

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.06.2015

CORAM

The Hon'ble TMT. JUSTICE PUSHPA SATHYANARAYANA

Second Appeal No. 160 of 2015

and

M.P. No. 1 of 2015

Janardhanam

... Appellant/2nd Defendant

vs.

1.Sathyannarayanan
2.Sundaravadivelu
3.Gopu
4.Radha Bai
5.Rukumani
6.Chandra

... Respondents/Plaintiff/R1
Defendants

Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 30.11.2009 in A.S. No. 6 of 2007 on the file of the Principal Subordinate Judge, Tindivanam, confirming the judgment and decree dated 03.8.2006 made in O.S. No. 115 of 2004 on the file of the Additional District Munsif, Tindivanam.

For Appellant : Mr. N. Gomathi

For R 1 : Mr. R. Sunilkumar

JUDGMENT

सत्यमेव जयते

The second defendant in a suit for partition, is the appellant in the instant Second Appeal challenging the concurrent finding of the Courts below.

2. The auction purchaser in O.S. No. 685 of 1964 on the file of the Principal District Munsif, Tindivanam, has filed suit O.S. No. 115 of 2004 seeking to pass preliminary decree for partition of 1/7th share in the suit property.

3. From the materials available on record, it is seen that, earlier, suit O.S. No. 685 of 1964 was filed by one Narasimman, brother of the plaintiff in the present round of litigation, viz., O.S. No. 115 of 2004, on the file of the Principal District Munsif, Tindivanam, for recovery of a sum of Rs.705.24. The said suit was decreed on 04.01.1965 and the decree holder attached and brought 1/7th share of the suit property of the judgment debtor, viz., Sundaravadivel, the first defendant in the present suit O.S. No. 115 of 2004, for sale in the court auction on 01.02.1984 in which the plaintiff in the present suit / the first respondent herein became the successful purchaser and the same was confirmed by the learned District Munsif, Gingee, on 14.8.1986. Based on the strength of the Court sale certificate dated 14.8.1986, the auction purchaser has filed O.S. No. 115 of 2004 for partition of 1/7th share of the suit property and to pass a final decree by appointing an Advocate Commissioner to divide the suit properties in to 7 equal share and allot him 1/7th share by metes and bounds.

4. Resisting the suit, the second defendant Janarthanam filed written statement denying the statement of the plaintiff that the suit O.S. No. 685 of 1964 was decreed in favour of the plaintiff's brother. He also denied the sale of 1/7th share of the plaintiff. It is further stated that since the first defendant Sundaravadivelu's whereabouts were not known for more than seven years, he is deemed to have been died during the sale proceedings as well as the decree and according to him, the plaintiff has obtained the decree against the dead person. According to the defendant, the suit is barred by limitation.

5. The trial Court / learned Additional District Munsif, Tindivanam, on the basis of the above pleadings, proceeded with the trial of the suit. The plaintiff examined himself as P.W.1 besides examining one Narasimman as P.W.2 to P.W.4 and marked 6 documents, viz., Exs. A.1 to A.6. To nullify the evidence adduced on behalf of the plaintiff, the second defendant examined himself as D.W.1 besides examining four more witnesses as D.W. 2 to D.W.5 and marked Exs. B.1 to B.6.

6. The learned trial Judge, appreciating the pleadings as well as scanning the materials, found that the plaintiff has proved that he is entitled for partition of 1/7th share in the suit property and accordingly, decreed the suit as prayed for by judgment and decree dated 03.8.2006. Aggrieved by the same, the second defendant preferred appeal being A.S. No. 6 of 2007 and the Lower Appellate Court / learned Principal Subordinate Judge, Tindivanam, vide

judgment and decree dated 30.11.2009, dismissed the appeal confirming the judgment and decree of the trial Court. Challenging the concurrent finding of the Courts below, the second defendant has come up with the instant Second Appeal.

7. Heard Ms. N. Gomathi, learned counsel appearing for the appellant / second defendant and Mr. R. Sunilkumar, learned counsel for the first respondent / plaintiff and perused the records.

8. Now, the point to be decided in this Second Appeal is whether the concurrent finding of the Courts below is vitiated.

9. Assailing the very auction sale proceedings, learned counsel for the appellant / second defendant, at the outset, contended that the suit filed against the dead person, viz., first defendant Sundaravadivelu, is not maintainable. The second contention raised by him is that suit has to be rejected as the same is barred by law. Lastly, he contended that the decree passed in O.S. No. 685 of 1964 is not binding on defendants 2 to 6 as they were not parties to the said suit. On these grounds, he sought for the interference of this Court.

10. It is not disputed that Narasimman, who filed suit O.S. No. 685 of 1964 for recovery of money, was none other than the brother of the plaintiff in the present round of litigation / first respondent herein. Originally, the suit properties belonged to one Appavu Pillai, the father of the appellant and respondents 2 to 5 herein. It is also admitted that the plaintiff / first respondent herein purchased the property which belongs to the father of the defendants in which the first defendant had 1/7th share in the Court auction held in the earlier round of litigation. A perusal of the materials would further show that one Padmavathy, the wife of the first defendant also filed application in E.A. No. 602 of 1984 under Order I Rule 90 CPC and the same was dismissed on 21.8.1984. Challenging the same, she filed C.M.A. Nos. 34 of 1984 and 10 of 1986 before the Sub-Court, Tindivanam and the same were allowed on 13.01.1988. Hence, the plaintiff preferred C.R.P. No. 147 of 1989 before this Court and the same was allowed on 04.10.1994 in his favour setting aside the judgment passed in E.A. No. 602 of 1984. As such, the 1/7th share of the plaintiff was confirmed. Since he has purchased the undivided share of the family property, he filed suit O.S. No. 115 of 2004 for partition.

11. As far as the first contention raised by the learned counsel for the appellant that the suit against dead person is not maintainable and hence, the decree passed in O.S. No. 685 of 1964

will not bind him, is concerned, the same is only to be rejected. In this regard, it is to be seen that both the Courts below have concurrently held that excepting the oral statement, no evidence has been produced to confirm the death of the first defendant Sundaravadivalu. On the other hand, the trial Court has recorded a finding that the first defendant Sundaravadivelu has got a three years old girl child and disbelieved the version of the appellant / second defendant. It is also pertinent to point out at this juncture that the appellant / second defendant, while contending on the one hand that the suit has been filed against a dead person, has himself impleaded the first defendant Sundaravadivelu as second respondent before the Lower Appellate Court as well as this Court. When this Court posed question on the same, no convincing reply was forthcoming. As such, it is clear that the first defendant Sundaravadivelu is alive and the Courts below have rightly rejected the said contention. In such circumstance, it cannot be said that the suit has been filed against the dead person.

12. As regards the second contention regarding limitation, the same cannot stand. From the materials available on record, it is seen that pursuant to the confirmation of Court auction sale by the learned District Munsif, Gingee, in O.S. No. 685 of 1964, the first respondent / plaintiff herein had taken symbolical delivery of 1/7th share in the suit property through the Court of District Munsif, Gingee, in E.A. No. 719 of 1987. It is further seen that as against the order passed in E.A. No. 602 of 1984 filed at the instance of the wife of the first defendant, the first respondent herein / plaintiff filed C.R.P. No. 147 of 1989 before this Court and the same was allowed in his favour by order dated 04.10.1994 and the present suit O.S. No. 115 of 2004 was filed on 13.12.2001. Therefore, this Court is of the opinion that the suit was filed before 12 years and as such, the question of limitation does not arise.

13. The last point raised by the learned counsel for the appellant / second defendant is that since the defendants 2 to 6 were not parties to the suit O.S. No. 685 of 1964, the decree passed therein will not bind them. It is an admitted fact that the first respondent / plaintiff purchased only 1/7th share of the first defendant in the court auction sale. Even as per the admission of the appellant / second defendant, the decree in the earlier round of litigation in O.S. No. 685 of 1964, has been passed against the first defendant alone. Therefore, this Court is of the opinion that the other defendants need not be arrayed as parties to the suit and the contention of the learned counsel for the appellant in that line, cannot be countenanced.

14. In the light of the foregoing discussion, this Court is of the considered opinion that the appellant / second defendant had not come to Court with clean hands as he had taken false and contradictory pleas and as such, the contentions of the learned counsel for the appellant cannot be accepted. In that view of the matter, the first respondent / plaintiff is entitled to the relief of partition of 1/7th share in the suit property as claimed in the suit and resultantly, the appeal fails and the decree granted in favour of the plaintiff, requires no interference.

In fine, the Second Appeal fails and stands dismissed. Consequently, the judgment and decree dated 30.11.2009 passed by the Principal Subordinate Judge, Tindivanam, in A.S. No. 6 of 2007 confirming the judgment and decree dated 03.8.2006 passed by the Additional District Munsif, Tindivanam, in O.S. No. 115 of 2004, are affirmed. Having regard to the facts and circumstances of the case, the parties are directed to suffer their respective costs. Connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

gri

To

1. The Principal Subordinate Judge
Dindivanam
2. The Additional District Munsif,
Tindivanam
3. The Record Keeper
V.R. Section
High Court, Madras.

+1cc to Mr.D.Rajagopal, Advocate, S.R.No.27091
+1cc to M/s.R.Sunil Kumar, Advocate, S.R.No.27643

S.A. No. 160 of 2015

TEJ(CO)
CA(15/07/2015)