



S.A(MD)No.692 of 2013

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 30.08.2024

CORAM:

THE HONOURABLE MS.JUSTICE P.T.ASHA

S.A.(MD) No.692 of 2013

Mahamayee

.. Appellant/Appellant/
Plaintiff

Vs.

A.Kamaraj

.. Respondent/
Respondent/Respondent

Prayer :- Second Appeal filed under Section 100 C.P.C., against the judgment and decree dated 27.06.2013 passed in A.S.No.125 of 2010 on the file of the Sub-Court, Sivagangai, confirming the judgment and decree dated 08.10.2010 passed in O.S.No.37 of 2008 on the file of the District Munsif-cum-Judicial Magistrate Court, Ilayangudi.

For Appellant :Mr.D.Nallathambi

For Respondent :Mr.S.Parthasarathy



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JUDGMENT

The unsuccessful plaintiff before the Court below is the appellant before this Court. For easy understanding, the parties are referred to in the same ranking as before the trial Court.

2.The plaintiff has filed a suit in O.S.No.37 of 2008 before the District Munsif-cum-Judicial Magistrate Court, Ilayangudi, to declare the plaintiff's 1/3rd share in the suit first item measuring an extent of 12 cents and the second item of the property and consequently restraining the defendants from interfering with the plaintiff's peaceful possession and enjoyment of the said property.

3.The plaintiff's case was that the suit schedule property measuring a larger extent belonged to one Narayanasami Muthaliar. It is the further case of the plaintiff that on 20.09.1978, the said Narayanasami Muthaliar's sons viz., Muthusamy, Ponnusamy and his wife Sivagami Ammal had entered into an unregistered partition deed, in and by which, suit 'A' schedule property fell to the share of Muthusamy, 'B' schedule



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property fell to Ponnusamy and 'C' schedule property fell to the share of Sivagami Ammal. The property which had been allotted to the share of Sivagami Ammal was later mutated in her name.

4.By a 'Will' dated 23.09.1987 the said Sivagami Ammal had bequeathed his property in favour of her daughter(plaintiff). The said Sivagami Ammal had passed away on 15.08.1990 and the 'Will' came into force. It is also the contention of the plaintiff that the first item of property shown as ABCD in the rough sketch measuring an extent of 1 acre 4 cents. To the south of the first item of the suit property, the said Muthusamy's property is situated, which has been purchased by the defendant and after the purchase, the defendant is giving out as if he has purchased 12 cents in the southern end of the first item of the suit property. The plaintiff cannot make such a claim.

5.The defendant had filed a written statement *inter alia* denying the various allegations contained in the plaint. The defendant would contend that the said Narayanasami had two wives, the first wife had 4



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daughters and as per the family tradition, the daughters were not entitled to share in the property. The said Sivagami Ammal was the second wife of Narayanasami and through him, the plaintiff and her two brothers Muthusamy and Ponnusamy were born. The elder brother Muthuswamy himself had conducted the plaintiff's marriage at huge expense and gave her few things. In the partition that took place in the year 1978, life interest was given to the mother Sivagami Ammal in respect of 92 cents along with the land in Pudukkottai. It was clearly stated that after her life time, these properties would devolve equally on her two sons. The suit survey number originally measured an extent of 1.75 acres and out of these extent, 83 cents were allotted to Muthusamy in the partition and Sivagami Ammal was allotted with 92 cents for her maintenance for life. The defendant would submit that he is in continuous possession and enjoyment of the property and had put up a house thereon. A Well and pump-set were put up by the said Muthusamy out of his own earnings. During the UDR survey, 83 cents allotted to Muthusamy, was assigned with S.No.19/4 and that of Sivagami Assmal was assigned with S.No. 19/4A. On 17.08.1992, the said Muthusamy mortgaged his property in



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S.No.19/4B to the defendant by way of registered 'othi'. From the said date, the defendant was in possession and enjoyment of the property. Thereafter, on 09.11.1998 the said Muthusamy sold the suit schedule property along with pump-set and Well in S.No.19/4B for a sum of Rs.1,10,000/-, to the defendant who, since then was in continuous possession of the property.

6.It was also the case of the defendant that initially the plaintiff had instigated the sons of Ponnusamy's second wife and filed a suit in O.S.No.36 of 2000, which was dismissed. In the suit, when the plaintiff came to know that the property of Sivagami Ammal was partitioned among themselves, she has created a false 'Will'. The defendants would submit that the grant of joint patta to the plaintiff and the subdivision of S.Nos.19/4B as 19/4B1 and 4B2 was made without notice to the defendant. On coming to know about the same, the defendant had submitted his objection and thereafter, patta was restored back in the name of the defendant. This order has reached its finality, since the plaintiff has not chosen to challenge the same. Further, the plaintiff, who



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seeks to have her title declared to the suit property, has failed to implead her brothers/their legal representatives and therefore, the suit is hit by non-joinder of necessary parties. The defendant would submit that the plaintiff is not entitled for a decree of injunction since she has never been in possession of the suit schedule property.

7.The trial Court had framed the following issues:

- “1.வாதி 1ஆவது இலக்கச் சொத்தைப் பொறுத்தும்
2ஆவது இலக்கச் சொத்தில் 1/3 பாகம் பொறுத்தும் விளம்புகை
பரிகாரம் பெற உரிமை கொண்டவரா?
- 2.வாதி கோரும் நிரந்தர உறுத்துக்கட்டளைப் பரிகாரம் பெற
அவர் உரிமை கொண்டவரா?
- 3.20.09.1978ஆம் தேதிய பாகப் பத்திரமானது
செல்லத்தக்கதா? தரப்பினர்களை கட்டுப்படுத்தக்கூடியதா?
- 4.வழக்கானது அவசியத் தரப்பினர்களை சேர்க்காத தோஷத்திற்கு
ஆளாகியுள்ளதா?”

8.Before the trial Court, on the side of the plaintiff, three witnesses were examined as P.Ws.1 to 3 and 30 documents were marked as Exs.P.1 to P.30. On the side of the defendant, 3 witnesses were examined as D.W. 1 to D.W.3 and 13 documents were marked as Ex.D.1 to Ex.D.13.



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9.Ultimately, the learned District Munsif-cum-Judicial Magistrate, Ilayangudi, by judgment and decree dated 18.10.2010 proceeded to dismiss the suit. Challenging the same, the plaintiff had filed A.S.No.125 of 2010 before the Subordinate Court, Sivagangai. The learned Subordinate Judge, also confirmed the judgment and decree of the learned District Munsif-cum-Judicial Magistrate, Ilayangudi and dismissed the appeal. Against which, the appellant is before this Court.

10.The Second Appeal was admitted on the following substantial questions of law:

“1.Whether Ex.A.1 is a partition Yathasthu as claimed by the appellant or it is a partition deed which requires registration and stamp duty?

2.Whether Ex.A2-Will is proved as per the provisions of the Evidence Act and Hindu Succession Act?

3.Whether the First Appellate Court is right in allowing I.A.No.313 of 2010 filed under Order 41 Rule 2 of Civil Procedure Code?”

11.Heard the learned counsel appearing on either side.



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12.The plaintiff has claimed title to the property on the basis of Ex.A.1-unregistered partition deed, under which, the properties have been allotted to her brothers Muthusamy and Ponnusamy and her mother Sivagami Ammal. The suit is in respect of the property 12 cents, which is described as 'C' schedule, allotted to Sivagami Ammal. The plaintiff's contention is that under Ex.A2-Will, dated 23.09.1987, her mother had bequeathed the property in her name. It is her further case that she has, on the demise of her mother, taken possession of the property and mutated the revenue records in her name. She would state that the defendant is attempting to interfere with her peaceful possession; that he is the purchaser from her brother Muthusam,y who was allotted with 'A' schedule property, that in the guise of enjoying the 'A' schedule property attempts to trespass is made. She would further state that the defendant is attempting to claim a right to the suit property. To prove the oral partition, the plaintiff has examined P.W.2 Shanmugam, who admittedly is not a signatory to the partition deed Ex.A.1.



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13.The plaintiff's contention is that Sivagami Ammal was allotted with an extent of 1 acre and 4 cents, whereas the defendant would submit that the Sivagami Ammal was allotted only an extent of 92 cents and that too, she was allotted only with a life interest. The said P.W.2 would state that she was present, when the partition deed was reduced into writing. That apart, the plaintiff's vendor, who has been examined as P.W.2 had denied the execution of Ex.A.1. He would admit that there was a partition in the year 1978. The plaintiff had filed the xerox copy of the alleged partition deed, which is marked as Ex.A.1. It is also seen that, in the appellate Court yet another document purported to be the partition of the year 1978 has been filed, which has been marked as Ex.A.31. A comparison of Ex.A.2 would clearly show the discrepancy in the properties, though the plaintiff would claim that they are one and the same. Therefore, the manner in which the properties have been partitioned as set out by the plaintiff cannot be countenanced. That apart, the plaintiff in her cross-examination has stated as follows:

“17.08.1992ல் முத்துச்சாமி அவர்கள் தனக்கு கிடைத்த புல எண்.19/4 மீ மொத்தம் 83 சென்ட்டையும் அதிலுள்ள கிணறு மற்றும் பம்ப்செட் ஆகியவற்றை பிரதிவாதிக்கு ரிஜிஸ்டர் ஒத்தி செய்யப்பட்டது. அந்த ஒத்தியின்படி ஒத்தி சொத்தை 1992 முதல் காமராஜ் என்பவர்



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அனுபவித்து வந்தார். அதன்பிறகு அந்த சொத்தை காமராஜ்வுக்கே கிரையம் கொடுத்துவிட்டார்.”

Therefore, the plaintiff has acknowledged the fact that the property measuring an extent of 83 cents in S.No.19/4B including the Well and pump-set therein fell to the share of Muthusamy and till the final adjudication of the suit in the year 2008, there has been no objection on the side of the plaintiff. The plaintiff, who had admitted in the cross-examination that original of Ex.A1 was available with her, has not produced the same.

14.That apart, under the partition deed, the properties have been allotted in praesenti which requires registration. Therefore, on this ground also the plaintiff cannot rely upon Ex.A.1. Therefore, the first substantial question of law is answered against the plaintiff. As regards the second substantial question of law, it relates to the Will-Ex.A.2. Admittedly, the plaintiff has not examined the witnesses to the execution of the 'Will' by Sivagami Ammal. The scribe has been examined as P.W.3. The evidence of P.W.3 does not satisfy the ingredients for proving the Will. It is not the case of the plaintiff that the attesting witness are not



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available. Therefore, the second substantial question of law is answered against the plaintiff. As regards the substantial question of law No.3, the document had been produced before this Court and the counsel for the defendant has relied upon the said documents to show that Ex.A.1 and Ex.A.31 have been created documents.

15. Therefore, I see no reason to interfere with the concurrent judgment of the Courts below. Hence, the second appeal is dismissed. No costs.

30.08.2024

NCC : Yes/No

Index : Yes/No

Internet : Yes

To

1.1. The Sub-Court,
Sivagangai.

2. The District Munsif-cum-Judicial
Magistrate Court,
Ilayangudi.

3. The Section Officer,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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P.T.ASHA, J.
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