



S.A.No.685 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on
12.02.2024

Judgment Pronounced on
08.03.2024

CORAM

THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No.685 of 2019
and C.M.P.No.12845 of 2019

1.Vijayalakshmi

2.Kandasamy

..Appellants

Vs.

1.K.Myilsamy @ K.Palanisamy

2.Subbulakshmi

3.Udhayakumar

4.Krishnaveni

5.Ponne Gounder

..Respondents

PRAYER: The Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 30.11.2018 made in A.S.No.3 of 2017 on the file of the II Additional Subordinate Judge, Coimbatore, reversing the judgment and decree dated 27.09.2016 passed in O.S.No.1230 of 1995 on the file of the III Additional District Munsif Court, Coimbatore.



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For Appellants : Mr.C.R.Prasanan

For Respondents

For R1 : Mr.D.Manimaran

For RR2 to 4 : No appearance

For R3 : Given up

JUDGMENT

This Second Appeal has been filed against the judgment and decree dated 30.11.2018 made in A.S.No.3 of 2017 on the file of the II Additional Subordinate Judge, Coimbatore, reversing the judgment and decree dated 27.09.2016 passed in O.S.No.1230 of 1995 on the file of the III Additional District Munsif Court, Coimbatore.

2.The defendants 2 and 3 in a suit for permanent injunction, seeking to restrain the defendants from interfering with the 2nd plaintiff's peaceful possession and enjoyment of the suit property, are the appellants herein.

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



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4.The brief facts that are necessary for adjudicating the above Second Appeal are as follows:

The case of the plaintiffs is that 1st plaintiff is the son of one Palani Kangae Gounder, who died 20 years back. His wife Pachiammal died 15 years back. The plaintiff has two married sisters. The suit property originally belonged to his father Palani Kangae Gounder and the old house in the suit property fell apart in 1968 and the property became vacant. The 1st plaintiff was residing in Kerala and looking after his lands there. Taking advantage of the 1st plaintiff's absence in the suit property, the defendants attempted to trespass into the suit property of the 1st plaintiff. The 1st plaintiff therefore appointed his cousin K.Palanisamy, as Power Agent, to look after the property. According to the plaintiffs, the defendants 1 and 2 owned properties in the northern side of the suit property and Kumara Gangae Gounder, father of K.Palanisamy, i.e., the Power Agent, owned property on the southern side of the suit property. The defendants do not have any right in the suit property and in order to prevent trespass, the suit was filed.

5.The 1st defendant filed a written statement, which was adopted by the defendants 2 to 5. Neither the plaintiffs nor the plaintiffs' predecessors had



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title to the suit property. According to the defendants, the plaintiffs had no right on the southern side of the defendants property and it is only the defendants 1 and 2 who are in possession of their own properties. The plaintiffs are attempting to claim the defendants' property, as if it belongs to the plaintiffs and prayed that the suit is also an abuse of process of law and also liable to be dismissed on the ground of non-joinder of proper parties, namely sisters of the plaintiff, who are admittedly co-owners. The suit is also barred by *res judicata*, in view of the earlier decree in O.S.No.1323 of 1988. The property description also is incorrect and for all these reasons, the suit was sought to be dismissed.

6.The Trial Court dismissed the suit on the ground that the plaintiffs' possession and enjoyment of the suit property was not established and that the suit was also barred by *res judicata* as contended by the defendants.

7.On appeal, the First Appellate Court reversed the findings of the Trial Court and decreed the suit as prayed for by the plaintiffs. Aggrieved by the said reversal findings rendered by the First Appellate Court, the defendants have come up by way of this Second Appeal.



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8.The above Second Appeal was admitted by this Court on 21.06.2019, on the following substantial questions of law:

I. Whether in law the lower appellate court erred in overlooking that the suit is barred by *res judicata*, an abuse of process of law, virtually amounting to re-litigation?

II. Whether in law the lower appellate court erred in overlooking that the suit is being one for permanent injunction is not maintainable without a prayer of declaration, especially his title is denied?

III. Whether in law the lower appellate court erred in overlooking that the documentary evidence namely, Ex.B1 to Ex.B7 and the report and the plan of the Advocate Commissioner, namely, Ex.C1 to Ex.C4 coupled with the admission made by the plaintiff that the property in Ex.A1 is a part of Ex.B5?

IV. Whether in law the lower appellate court erred in overlooking that the plaintiff, after admitting appellant's possession of the property in Ex.A1 and contested decree in O.S.No.1323 of 1988 confirming appellant's possession from contending that the appellant is not in the possession of the property is estopped from filing the present suit and in the wake of



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Ex.A1 to Ex.A9 which did not prove his exclusive possession?

9.I have heard Mr.C.R.Prasanan, learned counsel for the appellants and Mr.D.Manimaran, learned counsel for the 1st respondent. Though respondents 2 to 4 are served, they have not chosen to appear and the 5th respondent has been given up by the counsel for the appellant.

10.Mr.C.R.Prasanan, learned counsel for the appellants would place reliance on the report of the Advocate Commissioner, Ex.C1 and also the judgment and decree in O.S.No.1323 of 1988. The learned counsel for the appellants would also state that the present suit for bare injunction was not maintainable, moreover, when the defendants had clearly denied the title of the plaintiffs, the plaintiffs ought to have amended the plaint and sought for a relief of declaration. Thus, according to the learned counsel for the appellants, the findings rendered by the Trial Court were in order and was erroneously set aside by the First Appellate Court, on a clear non application of settled judicial position of law relating to *res judicata* as well as non-joinder of the proper and necessary parties.



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11.Per contra, Mr.D.Manimaran, learned counsel for the 1st respondent/ 2nd plaintiff would submit that the defendants have taken inconsistent pleas and on the plaintiffs side Ex.A1 and Ex.A2, clinching documents to establish and title as well as possession of the plaintiffs have been filed. He would take me to the findings of the Trial Court as well as the First Appellate Court and also the evidence of the witnesses, regarding oral partition, which was admitted by the plaintiffs themselves and consequently, there is no subsisting right for the plaintiffs to claim title, much less possession of the suit property and the evidence of 3rd defendant was also clearly in the nature of improvising the case and it could not be relied upon.

12.The learned counsel for the 1st respondent would also rely on the cross-examination of D.W.1, namely, the 3rd defendant in this regard. He would also state that the Advocate Commissioner has not given any adverse findings as against the plaintiffs and therefore, the findings of the First Appellate Court did not warrant any interference.

13.In reply, Mr.C.R.Prasanan, learned counsel for the appellants would state that even in the schedule in the plaint, there are no measurements



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or survey numbers mentioned and Ex.A1 was admittedly sufficient to disprove the plaintiffs' case. Moreover, he would invite my attention to the schedule in the Power of Attorney, where also there is no proper description of the proper by survey numbers, extents, etc.

14.The first and foremost question that would have to be decided is regarding the plea of *res judicata*. The Trial Court found that the suit property is situate between the properties of Kangae Gounder, Kumara Kangeya Gounder and Mottaiyappa Gounder and the property of the defendants 1 and 2. During the pendency of the suit, the 1st plaintiff died, leaving behind a Will dated 09.03.1998 in favour of the 2nd plaintiff. Though the plaintiffs 3 to 5 were impleaded as legal heirs of the deceased 1st plaintiff, they have clearly submitted to the Court that they have no right in the suit property, as it has been bequeathed to 2nd plaintiff. However, I do not find any pleadings with regard to the earlier suit in O.S.No.1323 of 1988, in the plaint. However, in the written statement, the defendants have categorically denied the title of the plaintiffs and have also stated that in the suit filed by Kannammal and Vijayalakshmi in O.S.No.1323 of 1988, against Kangeya Gounder @ Kumara Gounder @ Mottaiyappa Gounder and Myilsamy, the



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2nd plaintiff and the 1st plaintiff for injunction, the title of the suit property was upheld in favour of the Kannammal and Vijayalakshmi and the suit was decreed. The said decree has become final and admittedly, no appeal was preferred against the said judgment and decree in O.S.No.1323 of 1988.

15. According to Mr.C.R.Prasanan, learned counsel for the appellants, the plaintiffs ought to have atleast prayed for setting aside the decree in O.S.No.1323 of 1988 and in any event, the defendants had specifically denied the title to the suit property, the plaintiffs ought to have amended the plaint and sought to declare their title and having failed to do so, the suit has to necessarily fail.

16. He would also invite my attention to the Tr.O.P.No.75 of 1999, which was marked as Ex.B6, where the plaintiff has categorically admitted that the suit property is the subject matter of O.S.No.1323 of 1988 and the subsequent suit in O.S.No.1230 of 1995 i.e., the present suit, under appeal are one and the same. Moreover, in Ex.A6, the Partition Deed also amongst the family of the plaintiffs, curiously, the suit property has not been made purchased in the said Deed. Referring to Ex.A1, D.W.1 also admitted in



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cross-examination that the property of Palani Kangae Gounder was situate on the southern side of 2nd plaintiff's property and that the property of defendants 1 and 2 was situate on the northern side of the said Palani Kangae Gounder's property. As rightly contended by the learned counsel for the appellant, I also find that Ex.A2 does not relate to the suit property and it only pertains to a sale effected by the 2nd plaintiff and his father and cannot be correlated to be relating or connecting to the suit property.

17.Having come to the Court with the relief of a bare injunction, it is the bounden duty to the plaintiff to establish his entitlement to the said relief by proving that he has been in lawful possession of the suit property on the date of filing of the suit. The Advocate Commissioner, who inspected the property during the trial of the suit, has also filed a report along with a plan, wherein it is also seen that the house of the 2nd plaintiff is shown to be situate on the southern side of the suit property only. Though the learned counsel for the 1st respondent contends that one Vijayalakshmi had purchased part of Palani Kangae Gounder's property and that D.W.1 also admitted the same, the plaintiffs have not chosen to produce the said Sale Deed to establish that the property lying to the north of the portion sold to said Vijayalakshmi was retained by Palani Kangae Gounder.



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18.I have gone through the report of the Advocate Commissioner who has identified the house of the 2nd plaintiff and as already pointed out, it lies on the southern side of the suit property alone. Further, the Advocate Commissioner also found existence of a 3 feet pathway on the southern side of the property of said Vijayalakshmi for the purposes of ingress and egress, it is used by the 2nd plaintiff, the Power Agent, who also subsequently acquired title in pursuance of demise of Vellingiri Gounder. Further, the Advocate Commissioner has also categorically found that the property of the plaintiffs was clearly demarcated as the southern part of the property, specified in Ex.A1, i.e., decree in O.S.No.1323 of 1988.

19.Even in Ex.B5, Sale Deed dated 09.06.1958, it is seen that defendants property alone is situate on the eastern side and further even P.W.1 has admitted in his cross-examination that Ex.B5, Sale Deed, the house specified in the suit property was the same as the property specified in decree in O.S.No.1323 of 1988, namely Ex.A1.

20.From all the above, it is clear that the plaintiffs could not have approached the Court with a bare suit for injunction, and the moment, the



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title of the plaintiffs was called in question, by way of filing written statement, the plaintiffs were obliged to amend the plaint and seek for relief for declaration of the title. In any event, in view of the candid admissions made by the plaintiff himself and also the findings in O.S.No.1323 of 1988 having become final, with no appeal therefrom, the present suit for injunction is clearly amounting to re-litigation of decided and final issues. The Trial Court had rightly discussed all these aspects and dismissed the suit. However, the First Appellate Court, without adverting to the issue of maintainability of the suit on the ground of *res judicata* as well as on the ground of seeking relief of injunction, without prayer for declaration, proceeded to reverse the well considered and well merited findings rendered by the Trial Court. Thus, I am inclined to interfere with the said improper, illegal and perverse findings of the First Appellate Court. In fine, the substantial questions of law are answered in favour of the appellants herein.

21. In the result, this Second Appeal is allowed. There shall be no order as to costs. Consequently, connected Civil Miscellaneous Petition is closed.

08.03.2024

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

1. The II Additional Subordinate Judge, Coimbatore
2. The III Additional District Munsif Court, Coimbatore.
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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