintiff being his daughter, inherited the half undivided share and the remaining half share that belongs to Sowriraja Chettiar. When the appellant demanded the share of the said Sowriraja Chettiar to divide the suit properties and to allot her half share, the said Sowriraja Chettiar had not accepted the claim of the appellant/plaintiff, and hence, she filed the suit in O.S. No. 28 of 2006 on the file of the Subordinate Court, Nagapattinam against Sowriraj Chettiar for partition and separate possession. After trial, the said suit was decreed and preliminary decree was passed. Subsequently, final decree was also obtained by the appellant/plaintiff in I.A. No. 69 of 2007 on 22.11.2007. Then, she filed an Execution Petition in E.P. No. 5 of 2009 on the file of the Subordinate Court, Nagapattinam and in the execution proceedings, a part of the suit property had been allotted in favour of the appellant/plaintiff. Pending Execution Petition, one Veerasamy (deceased) filed E.A. No. 68 of 2009 and one V. Kunjithapatham filed E.A. Nos. 64 and 75 of 2009 against the appellant and respondents 2 to 5 on the file of the Subordinate Court, Nagapattinam.

2.2. The case of the petitioners in E.A. Nos. 64 of 2009 and 68 of 2009 is that originally, the suit properties in O.S. No. 28 of 2006 belonged to



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one Rajesh by way of ancestral right. The said Rajesh had sold the petition property i.e. 9 cents (E.A.No.64 of 2009) in favour of one Jayathilagan under a registered Sale Deed dated 04.01.1996. In one shop situated in the aforesaid property, one Veerasamy was running a Tiffin Centre for more than 65 years and he had become a tenant in respect of the said shop under one Subbiah Mudaliyar, who is the grand father of Rajesh. After the purchase, the said Jayathilagan had instituted the suit in O.S. No. 251 of 1999 on the file of the District Munsif Court, Nagapattinam seeking to vacate Veerasamy from the said property, through his Power of Attorney Agent Sowriraj Chettiar and the same was decreed on 01.02.2001. As against the said judgment, the said Veerasamy had preferred an appeal in A.S. No. 44 of 2001, which came to be dismissed, vide judgment dated 21.08.2001. Challenging the same, Veerasamy had filed a Second Appeal in S.A. No. 257 of 2002 before this Court and the same is pending. In the meanwhile, the said Jayathilagan passed away on 08.01.2003 and thereupon, the legal heirs of Jayathilagan sold the petition mentioned property in E.A. No. 64 of 2009 i.e. 9 cents to one Kunjithapatham. As such, 9 cents of lands and the superstructure available therein, which is a portion of the suit properties in O.S.No.28 of 2006 vested with Kunjithapatham. Thereafter, the said Veerasamy, who is the father of the Kunjithapatham, had attorned the tenancy with his son. Therefore, the said



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Veerasamy and Kunjithapatham filed E.A.Nos. 64 and 68 of 2009 contending that they have been dis-possessed from the petition mentioned property.

2.3. The learned Subordinate Judge, Nagapattinam tried E.A.Nos. 64 and 68 of 2009 and 75 of 2009 and vide common order dated 26.08.2011, had allowed E.A. Nos. 75 and 68 of 2009 and declared that Kunjithapatham is the title holder with respect to the petition mentioned property in E.A. No. 68 of 2009 and dismissed E.A. No. 64 of 2009. Challenging the same, the appellant herein filed appeals in A.S.Nos. 39 and 40 of 2011 before the learned District Judge, Nagapattinam, which came to be dismissed on 27.02.2012. Assailing the said judgment and decree, the appellant filed the present Civil Miscellaneous Second Appeals before this Court.

3. The learned counsel for the appellant submitted that the subject matter of E.A. No. 68 of 2009 and E.A. No. 75 of 2009 is 9 cents, but the subject matter of O.S. No. 28 of 2006 is more than 25 cents and that the finding given by Court below that the decree passed in O.S. No. 28 of 2006 is a collusive decree, is erroneous. He further submitted that while dealing with the applications filed under Order XXI Rule 97 CPC, the Court below is entitled to consider and decide the questions relating to right, title or interest in



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the property arising between the parties to the proceedings. In the present case, the appellants claim that the petition mentioned property belongs to her family through her ancestral, whereas, it is the case of the petitioners in E.A.Nos. 68 and 75 of 2009, that the petition mentioned property originally belonged to one Subbiah Mudaliyar and the legal heirs of Subbiah Mudaliyar sold the same in favour of Jayathilagan, who in turn, sold the same in favour of Kunjithapatham and as such, he is the absolute owner of the said petition mentioned property. However, the Court below failed to look into the aspect of origin of title relating to the suit properties by appreciating acceptable documentary evidence and rendered a finding that the suit proceedings are collusive in nature, which is not correct and not in accordance with law. He further submitted that both the Courts below have been carried away by the sale deed dated 04.01.1996 allegedly executed by the legal heirs of Subbiah Mudaliyar in favour of Sowriraj Chettiar (defendant in O.S. No. 28 of 2006) and another sale deed dated 16.9.2009 executed by the legal heirs of Jayathilagan in favour of Kunjithapatham. However, the Courts below failed to look into the question as to whether the executants of the aforesaid sale deed or their predecessors have got any valid and marketable title to execute those documents and passed the order in favour of the petitioners.



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4. The learned counsel for the appellant further submitted that one

Rathinathanni, who is the wife of Subbiah Mudaliyar, had filed a suit in O.S. No. 54 of 1989 against Sowriraj Chettiar (with respect to the portion of the suit properties in O.S. No. 28 of 2006) seeking the relief of recovery of possession on the file of the District Munsif Court, Nannilam, which came to be decreed on 28.08.1990 in her favour. Against the said decree, the said Sowriraj Chettiar preferred an appeal in A.S. No. 35 of 1991 on the file of the Subordinate Court, Nagapattinam and it ended in favour of the said Sowriraj Chettiar on 30.07.1993. In the said judgment, it was held that the petition mentioned properties are ancestral properties of Sowriraj Chettiar and as against the said judgment and decree, one Rajesh and Saroja, who are the legal heirs of Subbiah Mudaliyar had preferred second appeal in S.A.No.1279 of 1993 before this Court, which came to be dismissed on 03.07.2003 as 'withdrawn'. Therefore, the title of Rajesh in respect of the petition mentioned properties, was not confirmed. Since Rajesh does not have any right or title over the petition mentioned properties, one Jayathilagan, who had purchased the petition mentioned properties and obtained sale deed from one Rajesh, is not a valid one. He further submitted that since the appellant herein is not a party either to the suit proceedings in O.S. No. 54 of 1989 or to the sale deed



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dated 04.01.1996, the sale deed allegedly executed by Rajesh will not bind the appellant in any manner.

5. The learned counsel for the appellant further submitted that one Veerasamy, who was running a tea stall in Door No.23 of the said property, was paying monthly rent of Rs.100/- to Sowriraj Chettiar, who had acted as the Power of Attorney Agent for one Jayathilagan. Originally, the said Jayathilagan had purchased the Eastern portion of the suit property (9 cents) from the said Rajesh under sale deed dated 04.01.1996. After purchase, the said Jayathilagan had instituted the suit in O.S. No. 251 of 1999 on the file of the District Munsif Court, Nagapattinam seeking to vacate Veerasamy from the said property, through his Power of Attorney Agent Sowriraj Chettiar and the same was decreed on 01.02.2001 and the appeals arising out of the judgment rendered in the said suit was confirmed. Under the said circumstances, merely because Sowriraj Chettiar had allegedly acted as the Power of Attorney holder in instituting and conducting O.S.No.251 of 1999, it cannot be concluded that the appellant/plaintiff had accepted the title of Subbiah Mudaliyar and his successors claiming right regarding the suit properties.



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6. The learned counsel for the appellant further submitted that the appellant/plaintiff, who filed the partition suit in O.S. No. 28 of 2006 obtained final decree based on the Commissioner's report. As per the final decree shop bearing Nos. 22, 22B and 23 and house bearing Door No.22 A belong to the appellant, and house bearing Door No.21A with its backyard belong to Sowriraj Chettiar, therefore, the contention of the respondent-Kunjitapadam, who filed E.A.Nos. 64 and 75 of 2009 that after death of Jayathilagan on 08.01.2003, he purchased the petition mentioned property on 18.09.2009 is not acceptable and the sale deed obtained after decree is not a valid one. Even earlier, two months from the date of filing of the execution petitions, the appellant sent notice to the respondents and also filed caveat, thereafter, she took delivery of possession of the petition mentioned properties through Court Amin. Further submission of the learned counsel for the appellant is that the property mentioned in the execution petition is only nine (9) cents and the said Sowriraj Chettiar has perfected title by adverse possession by 13 cents from one Rajesh. Since the decree passed by the trial Court has not been set aside, though the Execution applications were filed under Order XXI Rule 97 CPC., the Executing Court can decide the right, title and interest of the parties in the petition itself and they need not file separate suit. However, the petitioner in E.A. Nos. 64 and 75 of 2009 Kunchitapadam is claiming the larger extent.



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Therefore, the properties, which are not covered under the suit or decree, cannot be decided in the execution petitions. At the time of pending execution petitions, if any dispute arise between the parties or the third party in respect of right, title and interest over the property, they can agitate the issue covered under the decree and not more than that. The execution Court failed to consider those aspects and allowed the execution applications filed by the respondent Veerasamy (deceased) and Kunjitapadam, which was confirmed by the lower Appellate Court. Therefore, the appellant is before this Court.

7. At the time of admission, this Court has formulated the following substantial question of law in both the appeals on 25.02.2014 :

“Whether the unilateral action of the Co-owner against the interest of another Co-owner, will prejudice the entitlement of such another Co-owner?”

8. Heard the learned counsel on either side and perused the materials available on record.

9. On a perusal of the records, it is seen that admittedly, the appellant filed the suit in O.S. No. 28 of 2006 and obtained preliminary decree and also final decree. Then, the appellant filed execution petition for taking



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delivery of possession. Pending execution petition, one Veerasamy (deceased) filed E.A. No. 68 of 2009 seeking to declare that the petition mentioned property was under his tenancy right and enjoyment and one Kunjithapadam filed E.A.Nos. 64 and 75 of 2009 seeking to declare that the petition mentioned property belongs to him and after enquiry, the Court below allowed E.A. Nos. 68 and 75 of 2009 and dismissed E.A. No. 64 of 2009. Even assuming that the said Kunjithapatham purchased the petition mentioned property and that will not bind the share of the appellant, unless final decree passed by the Court below, is not set aside, the rights of the parties then be decided. Further, the appellant has established her right, title and interest over the suit properties, and even though the respondents have stated that the appellant has got a collusive decree, unless it is set aside by the competent Court, still the *ex-parte* decree is executable. Therefore, the appellant has right over the properties.

10. It is further seen that even the said Veerasamy and Kunjithapatham have admitted that they are the tenant in a portion of the suit properties, but contended that subsequently, they have purchased the property from one Rajesh. Earlier in A.S. No. 35 of 1991, the lower appellate Court had concluded that Rathinathanniammal, who claims title under one Subbiah



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Mudaliyar, had failed to establish the title over the petition mentioned property. Therefore, the said Rajesh, who is the legal heir of Subbiah Mudaliyar does not have any right or title over the petition mentioned property and further also the said judgment will bind the respondents, who are claiming title over the properties in dispute. Further, in the present case, the respondents have not proved that the decree obtained by the appellant is a collusive one and the same will not bind on them. Further, the respondents have failed to produce any documents to establish the title of Rajesh and his ancestors.

11. It is further seen that in A.S. No. 35 of 1991, the claim of right and title put forth by the legal heirs of Subbiah Mudaliyar regarding the portion of the suit properties in O.S. No. 28 of 2006, came to be negated. Moreover, the right and title of Sowriraj Chettiar's family over the said property was upheld in the said judgment. Therefore, the right, title and interest of Sowriraj Chettiar over the said properties cannot be questioned by the respondents notwithstanding the withdrawal of Second appeal in S.A. No. 1279 of 1993 filed by one Rajesh and execution of sale deed by Rajesh in favour of Sowriraj Chettiar. Both the Courts below have not appreciated that the appeal filed in A.S. No. 35 of 1991 was binding on Rajesh's predecessors' title and interest of the respondents, who filed execution petitions. Therefore,



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the third party, who filed the execution petitions, who is said to have derived the title under Rajesh, is legally not sustainable. Further, the said Rajesh has not proceeded with the second appeal in S.A. No. 1279 of 1993, and he himself withdrew the said appeal and therefore, the successors, who are claiming title over the disputed properties under the said Rajesh are not entitled to get any title. Further, the deceased Veerasamy, who filed E.A. No. 68 of 2009, claiming that the petition mentioned property was under his tenancy right and enjoyment and to declare the eviction from the said property, is illegal. Once he claims his tenancy right, he cannot deny the ownership of the owner of the property and he is estopped from doing so. Therefore, the Court cannot declare the title unless he surrendered the possession and also to establish his title. Once he has admitted that he is a tenant, he cannot dispute the ownership, if he wants to dispute the ownership, he has to surrender the possession and then he has to establish his right, title and interest over the said properties. However, both the Courts below have failed to consider the fact that neither the appellant nor her father is a party to the suit proceedings in O.S. No. 54 of 1989 or to the sale deed dated 04.01.1996 and 16.09.2009 allegedly executed by Rajesh in favour of Sowriraj Chettiar and Jayathilagan and that will not bind the appellant. Therefore, the said Sowriraj Chettiar cannot act against the interest of the appellant. Even if he acts, against the



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interest of the appellant, it will not bind the appellant, since the appellant filed the suit against the said Sowriraj Chettiar for partition and obtained preliminary decree and also final decree, but the said Sowrirajan did not challenge the said decree. The said *ex-parte* decree was not challenged till the filing of the execution applications. Therefore, subsequent filing of the suit by Rajesh will not bind the appellant and the respondents cannot claim any right, title or interest over the said property, that will not affect the interest of the appellant. Further, the decree passed in O.S. No. 28 of 2006 is an executable one and the respondents have not established that the decree is a collusive decree. Unless it is established and set aside by the competent Court, the decree obtained by the appellant is a valid one and executable one.

12. Therefore, under the above circumstances, it is hereby found that the appellant has established her right, title and interest over the suit properties by obtaining final decree in O.S. No. 28 of 2006, whereas, the plea that the said decree is collusive one has not been established by the respondents. Therefore, Sowriraj Chettiar, who is the defendant in the suit in O.S. No. 28 of 2006, cannot act against the interest of the appellant. Therefore, the substantial question of law is answered accordingly.



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13. Considering the facts and circumstances, the order passed in E.A.Nos. 68 and 75 of 2009 in E.P.No.5 of 2009 in O.S.No.28 of 2006 dated 26.8.2011 on the file of the Court of the Subordinate Judge, Nagapattinam, as confirmed in A.S.Nos.39 and 40 of 2011 dated 27.02.2012 on the file of the District Judge, Nagapattinam, are hereby set aside. These Civil Miscellaneous Second Appeals are allowed accordingly. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

17.08.2023

Index: Yes/No
Speaking Order/Non-Speaking Order
Neutral Citation Case : Yes/No
ms

To

1. The Subordinate Judge,
Nagapattinam.
2. The District Judge,
Nagapattinam.
3. The Section Officer,
V.R.Section,
High Court, Madras.



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