

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 27.03.2015

CORAM:

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

Second Appeal No.663 of 2014
and
M.P.No.1 of 2014

1. K.Rajmohan
2. Sitara

.. Appellants/Appellants/
Third party

-Vs-

R.Viswanathan

.. Respondent/Respondent/
Plaintiff

SECOND APPEAL filed under Section 100 of Code of Civil Procedure against the judgment and decree dated 31.10.2013 passed in A.S.No.33 of 2013 on the file of the Principal District Judge, Tiruvallur, confirming the judgment and decree dated 30.04.2012 passed in I.A.No.289 of 2009 in O.S.No.247 of 1996 on the file of the Subordinate Judge, Poonamallee.

For Appellants : Mrs.Chithra Sampath,
Senior Counsel
for Mr.T.S.Baskaran

For Respondent : Mr.T.Viswanatha Rao

J U D G M E N T

The appellants are third parties to the suit in O.S.No.247 of 1996 on the file of the learned Subordinate Judge, Poonamallee. The respondent herein is the plaintiff in the suit. There were as many as 42 defendants in the suit. The said suit was filed for partition and for separate possession of the 1/5th share of the plaintiff. The trial court passed a preliminary decree on 31.12.2008, thereby declaring that the plaintiff is entitled for 1/5th share in the suit property. As against the same, an appeal in A.S.No.50 of 2009 was filed by some of the defendants and the same was also dismissed. Thus, the preliminary decree has become final.

2. Thereafter, the respondent/plaintiff filed an application for passing of final decree. The trial court has passed a final decree on 30.04.2012. As against the allotment of Plot No.21 which is one of the suit properties, the appellants herein filed an appeal as third parties. The said appeal in A.S.No.33 of 2013 was filed before the learned Principal District Judge, Tiruvallur. In that appeal, the appellants had claimed that as innocent purchasers, the said plot No.21 should have been allotted to them by adjusting the same towards the share of the 9th defendant. But the lower appellate court dismissed the appeal, thereby declining to interfere with the final decree. As against the same, the appellants are before this Court with this Second Appeal.

3. I have heard the learned Senior Counsel for the appellants and the learned Counsel for the respondent and I have also perused the records carefully.

4. The case of the appellants in brief is as follows:

In the suit, the 9th defendant is one Gurunathan who is also entitled for a share as per the preliminary decree. Mr.R.Gurunathan had sold some of the properties including Plot No.21 to the defendants 19 and 20. This sale took place even before the filing of the suit. The defendants 19 and 20 had, in turn, sold away Plot No.21 to the 23rd defendant during the pendency of the suit and the appellants herein purchased Plot No.21 from the legal heirs of the 23rd defendant since the 23rd defendant died. According to the appellants, they are bonafide purchasers of Plot No.21 for value without notice of the suit. It is the further case of the appellants that while passing a final decree, the lower appellate court was aware of the fact that one of the sharers, namely, the 9th defendant, had sold away Plot No.21 to the other defendants as mentioned above, from whom the appellants herein have purchased. It was the claim made by the appellants that while passing a final decree, the Plot No.21 should have been adjusted towards the share of the 9th defendant and thus, the same should have been allotted to the appellants by way of granting equitable relief. This has not been done is their grievance.

5. The learned Counsel for the respondent would, however, submit that the 9th defendant had sold away number of properties existing in his entitlement for a share in the joint family properties. It is further contended that Plot No.21 cannot be allotted to the purchasers, more particularly, to the appellants, because the said property is a prime property and the same was allotted to the share of the plaintiff.

6. When it was pointed out to the learned Counsel for both parties by this Court as to why the other defendants were not added as parties in the Claim Application, the learned Senior Counsel for the appellants submitted that it was an error committed on the side of the appellants without proper legal advise. The learned Senior Counsel would further submit that for that technical error committed in filing the appeal, the valuable right of the appellants should not be deprived of. She would, therefore, submit that the Second Appeal may be remanded to the trial court to enable the appellants to implead all the other interested parties and then to have an effective adjudication.

7. From the records available before me and from the submissions made by the learned Counsel on either side and the grounds of appeal, I find the following substantial questions of law for consideration:

a. Whether the first appellate court was right in entertaining the appeal which was filed without impleading the other necessary parties to the same? and

b. Whether the courts below were right in not adjusting the Plot No.21 purchased by the appellants herein, towards the share of the 9th defendant and to allot the same to the appellants by way of equitable relief?

8. I have considered the rival submissions.

9. In my considered opinion, the appeal filed before the lower appellate court has not been prosecuted properly by impleading all the necessary parties. The plaintiff alone had been impleaded as a respondent in the said appeal. Thus, in my considered opinion, it is a serious error. For any reason, if this Court ultimately finds fault with the final decree in respect of the allotment of the properties as per the preliminary decree, it may affect the other persons who are also interested in getting allotment of the properties. At any rate, in my considered opinion, the lower appellate court, ought to have insisted for the impleadment of all the necessary parties to the appeal. In such view of the matter, I am inclined to answer the first question of law in favour of the appellants and to remit the matter back to the first appellate court.

10. So far as the second substantial question of law is concerned, I do not want to answer the same, because it is for the first appellate court to decide. Any opinion expressed on the second substantial question of law may have influence in the minds of the lower appellate court. Therefore, I do not want to express any opinion.

11. In the result, the Second Appeal is allowed; the decree and judgment of the lower appellate court is set aside and the Appeal is remitted back to the file of the learned Principal District Judge, Tiruvallur, for fresh disposal in accordance with law. The lower appellate court shall permit the appellants to implead all the other necessary parties to the first appeal. At any rate, the lower appellate court shall dispose of the appeal, within a period of six months from the date of receipt of a copy of this Order. No costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

tsi

To

- 1.The Subordinate Judge, Poonamallee.
- 2.The Principal District Judge, Tiruvallur.

+ 2 ccs to Mr.T.S. Baskaran, Advocate SR.17571
+ 1 cc to Mr.T. Viswanatha Rao, Advocate SR.17281

RSY (CO)
EU 16.04.2015

S.A.No.663 OF 2014
& M.P. No. 1 of 2014

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