

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.04.2016

CORAM

THE HONOURABLE MR. JUSTICE N.KIRUBAKARAN

S.A.No.829 of 2009
and

M.P.Nos.1 of 2009 and 1 of 2010

1.Ganesan
2.Durai
3.Balamurugan

... Appellants/Defendants

Vs

Alamelu Ammal

... Respondent/Plaintiff

Prayer: Second appeal filed under Section 100 of C.P.C. against the Judgment and decree of the Additional Subordinate Court, Salem passed in A.S.No.232 of 2007 dated 05.09.2008, confirming the judgment and decree of the Principal District Munsif Court, Salem passed in O.S.No.761 of 2006 dated 10.09.2007.

For Appellants : Mr.T.Seshian

For Respondent : Mr.K.Selvaraj

J U D G M E N T

The defendants are the appellants herein. This second appeal has been filed against the decree and Judgment passed by the appellate Court confirming the decree of partition granted in favour of the respondent herein in the suit filed by the respondent against the appellants.

2. The facts of the case are as follows:-

The mother of the plaintiff's viz., Palaniammal and the defendants are the sisters born to one Periyathambi Gounder and Chinnammal. The said Periyathambi Gounder and Chinnammal purchased the suit properties by virtue of sale deed dated 25.05.1963 and 30.05.1965 respectively. The said Chinnammal executed a registered sale deed dated 21.05.1993 in favour of the plaintiff with regard to the first item of the suit property. Subsequently, the said Periyathambi Gounder died on 26.10.1992 and Chinnammal died on 10.05.1995. After the demise of parents, the respondent herein filed a suit in O.S.No.1536 of 2004 before the II Additional District Munsif Court, Salem for the relief of permanent injunction in respect

of the first item of the property and for the relief of partition in respect of second item of the suit properties. The above suit was dismissed and thereafter, the respondent herein preferred an appeal in A.S.No.132 of 2005 before the Additional Sub Court, Salem which confirmed the Decree and Judgement of the trial court. The appellate court directed the respondent herein to file a fresh suit for partition in respect of entire property. Therefore, the respondent filed another suit in O.S.No.761 of 2006 praying for 50% shares in both the properties.

3. The appellants took up plea that they are absolutely in possession and the respondent was ousted from the first item of the suit property and he is estopped from claiming any relief and plea of limitation was also taken.

4. During the Trial, plaintiff was examined himself as P.W.1 and her witness was examined as P.W.2 ; first defendant was examined himself as D.W.1 and Exs.A1 and A2 and Exs.B1 to B25 documents were marked on both sides.

5. The Trial Court after trial held that the respondent was residing in a small portion of the suit property and any possession of the co-sharer is deemed to be on behalf of the other co-sharer also and negatived the plea of limitation. Moreover, details regarding ouster, namely from which date onwards, the respondent has been ousted from the property were not given and therefore, the plea of ouster was also rejected.

6. With regard to plea of partition, the trial court based on Ex.A1- certified copy of Judgment in A.S.No.132 of 2005 dated 24.03.2006 and taking into consideration, the said Palaniammal, who is the mother of the appellants and the respondent are sisters and the legal heirs of Periyathambi Gounder and Chinnammal, they are entitled to half share each in both properties.

7. As far as the Plea of estoppel was rejected based on the right given by the appellate court in A.S.No.132 of 2005 viz., the previous proceedings taken by the respondent wherein, the appellate court directed the respondent to file a suit for partition and granted decree of partition as prayed for. The said findings of the trial Court were confirmed and the appeal filed by the appellants was dismissed. Aggrieved against the dismissal of the appeal, the present second appeal has been preferred by the defendants.

8. At the time of admission, the following substantial questions of law were framed:

1. Whether in law the courts below are right in overlooking that the suit is hit by res judicata?

2. Whether in law the courts below are right in overlooking that the respondent had been ousted from the property?

9. As far as res judicata is concerned, a perusal of Ex.A.1- certified copy of Judgment in A.S.No.132 of 2005 filed by the respondent earlier would go to show that a direction was given to the respondent to file a fresh suit for partition of the entire property. The said Decree and Judgment of the appellate court in A.S.No.132 of 2005 had not been appealed against or set aside. When the liberty was given to the respondent to file fresh suit, there is no question of estoppel and therefore, the first question of law is answered against the appellants.

10. With regard to second question of law is concerned, as rightly pointed out by the trial court, the appellants have not pleaded the date of ouster of the respondent and the period of ouster. Moreover, there is neither pleading nor evidence in this regard. Therefore, the question of ouster was rightly negatived by the trial court as well as the appellate court and it does not call for any interference by this court. Hence the second question of law is also answered against the appellants.

11. In the result, the second appeal is dismissed. The judgment and decree passed by the appellate court is confirmed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar (CS VI)

//True Copy//

Sub Assistant Registrar

kkd

To

1. The Additional Subordinate Court,
Salem.
2. The Principal District Munsif Court,
Salem.

+1cc to Mr.K.Selvaraj, Advocate, S.R.No.24270
+1cc to Mr.K.Meenal, Advocate, S.R.No.24640

S.A.No.829 of 2009 and
M.P.Nos.1 of 2009 and 1 of 2010

UG (CO)
CA/27/07/2016