

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.11.2015

CORAM:

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

Second Appeal No.1204 of 2007

and

M.P.Nos.1 of 2007 & M.P.No.1 of 2010

Kaliyaperumal

.. Appellant/1st defendant

- Vs -

1. Ramalingam

..1st Respondent/Plaintiff

2. Selvarasu

3. Sivakumar

4. Indirammal

5. Govindarasu

6. Sivasakthi

7. Palanivel

8. Poonalai Konar

9. Ramesh

.. Respondents 2 to 9/  
Defendants 2 to 9

Prayer:- Second Appeal filed under Section 100 of C.P.C., against the Decree and Judgment dated 17.03.2005 made in A.S.No.23 of 2004 on the file of the learned Additional Subordinate Judge, Virudhachalam reversing the Decree and Judgment dated 27.11.2003, made in O.S.No.690 of 1988 on the file of the learned Additional District Munsif-I, Virudhachalam.

For Appellant

: Mr.V.Raghavachari

For Respondent 1

: Mr.R.Margabandu

For Respondent 2

: Mr.G.Kadhiresan

For Respondent 6

: No appearance

Respondents 3,4,5,7,8,9: remained Ex parte

J U D G M E N T

The first defendant in O.S.No.690 of 1988 on the file of the learned Additional District Munsif, Virudhachalam is the appellant herein. The first respondent herein is the plaintiff in the suit and the others are the other defendants in the suit. The said suit was filed for partition and for allotment of 27 ½ cents of land comprised in Survey No.237/4 at Mathur Village, Mangalmpet Sub Division, Chidambaram Taluk

out of the total extent of 46 ½ cents. The suit was dismissed by the Trial Court. As against the same, the plaintiff filed an appeal in A.S.No.23 of 2004 on the file of the learned Additional Subordinate Judge, Virudhachalam. By decree and judgment dated 17.03.2005, the lower appellate Court allowed the appeal and set aside the decree and judgment of the trial Court and granted preliminary decree for partition of his 1/3 share measuring 15 ½ cents in the suit property. As against the same, the first defendant has come up with this second appeal.

2. The case of the plaintiff is as follows:

(i) The suit property was originally owned by one Mr.Narayanasamy Padayachi and his first wife was one Chellapangi through whom, he had two sons by name Ramalingam and Kaliyaperumal the plaintiff and the first dependent respectively.

(ii) After the demise of his first wife, Mr.Narayanasamy Padayachi married one Andal Ammal, through her he had three children by name Mr.Selvarasu and Mrs.Selvamani and Mrs.Vembayee. Mr.Selvarasu is the second defendant in the suit. Mrs.Selvamani and Mrs.Vembayee are not arrayed as parties to the suit.

(iii) During the life time of Mr.Narayanasamy Padayachi, there was a partition effected by means of a registered Partition Deed dated 23.03.1969, in which, an extent of 46 1/2 cents comprised in Survey No.237/4 was allotted to the share of Mr.Narayanasamy with a condition that on his demise, the said property shall be taken by his male legal heirs equally in the event of them contributing for the marriage of his daughters Selvamani and Vembayee. In other words, if any one of his sons have not spent for the marriage expenses of Mrs.Selvamani and Mrs.Vembayee then he shall have no right to claim any share in the suit property.

(iv) According to the plaintiff, for the marriage of Mrs.Selvamani and Mrs.Vembayee, he along with the defendants 1 and 2 contributed equally and thus, he is entitled for a share in the suit property.

(v) It is the further case of the plaintiff that though in the document viz., in the partition deed, the extent of the property has been mentioned as 46 1/2 cents, when the property was measured, it was found that the extent was only 46 cents. Therefore, the plaintiff is entitled for 15 1/2 share. According to the plaintiff, he has purchased 12 cents of land under Ex.B9 from the second defendant. Thus, he is entitled for 27 1/2 cents in the suit property. Since, this 27 1/2 cents was undivided, he filed the suit for partition.

(vi) The first defendant/appellant herein contested the said suit stating that for the marriage of Mrs.Selvamani and Mrs.Vembayee the plaintiff did not contribute anything at all. The entire marriage expenses were borne out by the defendants 1 and 2 alone. Though the second defendant was a minor, on his behalf, the first defendant has spent for the marriage. Thus, according to the defendants 1 and 2, the plaintiff has got no share in the suit property at all.

(vii) It is further stated that Mrs.Vembayee's marriage held in the year 1980. Since the plaintiff did not contribute for the marriage of Mrs.Vembayee, he had nothing to do with the suit property at all except the portion which he has purchased.

(viii) It is further stated that the plaintiff purchased a well defined 12 cents from the second defendant under Ex.B9 and another 3 cents from one Mrs.Indira who in turn had earlier purchased from the second defendant measuring 3 cents. Thus, according to the defendants, the plaintiff had acquaintance to the fact that he had no right whatsoever over the suit property.

(ix) Based on the above pleadings, the trial Court framed appropriate issues and on the side of the plaintiff, two witnesses were examined and two documents were marked. Ex.A1 is the partition deed dated 23.03.1969 and Ex.A2 is the sale deed executed by D2 in favour of the plaintiff dated 27.04.1987 in respect of 12 cents. On the side of the defendants, four witnesses were examined and 11 documents were marked. Considering all the above, the trial Court dismissed the suit which was reversed by the lower appellate Court and that is how the first defendant is before this Court with this second appeal.

3. This second appeal has come up today for admission. I have heard the learned counsel on either side and have perused the records carefully.

4. In this second appeal, according to the appellant, the following is the substantial questions of law viz.,

"Whether the lower appellate Court was right in holding that the plaintiff is entitled for 1/3rd share notwithstanding the condition in Ex.A1 ?"

5. The learned counsel appearing for the appellant would submit that the terms and conditions imposed under Ex.A1 dated 23.03.1969 is not in dispute. Both parties have accepted that as per Ex.A1, if only any amount is spent for the marriage of Mrs.Selvamani and Mrs.Vembayee, they will be entitled for a share in the suit property. The crux of the issue in this matter is as to whether the plaintiff has spent anything for

the marriage of Mrs.Selvamani and Mrs.Vembayee or not ? This is essentially a question of fact. The plaintiff has not produced any document to show that he spent anything for the marriage of Mrs.Selvamani and Mrs.Vembayee. On the side of the defendants, the account details and various other documents were filed to prove that the marriage expenses were borne out only by the defendants 1 and 2. Apart from that Mrs.Vembayee has been examined as D.W.2, who has stated that the entire marriage expenses were borne out by the first and second defendants and the plaintiff did not contribute anything at all. The trial Court found that the plaintiff did not spent anything for the marriage of the daughters of Mr.Narayanasamy. But the lower appellate Court has given a finding that the condition imposed in Ex.A1 is not valid. So far as the finding that the plaintiff did not contribute anything for the marriage, I do not find any fault and the trial Court was right. This is not only based on the documents and the evidence of Mrs.Vembayee, but also from various other circumstances, which I am going to deal with immediately.

6. Ex.A2 (Ex.B9) is the sale deed dated 27.04.1987 executed by Mr.Selvarasu (D2) in favour of the plaintiff. Under this document, the plaintiff has purchased 12 cents of land and there is no mention anywhere in the document that what was purchased from the second defendant by the plaintiff was the undivided share of Mr.Selvarasu. The document clearly spells out the four boundaries of the land purchased by him. It states that the 12 cents purchased by him is bounded on the North by the land belonging to the Kuppusamy, South by Road, East by the land purchased by one Vadivel, West by the common pathway. This would clearly go to show that what was sold by the second defendant to the plaintiff under Ex.A2 (Ex.B9) is nothing but a well defined 12 cents of land. Had it been true that the entire extent of 46 1/2 cents remain undivided, then what has been purchased by the plaintiff from the second defendant would be only the undivided share, in which case, the four boundaries of the property would have been mentioned for the entire extent of 46 1/2 cents. But the four boundaries, as I have already mentioned, clearly mention definite area of 12 cents. Thus, what was sold by the second defendant to the plaintiff is a well defined property which is not an undivided property.

7. Similarly, the plaintiff has purchased three cents of land from one Mrs.Indira and Mrs.Indira purchased the same only from the second defendant and the extent of the land is only three cents. Thus, the three cents of land is situated on the property purchased under Ex.A9. This document also does not spell out that the suit property remains undivided and what was sold to Mrs.Indira by the second defendant was the undivided share. In the sale deed executed by Mrs.Indira to the plaintiff, 3 cents of land has been well defined. It has not been stated as an undivided share. Thus, the

plaintiff has purchased 15 cents of land out of the total extent of 46 1/2 cents of land and it is not an undivided property but is a well defined property.

8. The learned counsel appearing for the plaintiff/first respondent would try to explain this situation. According to him, what was purchased by the plaintiff from the second defendant and from Mrs.Indira was only the undivided share of the second defendant. This contention cannot be accepted and therefore this explanation has to be only rejected.

9. From the very fact that the plaintiff himself has purchased an extent of 15 cents of land from out of the total extent of the suit property which is well defined by the four boundaries would go to show that the plaintiff has no claim over the suit property and he himself had conceded to the fact that the defendants 1 and 2 have become the absolute owners of the the property in terms of the partition deed dated 23.03.1969. The evidence of Mrs.Vembayee also cannot be brushed aside.

10. The lower appellate Court has stated that the condition imposed in Ex.A1 is not binding. As per the judgment of the Trial Court, it is crystal clear that such condition is valid. In the plaint there is no such plea taken that the condition imposed in Ex.A1 is not valid and binding on the parties. The case of the plaintiff itself is that he had complied with the condition. There was also no issue on the same. But the lower appellate Court has held that on the demise of Narayanasamy, the plaintiff has vested right for 1/3 rd share and the same cannot be deprived by the non compliance of the condition. These findings of the lower appellate Court are perverse and contrary to the pleadings and the evidence. I hold that the trial Court was right in holding that the condition is valid and the non compliance of the same by the plaintiff has been proved. Thus, the plaintiff has no right to ask for partition. Accordingly, the question of law is answered in favour of the appellant. In view of the foregoing discussions, the decree and judgment of the lower appellate Court deserves to be set aside and that of the trial Court has to be restored.

11. In the result, the appeal is allowed and the decree and judgment of the lower Appellate Court is set aside and the decree and judgment of the Trial Court is restored. There shall be no order as to cost. Consequently, the connected miscellaneous petitions are closed.

Sd/-  
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To

1. The Additional Subordinate Judge,  
Virudhachalam.

2. The Additional District Munsif,  
Virudhachalam.

+ 2 ccs to Mr.S. Argabanthu, Advocate SR.65273

S.A. No.1204 of 2007 and  
M.P.Nos.1 of 2007 & 1 of 2010

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