



S.A.No.409 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 28.02.2024	Pronounced on: 08.03.2024
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CORAM

THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No.409 of 2018

and

CMP. No.11337 of 2018

1.Mohammed Ismath (Died)
2. Habibunnissa
(2nd appellant brought on record as LR's
of the deceased sole appellant vide
order dated 15.11.2021)

...Appellant

Vs.

Mohamudha Beevi

...Respondent

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree passed in A.S. No.95 of 1999 dated 20.02.2018 on the file of the Court of Principal Subordinate Judge, Mayiladuthurai in reversing the judgment and decree passed in O.S. No.175 of 1992 dated 17.09.1999 on the file of the Court of District Munsif, Sirkali and dismiss the suit.

For Appellant : Mr.A.Muthukumar

For Respondent : M.B.Jawahar



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JUDGMENT

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The defendant in a suit for recovery of possession of 'B' schedule property and permanent injunction regarding 'C' schedule property is the appellant herein.

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

3. The case of the plaintiff is that suit 'A' schedule property belongs to the plaintiff, claiming that it was purchased by the plaintiff's father Mohamed Yusuf in the year 1920. According to the plaintiff, she has been in possession of the suit property for several years and the defendant had trespassed into the portion of 'A' schedule property which is set out in Schedule 'B' of the plaint and in respect of remaining portion of Schedule 'A' property which is under the possession of the plaintiff, permanent injunction has been prayed for.

4. The suit was resisted by the defendant on the ground that the



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property under Ex.A1, was different and distinct from the suit property and therefore, the defendant had not encroached into any portion of the plaintiff's property as alleged. The trial Court accepted the defence raised by the defendant and dismissed the suit holding that the suit property and property covered under Ex.A1, were different properties.

5. The plaintiff preferred an Appeal in A.S. No.95 of 1999, which came to be allowed mainly on the ground that the suit property and the property under Ex.A1 were one and the same and merely because there was a mis-description in Ex.A1 property, the plaintiff cannot be non suited. The said reversal finding rendered by the First Appellate Court was challenged before this Court in S.A. No.1301 of 2000. However, this Court remanded the matter to the First Appellate Court in and by judgment dated 13.02.2017, permitting the plaintiff to seek for amendment of the prayer by including declaratory relief, subject to limitation and calling upon the First Appellate Court to go into the questions of title and after taking evidence by both parties, give a finding with regard to not only the title of parties concerned, but also identifying the suit property with reference to Ex.A1.



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6. Pursuant to the said remand, an Advocate Commissioner was appointed and his report was also filed alongwith sketch, showing the lay of the properties. The First Appellate Court held that the plaintiff was entitled to the reliefs prayed for and reversed the findings of the trial Court.

7. Aggrieved by the said reversal findings rendered by the First Appellate Court, the defendant has preferred the above Second Appeal. The Second Appeal has not yet been admitted.

8. I have heard learned counsel for the appellant Mr.A.Muthukumar as well as Mr.B.Jawahar, learned counsel for the respondent and after hearing their arguments, I have framed the following substantial questions of law:

“(i) Whether the First Appellate Court erred in granting a decree for declaration and recovery of possession when title had been denied even in the year 1993, rendering the suit liable to be dismissed as barred by limitation?”

“(ii) Whether the First Appellate Court has wrongly shifted the burden on the defendant to establish regarding entitlement and possession of the portion of the suit property?”

9. The learned counsel for the appellant would bring to my notice, the



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inconsistent stand taken by the plaintiff in the pre-suit notices and in the plaintiff. In the pre-suit notice dated 06.07.1992, the plaintiff claims to be in possession of the suit property for about 35 years whereas, in the plaintiff the plaintiff claims to be in possession of the suit property for more than 20 years. The learned counsel also brings to my notice the admission of P.W.1, the son of plaintiff, that Mohamed Yusuf is not the father of the plaintiff, but the said Mohamed Yusuf was the plaintiff's uncle only. The plaintiff's specific case being she is the daughter of Mohamed Yusuf and she is entitled to the suit properties, P.W.1 virtually committed *harakiri* by admitting that the said Mohamed Yusuf was only the plaintiff's uncle and not her father. This demolishes the claim of title over the suit property itself. Further, in the pre-suit notices, I find that the plaintiff has not even whispered about Ex.A1, which is the sale deed in favour of Mohamed Yusuf on 15.04.1920.

10. Finally, the learned counsel for the appellant contended that the suit is barred by limitation, especially, the amended relief of declaration, since the title of the plaintiff was denied even in the year 1993, yet, the



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plaint was amended only after liberty being granted by the High Court in the judgment dated 13.02.2017 while remanding S.A.1301 of 2000.

11. Per contra, the learned counsel for the respondent Mr.B.Jawahar, would state that though the defendant claims to be in possession, absolutely no proof has been adduced by him and the suit cannot be dismissed merely because of wrong boundaries being stated and the First Appellate Court has rightly observed the same, while reversing the judgment and decree of the trial Court. He would also invite my attention to the discussion by the First Appellate Court with regard to the property being one and the same viz., the suit property and the property covered under Ex.A1.

12. I have paid my anxious careful consideration advanced by the learned counsel on either side.

13. This Court while remanding S.A. No. 1301 of 2000, gave liberty to the plaintiff to amend the plaint and seek relief of declaration. At the same time, in the said judgment, the Court has left open the question of limitation.



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14. With regard to title of the plaintiff, first and foremost, the plaintiff claims title being daughter of Mohamed Yusuf in whose name the suit property was purchased under Ex.A1. However during cross examination, plaintiff's son himself as P.W.1 has admitted that the said Mohamed Yusuf was not the father of his mother but only her uncle. In such circumstances, there is absolutely no evidence to show as to how the plaintiff claims title to the suit property. Once she is unable to satisfy the Court with regard to her title to the suit property, consequently, she dis-entitles herself for the reliefs of declaration, possession and permanent injunction.

15. Even otherwise, going by the plaint sketch, the case projected by the plaintiff and the report of the Advocate Commissioner, it is evident that the property covered in Ex.A1 is not the suit property. As seen from the Commissioner's report, the suit property cannot be the property which is subject matter of Ex.A1 and it not merely mis-description of boundaries alone but the very lay of the property itself is different. Without noticing the same, the First Appellate Court has erroneously shifted the burden on the defendant to prove his entitlement and lawful possession, instead of calling



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upon the plaintiff to establish her title and also lawful possession of the suit property.

16. Further when the defendant had categorically denied the title of the plaintiff, even in the year 1993, immediately after filing of the suit, the plaintiff ought to have amended the prayer and sought for a relief of declaration. Liberty has been granted by this Court in S.A. No.1301 of 2000, to agitate the question of limitation also. Having found that the title of the plaintiff being denied in the year 1993 and the relief of declaration was sought for and included only in the year 2017, relief of declaration is clearly time barred. Moreover, apart from Ex.A1 sale deed, the plaintiff has not produced any evidence whatsoever to establish her right, title and entitlement to the suit property. P.W.1, being the son of the plaintiff, has categorically admit that the purchaser under Ex.A1, Mohamed Yusuf is not the father of the plaintiff, also does not help the plaintiff's case and has only placed a heavier burden on the plaintiff to establish title to the suit property, which has not been discharged at all.



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17. For all the above reasons, I deem it necessary to interfere with the findings of First Appellate Court which are illegal, perverse and also based on mis-appreciation of the Advocate Commissioner's report and plan.

18. In fine, substantial questions of law are answered in favour of the appellant and Appeal is allowed. Judgment and Decree passed in A.S. No.95 of 1999 by the learned Principal Subordinate Judge, Mayiladuthurai is set aside and Judgment and Decree passed in O.S. No.175 of 1992 is hereby restored. Connected Miscellaneous Petition is closed. No costs.

08.03.2024

Index :Yes/No

Internet : Yes/No

Neutral Citation :Yes/No.

Speaking order/Non-speaking order

rkp

To

1. The Principal Subordinate Judge, Mayiladuthurai.

2. The District Munsif, Sirkali.



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P.B.BALAJI, J.

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