

K.P.Annadurai Vs. Kalaiselvi

K.P.Annadurai Vs. Kalaiselvi

SooperKanoon Citation : sooperkanoon.com/965679

Court : Chennai

Decided On : Mar-22-2013

Judge : G. Rajasuria

Appellant : K.P.Annadurai

Respondent : Kalaiselvi

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED :

22. 03.2013 Coram: THE HONOURABLE MR.JUSTICE G. RAJASURIA
S.A.No.139 of 2013 and M.P.No.1 of 2013 K.P.Annadurai ... Appellant vs.
1.Kalaiselvi 2.Arun Nehru 3.Anand 4.Kamalam ... Respondents This Second
Appeal is focussed as against the judgment and decree dated 19.11.2001 passed
by the Sub-Court, Namakkal in A.S.No.19 of 2010, confirming the judgment and
decree dated 31.12.2009 passed by the Principal District Munsif, Namakkal, in
O.S.No.222/2006. For appellant : Mr.J.L.Vincent For respondents :
Mr.V.Nithyanandam for M/s.Star Associates JUDGMENT This Second appeal is
focussed by the plaintiff animadverting upon the judgment and decree dated
19.11.2001 passed by the Sub-Court, Namakkal in A.S.No.19 of 2010, confirming
the judgment and decree dated 31.12.2009 passed by the Principal District Munsif,
Namakkal, in O.S.No.222/2006, which was one for permanent injunction.

2. The parties, for the sake of convenience, are referred to hereunder according to
their litigative status and ranking before the trial Court. 3.Compendiously and

concisely, the germane facts absolutely necessary for the disposal of this second appeal would run thus: The appellant herein, namely, Annadurai, filed the suit for bare injunction, so as to restrain the defendants from interfering with his peaceful possession and enjoyment of the suit property found described in the schedule of the plaint. 4.The nutshell facts that could be deduced and understood from the plaint could pithily and precisely be set out thus: (i)The plaintiff-Annadurai's brother Asaithumbi during his life time turned out to be an estranged husband of D.1, and D2 to D4 happened to be the children of Asaithumbi and D.1, living with D1. Inasmuch as Asaithambi was looked after by the plaintiff-Annaduri, the former, due to love and affection towards the latter, executed the Will dated 29.10.2003, bequeathing the suit property in favour of the plaintiff. (ii)The said Asaithambi died on 7.9.2005, whereupon, the Will came into effect. While so, the defendants, who had not been living along with the said testator, all of a sudden started laying claim over the suit property and tried to barge into the suit property, wherein he had already put his parents in possession. 5.Per contra, the defendants filed the written statement, the warp and woof of the same would run thus: (a)The suit was bad for want of a prayer for declaration and title. (b)Neither the plaintiff nor his parents were in possession and enjoyment of the suit property as on the date of filing of the suit. In fact, the Will pleaded in the plaint is a bogus one and the plaintiff attempted to dispossess the defendants, which resulted in the defendants lodging a complaint with the police on 3.12.2005. Accordingly, the defendant would pray for the dismissal of the suit. 6.Whereupon issues were framed. Up went the trial, during which, the plaintiff examined himself as P.W.1 along with petitioner.Ws.2 and 3 and marked Exs.A1 to A9. The second defendant examined himself as D.W.1 and Exs.B1 to B11 were marked on the defendants' side. 7.Ultimately the trial Court dismissed the suit, as against which, the appeal was filed for nothing but to be dismissed by the first appellate Court, confirming the judgment and decree of the trial Court. 8.Challenging and impugning the judgments and decrees of both the Courts below, this second appeal has been focussed by the plaintiff on various grounds and also suggesting the following substantial questions of law: "(a)Whether the learned appellate Judge has to analyse the matter incidentally when the case is framed in question of law. b)Whether a person has right to execute a Will when the wife and children

deserted him? c)Whether the title of ownership is essential for possession? d)Whether the documents proving possession is inadmissible? e)Whether a mistake in titles make a man's rightful possession ineffective? f)Non-adoption of procedure is not a bar for a possession holder. g)The respondents 1 to 3/defendants 1 to 3 cannot step into the shoes of the appellant/plaintiff's omission. (extracted as such) 9.The learned counsel for the appellant/plaintiff would pyramid his arguments, which could succinctly and precisely be set out thus: (i)Both the Courts below fell into error in holding as though the Will was not proved and that the plaintiff and his parents were not in possession of the suit property. (ii)During the life time of Asaithambi-the testator, a litigation erupted between the defendants and Asaithambi. While so, the probabilities are in favour of the case of the plaintiff that Asaithambi, in all probabilities would have executed the Will in favour of the plaintiff/Annadurai and that the plaintiff might have been put in possession of the suit property. (iii)Quite as against the preponderance of probabilities, both the Courts below simply held as though the entire case of the plaintiff was not proved. (iv)P.Ws.2 and 3 were examined in order to fortify and buttress the case of the plaintiff, but for no good reason, both the Courts below pooh-poohed and belittled, slapped and slighted those evidence unjustifiably, warranting interference in second appeal. 10.Per contra, in a bid to slap down and torpedo, pulverise and inveigh the arguments as put forth and set forth on the side of the appellant/plaintiff, the learned counsel for the defendants would advance his arguments, the gist and kernel of the same would run thus: (i)Indubitably and indisputably, unarguably and incontrovertibly the defendants are the legal heirs of the deceased Asaithambi. While so, the plaintiff, who approached the Court for bare injunction should have prayed for declaration that he became the owner of the suit property by virtue of the Will. (ii)In the absence of such a prayer for declaration, the question of granting injunction in favour of the plaintiff would be a well-nigh impossibility and both the Courts below in consonance with the well established principles of law, dismissed the suit, warranting no interference in second appeal. (iii)Both the Courts below, after analysing the factual evidence held that the plaintiff did not prove that he was in possession and enjoyment of the suit property as on the date of filing of the suit. Whereas the findings of both the Courts below were to the effect that the defendants as on the date of filing of the

suit were in possession and enjoyment of the suit property, being the legal heirs of the original owner Asaithambi. Accordingly, the learned counsel for the defendants would pray for the dismissal of the second appeal.

11. 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) 12. 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 Mfg. 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] 13. 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. 14.Keeping the dictum as found enunciated in the aforesaid precedents of the Supreme Court, I would like to analyse the records placed before me. 15.I would like to refer to the fact that the trial Court appropriately and appositely, correctly and legally referred to the decision of this Court reported in 2007(4) CTC 7.Chinna Nachiappan and another vs. PL.Lakshmanan. 16.I would like to fumigate my mind with the relevant decision of the Hon'ble Apex Court reported in 2008(6) CTC 23.[Anathula Sudhakar v. P.Buchi Reddy (Dead) by Lrs. and others], an excerpt from it would run thus: "12. We may however clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to plaintiff's title raises a cloud on the title of plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient. Where the plaintiff, believing that defendant is only a trespasser or a wrongful claimant without title, files a mere Suit for injunction, and in such a Suit, the defendant discloses in his defence the details of the right or title claimed by him, which raises a serious dispute or cloud over plaintiff's title, then there is a need for the plaintiff, to amend the Plaint and convert the Suit into one for declaration. Alternatively, he may withdraw the Suit for bare injunction, with permission of the Court to file a comprehensive Suit for declaration and injunction. He may file the Suit for declaration with consequential relief, even after the Suit for injunction is dismissed, where the Suit raised only the issue of possession and not any issue of title." 17.A mere running of the eye over those precedents would exemplify and demonstrate, portray and parody that it is the duty of the plaintiff to prove that as on the date of filing of the suit, he was in occupation and established possession of the suit

property. It is also crystal clear that if there is any cloud relating to the title of the plaintiff, then he would not be justified in filing a simple suit for bare injunction without praying for declaration of title. 18. Here the suit has been filed by Annadurai not as against Tom Dick and Harry, but as against the legal heirs of the Asaithambi-the testator of the alleged Will. Wherefore, as against the legal heirs, the plaintiff could assert his title, only by proving the Will and for that there should be a prayer for declaration of title in the suit. When the plaint averments themselves disclose the dispute relating to title, the non inclusion of a prayer for declaration of title was fatal. Au fait with law and au courante with facts, both the Courts below appropriately held that the suit was bad for want of a prayer for declaration of title, warranting no interference in second appeal. 19. The first appellate Court, which happens to be the last Court of facts, analysed the evidence placed before the trial Court and confirmed the same. On the defendants side, to prove their possession, they relied upon Exs.B1-the original family card in the name of the defendants 1 to 3 and the deceased Asaithambi for the year 2005-09, Ex.B2-the receipt for lodging police complaint, Ex.B3-the original house tax receipt for the year 2005-06 in the name of the first defendant, Ex.B4-the original house tax receipt for the year 2005-06 in the name of the first defendant, Ex.B10-the certified copy of the order in C.M.P.No.6796/04 in MC.14/03 by the Judicial Magistrate, Thiruthuraipondi, dated 30.9.2004 and Ex.B11-the copy of the Criminal Revision Petition in RP.28/04 before the District Court, Nagapattinam, dated 27.1.2005. 20. Whereas, on the plaintiff's side Ex.A3-the original house tax receipt in the name of late Asaithambi, dated 28.3.2005, Ex.A4 dated 29.10.2003--the original Will executed by the late Asaithambi in favour of the plaintiff, Ex.A6-dated 28.5.2007-the original house tax receipt for the period 2007-08 in the name of the plaintiff and Ex.A7-dated 23.11.2009- the original house tax receipt for the period 2009-2010 in the name of the plaintiff, were filed and the tax receipts would refer to the name of Asaithambi-the testator only and none of the documents could be taken as sufficient proof to hold the possession over the suit property in favour of the plaintiff. 21. The suit itself was filed in the year 2006 and Ex.A6-dated 28.5.2007-the original house tax receipt for the period 2007-08 in the name of the plaintiff and Ex.A7-dated 23.11.2009- the original house tax receipt for the period 2009-2010 in the name of the plaintiff, Ex.A8 dated 3.12.2009-the proceedings of

the Junior Assistant Engineer, TNEB, Valayapatty for name transfer in the name of the plaintiff and Ex.A9-dated 5.12.2009-the proceedings of the Junior Assistant Engineer, TNEB, Valayapatty for name transfer in the name of the plaintiff, all emerged pendency lite and no importance could be attached to them.

22. I recollect and call up the following maxims: (i) Affirmatis est probare He who affirms must prove. (ii) Affirmanti, non neganti incumbit probatio The burden of proof lies upon him who affirms, not upon one who denies. 23.It is the duty of the person who affirms a particular fact to prove it and he cannot call upon the other side to prove the negative aspect. 24.It is therefore crystal clear that the burden is on the plaintiff to prove his case, but he failed to do so. 25.I also recollect the maxim: 'In re dubia magis infitatio quam affirmatio intelligenda' In a doubtful matter, the negation is to be understood rather than the affirmation. When evidence is lacking and is sketchy and patchy, only the negative could be presumed and not the affirmative. 26.Accordingly, both the fora below, correctly, analysing the evidence, rendered the judgments warranting no interference in second appeal. I could see no substantial question of law involved in the matter also. The second appeal therefore stands dismissed. However, there is no order as to costs. Consequently, connected miscellaneous petition is dismissed. 27.On hearing this judgment pronounced, the learned counsel for the appellant/plaintiff would make an extempore submission that liberty might be given to the appellant to file a proper suit incorporating appropriate prayers, including the prayer for declaration of title. 28.What I would like to observe is that it is always open for a litigant to do the needful if at all law permits so. Msk 22.3.2013 Index:Yes Internet:Yes To 1.The Sub-Court, Namakkal 2.The Principal District Munsif, Namakkal, G.RAJASURIA, J.

msk S.A.No.139 o

22. 3.2013

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com