



S.A.(MD)No.461 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 09.07.2024

PRONOUNCED ON: 20.09.2024

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

S.A.(MD)No.461 of 2017

1.Sakunthala(died)
(Memo dated 24.02.2023 in USR
No.6932 is recorded, as first
appellant died and second defendant
who is already on record is recorded
as LR of the deceased first appellant
vide Court order dated 27.02.2023)

2.Arulmozhisakaran : Defendants /Respondents/
Appellants

Vs.

Thirugnanam(died) : Plaintiff/Appellant/Respondent

2.Paunnayagi

3.Nadanam

4.Prema

5.Dinesh

Respondents 2 to 5

(Respondents 2 to 5 are brought on record
as LR of the deceased sole respondent
vide court order dated 23.02.2024 made in



S.A.(MD)No.461 of 2017

C.M.P.(MD)Nos.2620, 2621 and 2622 of
2023 in SA(MD)No.461 of 2017)

PRAYER:- Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree passed in A.S.No.12 of 2016, on the file of the Principal Subordinate Court, Thanjavur, dated 10.03.2017 reversing the judgment and decree passed in O.S.No.214 of 2009, on the file of the District Munsif, Thanjavur, dated 27.02.2015.

For Appellants : Mr.S.Venkatesan

For Respondents :R.1 died steps taken
: Mr.P.Vadivel
for R.2 to R.5

JUDGMENT

The Second Appeal is directed against the judgment and decree passed in A.S.No.12 of 2016, dated 10.03.2017, on the file of the Principal Subordinate Court, Thanjavur, reversing the judgment and decree passed in O.S.No.214 of 2009, dated 27.02.2015 on the file of the District Munsif, Thanjavur.

2. For the sake of convenience and brevity, the parties will hereinafter be referred as per their status/ranking in their original suit.



S.A.(MD)No.461 of 2017

WEB COPY

3. Originally, the respondent as plaintiff has filed the suit against the deceased Selvaraj claiming permanent injunction. Pending suit, the defendant died and his L.Rs., came to be impleaded as the defendants 2 and 3. Pending the Second Appeal, the second defendant was reported dead and her son was already on record as the third defendant. Pending Second Appeal, the plaintiff also died and his L.Rs., came to be impleaded as respondents 2 to 5 in the present Second Appeal.

4. It is admitted by both parties that the suit property was owned by Alamelu Ammal – paternal grandmother of the plaintiff through a Will dated 25.06.1900 executed by her father Amirtha Thenkondar. The case of the plaintiff is that the plaintiff's grandmother Alamelu Ammal died intestate leaving behind the plaintiff's father Paramasiva Nattar as her only legal heir, that before the death of the plaintiff's father Paramasiva Nattar, patta regarding the suit property was transferred in favour of the plaintiff, that the plaintiff and his predecessors in title have been in possession and enjoyment of the suit property for 100 years and are paying the taxes therefor, that the defendant has absolutely no right over the suit property, that the defendant has attempted to disturb the



S.A.(MD)No.461 of 2017

possession and enjoyment of the plaintiff on 02.06.2009 and the same was prevented and that since the apprehension continued, the plaintiff was forced to file the above suit claiming permanent injunction restraining the defendant and his men from in any manner interfering with the plaintiff's possession and enjoyment of the suit property.

5. The defence of the defendant is that the plaintiff's father Paramasiva Nattar inherited the suit property from her mother Alamelu Ammal, that the said Paramasiva Nattar has executed a Will in favour of his sister by name Neelambal, wife of Subbaiah Nattar, dated 08.06.1979, that the said Neelambal has been in possession and enjoyment of the suit property till her life time, that the said Neelambal's sons by name Rajamanickam and Jagadeesan inherited the property and they have been in possession and enjoyment of the property till 20.04.1999 and both of them have entered into a sale agreement with the defendant on 20.04.1999 for R.41,825/- and possession was handed over at the time of agreement itself and since then, the defendant has been in possession and enjoyment of the suit property till now, that since the plaintiff's father already executed a Will in respect of the suit property to the said Neelambal, the plaintiff has absolutely no right in the suit property and



S.A.(MD)No.461 of 2017

that the plaintiff has filed the above suit vexatiously and to harass the defendant and as such, the same is liable to be dismissed.

6. The trial Court, upon considering the pleadings of both parties has framed the following issues:

- (1) Whether the plaintiff is in possession of the suit property?
- (2) Whether the plaintiff is entitled to get the relief of permanent injunction?
- (3) What other reliefs, the plaintiff is entitled to?

7. During trial, the plaintiff has examined himself as P.W.1 and exhibited 3 documents as Exs.A.1 to A.3. The defendant has examined himself as D.W.1 and examined two more witnesses Thiru.Duraiarasan and Tmt.Anbuselvi as D.W.2 and D.W.3 respectively and exhibited 4 documents as Exs.B.1 to B.4. The learned trial Judge, upon considering the evidence both oral and documentary and on hearing the arguments of both sides, by holding that the plaintiff has failed to prove his possession and that the suit for bare injunction without claiming the relief of declaration is not maintainable, dismissed the suit vide judgment and decree dated 27.02.2015. Aggrieved by the judgment of the dismissal,



S.A.(MD)No.461 of 2017

WEB COPY

the plaintiff has preferred an appeal in A.S.No.12 of 2016 and the learned Principal Subordinate Judge, upon perusing the materials available on record and on hearing the arguments of both sides, has passed the judgment and decree dated 10.03.2017 by holding that the plaintiff has proved his title, possession and enjoyment of the suit property, but the defendants have failed to establish their title and possession of the suit property, set aside the judgment and decree of the trial Court and consequently, granted the relief of permanent injunction as sought for. Challenging the reversal of the judgment and decree, the defendants 2 and 3 have preferred the present Second Appeal.

8. At the time of admission, the following Substantial Questions of Law came to be formulated:

1. Whether the Appellate Court is correct in allowing the appeal on the basis of Ex.A.3 adangal extract which is related to the year 2011-2012 that too after filing of the suit in 2009?

2. Whether the suit for injunction is maintainable when the appellant disputing the title of the suit property?



S.A.(MD)No.461 of 2017

WEB COPY

3. Whether the Appellate Court can shift the burden of proof on defendants when the plaintiff has failed to comply the Section 101 of Indian Evidence Act?”

9. Heard the learned Counsel appearing on either side and perused the materials available on record.

10. Before entering into further, it is necessary to refer the judgment of the Hon'ble Supreme Court in the case of **Anil Rishi Vs. Gurbaksh Singh** reported in **AIR 2006 SC 1971**, wherein the Hon'ble Apex Court has held that as per Section 101 of the Indian Evidence Act, the burden of proving the fact rests on the party who substantially asserts the affirmative issues and not the party who denies it and the relevant passages are extracted hereunder:

“The initial burden of proof would be on the plaintiff in view of [Section 101](#) of the Evidence Act, which reads as under:-

"[Sec. 101](#). Burden of proof. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.



S.A.(MD)No.461 of 2017

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

In terms of the said provision, the burden of proving the fact rests on the party who substantially asserts the affirmative issues and not the party who denies it. The said rule may not be universal in its application and there may be exception thereto. The learned trial Court and the High Court proceeded on the basis that the defendant was in a dominating position and there had been a fiduciary relationship between the parties. The appellant in his written statement denied and disputed the said averments made in the plaint.

In R.V.E.Venkatachala Gounder V. Arulmigu Viswesaraswami & V.P.Temple and another (JT 2004 (6) SC 442], the law is stated in the following terms :

"29. In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored to him. However, as held in [A. Raghavamma v. A. Chenchamma](#) there is an essential distinction between burden of proof and onus of proof:

burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence.



WEB COPY



S.A.(MD)No.461 of 2017

In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant it is for the defendant to discharge his onus and in the absence thereof the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff's title."

11. It is pertinent to note that the plaintiff by alleging that he is having title and possession of the suit property and by alleging that the defendant had attempted to interfere with his possession, has laid the suit for permanent injunction and as such, the plaintiff is duty bound to establish his case. No doubt, in a suit for bare injunction, it is not necessary to probe the title to the property in dispute, but at some times, while deciding the issue with regard to the possession, the Court has to necessarily go into the title to the property in dispute incidentally.

12. In the case on hand, as already pointed out, there is no dispute that the suit property was originally owned by Alamelu Ammal and that the plaintiff, in order to prove his title and possession, has produced and exhibited the Will executed in favour of Alamelu Ammal by her father on



S.A.(MD)No.461 of 2017

WEB COPY

25.06.1900, patta pass book standing in favour of the plaintiff and Adangal extract for the faslis 1419 and 1420 as Exs.A.1 to A.3. The defendant, in an attempt to establish his defence, has produced the registration copy of the mortgage deed dated 09.10.1985 executed by Neelambal in favour of one Banumathy, kist receipt and a sale agreement dated 20.04.1999 executed by Neelambal's sons namely Rajamanickam and Jagadeesan as Exs.B.1 to B.3 and a copy of the certificate of the Village Administrative Officer along with the proceedings of the headquarters Deputy Tahsildar, Thiruvaiyaru, which came to be marked through D.W.3- VAO as Ex.B.4.

13. In the plaint, as already pointed out, the plaintiff has alleged that his father Paramasiva Nattar had died leaving behind the plaintiff as his only legal heir, but during the trial, the plaintiff has specifically admitted that Neelambal is her paternal aunt and she was married to Subbaiah Nattar of Puthur. It is not the specific case of the plaintiff that Alamelu Ammal had executed any testamentary instrument in favour of his son Paramasiva Nattar. Since Alamelu Ammal died intestate, the plaintiff's father Paramasiva Nattar and her sister Neelambal being the legal heirs of Alamelu Ammal are certainly entitled to get 1/2 share each.



S.A.(MD)No.461 of 2017

No doubt, the defendants have taken a stand that Paramasiva Nattar had inherited the property and he executed a Will in favour of his sister Neelambal.

14. In Ex.B.1 – mortgage deed executed by Neelambal, she has stated that the property came to be owned by her as per the partition and the release deed dated 07.07.1983 executed by her brother Paramasiva Nattar. No doubt, the defendant has produced neither the Will nor the release deed. It is settled law that the plaintiff has to succeed through his case and he cannot be allowed to succeed by relying on the loopholes and the defects in the defence of other side. As already pointed out, the plaintiff has not produced any title deed to claim ownership over the entire suit property. It is not his case that his father had executed any testamentary instrument in his favour. No doubt, he has produced the patta pass book which came to be issued by the office of the Tahsildar, Thiruvaiyaru on 09.12.2003. He has also produced the adangal extract for the faslis 1419 and 1420 corresponding to 2009 and 2010 which came to be issued in favour of the plaintiff. But admittedly, the suit came to be filed on 17.06.2009. The plaintiff has not chosen to produce the adangal extract for the previous years ie., prior to the filing of the suit, though he



S.A.(MD)No.461 of 2017

WEB COPY

claimed that he was in possession of the property for very long time. The plaintiff has also not chosen to produce the kist receipts, though the plaintiff in the plaint has alleged that the plaintiff has been paying the necessary taxes and in his cross-examination that he has produced 2, 3 tax receipts. As already pointed out, she has not produced any single receipt for payment of kist/tax. Even P.W.1, in cross-examination, would admit that he does not know the patta number. He would further depose that there are dry and wet lands in 57 cents of suit property, but he does not know the extent of wet lands and dry lands in the said extent, that he has not visited the suit property for more than 5 to 6 years before giving evidence. Though the plaintiff has alleged that patta was issued in his favour in the year 1994, he has not produced the said pata nor any other documents to substantiate the same. As already pointed out, even assuming that there was no such release deed executed by the plaintiff's father in favour of his sister Neelambal, even then the plaintiff's father was only owning 1/2 share in the suit property and as such the plaintiff cannot claim title over the entire suit property.

15. The learned counsel for the defendants would submit that since the defendant has specifically disputed and denied the title of the



S.A.(MD)No.461 of 2017

plaintiff, the plaintiff ought to have claimed the relief of declaration and that therefore, the suit for bare injunction without claiming declaratory relief is legally not maintainable. He would further submit that though the trial Court has rightly held that the suit for bare injunction is not maintainable, the first appellate Court has failed to consider that aspect and no finding has been given with regard to the maintainability of the suit.

15. To counter the said arguments, the learned Counsel for the plaintiff would rely on the following decisions:

(i) (2008)4 SCC 594 (Anathula Sudhakar Vs. P.Buchi Reddy (dead) by LRs., and others;)

“21. To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under :

(a)

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in



S.A.(MD)No.461 of 2017

WEB COPY

cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c)

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction.”

(ii) (2019)17 SCC 692 (Jharkhand State Housing Board Vs.

Didar Singh and another):

“11. It is well settled by catena of judgments of this Court that in each and every case where the defendant disputes the title of the plaintiff it is not necessary that in all cases plaintiff has to seek the relief of declaration. A suit for mere injunction does not lie only when the defendant raises a genuine dispute with regard to title and when he raises a cloud



S.A.(MD)No.461 of 2017

over the title of the plaintiff, then necessarily in those circumstances, plaintiff cannot maintain a suit for bare injunction.”

17. The learned Counsel for the defendants would rely on a recent decision of the Hon'ble Supreme Court in the case of ***the Tahsildar, Urban Improvement Trust and another Vs. Ganga Bai Menariya (dead) through LRs., and others*** in Civil Appeal No.722 of 2012, dated 20.02.2024, wherein the Hon'ble Apex Court has held that a suit for bare injunction is not maintainable when the title of the property was disputed by the other side and the relevant passages are extracted hereunder:

“21. In the light of the aforesaid stand and the evidence led on record by the appellants-defendants, it was incumbent on the respondents to have proved their title on the land, which they failed to establish. As per the stand of the appellants, the respondents were encroachers upon the land for which notice under Section 92A of the 1959 Act was issued to them. The same was replied to by the respondents stating therein that they have patta executed in their favour by the Gram Panchayat.

21.1 Further a suit simpliciter for injunction may not be maintainable as the title of the property of the



S.A.(MD)No.461 of 2017

WEB COPY

plaintiff/respondent was disputed by the appellants/defendants. In such a situation it was required for the respondent/plaintiff to prove the title of the property while praying for injunction. Reference can be made to the judgment of this Court in [Anathula Sudhakar v. P. Buchi Reddy \(Dead\) by Lrs. and ors.](#)

21.2 In view of aforesaid discussions, in our opinion, the judgment of the High Court suffers from patent illegality. Consequently, the judgment and decree of the First Appellate Court as well as the High Court are set aside and that of the Trial Court is restored. As a consequence, the suit filed by the respondents is dismissed.”

18. There is absolutely no dispute about the legal position laid down by the Hon'ble Supreme Court. Just because the defendant denies the title of the plaintiff, it cannot be stated that the plaintiff has to seek the relief of declaration in all cases. But when the defendant raises a genuine dispute with regard to the title, then the plaintiff has to necessarily claim the relief of declaration and on his failure to seek such a prayer, that would be fatal to his case. Moreover, when a plaintiff is able to prove his title and possession and if the defendant denies the title,



S.A.(MD)No.461 of 2017

purposely and for the purpose of the case, it cannot be stated that seeking declaratory relief is must.

19. In the present case, as already pointed out, the defendant has raised a genuine dispute with regard to the title to the suit property. But the learned Counsel for the plaintiff would attempt to side tract the issue by submitting that the defendant would not protect his possession in terms of the doctrine of part performance as enshrined in Section 53A of the Transfer of Property Act against the plaintiff, as there was no privity of contract between the parties and that the defendant not being a transferee within the meaning of Section 53A of the Transfer of Property Act could not invoke the protection under the said doctrine.

20. Admittedly, the defendant has not claimed any protection under Section 53 of the Transfer of Property Act. The defendant in their written statement has taken a stand that he has entered into a sale agreement with the sons of Neelambal and on that basis, they are in possession and enjoyment of the property. Admittedly, there is no dispute between the defendant and the sons of Neelambal, who had allegedly entered into the sale agreement and if only there is any dispute between them, the



S.A.(MD)No.461 of 2017

WEB COPY

question of defendant invoking Section 53A of the Transfer of Property Act would come into picture. Hence, the decision of the Hon'ble Supreme Court in ***Rambhau Namdeo Gajre Vs. Narayan Bapuji Dhotra (dead) through LRs.***, reported in ***(2004)8 SCC 614***, cannot be made applicable to the case on hand.

21. Since the defendant has disputed the title of the plaintiff specifically, the plaintiff ought to have claimed the relief of declaration or ought to have amended the plaint during the pendency of the suit. As held by the trial Court, the suit for bare injunction is not maintainable. As rightly contended by the learned Counsel for the defendant, the first appellate Court, by shifting the burden on the defendant and by holding that the defendant has not proved their case and by giving much importance to the adangal extract for the period of 2009 and 2010, has granted the permanent injunction as sought for by the plaintiff.

22. Considering the evidence available on record, the learned trial Judge has rightly come to a decision that the plaintiff has miserably failed to prove his case and as such, he is not entitled to the relief of permanent injunction. Hence, this Court has no hesitation to hold that



S.A.(MD)No.461 of 2017

WEB COPY

the impugned judgment and decree of the first appellate Court are liable to be interfered with and that the judgment and decree of the trial Court are to be restored. Considering the other facts and circumstances, this Court is of the view that the parties are to be directed to bear their own costs. Hence, the Substantial Questions of Law are answered in favour of the appellants/defendants and against the respondents / plaintiffs.

23. In the result, the Second Appeal is allowed and the judgment and decree dated 14.03.2017, passed in A.S.No.12 of 2016, on the file of the Principal Subordinate Court, Thanjavur are set aside and the judgment and decree dated 27.02.2015, passed in O.S.No.214 of 2009, on the file of the District Munsif Court, Thanjavur are restored and the suit in O.S.No.214 of 2009 stands dismissed. The parties are directed to bear their own costs.

20.09.2024

NCC : Yes:No
Index : Yes : No
Internet : Yes : No
SSL



S.A.(MD)No.461 of 2017

WEB COPY

To

1. The Principal Subordinate Court, Thanjavur.
2. The District Munsif Court, Thanjavur
3. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



WEB COPY



S.A.(MD)No.461 of 2017

K.MURALI SHANKAR,J.

SSL

PRE-DELIVERY JUDGMENT MADE IN

S.A.(MD)No.461 of 2017

20.09.2024