

Felix Vs. A.Josphine

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SooperKanoon Citation : sooperkanoon.com/964646

Court : Chennai

Decided On : Mar-21-2013

Judge : G.Rajasuria

Appellant : Felix

Respondent : A.Josphine

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED :

21. 03.2013 Coram: THE HONOURABLE MR.JUSTICE G. RAJASURIA
S.A.No.415 of 2012 and M.P.No.1 o

1. Felix @ Sankar 2.Gnanabarnam ... Appellants Vs. 1.A.Josphine 2.A.Francis ...
Respondents This Second Appeal is focussed as against the judgment and decree
dated 31.10.2011 passed by the III Additional Judge, City Civil Court, Madras, in
A.S.No.621 of 2008, reversing the judgment and decree dated 31.7.2008 passed
by the XIV Assistant Judge, City Civil Court, Chennai, , in O.S.No.7461 of 2006.
For appellants : Mr.P.Kandavelu For respondents : Mr.M.Balasubramanian
JUDGMENT This Second appeal is focussed by the defendants animadverting
upon the judgment and decree dated 31.10.2011 passed by the III Additional
Judge, City Civil Court, Madras, in A.S.No.621 of 2008, reversing the judgment
and decree dated 31.7.2008 passed by the XIV Assistant Judge, City Civil Court,
Chennai, , in O.S.No.7461 of 2006, which was one for recovery of possession.

2. The parties, for the sake of convenience, are referred to hereunder according to their litigative status and ranking before the trial Court. 3. Niggard and bereft of unnecessary details, the germane facts absolutely necessary for the disposal of this second appeal would run thus: (i) The first respondent herein, namely, Josphine, filed the suit as against two defendants, namely, 1. Felix @ Sankar and 2. Gnanaparnam, seeking recovery of possession from them. The gist and kernel of the averments in the plaint would run thus: (a) The plaintiff is the widow of the deceased Anthonydoss. The suit property was originally owned and enjoyed by the plaintiff's husband-Anthonidoss, who during his life time settled the property in favour of his wife-the plaintiff, vide the registered settlement deed Ex.A1 dated 13.9.1984. At the time of such settlement, there were only thatched houses in the suit plot, in which the tenants and the plaintiff along with her husband were occupying. (b) Thereafter, the plaintiff demolished the thatched structures and constructed a building, after getting approval of the building plan from the authorities concerned. (c) The plaintiff's husband-Anthonidoss died on 5.11.1988. The plaintiff also mortgaged the property on 9.6.1988 and raised loan. A portion of the suit property was also rented out by her. (d) D2 is one of the daughters of the plaintiff's sister, namely, Arupudhamerry. D.1 is the husband of D2 and they were permitted to occupy the first floor of the suit building, whereas, the plaintiff sold the ground floor to her brother, namely, A. Francis, vide sale deed dated 7.2.2005. (e) Subsequently, when the plaintiff demanded the defendants to vacate and hand over possession of the first floor, they refused to do so. The plaintiff's lawyer's notice was replied by the defendants with false and untenable allegations. Hence, the suit,. (ii) Per contra, D2 filed the written statement, which was adopted by D.1, a thumbnail sketch of the averments in it, would run thus: (a) D.2 is the adopted daughter of the plaintiff and her husband-Anthonidoss. They adopted D2 even while she was a year and half old. Ever since that time, D2 has been in possession of the suit property and she was treated as the adopted daughter of the plaintiff and her husband and there is no question of D2 occupying the suit property along with her husband as permissive occupier, as alleged in the plaint. (b) D2 also spent a sum of Rs.5,00,000 (rupees five lakhs) for carrying out the construction of the first floor of the suit property. Accordingly, the defendants would pray for the dismissal of the suit. (iii) Whereupon issues were framed. Up

went the trial, during which, the plaintiff examined herself as P.W.1 and marked Exs.A1 to A11. On the defendants' side, the second defendant examined himself as D.W.1 and the first defendant examined herself as D.W.2 along with D.W.3 and D.W.4 and Exs.B1 to B13 were marked on their side. (iv) Ultimately, the trial Court dismissed the suit. (v) Challenging and impugning the said judgment of the trial Court, the plaintiff preferred the appeal, whereupon, the first appellate Court reversed the judgement of the trial Court and decreed the suit. 4. Being aggrieved by and dissatisfied with the judgment and decree of the first appellate Court, this second appeal has been focussed by the defendants on various grounds and also suggesting the following substantial questions of law: "1. Whether the finding of the appellate Court that the appellant(defendant) are in permissive occupation of the suit property under the plaintiff in the absence of any material evidence is correct? 2. Whether the finding of the appellate Court, holding that the suit filed by the first plaintiff alone for possession of the suit property is maintainable is correct and since the first plaintiff even before filing of the suit sold away and parted with possession of half share in the suit property and the notice to vacate(P) issued only by the plaintiff is valid in law and of course this is without prejudice to the contention already raised by the appellant herein as regarding heirship and ownership. 3. Whether the finding of the appellate Court that the appeal by the first plaintiff alone is maintainable since she had already sold half share to the 2nd appellant is maintainable and the other half share was also sold during the pendency of appeal in the absence of the purchase without the leave of the court during the pendency of the appeal proceedings is correct. 4. The observation of learned appellate judge in various paragraphs of the judgement are perverse, erroneous and arbitrary and the same is not sustainable in law. 5. The learned appellate Judge after accepting the case of the appellant(defendant) and after accepting the Exts.B1 to B8 ought to have dismissed the appeal with costs confirming the lower Court judgement and decree. 6. The other reason adduced by the appellate Court in allowing the appeal and dismissing the suit O.S.No.7461 of 2006 are ill founded and contrary to law. Whether the appeal itself is maintenance in view of the fact that during the pendency of appeal the first respondent had sold away the remaining half share to the 2nd respondent on account of which the appeal itself had become infructuous. (extracted as such) 5. The learned counsel

for the second appellants/defendants would pyramid his arguments which could succinctly and precisely be set out thus: (i)The first appellate Court, without adhering to Order 31 Rule 41 of C.P.C., simply reversed the reasoned findings and judgement of the trial Court, warranting interference in second appeal. (ii)The trial Court held that there was adoption of D2 by the plaintiff and her husband, whereas, the first appellate Court did not advert to that point at all, but ordered delivery of possession warranting interference in second appeal. (iii)As per the customary practice, adoption among Christians is a permissible one and the trial Court correctly and appropriately appreciated the same and held that D2 happened to be the adopted daughter of the plaintiff and her husband; Whereas, not even a single sentence relating to adoption was written by the first appellate Judge in that aspect. Accordingly, the learned counsel for the appellants/defendants would pray for setting aside the judgment and decree of the first appellate Court and for restoring the judgment and decree of the trial Court.

6.Per contra, in a bid to torpedo and pulverise the arguments as put forth and set forth on the side of the appellants/defendants, the learned counsel for the plaintiff would advance his arguments, the warp and woof of the same would run thus: (a)The deciding on the point as to whether there was valid adoption of D2 by the plaintiff and her husband, is not at all necessary or germane for the disposal of either the suit or the first appeal or even the second appeal, because of the singularly singular circumstance involved in this case. (b)The bedrock of the plaintiff's case is the settlement deed-Ex.A1 dated 13.9.1984 executed by Anthonidoss in favour of the plaintiff. (c)Indubitably and indisputably, the suit property belonged to Anthonidoss and in such a case, he had full capacity to alienate his property in favour of his wife-the plaintiff. On the strength of that settlement, the recovery of possession was sought for and the same was ordered by the first appellate Court and simply because the first appellate Court did not advert to the point relating to adoption that it does not mean that the first appellate Court's judgement could be labelled or dubbed as one in violation of Order 41 Rule 31 of C.P.C. (d)This Court also is having the competence to take note of the subsequent developments in this matter. Pending these proceedings, D2 went to the extent of filing the suit in O.S.No.1204 of 2009 in the City Civil Court, Madras, seeking the following reliefs: "The plaintiff therefore prays for judgement and

decree against the defendant declaring: a.that the plaintiff is the foster daughter of Anthony Doss and his wife 1st plaintiff. b.that the settlement deed dated.13.9.1984 is illegal, void and not binding on the plaintiff and consequently, c.that the sale deed dated.20.3.1974 executed by the 1st defendant in favour of the 2nd defendant is also invalid, illegal, void and not binding on the plaintiff. d.for costs." (extracted as such) As such, the very second appeal filed by the defendants itself, has become infructuous and it has to be dismissed. (e)The first appellate Court, on finding that the settlement deed Ex.A1, dated 13.9.1984 was executed by the deceased husband Anthonidoss in favour of his wife-the plaintiff, ordered eviction and in such a case, no substantial question of law at all is involved in this matter.

7. At the outset itself, I would like to fumigate my mind with the following recent decision of the Hon'ble Apex Court reported in 2012(8) SCC 14.[Union of India v. Ibrahim Uddin and another]; an excerpt from it would run thus: "59. Section 100 CPC provides for a second appeal only on the substantial question of law. Generally, a second appeal does not lie on question of facts or of law. In SBI v. S.N.Goyal (2008) 8 SCC 92.this Court explained the terms "substantial question of law" and observed as under: (SCC p.103, para

13) "13.....The word "substantial" prefixed to 'question of law' does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the lis between the parties. 'Substantial questions of law' means not only substantial questions of law of general importance, but also substantial question of law arising in a case as between the partiesany question of law which affects the final decision in a case is a substantial question of law as between the parties. A question of law which arises incidentally or collaterally, having no bearing on the final outcome, will not be a substantial question of law.....There cannot, therefore, be a straitjacket definition as to when a substantial question of law arises in a case." (emphasis added) 8. In the same precedent, the following decisions are found referred to: (1) AIR 196.SC 331.[Chunilal V. Mehta & Sons Ltd. v. Century Spg. and Mgf. Co. Ltd.] (2) (2011) 1 SCC 67.[Vijay Kumar Talwar v. CIT] (3) AIR 194.PC 1.[Bibhabati Devi v. Kumar Ramendra Narayan Roy] (4) (1949) 17 ITR 26.(Nag) [Suwalal Chhogalal v. CIT] (5) AIR 195.SC

85.[Oriental Investment Co. Ltd. v. CIT] (6) AIR 19.SC 160.[Jagdish Singh v. Natthu Singh] (7) (1996) 5 SCC 35.[Parativa Devi v. T.V.Krishnan] (8) (1998) 6 SCC 42.[Satya Gupta v. Brijesh Kumar] (9) AIR 200.SC 53.[Ragavendra Kumar v. Firm Prem Machinery & Co.] (10) AIR 200.SC 126.[Molar Mal v. Kay Iron Works (P) Ltd.] (11) (2010) 11 SCC 48.[Bharatha Matha v. R.Vijaya Renganathan] (12) (2010) 12 SCC 74.[Dinesh Kumar v. Yusuf Ali] (13) (2002) 3 SCC 63.[Jai Singh v. Shakuntala] (14) (2008) 12 SCC 79.[Kashmir Singh v. Harnam Singh] 9. A mere running of the eye over the above precedents would connote and denote, exemplify and demonstrate that unless there is any substantial question of law is involved, the question of upsetting the finding of the court below would not arise.

10. Keeping in mind the dictum as found enunciated in the aforesaid precedents of the Supreme Court, I would like to analyse the records. 11.It is glaringly and pellucidly, palpably and axiomatically clear that the plaintiff's husband Anthonidoss executed Ex.A1-the settlement deed dated 13.9.1984. On the strength of the said settlement deed, the plaintiff sought for recovery of possession of the first floor of the house concerned, as described in the schedule of the plaint, from the defendants. 12.Whereas, in the written statement, the defendants raised various pleas, including the one that D2 happened to be the adopted daughter of the plaintiff and her husband. The trial Court has not framed any issue in that regard. Without such an issue, virtually, the trial Court held as though D2 happened to be the adopted daughter of the plaintiff and her husband. 13.No doubt, the first appellate Court has not adverted to that point concerning adoption at all. In my considered opinion, if at all the defendants were very particular relating to their defence based on adoption, then they should have got an issue framed under Order 14 of the C.P.C. before the trial Court itself. However, that was not done so. Theoretically and academically, juridically and pragmatically speaking, the first appellate Court, strictly adverted to Order 41 Rule 31, while reversing the judgment of the trial Court, should have adverted to the point concerning adoption. Wittingly or unwittingly, knowingly or unknowingly, the first appellate Court failed to refer to it in view of the fact that there was settlement deed-Ex.A1 executed by the plaintiff's husband in favour of the plaintiff and only on the strength of that deed, the plaintiff sought for recovery of possession. Hence, in such a case, I do not think that non adherence to the point relating to the adoption, by the first appellate

Court, is fatal to the judgment of the first appellate Court. 14. Indubitably and indisputably both sides in unison would state that pending these proceedings one other suit in O.S.No.1204 of 2008 was filed with the prayer set out supra, and a copy of the plaint also is found enclosed in the typed set of papers. When such is the actual scenario, I am of the view that this Court need not, in the absence of any such issue relating to adoption having been framed and decided, pond over the said point. 15. The only point to be noted is that whether the first appellate Court was justified in ordering eviction on the ground of the settlement deed-Ex.A1 dated 13.9.1984. 16. There is nothing to indicate in this proceedings that the settlement deed-Ex.A1 stood vitiated etc. Both the Courts below gave concurrent findings based on the settlement deed-Ex.A1 that the plaintiff is the owner of the suit property and in the absence of any perversity or illegality, this Court would not be justified in interfering with such a finding based on facts, in the second appeal. 17. The first appellate Court in paragraph No.12 of its judgment elaborately referred to the oral and documentary evidence and held that the defendants started occupying the first floor of the suit house on permission obtained from the plaintiff. That is also one based on analysis of facts and I could see no perversity or illegality in that. 18. Hence, in this factual matrix, I am of the considered view that no interference in second appeal is warranted. Accordingly, the second appeal stands dismissed. However, there is no order as to costs. Consequently, connected miscellaneous petition is dismissed. 19. On hearing this judgment pronounced, the learned counsel for the appellants/defendants would make an extempore submission that sufficient time may be granted for the defendants to vacate and hand over vacant possession of the property and he would pray for a years' time. Whereupon, the learned counsel for the plaintiff would state that that would be too long a time. 20. By way of striking a balance between the two, I would like to grant nine months' time from this date for the defendants to vacate and hand over peaceful possession of the suit property and accordingly it is granted. An affidavit to that effect shall be filed by the defendants within 15 days from this date. Msk To 1. The III Additional Judge, City Civil Court, Madras 2. The XIV Assistant Judge, City Civil Court, Chennai