

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 05.06.2015

CORAM:

THE HON'BLE MRS. JUSTICE PUSHPA SATHYANARAYANA

Second Appeal No.408 of 2009

Dhandapani

.. Appellant/Plaintiff

Vs

Rajendran

.. Respondent/Defendant.

SECOND APPEAL filed under Section 100 of the Code of Civil Procedure against the judgment and decree of the learned Principal Subordinate Judge, Tindivanam in A.S.No.43 of 2007 dated 7.11.2008 confirming the judgment and decree dated 04.06.2007 made in O.S.No.35 of 2000 on the file of the learned District Munsif-cum-Judicial Magistrate, Vanur.

For Appellant : Mr.Bharatha Chakravarthy for
M/s Sai Bharath & Ilan

For Respondent : Mr.T.Dhanasekaran

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J U D G M E N T

The above second appeal arises against the Judgment and Decree in A.S.No.43 of 2007 on the file of the learned Principal Subordinate Court, Tindivanam confirming the Judgment and Decree in O.S.No.35 of 2000 on the file of District Munsif-cum-Judicial Magistrate, Vanur.

2. The plaintiff in the suit for declaration and permanent injunction is the Appellant herein. The case of the Appellant/Plaintiff is that the suit property originally belong to one Vasudeva Kounder. After his death, the properties were taken by his wife, namely, Lakshmi Ammal and his daughters, namely, Danarangavalli, Gandhimathi and his sons, namely, Chakravarthy and Kulasekaran. Of the above legal heirs, Chakravarthy and Kulasekaran died as bachelors and Gandhimathi also died issue less and Gandhimathi's husband is also no more. Therefore, Lakshmiammal, wife of Vasudeva Kounder and Danarangavalli, daughter of Vasudeva Kounder alone are the surviving legal heirs of deceased Vasudeva Kounder inheriting the suit property, which belongs to Vasudeva Kounder. The plaintiff and the defendant are brothers. The said Vasudeva Kounder is the junior paternal uncle of the plaintiff and the defendant. While so, the wife of Vasudeva Kounder, Lakshmiammal sold the suit

property in favour of the plaintiff under Ex.A7 dated 10.12.1999. Similarly, the defendant had purchased the same properties from the other legal heir namely, Danarangavalli on 29.12.1999 under Ex.B.3.

3.In the above factual matrix, the Appellant/Plaintiff has filed the suit for declaration of title of the entire property, which was purchased under Ex.A7 and for permanent injunction. Both the Courts below have correctly found that when there are two legal heirs, namely mother and the daughter of the deceased, Vasudeva Kounder, the property devolved on them equally, while so, each one of them are entitled to only 50% of the share and they cannot alienate in entirety. Though the vendors under Ex.A7 and Ex.B.3 have alienated the properties in favour of other respective purchasers, they have salable right only over 50% of the property and they could not have sold more than what they are entitled to.

4.Accordingly, the Trial Court as well as the Lower Appellate Court has held that the Ex.A7 and Ex.B.3 are binding only to the extent vendors are entitled to. However, instead of granting a decree for the admitted 50% of the property, the suit has been dismissed by the Courts below. Though the Plaintiff has filed a suit for declaration and injunction with respect to the entire property that has been purchased by him under Ex.A7 and the Court below have found that the vendor of the plaintiff is entitled only to 50%, the decree ought to have been granted for half ($\frac{1}{2}$) share of the suit property. However, dismissal of the Suit by the courts below without considering the above aspect is incorrect and the same is liable to be set aside.

5.The learned counsel appearing for the appellant also urged that when the larger interest is claimed and the parties can establish their right for a lesser extent, to that extent, a decree should have been granted.

6.Admittedly, the Appellant/plaintiff has established his title with respect to 50% of the share in the suit property over which even the defendant has got no quarrel. When the larger relief includes the lesser relief and it also arises out of the same cause of action, then, the Court can pass a decree for partition, in order to avoid another suit for partition.

7.Therefore, this Court is of the view that instead of driving the Appellant/Plaintiff to file another suit for partition, it is felt just and proper to pass Preliminary Decree for Partition and separate possession of the half ($\frac{1}{2}$) share that the plaintiff is entitled to. The plaintiff also cannot be said to have lost his right in the suit property, as the suit is filed in the very next year from the date of purchase. In such circumstances, even if the separate suit for partition is filed, the defendant may not have any sustainable defense. Therefore, no prejudice would be caused to the

defendant if Preliminary Decree is passed for partition and separate possession in this suit itself.

8.For the reasons mentioned above, this Appeal stands allowed. The Judgment and Decree of the Courts below are set aside. The plaintiff is declared to be the owner of half ($\frac{1}{2}$) share of the suit property more fully prescribed in the plaint schedule. There shall be a Preliminary Decree for Partition and Separate Possession of his half ($\frac{1}{2}$) share in the suit land. Any necessary deficit court fees payable by the plaintiff should be paid by the plaintiff on the plaint as per Tamilnadu Court Fee and Regulation Act. The plaintiff is also directed to pay the deficit court fees, if not paid, within a period of four weeks from the date of receipt of copy of the Judgment and Decree. No costs. M.P.No.1 of 2009 is closed.

ssd

s/d-
Assistant Registrar(CS-II)

True Copy

Sub-Assistant Registrar

To

- 1.The Principal Subordinate Judge, Tindivanam
- 2.The District Munsif-cum-Judicial Magistrate,
Vanur.

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The Section Officer,
VR. Section, High Court,
Madras.

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