



S.A.(MD) No.357 of 2004

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 22.07.2024

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A. (MD) No.357 of 2004
and C.M.P.(MD) No.7630 of 2024

M.Velu (died)

2.V.Saraswathi

3.Gangadevi

4.V.Palanimuthu

... Appellants

-vs-

T.Muthu Malayalam (died)

2.M.Angammal

3.M.Nagarajan

4.M.Nagalakshmi

5.M.Muthaiah

6.M.Ganesan

7.K.Gangadevi

8.M.Thadakathan

... Respondents



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(Appellants 2 to 4 are brought on record
as L.Rs. of the deceased sole appellant)

(Respondents 2 to 8 are brought on record
as L.Rs. of the deceased sole respondent)

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure against the judgment and decree, dated 28.07.2004, passed in A.S.No.280 of 2003 on the file of II Additional Sub-Court, Madurai, confirming the judgment and decree, dated 16.10.2003, passed in O.S.No.133 of 2003 on the file of District Munsif Court, Tirumangalam.

For Appellants : Mr.R.Subramanian

Respondent 1 : Died

For Respondents 2 to 8 : Mr.J.Bharathan
for Mr.A.Sivaji

JUDGMENT

The plaintiff in the suit is the appellant. The suit was originally filed for bare injunction. The suit was dismissed by the trial Court. The appeal filed by the plaintiff was also dismissed. Aggrieved by the same, he has come by way of this Second Appeal.



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2. According to the appellant/plaintiff, the suit property was purchased by him under a registered sale deed, dated 09.04.2003, executed by its previous owner Pappuammal. The plaintiff had been in possession and enjoyment of the suit property from the date of purchase, by paying property tax to Panchayat. The defendant wanted to purchase the suit property from the plaintiff at a lower rate. Aggrieved by the purchase of the suit property by the plaintiff, the defendant made an attempt to interfere with the plaintiff's possession and enjoyment. Hence, the plaintiff was constrained to file the suit for bare injunction.

3. The defendant filed a written statement, denying the title as well as possession of the plaintiff over the suit property. The defendant denied the sale in favour of the plaintiff, dated 09.04.2003, executed by Pappuammal. It was the case of the defendant that his wife – Angammal was in possession and enjoyment of the suit property by virtue of an oral sale agreement with Pappuammal. It was also claimed that Pappuammal borrowed a sum of Rs. 1,200/- from one Krishnan Servai based on a pronote, dated 10.06.1982, and, on the same day, she executed a 'Kudiuppu Receipt' in favour of Krishnan Servai, allowing him to enter the suit property for three years in lieu of interest for the sum borrowed by her. The debt was discharged by the defendant's wife – Angammal and, thereafter, she had been in possession and enjoyment of the



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same by paying tax to Panchayat. The allegation in the plaint as if tax assessment stood in the name of the plaintiff was also denied. The defendant also denied the title of Pappuammal to execute the sale deed in favour of the plaintiff. Thus, by denying the title as well as possession over the suit property, the defendant sought for dismissal of the suit.

4. Before the trial Court, the plaintiff was examined as P.W.1, the vendor of the plaintiff was examined as P.W.2, and the Advocate Commissioner was examined as P.W.3. On behalf of the plaintiff, 4 documents were marked as Exs.A-1 to A-4. The defendant was examined as D.W.1 and four other witnesses were examined as D.Ws.2 to 5. 8 documents were marked on the side of the defendant as Exs.B-1 to B-8. Advocate Commissioner's Report and Sketch were marked as Exs.C-1 and C-2.

5. The trial Court, on appreciation of oral and documentary evidence available on record, came to the conclusion that the suit for bare injunction filed by the plaintiff was not maintainable and consequently, dismissed the suit. Aggrieved by the same, the plaintiff preferred an appeal in A.S.No.280 of 2003 on the file of II Additional Sub-Court, Madurai. The first appellate Court came to the conclusion that prior possession of the plaintiff's vendor was



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proved and to that extent the title of the plaintiff had to be upheld. However, the first appellate Court also affirmed that the plaintiff failed to prove his possession over the suit property and hence dismissed the suit. Aggrieved by the same, the plaintiff has come by way of this Second Appeal.

6. At the time of admission, this Court formulated the following substantial questions of law, by an order, dated 24.11.2004 :

(1) Whether in law has not the lower appellate Court after finding that the plaintiff/appellant has better title and prior possession is good title vide 2004/3 LW 143, erred in finding that since the Commissioner did not find the plaintiff in possession, the plaintiff has to be non-suited.

(2) Whether in law are not the decree and judgment of the lower appellate Court vitiated in overlooking Ex.A-3 which coupled with Ex.A-2 proves plaintiff's possession ?

7. This Court, after hearing the arguments of the learned counsel for the appellants, formulated the following additional substantial question of law, by an order, dated 16.04.2024 :

"Whether the appellant/plaintiff is entitled to a decree for declaration of title and recovery of possession, in view of admission



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8. It is seen from the records that pending Second Appeal, the appellant/plaintiff filed an amendment petition in M.P.No.1 of 2007 seeking to amend the prayer in the plaint. By virtue of amendment, the plaintiff wanted to introduce a prayer for declaration of title and an alternative prayer for recovery of possession. The said amendment petition was allowed by this Court by an order, dated 06.08.2008, on payment of costs of Rs.1000/- to the other side. The appellant paid the costs as directed and a Memo to that effect was also filed on 07.08.2008. It is also seen from the records that the plaintiff paid an additional Court fee of Rs.1276/- towards the value of the new prayer, sought to be introduced by way of amendment, on 29.08.2008. However, it appears that the plaintiff failed to take any steps to carry out the amendment in the plaint and file an amended copy of the plaint. In view of the same, the appellant filed the present petition in C.M.P.(MD) No.7630 of 2024, seeking extension of time to carry out amendment in the plaint, as ordered by this Court. In the affidavit filed in support of this petition, it was asserted by the plaintiff that whenever an order of amendment was passed in High Court, the Registry used to carry out the amendment and the appellant was under the



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impression that the Registry would carry out the amendment. It was also averred in the affidavit that failure to carry out the amendment was a sheer inadvertence and it was not wilful and wanton. The petition is seriously opposed by the respondent by filing a counter, wherein it is stated that it is the duty of the parties seeking the amendment to carry out the amendment in the pleadings and failure to carry out the amendment within 14 days, as mandated by Order 6 Rule 18 of the Code of Civil Procedure, cannot be condoned, unless the petitioner shows a justifiable cause for his failure to carry out the amendment.

9. As mentioned above, the amendment petition was allowed by this Court, directing the appellant to pay costs of Rs.1000/- to the respondent. The appellant paid costs to the respondent and filed a Memo to that effect on the immediate next date. The appellant also paid necessary additional Court fee for inclusion of new prayers as per the amendment. However, the amendment was not carried out in the plaint. This Court can take judicial notice of the fact, as per the practice prevailing in the appellate side of this Court, the amendments ordered by this Court will be carried out only by the Registry and not by the party. Therefore, the assertion made by the petitioner that he was under the impression that the amendment would be carried out by the Registry is acceptable to this Court.



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10. In view of the reasons mentioned above, this Court is inclined to allow the petition filed for extension of time to carry out the amendment in C.M.P.(MD) No.7630 of 2024 and therefore, the C.M.P.(MD) No.7630 of 2024 is allowed. The appellant is directed to file an amended copy of the plaint. In fact, the amended copy of the plaint has been filed by the appellant before this Court and the same is taken on record. The Registry is directed to carry out the amendment in the original plaint and send a copy of the amended plaint to the trial Court for incorporation of the same in the Suit Register.

11. The learned counsel appearing for the appellant vehemently contended that the first appellate Court, having upheld the prior possession of the plaintiff's vendor, ought not have non-suited the plaintiff on the ground that when the Advocate Commissioner visited the suit property, the plaintiff was not found in possession of the same. The learned counsel further submitted that the Advocate Commissioner cannot give any finding with regard to physical possession of the parties and it is for the Court to give a finding, based on the evidence available on record.



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12. The learned counsel appearing for the respondent submitted that once the amendment petition is allowed by this Court, as a matter of right, he is entitled to file an additional written statement and lead evidence on the pleas, to be raised by him.

13. A perusal of the appellate Court judgment would suggest that the first appellate Court came to the conclusion that prior possession of Pappuammal, vendor of the plaintiff, was proved and hence the title of the plaintiff based on prior possession was proved. However, as far as physical possession on the date of presentation of the plaint is concerned, the first appellate Court held that the plaintiff's possession over the suit property was not established when the Advocate Commissioner inspected the property. It is a well settled law that Advocate Commissioner is not competent enough to give a finding with regard to physical possession of the parties and physical possession has to be assessed by the Court, based on the evidence available on record. The first appellate Court, without adverting to the oral and documentary evidence available on record with regard to the physical possession of the parties, simply non-suited the plaintiff, on the ground that the plaintiff was found to be not in possession of the property on the date of



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visit of the Advocate Commissioner. The conclusion of the first appellate Court with regard to possession of parties is palpably erroneous and hence needs to be interfered with. Therefore, the substantial questions of law 1 and 2, framed on 24.11.2004, are answered in favour of the appellant and the finding of the first appellate Court with regard to possession, without considering the evidence available on record, is set aside.

14. In view of the allowing of amendment and extension of time granted in C.M.P.(MD) No.7630 of 2024, the respondent / defendant shall be given an opportunity to file an additional written statement and lead further evidence on the pleas raised by him. Therefore, this Court feels that the matter shall be sent back to the trial Court to enable the defendant to file an additional written statement and to enable both the parties to lead further evidence, based on the subsequent pleadings raised by them. Since this Court has come to the conclusion that further opportunity shall be given to the parties to lead evidence, the additional substantial question of law, framed by this Court on 16.04.2024, cannot be answered at this stage. In view of the answer to the questions of law 1 and 2, the judgment and the decree passed by the Courts below are set aside and the matter is remanded back to the file of the trial Court for fresh consideration. The trial Court shall give an opportunity to the defendant to file additional written statement and both the



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parties shall be afforded with an opportunity to lead further evidence and thereafter, the suit shall be disposed of on merits as expeditiously as possible.

15. The Second Appeal is allowed accordingly. No costs. Consequently, the connected C.M.P.(MD) No.7630 of 2024 is also allowed.

22.07.2024

NCC : Yes
Index : Yes
Internet : Yes

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To:

- 1.II Additional Subordinate Judge,
Madurai.
- 2.District Munsif,
Tirumangalam.
- 3.Section Officer,
V.R. Section,
Madurai Bench of Madras High Court.



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