

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :31.08.2015

CORAM:

THE HON'BLE SMT. JUSTICE PUSHPA SATHYANARAYANA

S.A. No. 357 of 2009

Ramu Mudaliar

.. Appellant/Plaintiff

Vs.

1. Pachayammal

2. Pandurangan

3. Thirumangai Ammal

...Respondents/Defendants.

Appeal under Section 100 of the Civil Procedure Code, against the judgment and decree dated 11.01.2007 passed by the Subordinate Judge, Madurantakam, in A.S. No. 29 of 2006 confirming the judgment and decree passed by the District Munsif, Madurantakam, in O.S. No. 38 of 1999 on 26.10.2005.

For Appellant : Ms. Diviabharathi
for Mr.K.Goviganesan
For Respondent-1 : Mr.N.K.Sivakumar
For Respondents 2 and 3 : Mr.N.Nagusah

JUDGMENT

The plaintiff who had lost before both the Courts below is the appellant herein.

2. The suit was filed for declaration of title and for permanent injunction. The plaintiff claims his right in Ex.A1 dated 08.07.1997, having purchased the same from the first defendant. The first defendant herself derived her title through a decree in O.S.No.48 of 1995 on the file of District Munsif Court, Madurantakam, which was decreed on 12.11.1996 marked as Exs.A4 and A5. The suit property is an extent of 0.38 cents in Survey No.349 in Thinnallur Village, Madurantakam. In a suit filed by the first defendant in O.S.No.48 of 1995, the suit property was shown as Item No.3. The total extent was 1 acre 50 ½ cents. The said suit was decreed ex-parte in favour of the first defendant, declaring her 1/4th share. Based on the strength of the decree, the first defendant had sold the property to the plaintiff an extent of 0.25 cents on 15.05.1997 and an extent of 0.13 cents on 08.07.1997. The documents were marked as Exs.A1 and A2 respectively. Thus, the claim is made for 0.38 cents by the plaintiff. The second and third defendants also claimed to

have purchase the same property from the first defendant, thereby, casting cloud on the title of the plaintiff. Hence, the suit is for declaration of title.

3. The suit was resisted by the defendants 2 and 3 as the first defendant remained ex-parte. According to the defendants, the suit properties belonged to one Veerasamy and his sons Pachayappan and Seeman. Out of the total extent of property, the said Veerasamy had 1 acre 50 ½ cents, which was in possession and enjoyment of Veerasamy and his sons. Pachaiammal, the first defendant and one Indiraniammal are the daughters of Veerasamy. Both the daughters were got married long back and they have no title over the suit property. Veerasamy and Seeman who were in joint possession of the 1 acre 50 ½ cents and sold the same to the wife of Pachaiappan, whose name is Chellammal. The said sale was on 02.03.1987 under Ex.B.1. From the date of purchase, the said chellammal had been in possession of the same and in her own capacity sold the property in favour of the third defendant herein, subsequent, to which the patta was also transferred in the name of the third defendant. Therefore, according to the defendants, on the date of sale by the first defendant, pachaiammal, the said property was not available for sale. Even before the suit in O.S.No.48 of 1995 was filed by the first defendant, there was a partition between the Veerasamy and his children. Therefore, the said property was not available for partition even on the date of filing of the suit. Hence, the defendants prayed for dismissal of the suit.

4. Before the trial Court, the plaintiff examined himself as P.W.1, besides examining one Duraikannu as P.W.2 and marked Exs.A1 to A8. To nullify the case of the plaintiff, the third defendant examined as D.W.1 and two more witnesses were examined as D.W.2 and D.W.3 and marked Exs.B1 to B9.

5. The trial Court after considering the oral and documentary evidence, dismissed the suit and on appeal, the same was confirmed. Aggrieved by the same, the above second appeal has been preferred.

6. At the time of admission, the following substantial questions of law are formulated as under:-

1. Whether the Courts below are correct in rendering the finding that the Preliminary Decree passed in O.S.No.48 of 1995 is unenforceable after coming to the conclusion that the same is valid for negating the claim of the appellant?

2. Whether the Courts below have not committed a manifest error of not granting a lesser relief after holding that the vendor of the appellant may be entitled to 2 ½ share in the suit properties?.

7. The question that is involved in this appeal is as to whether the first defendant derived any title under the decree in O.S.No.48 of 1995, which would substantiate the right of the plaintiff. The properties originally belonged to one Veerasamy who had four children. The first defendant, Pachaiaammal is the daughter through the first wife and the other children are through the second wife. The first defendant, Pachaiaammal, filed in O.S.No.48 of 1995, claiming 1/4th share. The said suit was decreed ex-parte in her favour, declaring her ¼th right of the properties. As the other defendants in the said suit remained exparte, there was no decision on the question as to whether the properties were self acquired properties of Veerasamy and they were ancestral properties. If the properties were ancestral properties, the first defendant could not have been awarded ¼th share in the suit property. Therefore, presumably, the properties were enjoyed only as self acquired properties of Veerasamy. After the preliminary decree, which was passed on 12.11.1996, the first defendant had not filed any application for final decree for her separate possession of the properties. Therefore, inspite of the preliminary decree, the properties were divided by metes and bounds in a final decree proceedings.

8. Be that as it may, Veerasamy and his son Seeman, who had been dealing with the properties had sold the same in favour of Chellammal, who is the daughter-in-law of Veerasamy under Ex.B.1 on 02.03.1987. Thereafter, the said Chellammal had been in possession and enjoyment of the properties and in her own capacity had sold the property on 09.04.1997 under Ex.B.2 in favour of the third defendant. In between these two sale deeds, the plaintiff filed a suit for partition in the year 1995. Therefore, even on the date of filing the suit for partition, the said suit properties were not available. The said Veerasamy had sold the same in favour of Chellammal may be for the same reason that there was no property available for partition. The first defendant had not filed the final decree proceedings. Therefore, when the first defendant herself was not sure of her right and title over the suit property, which was not divided by metes and bounds, she could not have sold a specific extent of property in favour of the plaintiff. Therefore, the sale deed under Exs.A1 and A2, executed by the first defendant is without any saleable and marketable title. Having failed to prove the vendor's title, the plaintiff cannot base his claim on the sale deeds executed by the first defendant.

9. The plaintiff has not produced any other document to show that he is the owner of the property. The third defendant who had purchased the property from Pachaiappa Mudaliar and Chellammal had produced Ex.B.3-Patta and Kist Receipts under Exs.B4 and B5 in her favour to show her possession of the property. As the plaintiff who claimed the title under first defendant had not established the ownership of the said property of the first defendant by acceptable evidence, the Courts below had concurrently found that the plaintiff had failed to establish his right over the suit property.

10. From the above facts, it could also be seen that on the date of filing of O.S.No.48 of 1995, the suit properties were already sold by Veerasamy and Seeman in favour of Chellammal under Ex.B.1. Therefore, even on the date of O.S.No.48 of 1995, the said property was not available for partition. The first defendant has sold the property only on the strength of the exparte decree obtained by her in the above said suit. Hence, the Courts below are right in non suiting the plaintiff by dismissing the suit.

11. In view of the above, the substantial questions of law are answered accordingly and the Second Appeal is dismissed as devoid of merits. However, there shall be no order as to costs.

srn

s/d-
Assistant Registrar(CS-III)

True Copy

Sub-Assistant Registrar

To

1. The Subordinate Judge, Madurantakam
2. The District Munsif, Madurantakam
3. The Record Keeper,
V.R. Section, High Court
Madras

+ 1 cc to Mr.N.K.Sivakumar, Advocate SR 46370

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tej(co)

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