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SA(MD)No.46 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reserved	02/08/2024
Date of Pronounced	18/10/2024

CORAM

The Hon'ble Mr.Justice **G.ILANGO VAN**

SA (MD) No. 46 of 2021
and
CMP (MD) No. 499 of 2021

Dhilrazbanu : Appellant/Appellant/
3rd Defendant

Vs.

1.Sulthan : 1st Respondent/
1st Respondent/Plaintiff
2.Amin Malik Hussain
3.Akmal Jakhan : Respondents 2 and 3/
Respondents 2 and 3/
Defendants 1 and 2

PRAYER: Second Appeal is filed under Section 100 of the Civil Procedure Code, to set aside the judgment and decree in AS No.07 of 2019 on the file of the Sub Court, Mudhukulathur, dated 05/03/2020 confirming the judgment and decree in OS No.11 of 2011 on the file of the District Munsif Court, Mudhukulathur, dated 25/01/2019 and pass such further or other orders.

For Appellant : Mr.K.Kumaravel
For 1st Respondent : Mr.S.Pandiyaraj
For R2 and R3 : Mr.K.R.Laxman



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J U D G M E N T

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This second appeal is filed against the judgment and decree passed in AS No.07 of 2019 passed by the Sub Court, Mudhukulathur, dated 05/03/2020 confirming the judgment and decree passed in OS No.11 of 2011 by the District Munsif Court, Mudhukulathur, dated 25/01/2019.

2.Plaint averments in brief:-

The suit property belonged to one Dhilrazbanu, W/o.Varusai Ibrahim, Firoja Navas Begum, D/o.Syed Abuthahir Labai, Nasuma Begum, W/o.Najmudeen and the plaintiff. The suit in OS No.39 of 2007 was filed by the defendants 1 and 2 against the above said persons. The defendants 1 and 2 made endorsement that they are not contesting the suit. That suit was dismissed. It was the suit for declaration and consequential injunction. After dismissal of the suit, Dhilrazbanu, W/o.Varusai Ibrahim, Firoja Navas Begum, D/o.Syed Abuthahir Labai, Nasuma Begum, W/o.Najmudeen executed a gift deed in favour of the plaintiff on 03/08/2010 through a registered document. In pursuance of the sale, patta was transferred in the name of the plaintiff. The first defendant after filing caveat petition before the trial court, in the month of August 2010, made fencing and encroached the property. The defendants 1 and 2 have no right over the



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properties. So, the encroachment made by them is illegal.

So, the suit is laid for declaration that the suit property absolutely belongs to the plaintiff, recovery of possession and for costs.

3. Written statement filed by the defendants 1 & 2:-

It is denied that the suit property belonged to the persons mentioned in the plaint. The property never belonged to those persons. It originally belonged to one Sikappi Ammal, D/o.Kattaikhan Syed Imrahim Rawther, W/o.Chinna Varusai Rawther. It was sold to Chinnathambi Mapillai on 14/10/1929. After the death of Chinnathambi Mapillai, his only son Mohammed Hussain inherited the property. After his death, his sons namely Umar Sulthan, Shanthana Beer, Maherabanu, Rukhma Beevi inherited the property. Later, the female legal heirs released their share in favour of Umar Sulthan and Shanthana Beer orally. The entire properties were owned by Umar Sulthan and Shanthana Beer. But however, patta is standing in their joint name. The second defendant is the daughter-in-law of Mohammed Hussain, W/o.Umar Sulthan. She is in abroad. So, the defendants 1 and 2 are jointly enjoying the properties. The plaintiff's predecessor-in-title namely Dhilrazbanu, Firoja Navas Begum, Nasuma Begum made unnecessary trouble. So, the defendants 1 and 2



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filed the suit in OS No.39 of 2007 for declaration. The defendants in that suit remained ex-parte. After the dismissal of the suit, the above said persons tried to sell the property in favour of the plaintiff. Objection was made by the defendants 1 and 2 before the Registering Authority. So, the sale itself is not valid under law. Revenue records were standing in the name of the defendants 1 and 2. The suit is bad for non-joinder of necessary parties. On that account, the suit is not valid in law.

4. Additional Written statement filed by the defendants 1 and 2:-

The third defendant was impleaded by subsequent amendment. The plaintiff has no right in the property. Unless the right of the plaintiff is established, the sale effected in favour of the 3rd defendant is not valid. The 3rd defendant has not derived any title.

5. The third defendant filed written statement stating that the defendants 1 and 2 have no right over the properties. The case of the plaintiff is that the suit property belonged to the third defendant. Firoja Navas Begum and Nasuma Begum and the plaintiff admitted that after the sale, the third defendant name is also



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included in the patta. The suit property originally belonged to one Pitchai @ Syed Ibraim Rawther through the sale deed dated 27/12/1901. After his death, his son Syed Hussain inherited the property. Syed Hussain had 11 children. After the death of Syed Usain, his legal heirs namely Dhilrazbanu, Sanavas Begum, Rasuma Begum and Jaitha Begum inherited the properties. Others inherited some other properties. Even though, the third defendant is in possession of the property, without her knowledge the defendants 1 and 2 got patta transferred in their name. One of this circumstance, suit in OS No.39 of 2007 was filed. After the dismissal of the suit, patta was standing in the name of the third defendant. On 03/08/2010, except Jaitha Begum, other three persons released their share in the property in favour of the plaintiff through a release deed. The property was handed over to him. After 28/01/2011, the plaintiff sold the suit property and other properties in favour of the third defendant and put in possession. Later, the defendants 1 and 2 in the first week of February 2010 tried to fence the suit property. That was prevented. The defendants 1 and 2 removed the fence also. So, the suit property is in the possession of the third defendant. The sale deed dated 14/10/1929 is not related to the present property. So, counter claim is filed seeking the relief of



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declaration that the suit property absolutely belonged to the third defendant and for permanent injunction.

6.Perusal of the records shows that no reply statement was filed by the plaintiff. But additional statement was filed by the defendants 1 and 2, since the third defendant claims rival title against the defendants 1 and 2.

7.On the basis of the pleadings, the trial court formulated the following issues:-

1.Whether the suit property absolutely belongs to the plaintiff?

2.Whether the suit property is in illegal occupation of the defendants or in the legal possession of the defendants?

3.Whether the suit is bad for non-joinder of necessary parties?

4.Whether the plaintiff is entitled for declaration as prayed for?

5.Whether the plaintiff is entitled for the relief as prayed for in the plaint?



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6.To what relief, the plaintiff is entitled to?

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8.Before the trial court, on the side of the plaintiff, one witness was examine and 5 documents marked. On the side of the defendants 7 witnesses were examined and 22 documents were marked.

9.At the conclusion of the trial process, the trial court not only dismissed the suit filed by the plaintiff, but also the counter claim filed by the third defendant.

10.Against which, AS No.7 of 2019 was filed before the Sub Judge, Mudukulathur by the third defendant alone. There is no appeal by the plaintiff, since they already sold the suit property to the third defendant. Concurring with the judgment of the trial court, the first appellate court dismissed the appeal filed by the third defendant.

11.Against which, the third defendant filed this second appeal.

12.At the time admission, the following questions of law were framed:-



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(i)Whether the Court below have not committed error in dismissing the counter-claim of the third defendant, when admittedly she is in possession and enjoyment of the suit property as lawful owner?

(ii)Whether revenue records for a brief period, can be considered as evidence of title to the property?

13.At the time of hearing this appeal, another turn took place.

14.Before we enter into the issue, let us briefly summarize the respective claims.

15.The plaintiff namely Sulthan claims to have purchased the suit property from the third defendant and others on 03/08/2010. Through this document, he claims title over the property.

16.Per contra, it is the case of the defendants 1 and 2 that the suit property only belonged to the third defendant and others try to sell the property to the



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plaintiff by way of sale deed, dated 03/08/2010.

According to them, as mentioned in the pleadings, the suit property belonged to one Sikkappi Ammal. She sold the property to Chinnathambi Mapillai. He had a son by name Mohammed Hussain. Mohammed Hussain had 11 childrens. The male childrens are Umar and one Santhan Beer and the first defendant is also called as Amin Malik Hussain, who is the son of Santhan Beer. Santhan Beer is not a party. Umar Sulthan son is the Akmal Jakhan, who the second defendant. So according to them, the female members released their right in favour of the male childrens namely Umar Sulthan and Santhan Beer. After the death of Umar Sulthan and Santhan Beer, the defendants 1 and 2 inherited the properties and in possession.

17.Coming back to the case of the plaintiff and the third defendant, the property originally purchased by Pitchai @ Syed Ibrahim Rawther on 27/11/1901. He had a son by name Syed Hussain. Syed Hussain had 11 childrens. Among 11 childrens, the third defendant namely Dhilrazbanu is one among them. Others Firojaj Navas Begum and Nasuma Begum. The particulars of other childrens of Syed Hussain is not known. Among 11 childrens, the plaintiff' wife Jaitha Begum is one among the legal heirs.



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18.It is stated that in the partition, the property was allotted to the third defendant Dhilrazbanu, Firoja Navas Begum and Nasuma Begum. Others were allotted some other properties. The third defendant, Firoja Navas Begum and Nasuama Begum sold their 3/4th share to the plaintiff on 03/08/2010. After purchase, the plaintiff again sold the property by including the share belongs to his wife to the third defendant. Now the entire property belongs to her. This is the sum and substance of the rival claim.

19.As mentioned above, on the date of the plaint itself, the plaintiff was not the owner. He sold the property to the third defendant, who was brought on record by herself. As mentioned above, the sale deed is dated 28/01/2011. The suit was filed on 09/02/2011. Having sold the property to the third defendant, he has filed the suit seeking the relief of declaration and recovery of possession suppressing the above said sale, which itself shows that the plaintiff has not approached the court with clean hands. The suit ought to have been dismissed with exemplary costs at the institution itself. But however, it continued.

20.That after coming on record, the third defendant, who is the appellant herein took a novel counter claim



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not only against the plaintiff, but also against the defendants 1 and 2. But neither the trial court, nor the first appellate court had given any consideration as to the legality of such counter claim. The reason being that the counter claim can be made only against the plaintiff and not against the co-defendants. The third defendant if wanted to establish her individual title ought to have filed a separate suit. But she chose to implead herself as a party and disputed the title of the plaintiff in view of the earlier purchase. More specifically, no issue was framed by the trial court or by the first appellate court with regard to the legality of the counter claim.

21.Now we will clarify this position first, before we go to the factual aspects.

22.Order 8 Rule 6(A) and (B) CPC reads as under:-

"6-A.Counter-claim by defendant-

(1)A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing



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to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such a counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints.



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6-B Counter-claim to be stated-

Where any defendant seeks to rely upon any ground as supporting a right of counter-claim, he shall, in his written statement, state specifically that he does so by way of counter-claim."

23.The extracted Rule 6-A and B CPC makes the position clear that the counter claim can be made only against the claim of the plaintiff and not against the co-defendants.

24.In this regard also, we can refer to Order 8 Rule 6-C CPC, which reads as follows:-

"6-C.Exclusion of counter-claim-

Where a defendant sets up a counter-claim and the plaintiff contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent suit, the plaintiff may, at any time before issues are settled in relation to the counter-claim, apply to the Court for an order that such counter-claim may be



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excluded, and the Court may, on the hearing of such application make such order as it thinks fit."

25.By exercising the above said option, the plaintiff or the defendants 1 and 2 ought to have requested the court not to entertain the counter claim. But they failed, so also the court. This is the legal defect, which is available against the third defendant.

26.Now, another issue is whether the issue can be framed or decided between the co-defendants. So, the framing of the issue by the trial court touching *inter se* dispute between the first defendant and the second defendant on the one hand, third defendant on the other hand is not proper.

27.In this connection, we can refer to the judgment of the Telangana and Andhra Pradesh High Court in ***Imran Hussain Vs. Rulima Begum [(2018)2 Civil 56]***.

28.Reading of the above said judgment makes the position clear that no counter claim can be made against the co-defendants. As mentioned above, if at all he ought to have filed a separate suit only.



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29.The learned counsel appearing for the appellant would submit that the third defendant is also one of the co-sharers. Some of the co-sharers sold the property to the third defendant, as mentioned in the pleadings not only by way of purchase, but also by way of inheritance. She had right over the property. To decide the above said title, the suit must be remanded back to the trial court.

30.Per contra, the learned counsel appearing for the respondents 2 and 3 would submit that even though, the document of the year 1901 was relied, but it was not produced by the appellant. No points were raised as now argued in the grounds of appeal.

31.Per contra, the learned counsel appearing for the appellant would submit that the ancestral nature of the property was not decided or considered by the trial court and the first appellate court. The suit originally filed by the defendants 1 and 2 was withdrawn. So, the matter must be remanded back to the trial court.

32.The request made by the appellant will not give any purpose because of the inherent defect in the counter claim. So, the above said request is rejected.



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33.Now coming back to the substantial questions of law, since it has been decided that the third defendant's counter claim is not at all maintainable, one another feature may also be taken into account. Because the plaintiff has not filed any reply statement to the counter claim made by the third defendant. Only the defendants 1 and 2 filed the additional written statement repudiating the averments made in the counter claim.

34.So, without going into the factual aspects, leaving the parties to properly institute a regular suit of title, the first substantial question of law is answered that the entertainment of counter claim itself by the trial court as confirmed by the appellate court is not legal. So, the decree and judgment passed by the trial court as confirmed by the first appellate court required no interference, of course for different reasons.

35.In view of the above said discussion and answer given in the first substantial question of law, the second substantial question of law is answered that *inter se* title dispute between the defendants 1 and 2 and the third defendant shall be decided by properly instituting the suit for title. So, the parties are relegated to the



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regular suit and no answer is given to the second substantial question of law.

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36.For all the reasons stated above, this second appeal fails and the same is **dismissed**, of course liberty is granted to the appellant herein to file a regular suit impleading the necessary parties for establishing her title.

37.In the result, this second appeal is **dismissed**, of course with the above said liberty, confirming the judgment and decree passed by the courts below. No costs. Consequently, connected Miscellaneous Petition is closed

18/10/2024

Index:Yes/No
Internet:Yes/No
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To,

1.The Sub Court,
Mudukulathur.

2.The District Munsif
Mudukulathur.

3.The Section Officer,
VR/ER Section,
Madurai Bench of Madras High Court,
Madurai.



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G.ILANGO VAN, J

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