

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 04 - 06 - 2015

Coram

The Hon'ble TMT. JUSTICE PUSHPA SATHYANARAYANA

Second Appeal No. 617 of 2009

and

M.P. No. 1 of 2009

Palaniammal .. Appellant/2nd Plaintiffs

vs.

1. Alamelu
 2. Kaliappan
 3. Balammal .. Respondents 1 to 3/Defendants 2 to 4
 4. Selvamani .. 4th Respondent/1st Plaintiff
- (R3 is given up)

Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 02.07.2008 in A.S. No.181 of 2006 on the file of the Principal Subordinate Judge, Salem, confirming the judgment and decree dated 14.06.2006 made in O.S. No. 1152 of 2004 on the file of the II Additional District Munsif, Salem.

For Appellant : Mr. T. Meganathan
for Mr. R. Nalliyappan

For R 2 : Mr. D. Shivakumaran

For R1 & R4 : No Appearance
R3 given up

JUDGMENT

The non-suited second plaintiff before the Courts below in a suit for partition, has projected the instant Second Appeal.

2. The case of the plaintiffs in O.S. No. 1152 of 2004 is that the first defendant owned the suit properties by virtue of partition deed dated 30.8.1965 and he divorced the second defendant, who is his first wife, in the year 1972 subsequent to which he married the first plaintiff as his second wife and out of the wedlock, the second plaintiff was born to her. It is also stated that the first defendant was taking care of the third defendant, who was a minor at the time and a panchayat was held in the family as per which, a nominal partition was executed and the properties were divided and

allotted to the defendants 1 and 3. The further case of the plaintiffs is that the partition was not acted upon and all the properties were enjoyed by the first defendant. The grievance of the plaintiffs is that the first defendant, joining with the defendants 2 to 4, created all sorts of disturbances and drove them out. Since their demand for maintenance and partition in the suit properties were refused by the first defendant, claiming that the first plaintiff is entitled for maintenance and the second plaintiff is entitled for partition in the suit properties, they have filed the suit and sought for direction to the first defendant to divide the suit properties into 3 equal shares and allot one such share to the second plaintiff, for a direction to the first defendant to pay maintenance at the rate of Rs.1000/- per month to the first plaintiff from the filing of the suit and to create charge over the suit properties for the maintenance amount and also for costs.

3. The first defendant filed written statement admitting his relationship with the plaintiffs and the divorce from the second defendant. The first defendant denied the allegation of the plaintiffs that he drove them away and he is liable to pay maintenance. While admitting the share of the plaintiffs in the suit properties, he has stated that he was always ready to live with the first plaintiff as a dutiful husband and hence, there is no necessity for him to pay separate maintenance.

4. The third defendant filed a separate written statement adopted by the defendants 2 and 4, and contested inter alia denying the case of the first plaintiff that he is the second wife of his father, viz., the first defendant. Admitting that the suit properties are the ancestral properties of his father and also the partition deed dated 30.8.1965 as per which C schedule property was allotted to the first defendant and his heirs, he stated that himself and his father were in joint possession and enjoyment and subsequently, by way of partition deed dated 13.6.1978, they divided the properties between themselves in which A schedule was allotted to the first defendant while B schedule which consists of nearly 7 items, was allotted to him and they enjoyed the same separately. According to the third defendant, the suit properties are his separate properties in which the plaintiffs have no right and sought for the dismissal of the suit.

5. The trial Court, on the basis of the above pleadings, proceeded with the trial of the suit. The plaintiffs examined themselves as P.W.2 and P.W.1 respectively besides examining one Natarajan as P.W.3 and marked Exs. Exs. A.1 to A.8. To nullify the evidence adduced on behalf of the plaintiffs, the third defendant examined himself as D.W.1 and marked Exs. B.1 and B.2.

6. The trial court / learned II Additional District Munsif, Salem, on consideration of the evidence adduced and the materials available thereon, finding that the suit properties are the absolute properties of the third defendant, dismissed the suit vide judgment dated 14.06.2006. On appeal, the Lower Appellate Court / learned Principal Subordinate Judge, Salem, appreciating the facts and law, concurred with the findings of the trial Court and dismissed A.S. No. 181 of 2006 vide judgment dated 02.07.2008. Feeling aggrieved, the second plaintiff is before this Court.

7. At the time of admission of this Second Appeal, the following substantial question of law was formulated for consideration:-

"Whether the Courts below are right in holding that the admitted facts need further proof?"

8. Heard Mr. T. Meganathan, learned counsel appearing for the appellant / second plaintiff and Mr. D. Shivaumaran, learned counsel for the second respondent / third defendant and perused the records.

9. From the materials available on record, it is seen that pending suit, the first defendant died and defendants 2 to 4 contested the suit.

10. Learned counsel appearing for the appellant / second plaintiff contended that the first defendant married the first plaintiff only after the marriage with second defendant was annulled by way customary divorce and as such, the first plaintiff becomes the legally wedded wife of the first defendant and the second plaintiff / appellant herein, being a daughter born to the first defendant, is entitled to a share in the properties which are ancestral in nature.

11. Per contra, the contention of the learned counsel appearing for the second respondent is that the suit properties were allotted to the third defendant as per partition dated 13.6.1978 and as such, they are his separate and absolute properties in which the appellant cannot claim any share.

12. The legal battle emerges out of rival claim made by the half blood relations to get the properties of their father late Kandasamy. A perusal of the materials available on record would show that the first plaintiff is the second wife of the first defendant V.P.Kandasamy and the second plaintiff is their daughter. The second defendant is the first wife of the first defendant V.P.Kandasamy and defendants 3 and 4 are the children of the defendants 1 and 2. The said relationship between the parties has been admitted by the first defendant himself in his written statement.

13. The fact remains that the suit properties are the ancestral properties of the deceased first defendant acquired by virtue of partition deed dated 30.8.1965. The subsequent partition effected in the year 1978 between the first defendant and his son, viz., the third defendant / second respondent herein also remains undisputed.

14. It is seen from the materials available on record that the plaintiffs except pleading about a customary divorce between the defendants 1 and 2 in the year 1972, have not produced even an iota of evidence to probabalise the same. On the other hand, the second defendant has taken a stand before the trial Court that since her husband, viz., the first defendant married the first plaintiff, she was forced to live separately away from her husband. As rightly pointed out by the trial Court, the mere separation of the second defendant from her husband / first defendant will not establish the divorce alleged by the plaintiffs in the absence of any proof produced by them.

15. A mere perusal of Ex. B.2 registration copy of the partition deed dated 13.6.1978 would establish that only to safeguard the ancestral properties, the partition was effected between the defendants 1 and 3. At this juncture, it is relevant to point out that the marriage of the first defendant with the first plaintiff was registered on 09.6.1978 and the partition had taken place on 13.6.1978 immediately after the marriage. Furthermore, even as per the evidence of the first plaintiff, who deposed as P.W.2, she was not aware of the fact whether any property was allotted to the share of first defendant in the said partition. Even assuming that the first defendant was also allotted share in the partition, a mere reading of the plaint description would show that only seven items of properties which were allotted to the third defendant / second respondent have been shown as the suit property and the remaining seven items which were allotted to the first defendant, have not been mentioned. The plaintiffs have not put forward any reason before the Courts below as to why those properties have not been included in the plaint description. No reason is forthcoming even before this Court. Whereas the trial Court, based on the evidence of P.W.1, the second plaintiff / appellant herein, found that the first defendant had sold away the seven items which were allotted to him as per the 1978 partition deed and has arrived at the conclusion that the partition was given effect to.

16. As regards the claim of the appellant for her share in the suit properties, both the Courts below have held that the marriage of the first plaintiff with the first defendant is not legal and valid one since the first defendant had married her during the subsistence of his first marriage and as a result, the second plaintiff is only an illegitimate child, who can claim a share only from the properties of her father and not in ancestral properties. At the cost of repetition, it is pointed out that since both the Courts below have

held that partition of the year 1978 was given effect to and the parties have acted on the basis of it, the appellant / second plaintiff can have recourse only with regard to the properties allotted to her father, viz., the first defendant. As the first defendant had already sold away his share of the properties even as per the admission of the plaintiffs, as rightly found by the Courts below, the plaintiffs are left without any properties even to claim their due share. Moreover, even at the time of filing the suit, the plaintiffs should have asked for partition in all the 14 items of properties whereas the suit is filed only for seven items of the properties which fell to the share of the third defendant / second respondent.

17. Secondly, though the learned counsel for the appellant contended that the partition of the year 1978 is sham and nominal and not acted upon, no evidence is put forth to prove the same. Per contra, the third defendant / second respondent has proved that the partition of the year 1978 was acted upon and the seven items of the properties fell to the share of his father were sold by him even during his lifetime. What is now available and shown as suit property is only the seven items of properties allotted to the third defendant / second respondent over which the appellant / second plaintiff can have no claim.

18. It is also to be pointed out that when the first plaintiff herself has admitted that there was a partition and it has been acted upon, they cannot have any claim. Secondly, even presuming that there was no partition, no reason is forthcoming as to why the plaintiffs have not added the properties which fell to the share of the first defendant. Therefore, on the principle that admitted facts need not be proved, both the Courts below have rightly dismissed the suit. From the foregoing discussion, it is clear that the appellant has not established her claim and the concurrent findings of the Courts below are correct.

19. It is a settled principle that scope for interference with concurrent finding of fact while exercising jurisdiction under Section 100 CPC is very limited. Further, re-appreciation of evidence is not permissible unless the Courts below had misdirected themselves in appreciating the facts or placed the onus on the wrong party. The Courts below being the final fact finding Courts, it is not within the domain of this Court to investigate the grounds on which such findings were arrived at. Therefore, in the case on hand, no question of law, much less, substantial question of law arises for consideration.

In view of the above discussions relating to principles under Section 100 CPC, I have no hesitation to hold that no interference is warranted to the concurrent findings of the Courts below. For

the foregoing reasons, the Second Appeal fails and the same stands dismissed confirming the judgments and decrees of the Courts below. However, in the circumstances of the case, there will be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Deputy Registrar

True Copy

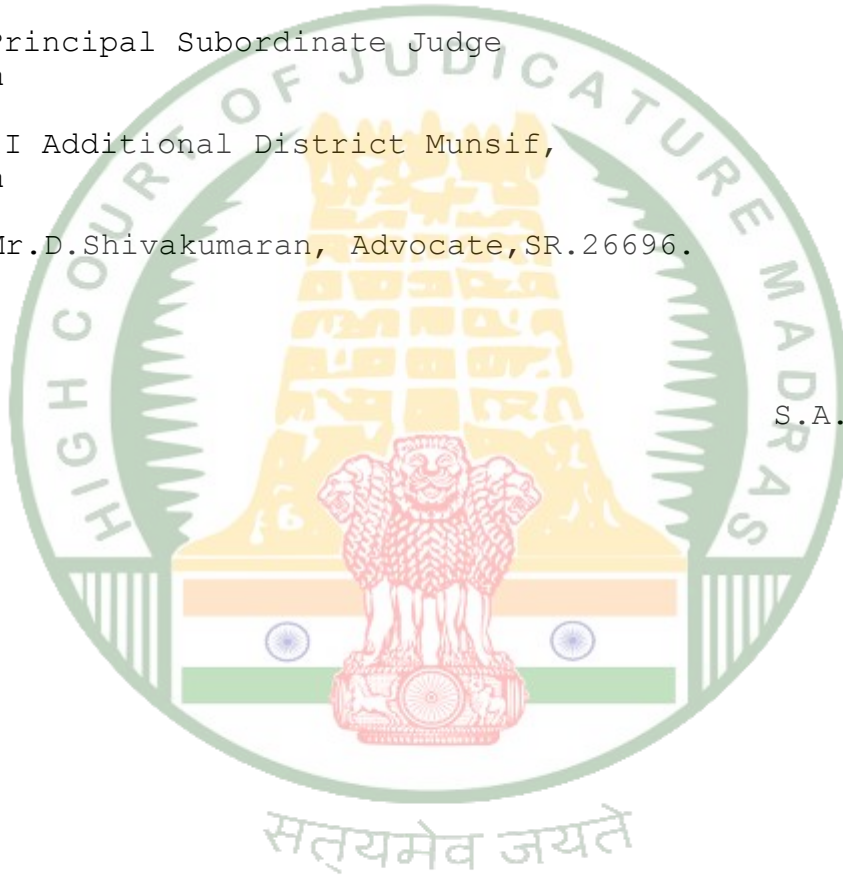
Sub Assistant Registrar

To

1. The Principal Subordinate Judge
Salem
 2. The II Additional District Munsif,
Salem
- +1 cc to Mr.D.Shivakumaran, Advocate,SR.26696.

Kgk(co)
krd 30/6

Judgment in
S.A. No. 617 of 2009



WEB COPY