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S.A.No.1036 of 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 05.07.2024

PRONOUNCED ON : 31 .07.2024

CORAM

THE HONOURABLE MR. JUSTICE V. SIVAGNANAM

Second Appeal No.1036 of 2011

and

M.P. No. 1 of 2011

Packirisamy

.. Appellant

Versus

Saibudheen,
rep. By his Power Agent,
Asraf Ali, S/o. Abdul Vaheed,
Pandaravadi, P.Kothagai,
Thittacherry Taluk,
Nagapattinam District.

.. Respondent

Second Appeal filed under Section 100 of CPC against the Judgement and Decree dated 18.11.2009 in A.S. No. 9 of 2008 on the file of the Court of Subordinate Judge at Nagapattinam reversing the judgment and decree dated 28.11.2007 in O.S. No. 340 of 2004 on the file of the Court of District Munsif at Nagapattinam.

For Appellant	:	Mrs. R.T. Shyamala
For Respondent	:	set-exparte



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JUDGMENT

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Challenge in this second appeal is made to the Judgement and Decree dated 18.11.2009 passed by the learned Subordinate Judge, Nagapattinam in A.S.No.9 of 2008, reversing the judgment and Decree dated 28.11.2007 passed by the learned District Munsif, Nagapattinam in O.S. No. 340 of 2004 .

2. For the sake of convenience, the parties are referred to as per their rankings in the Trial Court.

3. The defendant in O.S. No. 340 of 2004 on the file of the District Munsiff Court, Nagapattinam, is the appellant in this Second Appeal.

4. The fact of the case is that the suit property originally belonged to Dhanalakshmi Ammal in view of the purchase made by her on 10.08.1955 from Muthaiya Pathar. On 11.02.1959, Dhanalakshmi Ammal sold the property to Balkis Ammal, who in turn, executed a registered Settlement deed dated 23.03.1980 and settled the suit property to her sister Hameedu Vanjur Ammal. The said Hameed Vanjur Ammal had executed a settlement deed in favour of the plaintiff on 5.7.1987. Since the said Hammedu Vanjur Ammal died, her son Sheik Alaudheen alleging that he succeeded to the estate of his



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mother and become owner of the suit property executed a settlement deed dated 22.5.1989, infavour of the plaintiff and thereby, the plaintiff had obtained the entire suit property and he is in peaceful enjoyment of the same. The suit property is managed by the plaintiff's Power Agent,namely,Asraf Ali. The patta to the suit property stands in the name of plaintiff's father Sheik Alaudheen. The defendant, who resides on the western side of suit property and who does not have any right and title over the suit property broke open the western wall of the suit property in the last month of March and attempted to trespass into the suit property and thereby, caused damage to the tune of Rs.5000/- to the plaintiff. With regard to the same, the plaintiff has preferred a complaint before Thittacherry Police Station and the police warned the defendant not to cause interference with the suit property. Again, on 30.06.04, the defendant attempted to break the western wall of the suit property and trespass into the suit property and the same was prevented by the plaintiff. Hence, the suit.

5. The defendant filed written statement and contested the suit stating that the plaintiff_only has to prove all the transactions with regard to the suit property from the year 1955 till the plaintiff obtained the suit property, i.e. 1989. The Muthaiya Pathar is the eldest brother of Dhanalakshmi Ammal's



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husband Rathina Asari, hence, the sale in favour of brother's wife is a nominal one. Therefore Dhanalakshmi Ammal and following her Balkis Amman, Vamkir Ammal, Sheik Almidheen and plaintiff cannot be said to be in enjoyment of the suit property. The house was under the enjoyment and possession of Muthaiya Pathar and after his death, his only son Mani Asari obtained it and after death of Mani Asari, now the suit property is under the enjoyment of this defendant, his brothers and sisters. In the entire house, western half portion was allotted to this defendant's family and eastern half portion was allotted to Rathina Asari under a family arrangement. As per the said arrangement, the western half portion is under the enjoyment of this defendant and his sisters and it is not under the enjoyment of plaintiff. The attempt of the plaintiff to take enjoyment through Thittacherry Police station was foiled by this defendant and only to take possession, this suit is indirectly filed. The boundaries stated in the suit property are not correct. In the entire house, plaintiff has right for half portion and rest of the half portion belongs to the family of Rathina Asari. Seeking partition, notice was sent to Rathina Asari's son Mani Raj, but, he never gave reply and hence, only a partition suit has to be filed. Therefore this suit may be dismissed with costs.



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6. On the basis of the abovesaid pleas set out by the respective parties, the following issues were framed by the trial Court for consideration:

1. Whether the entire suit property absolutely belongs to plaintiff and it is under his enjoyment ?
2. Whether the plaintiff is entitled for the relief of permanent injunction as prayed for by him ?
3. To what other reliefs the plaintiff is entitled for ?

7. Before the Trial Court, in support of the plaintiff's case, one Asraf Ali, Power Agent of the plaintiff was examined as P.W.1 and one Mohammed Raffi was examined as P.W.2 and 11 documents have been marked as Ex.A1 to Ex.A11. On the side of defendant, the defendant examined himself as DW1, and 9 documents have been marked as Ex.B1 to Ex.B9. Ex.C.1 to Ex.C3 were marked as Court documents.

8. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the Trial Court dismissed the suit by a judgment and decree dated 28.11.2007. Aggrieved over the same, the plaintiff had preferred an appeal in A.S. No. 9 of 2008 before the Subordinate Court, Nagapattinam. The First Appellate Court, after considering the entire



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materials, vide judgment and decree dated 18.11.2009, partly allowed the appeal and set aside the judgment and decree passed by the Trial Court and granted permanent injunction with regard to the built up half of eastern house portion with door number 28 excluding the backyard portion of that house portion alone. Now, challenging the same, the present Second Appeal has been filed by the defendant.

9. Before the First Appellate Court, the settlement deed executed by Hameedu Vanjur Ammal in favour of the plaitniff's father Sheik Alaudheen for two cents in the suit property was marked as Ex.A.12 as per the order passed in I.A.No.73 of 2008.

10. The second appeal has been admitted on the following substantial question of law:

1. Whether the First Appellate Court is right in granting the relief of permanent injunction in respect o half of eastern portion of the suit house, while refusing to grant the relief of permanent injunction in respect of the backyard, stating that the same cannot be granted for the reason that the same was not partitioned among the parties ?



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2. When the suit is not for partition, whether the First Appellate

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11. The learned counsel for the defendant submitted that the First Appellate Court erroneously found that the plaintiff is entitled for permanent injunction in respect of the eastern half portion of the house when the plaintiff is not in possession of the property. The eastern half portion of the house is not demarcated and hence, not in separate enjoyment. Under these circumstances, the First Appellate Court, overlooking the above fact, granted injunction on the ground that the plaintiff's predecessor had purchased the property. Since there is no partition took place between the parties, granting permanent injunction in respect of the half share is unsustainable and erroneous one and reiterated the other grounds raised in the grounds of appeal and pleaded to allow the appeal.

12. Even though, notice served on the respondent and his name is also printed in the cause list and sufficient time was granted to him, he has not appeared and hence, he was called absent and set exparte on 05.07.2024.

<https://www.mhc.tn.gov.in/judis> 13. I have considered the matter in the light of the submission made by



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the learned counsel for the appellant and perused the materials available on records carefully.

14. On perusal of the fact and the evidence, it is seen that the suit property originally owned by Dhanalakshmi Ammal. She had purchased the property from one Muthaiya Pathar by way of a registered sale deed dated 10.08.1995 , which is evidenced by Ex.A.5. Dhanalakshmi Ammal by way of sale deed dated 11.02.1959 sold the suit property to Balkis Ammal, which is evidenced by Ex.A.4. Thereafter, Balkis Ammal by way of a registered settlement deed dated 23.03.1980 settled the property to Hameed Vajur Ammal, which is evidenced by Ex.A3. In turn, the Hameed Vajur Ammal executed a settlement deed in favour of the plaintiff on 05.07.1987, which is evidenced by Ex.A.2. After the death of Hameed Vajur Ammal, her son Sheik Alaudheen obtained the property and he executed a settlement deed in favour of the plaintiff on 22.04.1989, which is evidenced by Ex.A.1. Thus, the plaintiff obtained the entire suit property purchased by Dhanalakshmi Ammal from Muthaiya Pathar.

15. From the sale deed of Dhanalakshmi Ammal,i.e. Ex.A5 dated 10.08.1955, she had purchased only 5 cents. In Ex.A4 sale deed dated



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11.02.1959, the extent of property conveyed by her is not mentioned. On perusal of Settlement Deed Ex.A.3, dated 23.03.1980 the extent is mentioned as 8 cents, which is exceeding the extent purchased by the earlier vendor Dhanalakshmi Ammal. Therefore, it is evidenced that the plaintiff is not entitled for 8 cents of the suit property as claimed in the plaint schedule property. The Trial Court and the First Appellate Court rightly observed this and hold that the plaintiff is not entitled for 8 cents as mentioned in the plaint schedule property and such a findings on fact rendered by the courts below require no interference by this Court.

16. The Trial Court dismissed the suit on the ground that the plaintiff claimed more extent than what he is entitled and not filed the suit for declaration when his title is disputed by the defendant. The First Appellate Court found that the properties are not partitioned between the original owners of the land i.e.Dhanalakshmi's vendor Muthaiya Pathar and his brother. The backward portion of the house is identified by the Commissioner in his Report Ex.C1 & Ex.C2 as a common property. The defendant also in his written statement admitted that the eastern portion was purchased by the plaintiff's vendor.

17. The First Appellate Court, in its judgment and decree granted



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injunction in favour of the plaintiff in respect of the Eastern portion of the house overlooking the fact that the plaintiff has not filed any documents in support of his case to show his possession over the eastern side portion of the plaint schedule property (house). On perusal of the Commissioner's report, it is noticed that there is only one door in the house and that belongs to Mani Asari. On that western portion, defendant's mother was residing and there is no evidence that the plaintiff is in possession of the eastern portion of the house. Further on the backyard, there is no demarcation of the portion enjoyed by the plaintiff and the defendant. It is within one fence. For better appreciation the report of the commissioner is reproduced hereunder :-

" தாவா வீட்டிற்கும் மணி ஆசாரி வீட்டிற்கும் இடையில் எவ்விதமறைப்பும் இன்றி கொல்லை ஒரே வேலி அடைப்பில் திறந்த வெளியாக உள்ளது. "

18. In para, 2 it is observed as follows :-

" இந்த வீட்டில் மேற்குப்புற தாய் சுவரானது மணி ஆசாரி என்பவரது வீட்டிற்கும் சேர்த்து ஒன்றாக உள்ளது. வாசலில் ஒற்றைக் கதவு பழுமையானது உள்ளது. அதன் வழியாக உள்ளே சென்றபோது தென்மேற்கு மூலையில் ஒரு கட்டில் கூடத்தில் உள்ளது. அதன் அருகேதென்புற சுவற்றில் ஜன்னல் ஒன்று உள்ளது. மேற்குப்புற சுவற்றில் மணி ஆசாரி வீட்டிற்கு சென்று வரும் கதவு ஒன்று ஒற்றைக் கதவாக உள்ளது. "

19. It exposes the fact that there is only one door to the house and there

is no partition between the parties and there is also no evidence that the



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plaintiff is residing in the same house. Under these circumstances, based upon the sale deeds and the settlement deeds EX.A.1 to ExA6, the plaintiff is not entitled for permanent injunction against the defendant, who is in possession and enjoyment of the property. The First Appellate Court, overlooking these facts, granted injunction with regard to the eastern portion of the house since the defendant admitted in his written statement that the eastern portion belongs to plaintiff, which is unsustainable.

20. The First Appellate Court in its judgment, in paragraph no.8 though observed that the plaintiff has not filed any evidence to show his possession and enjoyment of the suit schedule properties, granted permanent injunction. The observation of the First Appellate Court runs as follows:

“ This suit for bare injunction was filed by the plaintiff on 07.07.2004 and so as rightly argued by the learned appellant's counsel in this suit the main point to be determined is plaintiff's possession of the suit property on the date of plaint. On going through the exhibits marked on the side of the plaintiff this Court determines that in this suit plaintiff has not even filed a single document such as house tax receipts, E.B. Receipts or water tax receipts to prove his possession over the suit property as on the date of plaint on 07.07.2004.



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WEB COPY 21. The First Appellate Court, overlooking the above fact, granted injunction only on the ground that in the written statement, the defendant had admitted that the plaintiff has a right to the half portion of the property by purchase, which is unsustainable. Therefore, the findings of the First Appellate Court being erroneous one and not considered the evidence on record is liable to be interfered with.

22. In view of the above, the finding of the First Appellate Court is liable to be set-aside and the judgment and decree of the Trial Court is liable to be restored and the substantial question of law formulated in the second appeals are, accordingly, answered in favour of the appellant/plaintiff. The plaintiff can very well file a suit for partition based upon his title for getting separate portion with regard to the plaint schedule properties. Since the plaintiff is not in possession and enjoyment of the property, he is not entitled for enjoyment against the another share holder.

23. For the aforesaid reasons, the second appeal is allowed and the



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judgment and decree passed by the First Appellate Court is set aside and the

judgment and decree passed by the Trial Court is restored. No costs.

Consequently, connected miscellaneous petition, if any, is closed.

Index : Yes / No

Internet : Yes / No

mrp

31.07.2024

To

1. The Sub -Court,
Nagapattinam.

2.The District Munsiff Court,
Nagapattinam.



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V.SIVAGNANAM, J.

mrp

Pre-Delivery Judgment made
in S.A.No.1036 of 2011

31.07.2024