

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 24 .2.2015.

CORAM

THE HON'BLE MR.JUSTICE R.MAHADEVAN

S.A.No.737 of 2007

and

M.P.No.1 of 2009

1.Velu

2.Dhondu Munusamy

...Appellants/ Defendants

vs.

1.Murugesan (Died)

2.Manickam

3.Gopal

4.Raji

5.Rukkuammal

6.Kanniappan

...Respondents/ Plaintiffs

(R5 to R6 brought on record as
LRS of the deceased R1 vide order
of Court dated 28.1.2014 and
made in M.P.Nos.1 to 3/14)

Second Appeal against the judgment and decree dated 26.4.2007 and made in A.S.No.7 of 2007 on the file of the Principal District Court, Vellore, confirming the judgment and decree dated 2.11.2006 and made in O.S.No.106 of 1998 on the file of the Sub Court, Ranipet, Vellore.

For appellant : Mr.T. Dhanyakumar

For respondent : Mr.Mukund
R2 to 4 for M/s. Sarvabhauman Associates

JUDGMENT RESERVED ON :22.12.2014

JUDGMENT

The judgment and decree, dated 26.4.2007 and made in A.S.No.7 of 2007 on the file of the Principal District Court, Vellore, confirming the judgment and decree dated 2.11.2006 and made in O.S.No.106 of 1998 on the file of the Sub Court, Ranipet, Vellore, are under challenge in this memorandum of second appeal.

2. The appellants are the defendants in the suit in O.S.No.106 of 1998, whereas the respondents are the plaintiffs.

3. For easy reference and for the sake of convenience, the appellants may hereinafter be referred to as the defendants and the respondents be referred to as the plaintiffs wherever the context so require.

4. The necessary facts leading to the filing of this second appeal are as under:-

a. The suit property originally belonged to one KandaPillai, who died intestate, about 75 years ago, leaving behind his four sons and a daughter, namely, (1) Ayyakkannu, (2) Appakutty, (3) Munusamy, (4) Arirangan and (5) Lakshmi w/o. Bodikan Pillai. The said Kanda Pillai had been in possession and enjoyment of the suit property till his death. His sons are entitled to $\frac{1}{4}$ th share each in the suit property.

b. The plaintiffs 1 to 4 are the sons of Munusamy, who is the third son of the said Kandapillai. The first defendant is the grandson of Bodikanpillai, who is the husband of the aforesaid Lakshmi. The second defendant is the son of the said Bodikanpillai and the father of the first defendant.

c. After the demise of the said Kandapillai, the fourth son of Kandapillai, namely, Ariranganpillai sold his $\frac{1}{4}$ th share in the suit property to the plaintiffs' step mother viz., Lakshmiammal, who is the first wife of the plaintiffs' father, under a registered sale deed, dated 5.12.1935.

d. Since the said Lakshmiammal had also died, the plaintiffs' father Munusamy in addition to his $\frac{1}{4}$ th share in the suit property, had acquired another $\frac{1}{4}$ th share of Lakshmiammal. Thus, the plaintiffs' father Munusamy had entitled for $\frac{1}{2}$ share in the estate of Kandapillai. After the demise of Munusamy, the plaintiffs are entitled to $\frac{1}{2}$ share in the suit property.

e. Similarly, the first defendant had purchased the remaining undivided half share from the heirs of Ayyakannu and Appakutty, who are the first and second sons of Kandapillai under two sale deeds, dated 11.11.1963 and 7.3.1977. Thus the first defendant has also entitled for $\frac{1}{2}$ share in the suit property.

f. The fourth item of the suit property is an old well. Since nobody has come forward to dug the well, the plaintiffs' father Munusamy and his sons had spent huge money to renovate the well about 30 years ago and installed an electric motor pump set and after obtaining an electric service connection No.67 separately, irrigating the said lands for more than 30 years with the knowledge of the defendants.

g. Similarly, the defendants had dug a new well near the said old well and they have been enjoying the undivided $\frac{1}{2}$ share in the suit property and irrigating the lands with the help of oil engine and as such the plaintiffs and the defendants are entitled to half share each in the suit properties without any proper division.

h. The name of the plaintiff's step mother and the paternal aunt's name are one and the same. Similarly, the plaintiff's father's name and the paternal aunt's son's name is also one and the same. Therefore, the defendants taking advantage of the similarity in the names had claimed right, title and interest in the $\frac{1}{4}$ th share already sold by the said Arirangapillai, who is the fourth son of Kandapillai and filed the suit in O.S.No.632 of 1995 on the file of the District Munsif Court, Walajah, for permanent injunction in respect of the well, pumpset and electric service connection in respect of item No.5 of the suit property, which exclusively belongs to the plaintiffs as afore stated.

i. Since the defendants had claimed excess right in the suit property, the plaintiffs have filed the present suit for partition and separate possession.

5. The defendants resisted the suit by filing their written statement denying the allegations made in the plaint. The $\frac{1}{4}$ th share of the Arirangapillai in the suit property was purchased by the second defendant's mother on 5.12.1935 and the defendants have been in possession and enjoyment the same and patta, chitta and adangal are all stand in the name of the second defendant. The defendants had filed a suit on the file of the District Munsif Court, Ranipet, and obtained injunction.

6. On receipt of the injunction notice, the plaintiffs had filed a false case on the file of the Judicial Magistrate Court No.II, Walajapet and obtained false death certificate in the name of Lakshmiammal. They never enjoyed the share of Arirangapillai's share and only to grab the same they have changed their step mother's name as Lakshmi instead of Mangai @ Thanjammal.

7. The second defendant's mother name is Lakshmiammal and the plaintiffs' mother name is Mangai Thanjammal. Now they removed the name Thanjammal and added the name Lakshmi since the name of their fathers name are similar. All the documents in respect of the alleged $\frac{1}{4}$ share stand in the name of Dondu Munisamy for the past 60 years.

8. On the aforesaid averments, the defendants sought for the dismissal of the suit.

9. Based on the material proposition of facts arising from the pleadings of the parties to the suit, the trial Court has

formulated as nearly as four issues for the better adjudication of the suit.

10. In order to substantiate their respective cases, both the plaintiffs and the defendants were directed to face the trial. Accordingly, the third plaintiff Gopal has examined himself as P.W.1 and during the course of his examination Exs.A1 and A12 were marked. On the other hand, the first defendant Velu has examined himself as D.W.1 and one more witness was examined and during the course of their examination Exs.B1 to B15 were marked.

11. On evaluating the evidences both oral and documentary, the trial court had proceeded to decree the suit.

12. Having been aggrieved by the impugned judgment and decree of the trial Court, dated 2.11.2006, the defendants had preferred an appeal in A.S.No.106 of 1998 on the file of the Principal District Court, Vellore.

13. Since that appeal was also dismissed and not being satisfied with the judgment and decree of the first appellate court, the present second appeal has been filed by the defendants.

14. The second appeal has been admitted on the following substantial question of law:-

" Whether the plaintiffs have discharged the burden of proving that Lakshmi Ammal referred to in Ex.B.1 is their predecessor in title relating to ½ share in the suit properties?"

15. Heard Mr.T. Dhanyakumar, learned Counsel appearing for the appellants and Mr.Mukund, learned counsel appearing for the respondents.

16. The learned counsel for the appellants has submitted that the second defendant's mother had purchased the property under Ex.B.1, dated 5.12.1935 from Ariranganpillai and the first defendant had purchased the property from Appukutty and Ayyakannu and ever since their purchase they have been in possession and enjoyment of the properties.

17. It is the contention of the learned counsel that oral partition had taken place even during the life time of Kandapillai and that the sons of the said Kandapillai have been in possession and enjoyment of their respective shares.

18. The learned counsel has argued that according to the plaintiffs the properties were purchased by Lakshmiammal, who is the step mother of the plaintiffs from Arirangan, but the said Lakshmiammal had died in the year 1935 itself and therefore, the said Ariranganpillai could not have executed the sale deed in favour of Lakshmiammal.

19. The learned counsel has maintained that the original sale deed Ex.A1 has not been produced before the trial Court to sustain their claim that the plaintiffs' step mother alone had purchased the 1/4th share of the suit properties from Ariranganpillai, but the original sale deed was marked by the defendants under Ex.B.1 and therefore, the case of the plaintiffs cannot be accepted.

20. On the other hand, the learned counsel appearing for the respondents has submitted that the fourth son of Kandapillai, namely, Mr. Arirangan had sold his ¼th share in the suit properties to Lakshiammal, who is the first wife of plaintiffs' father Munusamy, and after the death of the said Lakshmiammal, the said Munusamy was in possession and enjoyment of 1/4th share of Lakshmiammal along with his 1/4th share in the suit properties.

21. The learned counsel has further submitted that the name of the plaintiffs' step mother and the paternal aunt's name is Lakshmiammal and the plaintiffs' father name and the paternal aunt's son name is Munusamy and therefore, misusing the similarity between the names, the defendants have falsely claimed the share of the said Lakshmiammal.

22. The learned counsel has also rebutted the contention that since the said Lakshmiammal had died in the year 1935, she could not have purchased the property from Ariranganpillai and submitted that the property was purchased by the said Lakshmiammal only in the year 1935 and she died in the year 1936 and therefore, it is not correct to state the said Lakshmiammal died in the year 1935.

23. The learned counsel has argued that a perusal of Ex.A1 clearly shows that the said Ariranganpillai had executed a sale deed on 5.12.1935 in favour of Lakshmiammal w/o.Munusamy and therefore, the claim of the defendants cannot be accepted.

24. Now the main and only question to be considered is whether the property was sold by Ariranganpillai either to the first wife of Munusamy or to the mother of the second defendant.

25. The suit property originally belonged to one Kandapillai, who died intestate about 75 years ago, leaving behind his four sons and one daughter, namely, Ayyakkannu, Appakutty, Munusamy, Arirangan and Lakshmi, who is the wife of Bodikan Pillai.

26. The plaintiffs 1 to 4 are the sons of the said Munusamy, who is the third son of Kandapillai. The first defendant is the grandson of Bodikan pillai and the second defendant is the son of Bodikan Pillai.

27. It is the case of the plaintiffs that the sons of Kandapillai had been enjoying the suit properties without any division by metes and bounds. The father of the plaintiffs is entitled for ¼th share in the suit property.

28. While so, the fourth son of Kandapillai, namely, Arirangan, who is entitled for $\frac{1}{4}$ th share in the suit property had sold his share to the first wife of the said Munusamy, namely, Lakshmiammal and after the demise of Lakshmiammal, the said Munusamy has been in possession and enjoyment of $\frac{1}{4}$ th share of the said Lakshmiammal along with his $\frac{1}{4}$ th share in the suit property. Thus, he has been in possession and enjoyment of $\frac{1}{2}$ share in the suit properties.

29. On the other hand, it is the case of the defendants that the first defendant had purchased the remaining half share from the heirs of Ayyakkannu and Appakutty, who are the sons of Kandapillai and therefore, the defendants are entitled to $\frac{1}{2}$ share in the suit properties.

30. While so, the second defendant claims right over the share of Lakshmiammal as she is his mother, whereas the plaintiffs have claimed their right over the share of Lakshmiammal as she is the step mother and the first wife of their father.

31. A perusal of Ex.A1 and Ex.B.1 sale deed, dated 5.12.1935 shows that the said Arirangapillai had sold his $\frac{1}{4}$ th share in the undivided suit property and executed a sale deed in favour of Lakshmiammal, who is the first wife of Munusamy.

32. It is not the case of the second defendant that his father name is Munusamy. But his father name is Bodi Khan Pillai. On the other hand, it is not denied by the defendants that the father of the plaintiffs' name is Munusamy and the name of his first wife is Lakshmiammal.

33. The defendants had also filed a suit in respect of the suit property in O.S.No.632 of 1995 on the file of the learned District Munsif-cum-Judicial Magistrate No.1, Walaja, in which, the father name of the second defendant herein has been mentioned as Bodikan Pillai and not Munusamy.

34. It is also not in dispute that the plaintiffs' father Munusamy had two wives and their names are, Lakshmi @ Mangai and Thanjammal. Since the name of the daughter of Kandapillai and the first wife of Munusamy is similar, viz., Lakshmiammal, the first wife of the said Munusamy was called as Lakshmi @ Mangai.

35. Further, on the side of the plaintiffs, the death certificate of Lakshmi @ Mangai and Thanjammal, who are the wives of the said Munusamy are marked as Exs.A.10 and A.12. The death certificate of Munusamy was also marked as Ex.A.11.

36. A perusal of Ex.A10, the death certificate of Lakshmi @ Mangai, shows the name of Lakshmi @ Mangai and she died on 17.12.1936 and her husband name is shown as Munusamy Pillai.

37. Ex.A12 shows the name of the deceased as Thanjammal and she died on 27.2.1994 and her husband name is shown as Munusamy. Ex.A11 shows the name of the deceased as Munusamy Pillai and he died on 8.10.1978 and his father name is shown as Kandan. Therefore, Ex.A10 to A12 reveals that the name of the plaintiffs' father is Munusamay and the name of the first wife of Munusamy is Lakshmi @ Mangai and the said Munusamy had two wives.

38. On the other hand, no document has been produced that the second defendant's mother Lakshmi w/o.Bodi Khan Pillai had purchased the suit property. In this regard, the courts below have analysed the evidences both oral and documentary and came to the right conclusion that the plaintiffs' step mother had purchased $\frac{1}{4}$ th share of the suit property from Ariranganpillai and therefore, this Court does not like to interfere with such finding.

39. As far as the question of partition is concerned, even the fourth son of Kandapillai, namely, Ariranganpillai has mentioned in the sale deed Ex.A1 that his $\frac{1}{4}$ th share in the undivided suit property. Even in the sale deeds executed by Ayyakkannu Pillai and Appakkutty Pillai in favour of the first defendant also, they have stated that their $\frac{1}{4}$ th shares each in the undivided suit property. Therefore, it is clear the suit property was not divided metes and bounds and as there was a dispute between the plaintiffs and the defendants over the possession and enjoyment, the plaintiffs have filed the present suit for division of the suit properties into two equal shares by metes and bounds by appointing an Advocate Commissioner.

40. Though it is case of the defendants that the properties have been divided among them, it has not been proved by oral and documentary evidence as to when it was divided, survey number and boundaries and in the presence of whom. These details have not been furnished and no one was examined to prove the division in the suit property.

41. To prove that the suit property was not divided at any point of time, the plaintiffs have filed a certified copy of the judgment passed in O.S.No.632 of 1995 on the file of the District Munsif Court-cum-Judicial Magistrate No.1, Walajapet, filed by the defendants herein seeking permanent injunction. By judgment dated 30.4.1999, the District Munsif Court had dismissed the suit on the ground that no permanent injunction could be granted over the common suit property and when such judgment has become final, it is clear that the suit property was not divided so far.

42. In this regard also the courts below have analysed and rendered a finding that the suit property has not been divided metes and bounds so far and therefore, this Court does not like to interfere with such finding of the courts below in the absence of any oral and documentary evidence to the contra.

43. For the aforesaid reasons, the second appeal fails and the same is dismissed confirming the judgment and decree of the courts below. However, there will be no order as to costs. Connected M.P. is also dismissed.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

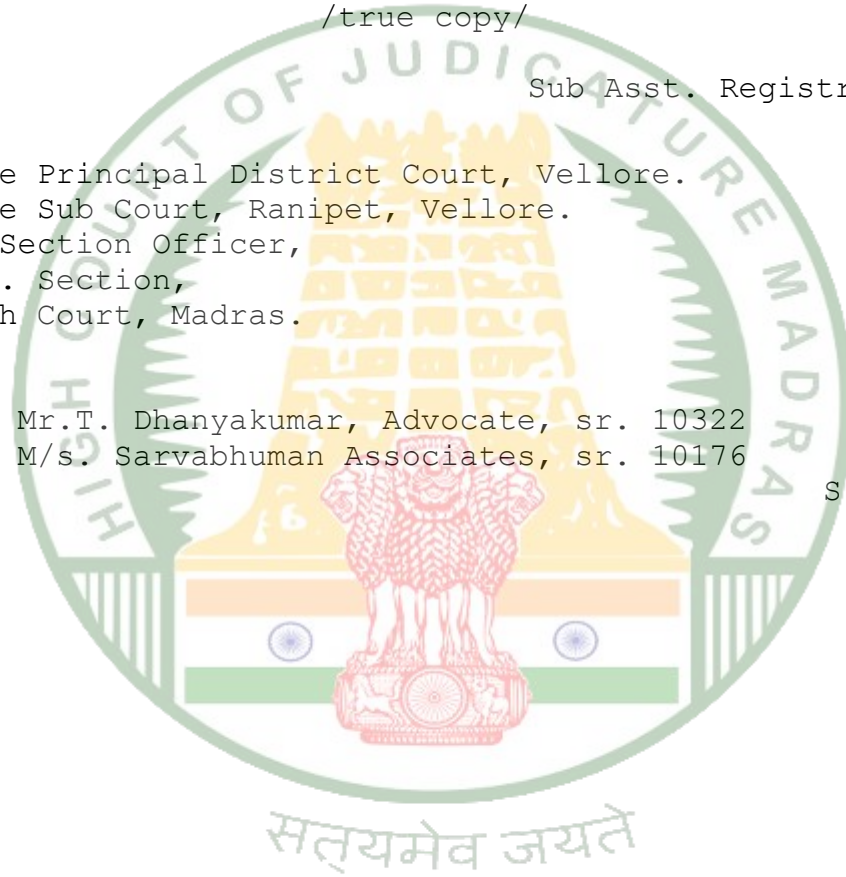
To

1. The Principal District Court, Vellore.
2. The Sub Court, Ranipet, Vellore.
3. The Section Officer,
V.R. Section,
High Court, Madras.

- 1 cc to Mr.T. Dhanyakumar, Advocate, sr. 10322
1 cc to M/s. Sarvabhuman Associates, sr. 10176

S.A.No.737 of 2007
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M.P.No.1 of 2009

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