

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.11.2016

PRONOUNCED ON : 05.12.2016

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.351 of 2010 and
M.P.No.1 of 2010

1.Chinnapillai @ Unnamalai
2.Ammasi @ Amsavalli

...Appellants

Vs

1.Periyasamy (Deceased)
2.Perumal
3.Kaliamoorthy
4.Pattammal
5.Mahalingam

(R5 brought on record as
LRS of the deceased R1
Vide order of this Court
dated 21/11/2016 made
in CMP 11225/2016)

... Respondents

Prayer:- Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree dated 30.07.2009 in A.S.No.70 of 2008 on the file of the learned Principal Subordinate Court, Villupuram confirming the judgment and decree dated 22.10.2007 in O.S.No.128 of 2005 on the file of the learned I Additional District Munsif, Tirukoilur.

For Appellants : Mr.V.R.Kamalanathan

For R.1 : Died

For RR.2 & 4 : Mr.V.Jayaprakash Narayanan

For RR.3 & 5 : Not Ready in notice.

JUDGMENT

The plaintiffs are the appellants in this Second Appeal. Having lost before both the Courts, this Second Appeal is directed against the concurrent findings of the Courts below.

2.The first plaintiff is the wife of one Mr.Balakrishnan. The second plaintiff is the daughter of first plaintiff and Mr.Balakrishnan. The first defendant, Mr.Periyasamy is the brother of Mr.Balakrishnan. Defendants 2 and 3 are the sons of first defendant, the fourth defendant is the widow of Mr.Nadesan, who is another brother of Mr.Balakrishnan.

3.The case of the appellants/plaintiffs is one Mr.Mottaiyan Gounder had three sons by name Mr.Periyasami, Mr.Nadesan and Mr.Balakrishnan. About 40 years prior to the suit, the sons of Mr.Mottaiyan Gounder divided their ancestral properties among themselves and they enjoying it separately. Five items of suit schedule properties and few other properties were allotted to Mr.Balakrishnan. After alienating some of the properties allotted to him, Mr.Balakrishnan died leaving behind his wife and daughter who are the plaintiffs in the suit. Taking advantage of their helplessness, the defendants have trespassed into the 3rd item of 'B' schedule property and had put up construction on the same. Hence, the suit for declaration of title; permanent injunction in respect of item Nos.1,2,4 and 5; declaration and mandatory injunction to remove the superstructure put up by the defendants; delivery of vacant possession of suit item No.3 and damages for forcible trespass and occupation was filed by the plaintiffs.

4.In the written statement filed by the defendants, they admit the claim of the plaintiffs in respect of suit 'B' schedule items 1,2 and 4. As far as items 3 and 5 of suit 'B' schedule properties are concerned, the plaintiffs are not owners, as claimed in the suit. They are entitle for 1/3 share alone as legal heirs of late Mr.Balakrishnan. All the three sons of Mr.Mottaiyan Gounder have each 1/3rd share in the Item Nos.3 and 5 item of 'B' schedule properties. In 3rd item of 'B' schedule property, the first defendant has purchased 1/3rd share of Mr.Nadesan from his widow - the fourth defendant and had put up construction in 2/3rd share and living in it, for a long time. They have not trespassed into the plaintiff's portion in 3rd item property and there is no necessity for them to trespass into plaintiff's land.

5.Based on these pleadings, the trial Court framed as many as 9 issues and examined witnesses. Considering the documentary evidences viz., Exs.A-1 to A-28, Exs.B -1 to B-11, Exs.C-1 and C-2, along with the ocular evidence of P-Ws.1 to 3 and DWs- 1 to 3, the trial Court granted the declaratory relief and injunction in respect of items 1,2 and 4. In so far as item 3 is concerned, the trial Court held that Ex A-1 - patta carries the name of the second plaintiff along with one Mrs.Ammasai. The same has been sub-divided into S.No.374/16A and 374/16 B. While the portion of 3rd item of property in S.No.74/16B proved to be in

possession and enjoyment of the defendants, the plaintiffs are not entitled for declaration and other reliefs, in respect of 3rd item of property. Regarding 5th item property, the trial Court held that there is no evidence placed by the plaintiffs that they wholly own that property.

6. Aggrieved by the disallowed portion, the appellants/plaintiffs preferred the First Appeal in A.S.No.70/2008 before the Sub-ordinate Court, Villupuram. The First Appellate Court confirmed the judgment and decree of the trial court and dismissed the appeal. Aggrieved by the said dismissal of First Appeal, the appellants/ plaintiffs are before this Court with this Second Appeal.

7. This Court, at the time of admission of this Second Appeal, formulated the following substantial questions of law:-

"1. Whether the courts below failed to consider the legal implication of the admission made by the respondents/ defendants that items 1, 2 and 4 of the suit 'B' schedule properties absolutely belong to the appellants/ plaintiffs and they are in possession and enjoyment of the same, while considering the plea of prior partition among the sons of Mookkaiya Gounder raised by the appellants/ plaintiffs in respect of the properties left by the common ancestor Mookkaiya Gounder ?

2. Whether the Courts below erroneously relied on the inclusion of the names of respondents 1 to 4 in the patta for item No. 3, which was made after the filing of the suit to non-suit the plaintiffs for the reliefs sought in the suit ?

3. Whether the finding of the courts below that the properties described as items 3 and 5 of plaint 'B' schedule are common properties belonging to the appellants and the respondents in the light of the fact that the defendants have executed several documents purporting to convey property within defined boundaries, shall amount to a perverse finding ?"

8. The learned counsel for the appellants submitted that, the patta - Ex.A-1 stands in the name of the second plaintiff. Whereas, the documents which are produced by the defendants are

subsequent to the filing of suit. In spite of that, the Courts below have erroneously accepted and relied on those tax receipts to reject the claim of the plaintiffs in respect of item Nos. 3 and 5 of the 'B' schedule properties. Having accepted the oral partition in respect of item Nos.1,2 and 4, the First Appellate Court ought to have allowed the suit in toto and ought not to have disallowed the reliefs sought in respect of item Nos.3 and 5 of the 'B' schedule properties.

9.Further, the learned counsel for the appellants submitted that, there was no superstructure in 3rd item of 'B' schedule properties while presenting the suit. Only after filing of the suit, the defendants trespassed into the 3rd item of 'B' schedule property and put up superstructure. The trial Court has misread the Advocate Commissioner's report to arrive at the wrong conclusion that the 3rd item of property has been subdivided into two portions long back and the defendants 2 and 3 have put up superstructure on the said land and enjoying it.

10.Per contra, the learned counsel for the respondents 2 and 4 submitted that, the Courts below have arrived at the right conclusion after proper appreciation of evidences. The defendants are in their respective portions in item Nos.3 and 5 of the 'B' schedule properties for a long period and had put up constructions in their portion and enjoying it. The Advocate Commissioner's report and sketch of the property marked as Exs.C-1 and C-2 supports this fact. While so, when there is no error or perversity in the findings of the Courts below, the substantial questions of law formulated in this Second Appeal is not sustainable.

11.This Court finds force in the submissions of the respondents 2 and 4. The Courts below have rightly appreciated the Ex.A-1 patta which are in two parts. As far as item Nos.1,2 and 4 are concerned, it is in the name of the plaintiffs and the defendants have no objection in granting the relief sought for in respect of these properties. In respect of 3rd item of 'B' schedule property namely the natham land in S.No.374/16, which is later sub divided into S.Nos.374/16A and 374/16B in the year 1994 and patta jointly stands in the name of Ms.Amsa and Mrs.Ammasai. Therefore, no error or perversity could be seen in the finding of the Courts below.

12.In respect of 3rd and 5th items of the 'B' schedule properties, the defendants concedes 1/3rd share to the plaintiffs who are the legal heirs of late Mr.Balakrishnan. They have resisted the suit only because the plaintiffs have claimed title over these two items in entirety and mandatory injunction to remove the superstructure put up by them in their 2/3rd share in the 3rd item of the property. The trial Court has framed issues

Nos.3 and 4 to find out whether the defendants are entitled for 2/3rd share in 3rd item of property and whether the plaintiffs hold 1/3rd share in 5th item of property and has rightly concluded that the suit is not for partition but for declaration and permanent injunction. No court fees paid for the relief of partition. Therefore, it is suffice to hold that the plaintiffs are not entitled for declaration in respect of items 3 and 5 of the 'B' schedule properties in entirety.

13.This Court for the aforesaid reasons, find no substantial questions of law to be addressed in this Second Appeal. However, while dismissing the appeal, it is appropriate in the interest of justice to make it clear that there is no legal impediment for the plaintiffs to seek partition, if they so desire, in respect of items 3 and 5 of the 'B' schedule properties.

14.In the result, the Second Appeal is dismissed and the judgment and decree of the First Appellate Court is confirmed. No order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To

1.The I Additional District Munsif,
Tirukoilur.

2.The Principal Subordinate Court,
Villupuram.

+1cc to Mr.V.Jayaprakash Narayanan, Advocate Sr.71923

+1cc to Mr.V.R.Kamalanathan, Advocate Sr.72132

Second Appeal No.351 of 2010

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srg 06/01/2017