

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.02.2015

CORAM

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

Second Appeal No.1077 of 2014

N.Dhanapalan

... Appellant/Plaintiff

Vs.

A.Mohammed Iqbal

... Respondent/Defendant

Prayer:- This second appeal has been filed under Section 100 C.P.C., against the judgement and decree in A.S.No.19 of 2013 dated 29.04.2014 on the file of the learned District Judge, Nagapattinam confirming the judgement and decree in O.S.No.79 of 2012 dated 13.03.2013 on the file of the learned Principal Subordinate Judge, Mayiladuthurai.

For Appellant : Mr.K.M.Subramaniam

JUDGEMENT

The plaintiff in O.S.No.79 of 2012 on the file of the learned Principal Subordinate Judge, Mayiladuthurai is the appellant herein. The respondent is the sole defendant in the suit. It was the suit for partition filed by the plaintiff claiming 3/4th share in the suit property and for other reliefs. The suit was dismissed by the trial Court by decree and judgement dated 13.03.2013. As against the same, the appellant/plaintiff has filed an appeal in A.S.No.19 of 2013 on the file of the learned District Judge, Nagapattinam. The First Appellate Court has also dismissed the same by decree and judgement dated 29.04.2014 thereby confirming the decree and judgement of the trial Court. Aggrieved over the same, the appellant is before this Court with this second appeal.

2.This second appeal has come up today for admission. I have heard the learned counsel for the appellant and I have also perused the records carefully.

3.The case of the plaintiff in brief is as follows:-

The suit property was originally owned by one Mrs.Tajul Juda who is the mother of the defendant. She had executed a settlement deed on 16.03.1987 thereby settling the suit property in favour of her four sons and the defendant is one of the sons. Thus, according to the settlement deed, each son is entitled for 1/4th share. Barring the defendant and other three sons/sharers of the suit property had agreed to sell their undivided shares to the plaintiff and for which an agreement for sale was entered into on 14.06.1998. Under the said agreement, a sum of Rs.2,80,000/- was paid as advance and

subsequently, a sum of Rs.78,200/- was paid by the plaintiff to them. But, the sale could not be completed because of two suits filed in O.S.No.234 of 1999 and O.S.No.153 of 1999. O.S.No.234 of 1999 was filed by the defendant for permanent injunction against the other sharers from alienating the suit property. O.S.No.153 of 1999 was filed by the wife and minor son of one Mr.Mohamed Ansari, seeking a charge over the suit property as against Mr.Mohamed Ansari's share. In view of those two suits, since, the sale could not be completed, the plaintiff filed a suit in O.S.No.185 of 2011 for return of the amount paid under the sale agreement. That suit was decreed in favour of the plaintiff against three sharers with whom the plaintiff had entered into sale agreement. Even after the decree, since, the judgement debtors did not pay the amount, the plaintiff filed the execution proceedings in E.P.No.39 of 2007 in O.S.No.185 of 2011 before the learned Subordinate Judge, Mayiladuthurai. The suit property was brought for sale in the said execution proceedings. In the Court auction, in the sale held on 09.06.2010, the plaintiff was emerged as successful bidder and he purchased the undivided 3/4th share in the suit property through the said Court auction sale. The sale deed was executed on 15.11.2010. Thus, according to the plaintiff, he is entitled for 3/4th share in the suit property. That is how the plaintiff has filed the present suit for partition.

4.The defendant remained exparte in the present suit. The plaintiff was examined as P.W.1 and the Sale Certificate issued by the learned Subordinate Judge, Mayiladuthurai in E.P.No.39 of 2007 in O.S.No.185 of 2011 was marked as Ex.A.1. Having considered the same, the trial Court dismissed the suit holding that there was another suit in O.S.No.155 of 2002 filed by the defendant in the suit for partition against his three brothers namely the vendors of the plaintiff for partition. In the said suit in O.S.No.155 of 2002, the three brothers of the defendant in the suit i.e., who are the judgement debtors in O.S.No.185 of 2011 remained exparte. Therefore, a preliminary decree for partition was passed, by which, 1/4th share was allotted to the defendant. Then, he filed a final decree application and in that application, the defendant's brothers namely the judgement debtors in O.S.No.185 of 2011 remained exparte. An Advocate Commissioner was appointed. He divided the property and submitted a report. Accordingly, it appears that the final decree has also been passed.

5.All these facts have been stated in the present plaint itself. Going by the above admitted facts, the trial Court found that the present suit is not at all maintainable, since, already there has been a decree for partition passed in O.S.No.155 of 2002, which, culminated in a final decree also. Accordingly, the trial Court dismissed the suit. The First Appellate Court also confirmed the same. That is how the appellant is before this Court with this second appeal.

6.This second appeal has come up today for admission. I have heard the learned counsel for the appellant and I have also perused the records carefully.

7. In this second appeal, it is contended that the preliminary decree as well as the final decree passed in O.S.No.155 of 2002 are not binding on the plaintiff in the present suit, because, suppressing the fact that, in a Court auction sale, in E.P.No.39 of 2007 in O.S.No.185 of 2011, the plaintiff has purchased the said property, the said preliminary as well as final decrees have been obtained. Inasmuch as the plaintiff in the present suit was not a party in the said suit in O.S.No.155 of 2002 at all including in the final decree application.

8. In my considered opinion, this contention cannot be accepted, for the simple reason that, there is no prayer in the present suit for declaration that the said preliminary decree passed in O.S.No.155 of 2002 and the final decree passed are void and the same are not binding on the plaintiff. There was no petition filed to get the final decree set aside nor was there any action taken by the plaintiff to challenge the decree passed in O.S.No.155 of 2002. Thus, the decree passed in O.S.No.155 of 2002 is in force. It is not as though in the said suit in O.S.No.155 of 2002, the defendant herein has been given anything more than his share. The plaintiff herein claims only through the Court auction sale and that through his vendors. According to the Court auction, the plaintiff is entitled for 3/4th share. As on the date of the suit in O.S.No.155 of 2002, the defendants in O.S.No.185 of 2011 had no interest at all over the suit property. Therefore, it is very obvious that the suit was filed against the wrong defendants and decree was obtained. But, without hearing them, it is not possible for this Court to set aside the decree in O.S.No.155 of 2002 and that too when there is no prayer for setting aside the decree in O.S.No.155 of 2002. Thus, in my considered opinion, the Courts below were right in holding that the in view of the decree passed in O.S.No.155 of 2002, the present suit is not maintainable. At the same time, the plaintiff who is the auction purchaser cannot go remedy-less.

9. The learned counsel for the appellant would submit that atleast it may be clarified that the plaintiff may work out his remedies to claim 3/4th share by taking steps against the decree in O.S.No.155 of 2002. Regarding this, in my considered opinion, it is always open for the appellant to challenge either the preliminary decree in O.S.No.155 of 2002 and all the subsequent proceedings or seeking to set side the final decree in O.S.No.155 of 2002, in the manner known to law and then get his 3/4th share allotted in O.S.No.155 of 2002 itself. In alternative, the plaintiff is also at liberty to file a separate suit for declaration that the decree in O.S.No.155 of 2002 is null and void and then to ask for partition.

10. At any rate, dismissal of the present suit will not be a bar in any manner, or, it will operate as res judicata for the plaintiff to work out his remedies as against the decree in O.S.No.155 of 2002 so as to get his 3/4th share in the suit property. Except making this clarification, in my considered opinion, the plaintiff is not at all entitled for any relief in the present second appeal.

11.In the result, the second appeal fails and accordingly, the same is dismissed. No costs.

Sd/-
Deputy Registrar

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Sub Assistant Registrar

jbm

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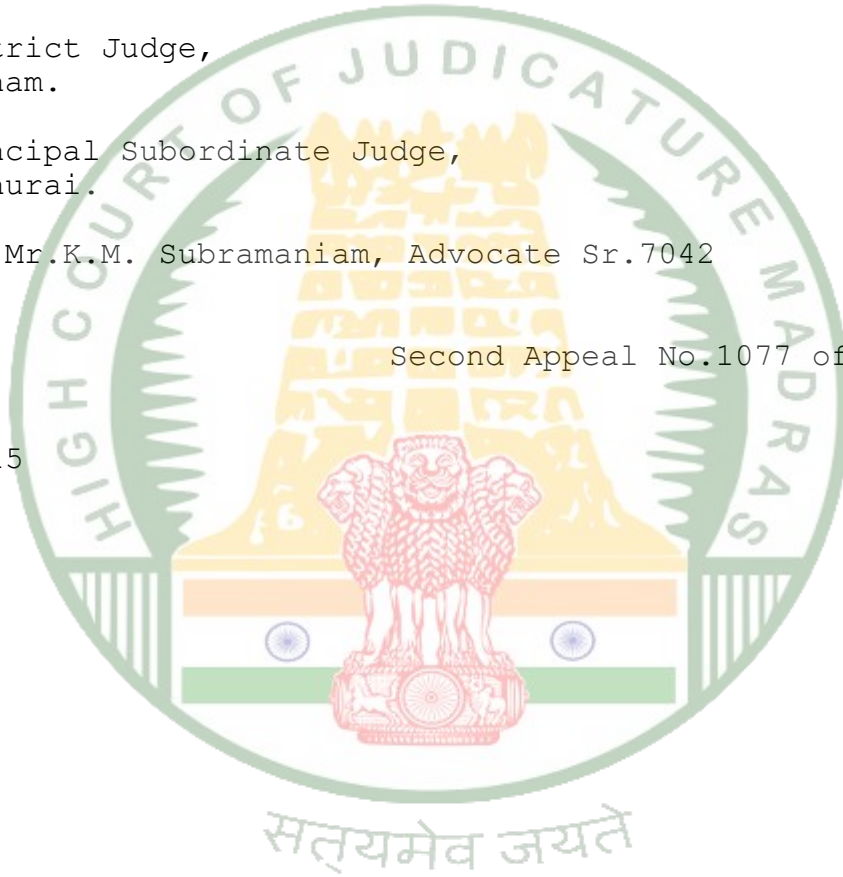
1.The District Judge,
Nagapattinam.

2.The Principal Subordinate Judge,
Mayiladuthurai.

+ 1 cc to Mr.K.M. Subramaniam, Advocate Sr.7042

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