



S.A(MD)No.432 of 2009

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED: 09.01.2023

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A(MD)No.432 of 2009

1.Arumugam Pillai (Died) ...Appellant/Respondent/
Plaintiff

2.A.Bakiam

3.S.Vijayalakshmi

4.A.Rajeshwari

5.S.Indirani ... Appellants

(Appellants 2 to 5 are brought on record as LR's of the deceased sole appellant vide Court order dated 09.01.2023 made in C.M.P(MD)Nos.305, 306 and 307 of 2023 in S.A(MD)No.4320 of 2009 by SSJ)

Vs.

1.Vemba Pillai (Died) ...Respondent/Appellant
Defendant

2.Eswari

3.Santhanam ... Respondents

(Respondents 2 and 3 are brought on record as LR's of the deceased sole respondent vide Court order dated 09.01.2023 made in C.M.P(MD)Nos.299, 300 and 301 of 2023 in S.A(MD)No.432 of 2009 by SSJ)



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PRAYER :-

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This Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree of the Principal Subordinate Judge, Dindigul dated 17.06.2008 in A.S.No.61 of 2005, reversing the judgment and decree passed by District Munsif Cum Judicial Magistrate, Vedasandur dated 16.06.2004 in O.S.No.886 of 1995.

For Appellants : Mr.S.Anand Chandrasekar

For Respondents : Mr.T.Antony Arulraj

JUDGMENT

The plaintiff is the first appellant. The suit is for injunction. The defendant/first respondent herein preferred a counter claim seeking mandatory injunction directing the first appellant/plaintiff to remove the asbestos sheet structure put up by him in the suit property. The suit as well as the counter claim were dismissed by the trial Court. On appeal, filed by the first respondent/defendant, the Appellate Court granted a decree for mandatory injunction as prayed for in the counter claim by the first respondent. Aggrieved by the same, the first appellant/plaintiff preferred this second appeal.



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2.The Second Appeal was dismissed for default on 24.04.2015.

Thereafter, both the first appellant and the first respondent passed away and the legal representatives of the first appellant filed an application to restore the second appeal in C.M.P(MD)No.4561 of 2022 by impleading the legal representatives of the first respondent. The said petition was allowed. Appellants 2 to 5 also filed two sets of petitions to bring them on record as the legal representatives of the deceased first appellant and to bring on record the legal representatives of the deceased first respondent. All the petitions were allowed today (09.01.2023) and the legal representatives of the respective parties were brought on record.

3.According to the first appellant/plaintiff, the suit property was originally allotted to his brothers in a family partition as 'C' schedule in the partition deed, which was marked as Ex.B8. The first appellant/plaintiff also claimed that there was an oral partition in the family in the year 1975 and the suit property was allotted to his share in the oral partition. Subsequent to the said oral partition, the appellant put up a thatched house in the said property and residing thereon. It was further averred that during June 1995, the first respondent, as an elder brother, requested the first appellant for purchasing



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the suit property and the said request was not accepted and aggrieved by the same, the first respondent tried to interfere with his possession over the suit property compelling the first appellant to file the suit for bare injunction.

4. The deceased first respondent filed a written statement and resisted the suit, wherein he had admitted the partition between the first appellant and his other brothers. It was pleaded by him that when the partition was effected between the first appellant and his other brothers in the year 1962 he was not in India and after coming back India in the year 1967, he demanded fresh partition and his request was accepted too. In the fresh partition that had taken place in the year 1967, the property lying on the western extremity of the suit scheduled property was allotted to the first respondent. It was further averred by the first respondent that in the year 1984, he left his native place and proceeded to Chennai in search of job. He executed an unregistered sale deed in favour of the first appellant in Ex.B1, after receiving the sale consideration of Rs.2,100/-. It was further averred that the said unregistered sale deed was cancelled by him on 28.11.1994 by paying a sum of Rs.8,000/- to the first appellant/plaintiff, which represents the sale consideration was received by him together with interest.



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5. The trial Court, on consideration of oral and documentary evidence available on record, came to the conclusion that portion of the property on the western side of the suit schedule property, which was mentioned as BCHI in the Commissioner's report and plan, had been allotted to the share of the first respondent in the oral partition effected in the family and consequently the claim of the first appellant that he was in exclusive possession of the entire suit property cannot be accepted. The trial Court also came to the conclusion that as per the averment of the first appellant in his plaint, he claimed exclusive right over the suit property under the oral partition and in the absence of any evidence to show that portion of the property was allotted to the respective shares, the first appellant/plaintiff can only be treated as a co-owner and hence, the prayer for injunction made by the first appellant was negatived.

6.As far as the counter claim made by the first respondent is concerned, by pointing out the discrepancy in the extent pleaded by the first respondent in the original written statement and the additional written statement, in which, prayer for mandatory injunction was made, the trial Court negatived



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his prayer for mandatory injunction to remove the asbestos sheet structure put up by the first appellant in the suit property.

7. Aggrieved by the dismissal of the counter claim made by the first respondent he preferred an appeal in A.S.No.61 of 2005 on the file of the Principal Sub Court, Dindigul. Challenging the dismissal of the suit, the first appellant/plaintiff had not preferred any appeal. The first Appellate Court reversed the findings of the trial Court with regard to the counter claim of the first respondent mainly on the ground that the trial Court having given a specific finding that the portion 'BCHI' mentioned in the Advocate Commissioner's report and plan had already been allotted to the share of first respondent in the oral partition ought not to have negatived the claim for mandatory injunction prayed for by the first respondent in respect of that portion. Aggrieved by the said judgment and decree the first appellant/plaintiff is before this Court. The second appeal was not admitted.

8. The learned counsel for the appellants mainly contended that the first respondent in his written statement and the additional written statement has given different measurements in respect of the property allotted to him in the



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oral partition claimed by him. When the first respondent himself is not sure about the measurement of the property allotted to him, the first appellate Court ought not to have granted a decree for mandatory injunction in his favour based on the Commissioner's report and plan. The learned counsel further submitted that the trial Court had given a finding that the first appellant/plaintiff is a co-owner of the property. In such circumstances, the first respondent should also be treated a co-owner and consequently he cannot maintain his prayer for mandatory injunction.

9.The trial Court in its judgment has given a categorical finding based on the Advocate Commissioner's report and plan and also based on the oral evidence of PW2, who attested Ex.B1 that the portion marked as BCHI in the Advocate Commissioner's report and plan had been allotted to first respondent in the oral partition. The trial Court also observed that though Ex.B1 unregistered sale deed executed by first respondent in favour of first appellant is not a valid document, which would not convey any title to the first appellant, the same can be considered for coming to the conclusion that the first appellant/plaintiff admitted allotment of BCHI portion to the first respondent in the oral partition based on the recitals found in Ex.B.1.



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10. When there is a specific finding by the trial Court that the portion mentioned as 'BCHI' in the Advocate Commissioner's report and plan was allotted to the first respondent and the same was based on the recitals in Ex.B1 and the oral testimony of witnesses, in absence of challenge by the first appellant, the said findings had obtained finality. In fact, based on this finding, the prayer for injunction made by the first appellant was negatived by the trial Court. The first appellant, who was un-successful before the trial Court failed to challenge the decree as well as the findings, which were made against him. The appellate Court in its judgment rightly observed that when the trial Court's finding that BCHI portion mentioned in the Advocate Commissioner's report and plan was allotted to the first respondent had attained finality, the first respondent is entitled to his prayer for mandatory injunction. The allotment of BCHI to the first respondent is a finding of fact rendered by the trial Court and the same had also already attained finality as the first appellant/plaintiff failed to challenge the same by filing regular appeal. Hence, as rightly found by First Appellate Court, the first respondent is entitled to mandatory injunction as prayed for.



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11. In these circumstances,

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a) I do not find any substantial question of law and consequently the Second Appeal stands dismissed and the judgment and decree passed by the learned Principal Subordinate Judge, Dindigul dated 17.06.2008 in A.S.No.61 of 2005 stands confirmed;

b) In the facts and circumstances of the case, there would be no order as to costs.

09.01.2023

NCC: Yes/No

Index: Yes/No

vsd

To

1.The Principal Subordinate Judge,
Dindigul.

2.The District Munsif Cum Judicial Magistrate,
Vedasandur.

3.The Record Keeper,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.

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