

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 20.01.2015

CORAM:

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

Second Appeal No.926 of 2014

and

M.P.No.1 of 2014

1. Dauglas
2. Melki
3. Sahayanathan
4. Fathima Mary
5. Rozoria .. Appellants/Defendants 6 to 10

-Vs-

1. Uthirai Nathan (deceased)
2. Josephine Mary
3. Uthirai Mary
4. Paulin Mary
5. Priya Thomas .. Respondents 2 to 8/Respondents 3,4 & 10 to 14/Defendants 4 & 5
6. Francis Thomas
7. Moala
8. Renot
9. Parimala Merry
10. Beula Sagayamary
11. Harry Bernad .. LR's of the Defendants 1 & 3
12. Edwin Lobo ... Respondents

(Cause title amended and Cause title accepted as per the order of this Court dated 24.6.2014 made in M.P.No.1 of 2014 in M.P.No.1 of 2010 in SA.SR.65380/2010)

SECOND APPEAL filed under Section 100 of Code of Civil Procedure against the decree and judgment dated 8.7.2008 rendered in A.S.No.269 of 2005 on the file of the V Additional Judge, City Civil Court, Chennai reversing the decree and judgment dated 29.08.2002 rendered in O.S.No.7828 of 1993 on the file of the I Assistant Judge, City Civil Court, Chennai.

For Appellants : Mr.S.Subbiah
For Respondents: Mr.C.Dhamodaran
9 to 12
R1 : died
R2 to R8 : Set ex-parte before lower court

J U D G M E N T

The defendants 6 to 10 in O.S.No.7828 of 1993 on the file of the learned I Assistant Judge, City Civil Court, Chennai are the appellants herein. The 1st respondent herein (deceased) was the plaintiff. The respondents 2 to 8 herein are the other defendants in the suit. Since the 1st respondent Uthirai Nathan died during the pendency of the proceedings, the respondents 9 to 12 have been added as his legal representatives.

2. The suit was filed for partition and for separate possession of 1/6th share in the suit property. The trial court by decree and judgment dated 29.08.2002 dismissed the suit. As against the same, the 1st respondent Uthirai Nathan (now dead) filed an appeal in A.S.No.269 of 2005 on the file of the learned V Additional Judge, City Civil Court, Chennai. By decree and judgment dated 08.07.2008, the lower appellate court allowed the appeal setting aside the decree and judgment of the trial court and decreed the suit as prayed for. As against the same, the appellants are before this Court with this Second Appeal.

3. The respondents 2 to 8 remained ex-parte throughout and therefore, I have not ordered notice to them.

4. This Second Appeal has come up today for admission.

5. I have heard the learned Counsel for the appellants and the learned Counsel appearing for the respondents 9 to 12 and I have also perused the records carefully.

6. The case of the respondents 9 to 12 is that the suit property was originally owned by one Mr. Joseph and Mrs. Arputha Mary who are the parents of the plaintiff and the defendants 1 to 5. After his demise, according to the plaintiff, all the children are entitled for equal share in the suit property. It is on that footing, the said suit is filed.

7. But the appellants herein took a stand that the plaintiff was ousted from the suit property and the 2nd defendant had perfected his title and thus, he is the absolute owner. This was negated by the lower appellate court. The lower appellate Court has held that the plaintiff is entitled for the decree and judgment as prayed for. In this appeal, it is contended that there is evidence to show that the plaintiff was ousted from possession. In my considered opinion, this would amount to reappreciation of the evidence as the lower court has appreciated the evidence both oral and documentary and come to the conclusion that the plea of his possession by the 2nd defendant has not been proved.

8. It is submitted by the learned Counsel for the appellants that earlier there were two suits filed in respect of the very same property, but in respect of different portions. One suit was filed by one of the defendants by name Mahimai Doss in O.S.4541 of 1994 and the other by one Therasa Mary in O.S.No.6056 of 1996. Both the suits were for permanent injunction to restrain the others from interfering with their respective peaceful possession. Both the suits were decreed. On this basis, it is stated that the plaintiff was ousted from possession. But the lower appellate court has held that the plaintiff was not a party to the said suits. Therefore, the decrees would not bind him. I am in full agreement with the same. Therefore, I do not find any reason to differ from the vital finding recorded by the lower appellate court that the plea of his possession has not been established by the 2nd defendant.

9. At the same time, from the records, it is seen that the ground, namely, the land of the suit property does not belong to the ancestors of the plaintiff and the defendants, but it belongs to Arcot Nawab. It is seen from the records that the ancestors of the plaintiff and the defendants were in possession of the suit property only as lessees. Therefore, at the most, there can be decree for partition only in respect of leasehold right and the superstructure constructed by the ancestors of the plaintiff and the defendants. There can be no decree for partition of the land in the absence of Arcot Nawab, the owner of the property being party to the suit.

10. When this was pointed out, the learned Counsel for the appellants would submit that after passing of the preliminary decree, a Commissioner was appointed to divide the property by metes and bounds and allot the respective share to the sharers. The Advocate Commissioner reported that the property is indivisible. Therefore, he suggested that the property could be sold. That was accepted by the lower appellate court and the Commissioner was asked to fix the value of the property. The Commissioner fixed the value of the land and superstructure at Rs.69,00,000/-. In order to avoid the sale being made, the appellants herein submitted to the lower appellate court that they would deposit 1/6th out of the said amount payable to the respondents 9 to 12 herein. Accordingly, the lower court allowed the appellants herein to deposit Rs.11,50,000/- and the appellants deposited Rs.11,50,000/- which was allowed to be withdrawn by the respondents 9 to 12 towards their 1/6th share in terms of the preliminary decree.

11. Now the learned Counsel for the appellants would submit that since that amount of Rs.11,50,000/- represents 1/6th share of the value of the land as well as superstructure, the appellants may be given liberty to work out their remedies to recover any amount paid in excess to the respondents 9 to 12 herein.

12. But the learned Counsel for the respondents 9 to 12 would submit that since the said amount of Rs.11,50,000/- precisely represents 1/6th share of the defendants 9 to 12, the defendants 9 to 12 are not liable to repay any amount to the appellants.

13. In my considered opinion, this dispute cannot be resolved in the Second Appeal. Whether the amount of Rs.11,50,000/- withdrawn by the respondents 9 to 12 represents 1/6th share of the land as well as the superstructure or it represents only superstructure is the matter to be gone into by the courts below for which the appellants can work out their remedy in the manner known to law. I do not want to express any opinion in this Second Appeal.

14. The learned Counsel for the respondents 9 to 12 who are the legal representatives of the plaintiff has filed separate affidavits today wherein they have stated that the decree may be modified for partition in respect of leasehold right and the superstructure of the suit property and not the land. The said affidavits are recorded.

15. The learned Counsel for the appellants would submit that the appellants have got no objection for decreeing the suit for partition in respect of leasehold right and the superstructure of the suit property. The said statement is also recorded.

16. In view of all the above, this Second Appeal is allowed in part modifying the decree and judgment of the lower appellate court in the following term:

1. There shall be a ***Preliminary** decree for partition only for leasehold right and for superstructure thereby allotting 1/6th share to the plaintiffs, namely, the respondents 9 to 12.

To that extent, the decree and judgment of the lower appellate court shall stand modified. No costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-

Assistant Registrar

Dated: 5.2.15

*Corrected as per order
dated 25.2.2015

Sd/

Assistant Registrar

Dated: 9.3.2015

True Copy

Sub Assistant Registrar

To

1.The I Assistant Judge, City Civil Court, Chennai.

2. The V Additional Judge, City Civil Court, Chennai.

+2 cc to Mr.S.Subbiah, Advocate,SR.10630

+1 cc to Mr.L.Damodaran, Advocate,SR.2925.

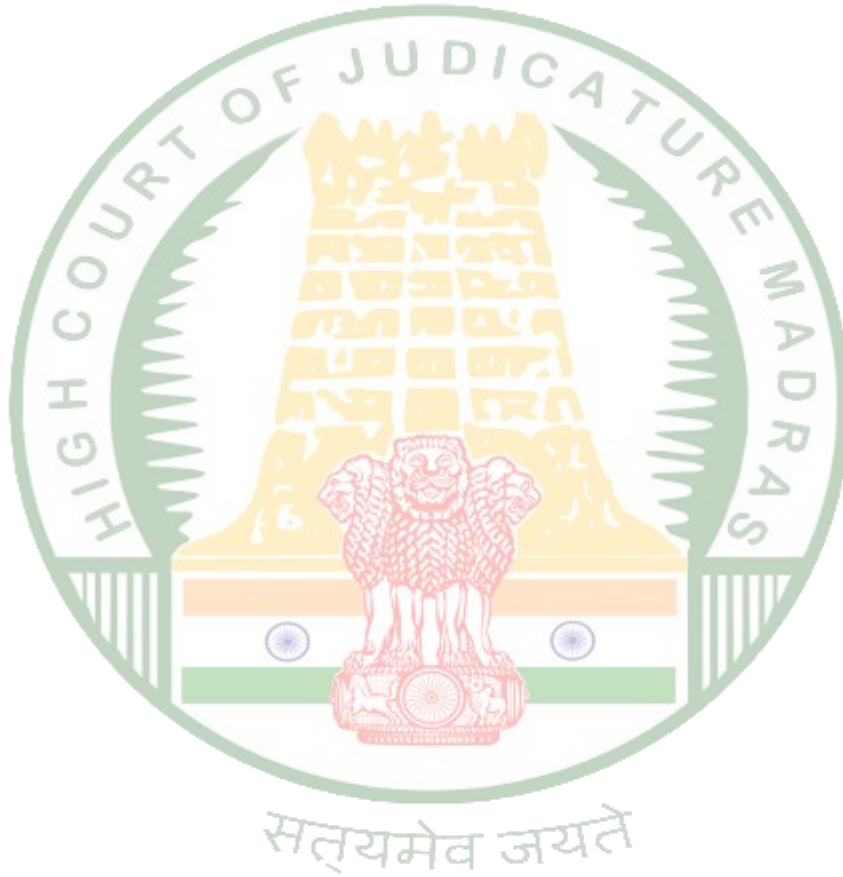
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krd 6/2

To be substituted
to the order
already
despatched
on 24.2.2015

S.A.No.926 OF 2014

kk 10/3



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