

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09 -10-2015

CORAM:

THE HON'BLE MRS.JUSTICE PUSHPA SATHYANARAYANA

S.A.No.438 of 2009

and

M.P.No. 1 of 2009

1. K.A. Shanmugam

2. M.Thambiraj

3. K.Kamudhin

.. Appellants/Defendants

Vs.

K.A.Prabhu

.. Respondent/Plaintiff

Appeal under Section 100 of the Civil Procedure Code, against the judgment and decree dated 11.08.2008 passed by the learned Subordinate Judge, Udhagamandalam in A.S.No.22 of 2008, reversing the judgment and decree passed by the learned District Munsif, Kothagiri, in O.S.No.35 of 2006, dated 27.02.2008.

For Appellants : Mr.P.R.Balasubramanian

For Respondent : Mr.A.Bobblie

JUDGMENT

The defendants in a suit for partition are the appellants.

2. The plaintiff and the first defendant are brothers. The suit in O.S.No.218 of 1998 before the Subordinate Judge, Niligiris at Udhagamandalam, filed by the both plaintiff and the first defendant against their brothers and sisters and the legal heirs of the brother K.A.Krishnan, was dismissed on 05.09.2003, with a liberty to file a fresh suit on the same cause of action with respect to item Nos.1 to 5 in Ex.A6-Family arrangement. Pursuant to the same, the plaintiff filed O.S.No.35 of 2006 before the District Munsif, Kothagiri.

3. According to the plaintiff, the suit property, measuring an extent of 2 acres of lands in Kothagiri Village is in common enjoyment by both of them and there was a panchayat under which the property was divided into two equal shares, which was not agreed upon. As it was difficult to continue the joint possession with the defendants, the plaintiff has come up with the present suit for partition of his $\frac{1}{2}$ share of the suit property.

4. The suit was resisted by the defendants, contenting that even before the disposal of the suit in O.S.No.218 of 1998, a settlement was arrived at between the parties with respect to the suit property. Pursuant to the said arrangement dated 01.07.2000, all the legal heirs have divided the properties by metes and bounds and the mutation of revenue records was also effected. The family arrangement was acted upon by the parties. The first defendant was allotted specified portion of bungalow known as Shelton, which was already in occupation of the defendant together with land surrounding the building. The plaintiff though has got his share of the property and was also paid a sum of Rs.50,000/- for the excess portion allotted to the first defendant, is making frivolous attempt to grab the property once again by filing the suit. In fact, the first defendant had sold a portion of the property to the second and third defendant, pursuant to the partition and they are the rightful owners as on date. Hence, the defendants prayed for dismissal of the suit.

5. Before the trial Court, the plaintiff examined himself as PW.1 and marked the documents as Exs.A1 to A7. On the side of the defendants, the first defendant examined himself as D.W.1 and marked the documents as Exs.A1 to A4.

6. The trial Court, after considering the oral and documentary evidence, dismissed the suit and on appeal, the suit was decreed. Aggrieved by the same, the defendants have come up with the above Second Appeal.

7. At the time of admission, the following substantial questions of law were formulated:

"1. Whether the present suit has been barred by principle of res judicata?.

2. Whether the judgment rendered by the lower appellate Court has to be reversed since no specific points for determination have been formulated.?"

8. The learned counsel for the appellants / defendants contended that the plaintiff is the brother of the first defendant and the suit is with respect to two acres of land in Survey No.579 of 2011 in Kothagiri Village, Nilgiris District. As the plaintiff contended that there was no division with respect to the property, the present suit has been filed. It is not in dispute that the suit property is the family arrangement. The defendants have contended that there was a partition of the suit property, in which, the suit property was allotted to his share, based on which, the first defendant also had alienated a portion of the suit property in favour of the defendants 2 and 3.

9. On a consideration of the pleadings available, it can be seen that a suit in O.S.No.218 of 1998 was filed for partition by the first appellant and the respondent as plaintiffs against and the other heirs entitled to the property. The said suit was dismissed with liberty to file a fresh suit with respect to item Nos.1 to 5 enlisted in Ex.A6. In the said suit, Ex.A7 is once again a family arrangement dated 24.06.1987. Both the appellants and respondent have admitted to the filing of the above suit and the result therein. The plaintiff claims that he has filed the above suit based on the direction given in O.S.No.218 of 1998. In O.S.No.218 of 1998, liberty is given for division of five item of properties, whereas, present suit is filed only with respect to one item of the suit, namely, two acres of land in Kothagiri Village.

10. The plaintiff has not given any convincing reason as to why the other properties were not added in the suit or whether division had already taken place among the parties with respect to rest of the items. At this juncture, the learned counsel for the appellants contended that there was an oral partition on 01.07.2000 between the parties, which was later reduced to writing and the same was marked as Ex.B1. In the said document, the plaintiff/defendants and 11 others have joined in bringing out the said document. In the said document, each of the sharer has been allotted a schedule of the property and 'G' schedule property was allotted to the first appellant/ the first defendant. The item Nos.1,2 and 3 of 'G' schedule property relate to the present suit property and 'H' schedule property was allotted to the plaintiff. Though it was said to be an oral partition, when it was reduced to writing the parties to the document have subscribed to the same by affixing their signatures.

11. The execution of Ex.B1 is admitted by both the parties. Pursuant to Ex.B1, Ex.B2 was executed, which is a 'No Objection Certificate' by all the parties to the document, expressing their no objection to transfer the revenue records and other records and also the panchayat records of the schedule mentioned property in the name of K.A.Shanmugam, the first appellant / first defendant herein. Thus, the first appellant / first defendant contended that the suit property was already divided and was allotted to the share of the first defendant and he has been in enjoyment of the property.

12. Assailing the above contention, the learned counsel for the respondent contended that though the execution of Ex.B1 is admitted, it was not acted upon by the parties. He further contended that the judgment in O.S.No.218 of 1998 was delivered only on 05.09.2003, whereas, Ex.B1 was executed on 01.07.2000. If the execution of Ex.B1 was pending the suit, the said document ought to have been marked in the said suit itself. Therefore, he contended that Ex.B1 was deemed to be not acted upon.

13. The contention of the respondent / plaintiff is not acceptable for the following reasons.

1. The plaintiff as P.W1 has specifically admitted that as per Ex.B1 dated 01.07.2000, the suit property was allotted to the share of the defendants/ appellants.
2. The 'No Objection Certificate' under Ex.B2 was also admitted to have been executed by all the parties.
3. Pursuant to Ex.B1, the defendant has dealt with a property by selling the same under Ex.B.4.
4. When the plaintiff herein was a party to O.S.No.218 of 1998 as one of the plaintiffs along with the first defendant and when the execution of Ex.B1-Family arrangement, pending the suit was admitted, there is no reason as to why the same was not brought to the knowledge of the Court, as the parties have amicably settled the matter among themselves. It is presumed that the plaintiff has thought in wisdom not to put forth the same before the Court.
5. In O.S.No.218 of 1998, liberty was given to sue for partition for five item of properties, whereas, the plaintiff who has based his suit on the same, has shown only one item of the property, which was allotted to the share of the first defendant without any just and convincing reason.
6. The plaintiff has not given any reason as to why the other sharers who are parties to Ex.B1 were not made as parties to the suit when he contends that Ex.B1 was not acted upon.

14. For all the above reasons, it is clear that suit property was already divided between the parties by metes and bounds. Pursuant to Ex.B1, they have been in separate enjoyment of the same and therefore, the same has been acted upon.

15. With respect to the question of res judicata, the same does not arise, as liberty was given in the earlier suit to file a separate suit on the same cause of action. However, the parties have resolved their dispute even pending suit. Therefore, the said question has not been taken up for consideration.

16. In view of the above discussion, the questions of law are answered in favour of the appellants / defendants that the suit is not maintainable, in view of the family arrangement dated 01.07.2000 under Ex.B1.

17. In the result, the Second Appeal is allowed, setting aside the finding of Appellate Court and the judgment and decree of the trial Court dismissing the suit in O.S.No.35 of 2006 are restored. However, in the facts and circumstances of the case, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Srn

Sd/-

Assistant Registrar (CS-IV)

/True Copy/

Sub-Assistant Registrar

To

1. The Subordinate Judge, Udthagamandalam

2. The learned District Munsif, Kothagiri

3. The Record Keeper, V.R. Section,
High Court, Madras

+1 C.C. To MR.P.R.Balasubramanian, Advocate in SR.NO.55314

+1 C.C. To MR.A.Bobblie Advocate in SR.NO.55743

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S.A. No. 438 of 2009
and

M.P. No. 1 of 2009

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KU (CO)

sd : 30/10/2015