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S.A.No.240 of 2



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 26.02.2024	Pronounced on: 28.03.2024
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THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No.240 of 2020
and
C.M.P.No.4946 of 2020

S.Selvalingam

...Appellant

Vs.

S.Bharadalingame

...Respondent

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, to set aside the Judgment and Decree dated 03.10.2018 made in A.S. No.91 of 2018 on the file of the Principal Sub-Judge at Puducherry confirming the judgment and decree dated 27.08.2018 made in O.S. No.1219 of 2006 on the Court of the II Additional District Munsif at Puducherry and allow this Second Appeal.

For Appellant : Mr.M.Gnanasekar

For Respondent : Mr.Usha Ramman

JUDGMENT

The defendant, in a suit for recovery of possession, who suffered concurrent findings before the trial Court as well as the First Appellate



Court is the appellant.

2. The parties are described as per their litigative status before the trial Court.

3. The brief facts that are necessary for deciding the Second Appeal are as follows:

4. The case of the plaintiff is that he is the owner of the suit property, having purchased the same under a registered sale deed dated 11.10.1995, for a valid consideration. The defendant is the brother of the plaintiff and the plaintiff permitted the defendant and another brother, one Palaniswamy to occupy the suit property to meet his temporary residential requirements in the year 2002. However, the defendant's attitude changed and he started asserting rights in the suit property and therefore, the plaintiff issued pre-suit notices to the defendant calling upon him to vacate and handover vacant possession. In view of the fact that the defendant did not even choose to reply to the pre-suit notices, the the plaintiff has come forward to file the suit for recovery of possession.

5. The defendant filed a written statement resisting the case of the



plaintiff on the ground that the property was not the self acquired property of the plaintiff, but purchased out of joint exertions and earnings, by all the other siblings, including the defendant. Therefore, the defendant denied the allegation of permissive occupation of the plaintiff and sought for dismissal of the suit.

6. The Trial Court, decreed the suit and the First Appellate Court dismissed the Appeal, confirming the judgment and decree of the Trial Court and directed the defendant to vacate and hand over vacant possession of the suit property to the plaintiff. Aggrieved by the said concurrent findings of the Courts below, the present Second Appeal has been preferred by the defendant.

7. On 23.03.2020, the above Second Appeal was admitted on the following substantial questions of law:-

“ (i) Whether the lower appellate Court was right in rejecting Exs.B1 and B8 in view of Section 92 of Indian Evidence Act?

(ii) Whether the Court below were right in not considering the evidence of P.W.1 where in P.W.1 has not specifically denied the execution of Ex.B8?”

8. I have heard Mr.M.Gnanasekar, learned counsel for the appellant



and Mr.Usha Ramman, learned counsel for the respondent.

9. The learned counsel for the appellant would submit that the plaintiff has denied the execution of Ex.B8 and the evidence adduced shows that the plaintiff himself had admitted that under the said document, the property was purchased out of joint family exertions and earnings and therefore, the defendant had a right in the property and could not be termed as a permissive occupation and sought to be dispossessed. He would also place reliance on the following decisions:-

- (i) *G.Felshia Vasanthi Vs. R.Sekar @ Gunasekar* reported in 2023 (3) CTC 184
- (ii) *G.Lakshmi and another Vs. U.Saraswathi* reported in 2023 (3) CTC 30
- (iii) *Sri Marcel Martins Vs. M.Printer and Ors* reported in (2012) 5 SCC 342
- (iv) *Paramjit Anand Vs. Mohan Lal Anand* in CS (OS) No.575 of 2001 dated 04.04.2018.

10. Per contra, the learned counsel for the respondent/plaintiff would state that execution of Ex.B8 was not admitted by the plaintiff and the so called admission, which is sought to be put against the plaintiff, is not on a reading of the entire evidence as a whole and further, he would also state that he has examined two of his other brothers who have also affirmed that the property is the self acquired property of the plaintiff. Therefore, no



interference was warranted in the concurrent findings arrived at by the Courts below. Therefore, the learned counsel for the respondent prays for dismissal of the Second Appeal.

11. I have carefully considered the rival submissions advanced by the learned counsel on either side. I have also gone through the pleadings, oral and documentary evidence and the judgments of the Courts below, besides also the decisions on which reliance has been placed by the learned counsel on either side.

12. Admittedly, the suit property stands in the name of the plaintiff. This is admitted to even by the defendant. However, the defendant places heavy reliance on Ex.B8, which is a document, said to have been executed by the plaintiff, allegedly on 25.06.2003, wherein, it is stated that the plaintiff, even during the lifetime of his father, out of the joint exertion of all his brothers, had purchased the suit property on 11.10.1995. The sale deed referred to in Ex.B8, in favour of the plaintiff, was executed and registered eight years prior i.e. on 11.10.1995. Both the Courts have found that the plaintiff had specifically denied the execution of Ex.B8 and hence the defendant was bound to prove the said fact, which he had miserably



failed to do. In this regard, the learned counsel for the appellant would take me through the evidence, viz., cross examination of P.W.1 and referred to the answer given by the plaintiff, where he has stated that he does not remember whether he had executed any such declaration on 25.06.2003. However, in the very next sentence, he has denied that he has admitted to the fact that his brothers Selvalingam and Palaniswamy have constructed the building, at their costs. Therefore, the evidence of P.W.1 cannot be treated as an unequivocal admission. A slip answer in cross examination cannot be isolated and interpreted. The entire evidence has to be read as a whole and in line with the consistent pleading and evidence of the party.

13. In the present case, the plaintiff has come to Court with a specific stand that he is the absolute owner of the property and he had permitted the defendant to occupy the suit property, and since he started claiming right over the suit property, the plaintiff was constrained to issue pre-suit notices and thereafter, filed the suit. Admittedly, the defendant did not reply to both the pre-suit notices. Even in the pre-suit notices, the plaintiff has asserted right over the suit property and called upon the defendant to vacate and hand over vacant possession. This is the case brought out in the plaint as well. In such circumstances, I am able to see that the plaintiff has only



specifically denied the execution of Ex.B8.

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14. With regard to the plea of Benami, the learned counsel for the appellant has cited the above referred decision of the Hon'ble Division Bench judgment of this Court in *G.Felshia Vasanthi's* case, where the dispute was between the husband and wife and in the facts of the case before the Division Bench, the Court found that it was not the wife who purchased, but her husband purchased the property for her beneficial interest. Therefore, in such circumstances, the judgment came to be delivered and therefore, is of no avail to the judgment in the present case.

15. The Hon'ble Division Bench of this Court, in *G.Lakshmi's* case, referred herein supra, speaking for the Bench, I held that when a Will had been executed by the mother of the caveators in favour of brother and challenge was made to the bequest in the Will being hit by the provisions of the Benami Transactions (Prohibition) Act, 1988, and on the facts of the said case, there being no challenge to the title or possession of the property of the propounder. The Testatrix had admitted to the purchase of the property by the brother and therefore, I proceeded to hold that the plea of benami cannot be raised against the propounder. Therefore, this position



also will not help the appellant's case.

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16. Moreover, apart from the plaintiff's evidence as P.W.1, P.W.2 and P.W.3, who are his two other brothers, have also asserted that the suit property was purchased only by the plaintiff. Even though defendant has examined one another brother, who supported the defendant's case and stated that the property was purchased out of joint family funds, I am unable to rely on the said evidence of the brother, who was examined on the side of the defendant. The burden of proof in such matters where the property admittedly stands in the name of the plaintiff, is on the defendant who takes a plea that the property was acquired in the plaintiff's name, only out of joint family funds. He has to clearly establish and prove (i) existence of joint family (ii) availability of surplus funds to purchase the property from and out of joint family funds and (iii) applying such surplus to purchase the suit property in the name of one of the members of the joint family. As also rightly contended by the learned counsel for the respondent, the plaintiff is not the eldest brother in the joint family. It is normal and accepted Hindu customary practice that in cases of joint family acquisitions, the property is acquired only in the name of eldest male member in the family, who is admittedly not the plaintiff in the present case and this coupled with the fact



that the defendant has not been able to establish the existence of joint family nucleus, or availability of surplus funds at the disposal of the joint family, in order to use the same for purchasing the suit property. I am unable to hold that the property was a joint family property and the same was purchased in the name of the plaintiff alone.

17. The learned counsel for the appellant also placed reliance on the decision, *Sri Marcel Martin's* case, referred herein supra, where the Hon'ble Supreme Court dealt with fiduciary relationship and held that when parties are placed in fiduciary relationship, the Courts should have to consider the factual matrix under which the disputes arose. However, in the present case, I do not find any plea whatsoever that the plaintiff was in a dominant position, in fiduciary capacity and thereby, he had prevailed over the will of the defendant and purchased the suit property in his name. Therefore, even this decision also has no Application to the facts of the present case.

18. Per contra, the learned counsel for the respondent relied on the decision of the Hon'ble Supreme Court in the case of *Maria Margarida Sequeira Fernandes and others Vs. Erasmo Jack De Sequeira (Dead) through LRs* reported in (2012) 5 SCC 370, where the Hon'ble Supreme



Court held that there was always a presumption that possession of a person, other than the owner is permissive on behalf of the title holder and that possession of the past is one thing and right to remain and continue in future is another thing. The Hon'ble Supreme Court also held that in an action for recovery of possession of immovable property, or for protecting possession thereof, of such property, based on legal title to the property being established, the possession or occupation of the property by other persons other than the holder of legal title would only be subordinate to the legal title and the burden would be on the person resisting the claim for recovery of possession to prove his claim or right to continue in possession.

19. Applying the said ratio laid down by the Hon'ble Supreme Court, considering the fact that the defendant has set up a plea of joint family purchase and having failed to establish the same, the defendant is not entitled to hold on to the possession of the suit property. The Courts below have rightly considered the oral and documentary evidence, in line with the pleadings and proceeded to decree the suit of the plaintiff and directed the defendant to hand over the vacant possession. I do not find any illegality or perversity in the findings arrived at by the Courts below and the same do not warrant interference under Section 100 of the Code of Civil Procedure,



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20. In fine, the Second Appeal is *dismissed*. The substantial questions of law are all answered against the appellant and in favour of the respondent. The appellant/defendant shall vacate and handover the vacant possession of the suit property to the respondent within a period of three months from the date of receipt of the copy of this judgment, subject to filing an affidavit of undertaking within 10 days from today, undertaking to vacate the suit property and hand over vacant possession to the plaintiff, without driving the plaintiff to execution proceedings, within three months from the date on which the certified copies of this judgment and decree is made ready by the Registry. In the event of the appellant not filing an undertaking affidavit within 10 days from today, it shall be open to the respondent to execute the decree forthwith. Consequently, connected Miscellaneous Petition is also dismissed. No costs.

28.03.2024

Index :Yes/No
Internet : Yes/No
Neutral Citation :Yes/No.
Speaking order/Non-speaking order
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To

- 1.The Principal Sub-Judge at Puducherry.
- 2.The II Additional District Munsif at Puducherry.

P.B.BALAJI, J.

rkp

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and
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