



S.A.(MD).No.61 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 26.07.2023

CORAM:

THE HONOURABLE MR.JUSTICE C.KUMARAPPAN

S.A.(MD)No.61 of 2017

and

C.M.P(MD) Nos.1207 and 1208 of 2017

1. S.Chandrasekar
2. S.Muniyasamy
3. S.Karuppasamy
4. S.Balamurugan
5. Vijayalakshmi

... Appellants/Appellants/Plaintiffs

-vs-

1. Seenappa Nadar
2. S.Saravanan
3. S.Kailash

... Respondent/Respondents/
Defendants

PRAYER: Second Appeal is filed under Section 100 of C.P.C, against the judgment and decree dated 31.08.2016, made in A.S.No.11 of 2014 on the file of the Principal District Court, Tuticorin, confirming the judgment and decree dated 21.03.2014 made in O.S.No.58 of 2011 on the file of the Sub Court, Kovilpatti in respect of item No.1 of the suit property.

For Appellants : Mr.R.Devaraj

For Respondents : Mr.K.K.Samy – for R2
: Ex-parte – for R1 and R3



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JUDGMENT

The present Second Appeal has been filed by the appellants under Section 100 of C.P.C, against the judgment and decree dated 31.08.2016, made in A.S.No.11 of 2014 on the file of the Principal District Court, Tuticorin, confirming the judgment and decree dated 21.03.2014 made in O.S.No.58 of 2011 on the file of the Sub Court, Kovilpatti in respect of item No.1 of the suit property.

2. The appellants/plaintiffs are the sons of the first respondent/first defendant, and the second and third respondents are the subsequent purchasers.

3. For the sake of convenience, the parties will be referred to as per the litigative status of the trial Court.

4. It is the submission of the plaintiffs that the suit schedule property originally belonged to one Periyasamy Nadar, and after the demise of Periyasamy Nadar, his sons partitioned the property orally, and the schedule



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mentioned properties were allotted to the younger son of Periyasamy Nadar namely, Seeniappa Nadar. The first defendant who is also S.Seeniappa Nadar, is the son of P.Seeniappa Nadar and grandson of Periyasamy Nadar. According to the plaintiffs, the suit properties are the ancestral properties, hence prayed to have 5/6 share in the suit schedule property.

5. The suit was stoutly contested by the defendants on the ground that the first item of suit property originally belonged to one Paulraj Nadar son of Subbiah Nadar, from whom the first defendant purchased the first schedule of property by virtue of sale deed dated 27.12.1972. It was further pleaded that from the date of purchase, he has been in actual physical possession and enjoyment of the same. Further the sale was subsequently acted upon by effecting mutations in the revenue records. Therefore, defendants submit that in respect of the first schedule property, the plaintiffs are not entitled to have any share. In respect of other schedule of properties, namely, item Nos. 2 to 9, the defendants did not raise any objection to have partition.

6. The trial Court found that the plaintiffs are entitled to 5/6 shares in all the properties, except the first item of the suit schedule property. It was the



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finding of the trial Court that the first item of the suit schedule property is the absolute property of the first defendant.

7. Aggrieved with the order of the trial Court, the plaintiffs herein have filed the first Appeal before the District Court, Tuticorin, in A.S.No.11 of 2014. The first appeal was disposed of on 31.08.2016, confirming the decree and judgment of the learned trial Judge. Against the order of the first appellate Court, the plaintiffs have filed the instant second appeal.

8. It is the submission of the learned counsel for the appellants that the Courts below have not considered the oral and documentary evidence, and that when the Courts below have come to a conclusion that the item Nos. 2 to 9 of the suit properties are ancestral properties, the exclusion of item one of the property has no rationale. It is also the submission of the learned counsel for the appellants that the first appellate Court has miserably failed to consider the non-examination of the second defendant and failed to draw adverse inference in this regard. It is also the submission of the learned counsel for the appellants that when the first appeal was posted for arguments, the counsel could not appear before the first appellate Court. It is



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the specific contention of the appellants that only in the absence of the appellants as well as the appellants counsel, the trial Court has proceeded to pass order in the first appeal on merits, which is contrary to Order 41 Rule 17 of C.P.C. Hence, he prayed to allow this appeal.

9. Per contra, the learned counsel for the respondents would strenuously argue that, in respect of the item Nos. 2 to 9 of the suit properties, they do not have any objection for partition and their only objection is in respect of the first schedule property. It is the submission of the learned counsel for the respondents that the first schedule property has been purchased by the first defendant vide Ex.B.2- Sale Deed. Therefore, the submission of the appellants that the first schedule property is ancestral property, is without any basis. Hence, he prayed to dismiss the appeal.

10. This Court, at the time of admission, has framed following substantial questions of law:

“A. Whether the courts below having come to the conclusion that the suit item Nos.2 to 9 are joint family properties of appellants and first respondent is right in taking contra view in respect of first item of the suit



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property?

B. Whether the findings of the courts below perverse in not considering Ex.A4 and E.A.5- Sale Deeds in favour of second and third respondents in which it is clearly stated that the suit properties are ancestral properties?

C. Whether mere filing of written statement can be treated as proof of pleadings?

D. Whether the Courts below are correct in coming to the conclusion that the suit first item of property is the self acquired property of the first respondent being purchased by the first respondent by way of Ex.B2 which is not proved in accordance with law?

E. Whether the courts below are correct in not taking adverse interference against the respondents for not getting into the box to give evidence to substantiate their contentions?

Any other substantial question of law that may arise at the time of hearing.”

11. This Court has given anxious consideration to the submissions of the learned counsel on either side.



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12. Though either side have submitted the arguments at length, on perusal of the order of the first appellate Court, this Court find that there was no representation on behalf of the appellants and that only in their absence the appeal has proceeded and eventually ordered confirming the judgment and decree of the trial Court. For ready reference, the observation of the first appellate Court is herewith extracted:

□இம்மேல் முறையீடு என் முன்னர் கடந்த 12.08.2016 ந் தேதியன்று விசாரணைக்காக வந்தபோது மேல் முறையீட்டாளர் தரப்பில் வக்காலத்து தாக்கல் செய்திருந்த வழக்கறிஞர் திரு.எம்.எவர்சியஸ் ஆஜராகாத நிலையில், மேல்முறையீட்டாளரும் அழைத்தும் ஆஜராகாததாலும் மேல்முறையீட்டாளர் தரப்பில் பிரதிநிதித்துவம் இல்லாததாலும், 2ம் எதிர்மேல் முறையீட்டாளருக்காக வழக்கறிஞர் திரு.எம்.ராஜ்குமார் அவர்கள் வழக்கேற்பு அதிகாரம் தாக்கல் செய்தும், 1 மற்றும் 3 எதிர்மேல்முறையீட்டாளர்கள் அழைத்தும் ஆஜராகாததால் எதிரவரில்லா தரப்பினர்களைக்கப்படும், வழக்கறிஞர்கள் நீதிமன்ற நடவடிக்கைகளில் கலந்து கொள்ளாமல் புறக்கணித்து வந்துள்ள நிலையில் கீழமை நீதிமன்றத்தில் விசாரிக்கப்பட்ட சாட்சிகள், சான்றாவணங்கள், கீழமை நீதிமன்ற தீர்ப்பு மற்றும் மேல்முறையீடு சம்பந்தப்பட்ட வழக்கு



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கோப்பு இவைகளைப் பரிசீலனை செய்தும், இதுநாள் வரையில் என் சீரிய ஆய்வில் இருந்தும் இன்று தகுதியின் (merits) அடிப்படையில் இந்நீதிமன்றம் வழங்கிடும்.

From the perusal of the above observation, it is clear that on the date when the appeal was posted for arguments, there was no representation either by the appellants or their counsel, but still the first appellate Court proceeded to pass order in the appeal on merits.

13. At this juncture, this Court would like to refer to Order 41 Rule 17 CPC. Which is extracted hereunder:

“17. Dismissal of appeal for appellant's default. - (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

(2) Hearing appeal ex-parte.- Where the appellant appears and the respondent does not appear, the appeal shall be heard ex parte.”



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As per the above provision, when on the date fixed for hearing of the appeal, if the appellants does not appear, then the only option available to the appellate Court is to pass a simple order of dismissal. Such dismissal order should only be for default. But contrary to the above provision, the first appellate Court has disposed of the appeal on merits. It is useful to refer the judgment of this Court reported in **2002 (2) KLT (SC) SN 77 (K.B.Ali Vs.Sree Sankaracharya University)**

14. The right of first appeal is a valuable right and become the final the trial Court to marshall and re-appreciate the evidence. In such situation, if the appeals are disposed on merits during the absence of the appellants, the same would cause great prejudice the appellants. Therefore, though either side has argued before this Court at length on merits, in view of the provision of Order 41 Rule 17 of C.P.C, this Court is of the view that, to meet the ends of justice, after setting aside the order of the first appellate Court, this case is liable to be remitted back to the first appellate Court for fresh disposal according to law.

15. At this juncture, the learned counsel appearing for the appellants



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would submit that he moved an application in C.M.P(MD) No.1208 of 2017 to receive the additional documents. Since the Second Appeal has been dismissed with a direction, and the matter is remitted back to the first appellate Court, the appellants are given liberty to move the similar application before the first appellate Court. In such an event the first appellate Court is directed to dispose the same according to law.

16. In the result, this Second Appeal is **dismissed** by setting aside the judgment and decree of the first appellate Court. And the matter is again remitted back to the first appellate Court fresh disposal according to law. The first appellate Court is directed to dispose of the A.S.No.11 of 2014 within a period of three months from the date of receipt of the copy of this order. There shall be no order as to costs. Consequently, the connected Miscellaneous Petitions are closed.

26.07.2023

NCC : Yes/No
Index : Yes / No
Internet : Yes / No
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To
1.The Principal District Court,

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2. The Sub Court,
Kovilpatti.



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