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S.A.No.204 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on 08.02.2024	Judgment Pronounced on 01.03.2024
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CORAM

THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No.204 of 2018
and C.M.P.No.5179 of 2018

- 1.Fathimuthu Beevi
- 2.K.N.Thulbagaar Ali
- 3.K.N.Mohammed Meeran (Died)
- 4.K.N.Basheer Mohammed
- 5.Anisha Beevi
- 6.Minor Fargees Banu
- 7.Minor Murshitha Banu

.. Appellants

[Appellants 5 to 7 brought on record as LR's of the deceased rd appellant viz., K.N.Mohammed Meeran vide order dated 15.11.2021 made in CMP.No.12460 of 2021 in S.A.No.204 of 2018]

Vs.



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- 1.Mohammed Zahariyas
2.Mohammed Mushadique
3.Faritha
4.Qurishith
5.Jhanush
..Respondents

PRAYER: The Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 30.11.2012 passed in A.S.No.9 of 2012 on the file of the learned Subordinate Judge, Madurantakkam, Kanchipuram District, confirming the judgment and decree dated 21.11.2011 made in O.S.No.222 of 2008 on the file of the District Munsif, Maduranthakkam, Kanchipuram District.

For Appellants : Mr.N.Nagu Sah

For Respondents
For RR1 to 5 : Mr.V.Mannarsamy

JUDGMENT

This Second Appeal has been filed against the judgment and decree dated 30.11.2012 passed in A.S.No.9 of 2012 on the file of the learned



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Subordinate Judge, Madurantakkam, Kanchipuram District, confirming the judgment and decree dated 21.11.2011 made in O.S.No.222 of 2008 on the file of the District Munsif, Maduranthakkam, Kanchipuram District.

2.The unsuccessful defendants, who suffered concurrent findings before the Trial Court as well as the First Appellate Court, are the appellants herein.

3.The parties are described as per their litigating status before the Trial Court.

4.The suit was filed by the plaintiffs in O.S.No.222 of 2008, seeking declaration of their title in 'A' schedule property and to restrain the defendants from in any manner interfering in the plaintiffs peaceful possession and enjoyment of the same. The 'A' schedule property is comprised in Old Survey No.176/1 and New Survey No.176/1A1, measuring 61 cents and it is stated to be lying West to Vilambur Village Battai, North and East to P.M.K.Shakul Ameen Vagaiyara land and South to Labbai Thundu.



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5.The case of the plaintiff was that the suit property was the absolute and self acquired property of one Maimunbee, who had purchased it from Kidir Mohammed Sahib, under a registered sale deed dated 26.05.1973. Patta was also granted in Patta No.1227. The plaintiffs are the legal heirs of said Maimunbee and according to them, the 'B' schedule of the property, being entirely different property, was purchased by the defendants under E.P.No.156 of 1996. The defendants had successfully taken delivery of possession from the Court and it was only the 'B' schedule property, and nothing to do with the 'A' schedule property. However, the defendants have attempted to disturb the plaintiffs' possession in 'A' schedule property and hence, the suit has been filed for declaration, declaring the plaintiffs' right over the 'A' schedule property and also for a permanent injunction.

6.The said suit was resisted by the 3rd defendant, by filing a written statement, which was also adopted by the other defendants. According to the defendants, the tracing of title by the plaintiffs was denied, being incorrect and there was a suit in O.S.No.25 of 1958, on the file of the Sub-court, Chengalpattu, for partition of joint family properties, including the suit



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property and the purchase made by the said Maimunbee was pending the suit. However, in the final decree proceedings, the said suit property was allotted to one Noor Mohammed Sahib, whose legal heirs are the defendants. The said Noor Mohammed Sahib, filed an Execution Petition and has taken delivery of the property. Therefore, the suit was sought to be dismissed.

7.The Trial Court found that the plaintiffs are entitled to the relief of declaration as well as relief of permanent injunction and decreed the suit as prayed for. The Advocate Commissioner's plan in Ex.C2 was also annexed to the decree passed by the Trial Court. The defendants preferred an appeal in A.S.No.9 of 2012 and the First Appellate Court confirmed the judgment and decree of the Trial Court, dismissing the appeal. The defendants, therefore aggrieved by the dismissal of their appeal thereby confirming the decree in favour of the plaintiffs, have chosen to come up by way of the present Second Appeal.

8.I find that the Second Appeal has not yet been admitted. However, Mr.N.Nagu Sah, learned counsel for the appellants and Mr.V.Mannarsamy, learned counsel for the respondents have advanced their arguments for final hearing of the Second Appeal itself.



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9.The learned counsel for the appellants would attack the concurrent findings of the Courts below stating that the predecessor in title, namely Noor Mohammed Sahib was the absolute owner of the suit property, having been allotted the same, in final decree proceedings and according to the learned counsel for the appellants, admittedly, the plaintiffs' predecessor in title had purchased the suit property only pending the suit for partition and therefore, they cannot claim to be having absolute title, as the title was only subject to the final outcome of the suit for partition. According to the learned counsel for the appellants, the suit itself was not maintainable, as there is a bar under Order XX1 Rule 101 of CPC, to agitate the issue by way of separate suit and the plaintiffs ought to have agitated their claim in the execution proceedings in E.P.No.156 of 1996, without filing a separate suit for declaration and injunction.

10.He would also state that having come to Court, it was the plaintiffs burden to prove their title. However, when they were admittedly bound by the final decree, whereby the property was allotted to Noor Mohammed Sahib, the plaintiffs' suit ought to have been dismissed. He would also suggest the following substantial questions of law:



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1. Whether the Courts below erred in not considering the bar under Order XXI Rule 101 of CPC.

2. Whether the Courts below were right in law in holding that the suit 'A' schedule property was not the subject matter of the partition suit in O.S.No.25 of 1958.

11. Per contra, Mr.V.Mannarsamy, learned counsel for the respondents would take me through the findings of the Trial Court, where it has been found placing reliance on the Advocate Commissioner's report that the survey number, under which the plaintiffs claim/title was not even part of the decree and it was a totally different and independent property and there was no correlation in the survey numbers.

12. He would also invite my attention to the schedule mentioned in the plaint, as well as the Sale Deed/Ex.A2, certified copies of execution proceedings in Ex.A6 to Ex.A8 and certified copy of judgment in Ex.A9 and certified copy of decree in O.S.No.25 of 1958 in Ex.A10 and referring it alongside to the plaint plan in Ex.A1 and Patta in Ex.A3.



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13.The learned counsel for the respondents would submit that the Courts below have rightly found that the property purchased by the plaintiff had nothing to do with the property belonging to the defendants, which was allotted to Noor Mohammed Sabib, under the final decree proceedings. The learned counsel therefore states that the suit was maintainable, as it was not relating to the property, which is subject matter of the partition deed. He would therefore pray for dismissal of the Second Appeal.

14.The learned counsel for the appellant would place reliance on the decision of the Hon'ble Supreme Court in ***N.S.S.Narayana Sarma and Others Vs. Goldstone Exports (P) Ltd., and Others***, reported in **(2002) 1 SCC 662** where, the Hon'ble Supreme Court held that all disputes raised by “any person other than the judgment-debtor” who was sought dispossessed by decree-holder had to be decided only by the Executing Court and not by resorting to independent suit proceedings.

15.He would also place reliance on ***Tanzeem-e-Sufia Vs. Bibi Haliman and Others***, reported in **(2002) 7 SCC 50** where also the Hon'ble Supreme Court referring to provisions of Order XXI Rules 97, 99 and 101 of



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CPC and held that third party rights also had to be agitated only in the execution proceedings.

16.I have paid my anxious and careful consideration to the arguments advanced by the learned counsel on either side and I have also kept in mind the principles laid down by the Hon'ble Supreme Court in the above two decisions.

17.In the present Second Appeal, admittedly, the plaintiffs specific case was that their property was totally different from the property, which was under the enjoyment of the defendants. Therefore, in such view of the matter, especially, when the Trial Court as well as the First Appellate Court have categorically found from the available pleadings, as well as the oral and documentary evidence that the Survey number, under which the plaintiffs have acquired title was not forming part of the partition decree in O.S.No.25 of 1958, there is no bar for the plaintiffs to file a separate suit and they cannot be forced or compelled to move appropriate applications only before the Executing Court, to agitate their claims.



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18.The Hon'ble Supreme Court in both the above referred decisions has only referred to the claims of the third parties in the very same property, which is the subject matter of the decree, which is put into execution or sought to be executed. Here, it is not the case as in the facts before the Hon'ble Supreme Court in the above two decisions, that have been relied on by the learned counsel for the appellants.

19.The Trial Court has also found from the Execution Proceedings and the plaint plan that the property purchased by Maimunbee was in S.No.176/1 and that it lies on the western side of the Battai. The Trial Court has given satisfactory reasons for coming to the conclusion that the schedules 'A' and 'B' properties are different and there is no overlapping as claimed by the defendants. The Trial Court also found that the Advocate Commissioner's report threw light on the contentious issues and noted that even the Advocate Commissioner had categorically found that the properties in schedules 'A' and 'B' were in different places. The Trial Court also found that it was only schedule 'B' property, that was allotted to the share of the father of the defendants in O.S.No.25 of 1958, namely, Noor Mohammed Sahib and therefore, 'A' schedule property was never taken delivery of by the defendants at any point of time.



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20.The First Appellate Court also, on an independent appreciation of the oral and documentary evidence, proceeded to confirm the findings of the Trial Court. I do not see any substantial question of law arising for consideration in the above Second Appeal, warranting interference of the concurrent findings rendered by the Courts below.

21.Accordingly, this Second Appeal is dismissed. There shall be no order as to costs. Consequently, connected Civil Miscellaneous Petition is closed.

01.03.2024

Index : Yes/No
Speaking Order/Non-Speaking Order

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To

- 1.The Subordinate Judge, Madurantakkam, Kanchipuram District.
- 2.The District Munsif, Madurantakkam, Kanchipuram District.
- 3.The Section Officer, V.R.Section, High Court, Madras.



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P.B.BALAJI, J.

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Pre-delivery judgment made in

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