



SA.No.1194 of 2014

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.10.2024

PRONOUNCED ON : 30.10.2024

CORAM

THE HONOURABLE MR.JUSTICE M. JOTHIRAMAN

SA.No.1194 of 2014
and MP.No.1 of 2014

Mathiyalagan

... appellant / defendant

V.

M.Thangavelu

... respondent / plaintiff

Prayer : This Second Appeal is filed under Section 100 of the Code of Civil Procedure 1908 to set aside the judgment and decree dated 28.08.2014 passed in AS.No.132 of 2010 on the file of I Additional Sub Court, Salem confirming the judgment and decree dated 21.09.2010 made in OS.No.591 of 2007 on the file of the Principal District Munsif, Salem.

For appellant : Mr.T.Murugamanickam, Sr. Counsel
for M/s.Zeenath Begam

For Respondent : Mr.T.S.Vijaya Raghavan



SA.No.1194 of 2014

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J U D G M E N T

Challenge in this second appeal is to the concurrent judgments and decrees in OS.No.591 of 2007 on the file of the Principal District Munsif, Salem and AS.No.132 of 2010 on the file of I Additional Sub Court, Salem.

2. For the sake of convenience, the parties will be referred to according to their litigative status before the trial Court.

3. The brief facts which gave raise to the instant second appeal are as follows :-

The plaintiff filed the suit for declaration of title and to direct the defendant to hand over the possession of the suit property after removing the thatched shed. The plaintiff is the son of one Mariappan. Apart from the plaintiff, the plaintiff's father had two other sons viz., Maduraiveeran and Velayutham. They have partitioned the joint family property by means of registered partition deed dated 16.11.1992. In the said partition deed "C" Schedule property is allotted to the plaintiff. The



SA.No.1194 of 2014

“C” Schedule property contains two items (i)house property in 420sq.ft which is in possession through his tenant (ii)vacant site 177 ½ in S.No.22/2 with specific boundaries. After partition, the respective parties have taken possession and they are enjoying the same. Whileso, the said plaintiff's father without knowledge and consent of the plaintiff sold the suit property to the defendant and the defendant tried to interfere with the possession of the plaintiff. The plaintiff filed the suit for permanent injunction in OS.No.2 of 1994 on the file of the II Additional District Munsif, Salem against his father, brothers and other defendants. The suit was dismissed and he preferred an appeal in AS.No.8 of 2000 before the Principal Sub Judge, Salem which was also dismissed on 17.01.2006, holding that suit for declaration is the remedy. In the meantime, the defendant unlawfully got into the suit property in the year 2000 and put up a small thatched shed in a corner.

4. It is the case of the defendant that the alleged partition deed dated 16.11.1992 is not admitted as genuine and true document. The plaintiff filed the suit in O.S.No.2 of 1994 on 03.01.1994, in respect of very same suit property after filing written statement the said suit was



SA.No.1194 of 2014

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came to be dismissed on 02.06.1999 and on appeal in AS.No.8 of 2000 on the file of the Principal Sub Judge, Salem was also dismissed on merits on 17.01.2006. As against the judgment and decree, the plaintiff has not preferred any second appeal, the judgment and decree passed in OS.No.2 of 1994 and in AS.No.8 of 2000 has attained finality. The karta of the family (i.e.,) the plaintiff's father. Since sons of Mariappan failed to maintain his father during his old age. The father of the plaintiff to maintain himself and also for the improvement of the estate has sold the suit property in favour of the defendant on 22.02.1993 and in the sale deed, the plaintiff's brother also signed as attestor. The defendant is bonafide purchaser through proper consideration and he is in possession and enjoyment of the suit property from 22.02.1993. The relief of declaration asked by the plaintiff in the suit is barred by limitation. But the plaintiff come forward with the suit after expiry of 15years. The second relief seeking delivery of possession also barred by limitation and also failed to question the title of the defendant's over the suit property and allowed the defendant to enjoy the suit property for more than 12years. This plaintiff is not at all in possession and enjoyment of the suit property at any point of time. Even the sale deed dated 22.02.1993,



SA.No.1194 of 2014

is accepted as true and genuine document and the defendant's title over the suit property is perfect by law on adverse possession.

Findings of both Courts below

5. Upon hearing either side arguments and considering the materials available on record, the findings rendered by the trial Court are as follows :-

(a). Ex.A1/partition deed dated 16.11.1992 is true and valid and there is no legal right to execute the suit property to the defendant under Ex.A2 sale deed dated 22.12.1993 and the same is not valid one.

(b). Since Ex.A2 is not valid and based on it possession cannot be claimed, the defendant also does not filed any revenue records and not chosen to examine any independent witnesses to prove his possession.

(c). There is no specific issues was framed with regard to cause of action in OS.No.2 of 1994 and also not decided on merits. The judgment and decree passed in OS.No.2 of 1994 and in AS.No.8 of 2000 are not binding on the plaintiff.



SA.No.1194 of 2014

WEB COPY

(d). The judgment passed in OS.No.2 of 1994 and in AS.No.8 of 2000 there was no findings that the defendant was in possession and enjoyment of the same. The defendant has failed to prove the factum of continuous possession and enjoyment of the suit property for more than 12years with the knowledge of the plaintiff.

(e). The defendant has failed to prove the adverse possession as against the plaintiff and as per Article 65 of the Limitation Act to seek the recovery of possession is 12years and the suit is not barred by limitation.

6. The trial Court decreed the suit as prayed for and the defendant is directed to hand over the possession within two months. Against the judgment and decree passed by the trial Court, the defendant has preferred an appeal suit before the first appellate Court in AS.No.132 of 2010. The first appellate Court after hearing both sides and upon reappraising the evidence available on record has dismissed the appeal whereby and where under confirmed the judgment and decree passed by the Trial Court. Against the concurrent judgments and decrees passed by the Courts below the present second appeal has been preferred at the instance of the defendant as appellant.



SA.No.1194 of 2014

WEB COPY

7. At the time of admission, this Court has formulated the following substantial questions of law :-

“(i)Whether the Courts below were legally right in holding that Ex.A1 stands proved on account of the said document being a registered document though no oral evidence has been let in to prove the execution, more particularly, when the vendor of the defendant in the earlier suit had disputed the execution of the said document by himself?

(ii)Whether the Courts below were right in holding that the decree and judgment made in OS.No.2 of 1994 and AS.No.8 of 2000 will not amount to res judicata to entertain the present suit?

(iii)Whether the factual finding recording in paragraph 13 of the judgment of the lower appellate Court that the appellant herein is party to execute Ex.A1 is not an erroneous finding and whether the decree and judgment of the lower appellate Court is



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SA.No.1194 of 2014

based on that erroneous appreciation of evidence which deserved interpretation at the hands of this Court.?”

8. Heard the learned senior counsel for the appellant and the learned counsel for the respondent and perused the materials available on record.

9. The learned Senior Counsel appearing for the appellant would submit that the following points:-

(a) The factual finding in para 13 of first appellate Court Judgment that appellant is signatory to Ex.A1 is not correct, the appellant has not attested the Ex.A1 partition deed.

(b) The present suit will be barred by principle of constructive resjudicata as set out in Explanation IV to Sec 11 CPC, seeks a specific findings has been rendered in earlier suit, that, when father not only denied his signature in Ex.A1/partition deed and it was fabricated one. To prove the execution of Ex.A1, no witnesses have been examined, the plaintiff should have sought for declaration of title arising out of the partition deed, therefore, Ex.A1 is not proved in accordance with law. In



SA.No.1194 of 2014

support of his contentions, he has relied upon the judgments of the Hon'ble Apex Court reported in (i) **(1994) 2 SCC 14, Sulochana Amma V. Narayanan Nair** wherein it is held that “*decree of Court based on equitable relief of injunction operates as resjudicata in later suit based on title between the same parties*” (ii) **2000 (3) LW 147, Swamy At Mamamda Pasupathipalayam and others vs. Sri Ramakrishnan Tapovam and others** and (iii) **(2005) 6 SCC 202 – Annaimuthu Thevar (dead) by Lrs v. Alagammal and others.**

(c) The plaintiff says that he was in possession and dispossessed in the year 2000, at that point of time the earlier appeal in AS.No.8 of 2000 was pending and if really he was dispossessed in 2000, then he ought to have amended the plaint. Therefore, for omission to sue for declaration of title with the earlier suit, then the plaintiff is precluded from seeking their relief of declaration in a subsequently instituted suit. Even assuming such an amendment was made in the earlier suit it would have been time barred. To strengthen his contention, he has relied the judgment of the Hon'ble Apex Court in the case reported in **(2016) 1 SCC 232 - L.C.Hanumanthappa (since dead) v. H.B.Shivakumar.**

(d) when specific findings that Ex.A1 was not proved that attestors



SA.No.1194 of 2014

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to Ex.A1 have not been examined to prove execution then the same right cannot be agitated in the 2nd suit. The original of Ex.A1 partition deed has not been filed into Court by the plaintiff. If made available, then a comparison of the father's signature, would have revealed the truth. A mere registration cannot confer validity on a document reference cannot be made copy of Ex.A1. The said Velayutham wantonly remained exparte in the earlier proceedings.

(e) even otherwise, declaration title cannot be granted in the absence of prayer seeking for declaration that he is entitled to the suit property on the basis of Ex.A1/partition deed, and, in the presence of all parties to the partition deed, without being made parties to the suit.

10. Per contra, the learned counsel appearing for the respondent submits that the earlier suit was filed only for possession and plaintiff's wife was examined who had spoken about the medical conditions of the plaintiff and there was no notice to produce Ex.A1 partition deed by the father. Hence, no adverse inference can be drawn over the same. The legal heirs of the deceased Velayutham have acted in terms of the partition deed and executed Ex.A6. Ex.A1 is a registered document there



SA.No.1194 of 2014

cannot be any oral evidence against the recital of the registered document, which by itself prove the possession of the respective parties. Ex.A1 definitely by itself is a proof of partition. Velayutham might not be interested in litigating between his father and his brothers and it cannot be interpreted, as he wantonly remained exparte. He would submit that the constructive resjudicata is not applicable to this case. The defense of the father is sham and nominal as he is a wrong doer and an interested witness. Hence, it will not drive the respondent to file a suit for declaration, so the necessity arose only when the plaintiff lost possession. In the earlier suit, there was no issue with regard to title and the only issue decided is with regard to possession. It was also contended that in the earlier suit, neither there were pleadings and establishing title, issues caused on title and evidence to that effect. Since, the respondent was out of possession only in the year 2000, he had time of 12years to file the suit and it was filed only in the year 2007. To strengthen his contention, he has relied on the judgment of the Hon'ble Apex Court reported in **2008 (4) SCC 594 Anathula Sudhakar V. P.Buchi Reddy (dead) by Lrs and others**, and (ii) **2008 (5) SCC 647 - William V. Lourdusamy and another.**



SA.No.1194 of 2014

WEB COPY

11. While considering the main contention of the learned senior counsel, whether the present suit will be barred by the principles of constructive resjudicata as set out in explanation (IV) to Section 11 of C.P.C.? is to be considered first. The relevant provision is extracted below :-

“11.Res Judicata :- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation IV.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

12. In Ex.B1 and Ex.B2 are judgment and decree passed in earlier suit in OS.No.2 of 1994, wherein the plaintiff claims to be in possession



SA.No.1194 of 2014

and enjoyment of the suit property in pursuance of the Ex.A1/Partition deed dated 16.11.1992. The trial Court comes to a conclusion that in a suit for mere injunction, it is sufficient to decide whether the plaintiff is in possession of the suit property based on partition deed. There is no issue with regard to title and the only issue decided is with regard to possession. Having said that, the trial Court without going into the issue of title non-suits the plaintiff, since he has not sought for declaration. In paragraph 9 of the judgment reported in **1994 (2) SCC 14** (*cited supra*), the Court comes to a definite conclusion and factual finding that the title has been decided in the earlier two suits and hence would operate as Resjudicata. However in the present case, there has been no determination of title. Hence, the above ruling is not supported, as the facts are not similar. There is no specific pleadings regarding the title dispute with respect of Ex.A2 sale deed dated 22.12.1993 executed by the father of the plaintiff. The denial of execution of Ex.A1/partition deed by the father, then the onus shifts on the person, who asserts and the same cannot be shifted on the plaintiff. Hence no adverse inference can be drawn against the plaintiff. The recitals of Ex.A1 shows that the possession of the respective parties were taken place. The plaintiff has



SA.No.1194 of 2014

proved partition effected under Ex.A1 and the legal heirs have acted upon in terms of partition. Subsequently based on it, Ex.A6 executed and acted upon, the father never challenged it by way of any litigation.

13. The denial of Ex.A1 in the written statement in the earlier suit carried no credibility, that will not drive the plaintiff to file a suit for declaration. Examining the attestors or scribe to prove the Ex.A1, which is not necessary under any law. The cause of action for the suit, that the plaintiff, he was out of possession only in the year 2000. Hence, he had time of 12 years to file a suit and it was filed in the year 2007.

14. A perusal of Ex.A1, it shows that the defendant was not a party to the document, this findings rendered by the first appellate Court seems to be a very small error, however the first appellate Court have elaborately discussed with the documents and oral evidences and on other valid considerations, the same can be ignored.

15. The Hon'ble Apex Court has held in catena of judgments (i) ***Karnataka Board of Wakf v. Anjuuman-E-Ismail Madris-Un-Niswan*** – (1999) 6 SCC 343 (ii) ***Ramanuja Naidu v. V.Kanniah Naidu*** – (1996)



SA.No.1194 of 2014

WEB COPY

3 SCC 392 (iii) Navaneethammal v. Arjuna Chetty – (1996) 6 SCC 166
and (iv) Secy., Taliparamba Education Society v. Moothedath
Mallisseri Illath M.N. - (1997) 4 SCC 484 that “if the findings of fact
of the Courts below are based on legal evidence, the same cannot be
interfered by this Court while exercising power under Section 100 of
the C.P.C.”

16. Therefore, viewing from any angle, the entire arguments advanced by the learned senior counsel appearing for the defendant/appellant is not having substance at all. The rulings relied by the learned Senior Counsel for the appellant is also not supported, as the facts are not similar. All the substantial questions of law formulated in the present second appeal are answered in favour of the plaintiff/respondent and altogether the present second appeal deserves dismissal. In fine, this second appeal deserves dismissal and accordingly dismissed without cost. The judgment and decree passed in OS.No.591 of 2007 by the Principal District Munsif, Salem, upheld in AS.No.132 of 2010 by the I Additional Sub Court, Salem are confirmed. The appellant / defendant is directed to hand over the possession of the suit property within three months from



SA.No.1194 of 2014

today.

30.10.2024

Index : Yes/No
Internet : Yes/No
Speaking Order/Non-Speaking Order
Neutral Citation : Yes/No
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To
1. The I Additional Sub Court, Salem
2. The Principal District Munsif, Salem

M. JOTHIRAMAN, J.

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SA.No.1194 of 2014

Pre Delivery Judgment in
SA.No.1194 of 2014

30.10.2024