

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.10.2016

PRONOUNCED ON : 26.10.2016

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No. 148 of 2011

and

M.P.No.1 of 2011

1.P.Ramalingam

2.P.Perumal

...Appellants/Plaintiff

Vs.

1.K.Subramani

2.K.Kandasamy

...Respondents/ Defendants 2&3

Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and Decree dated 21.06.2010 made in A.S.No.103 of 2009 on the file of the II Additional Subordinate Judge, Salem, reversing the Judgment and Decree dated 09.02.2009 made in O.S.No.1367 of 2007 on the file of the Principal District Munsiff, Salem.

For Appellants : Mr.S.Siva Shanmugam

For 1st Respondents : Mr.R.Ezilarasan

JUDGMENT

The plaintiffs have come forward with this second appeal impugning the judgment and decree dated 21.06.2010, made in A.S.No.103 of 2009 on the file of the II Additional Subordinate Judge, Salem, reversing the judgement and decree dated 09.02.2009 made in O.S.No.1367 of 2007 on the file of the Principal District Munsif, Salem.

2. The suit has been laid for partition.

3. Shorn of unnecessary details, the case of the plaintiffs is as follows:

The suit property originally belonged to Karuman @ Anai Gounder and he was having two daughters one, Periyammal and the other, Chinnathayee. He died intestate and the suit property was inherited by his above said two daughters. Thus, according to the plaintiffs, the above said two daughters are entitled to equal share in the suit property. The plaintiffs have purchased

Periyammal's 1/2 share in the suit property viz., 1.13 ½ acres and the other half share belongs to her sister Chinnathayee. According to the plaintiffs, the property purchased by them is situated on the western side and it has not been divided from the share of Chinnathayee by metes and bounds equally and as there is no clear demarcation dividing their property and the property of Chinnathayee in the suit survey number, they have been necessitated to file the suit for partition by metes and bounds.

4. The averments contained in the written statement filed by the defendants are briefly stated as follows:

The fact that the plaintiff had purchased the half share of Periyammal in the suit survey number is admitted. The plaintiffs' vendor Periyammal and the first defendant Chinnathayee had orally divided the property amongst themselves and after the oral partition, Periyammal had sold her 1/2 share to the plaintiffs and inasmuch as the oral partition has been effected, there is no need to go for another partition of the suit property again by metes and bounds and hence, according to the defendants, the suit is liable to be dismissed.

5. In support of the plaintiffs' case, PW1 has been examined and Exs.A1 and 2 were marked. On the side of the defendants, DWs1 & 2 have been examined and no document was marked.

6. On a consideration of the oral and documentary evidence adduced by the parties concerned, the trial Court was pleased to decree the suit as prayed for without costs, as against which, the third defendant preferred the first appeal and the first appellate Court was pleased to reverse the judgment and decree of the trial Court and consequently, dismissed the suit of the plaintiffs. The present second appeal has been laid, challenging the Judgment and Decree of the first appellate Court.

7. The Second Appeal was admitted on the following substantial questions of law:

(i). Whether the Lower Appellate Court has considered the oral and documentary evidence in its proper perspective?

(ii). Whether the Lower Appellate Court had erred in not properly construing the plaintiffs/appellants evidence in its proper perspective, when admittedly there was only an oral partition, but in actual the property is enjoyed by both the owners jointly?

8. The short point that arises for consideration in this

appeal is whether the plaintiffs are entitled to claim partition of the suit property by metes and bounds as put forth in the plaint. It is not disputed that the suit property equally belonged to Periyammal and Chinnathayee and according to the plaintiffs, they have purchased Periyammal's half share in the suit property and the remaining half share belongs to Chinnathayee. Chinnathayee is the first defendant. According to the plaintiffs, the patta in respect of the property contained in the suit survey, still remains joint and the property has not been divided by metes and bounds demarcating the respective shares, to which, the parties are entitled to and hence, they have been necessitated to file the suit for partition.

9. The defendants have agreed that the plaintiffs have purchased the half share belonging to Periyammal. According to them, the oral partition between Periyammal and Chinnathayee had already been effected and after oral partition, Periyammal sold her half share and therefore, there is no need to effect another partition by metes and bounds in respect of the suit survey as alleged by the plaintiffs. From Ex.A1, Patta, it could be seen that the patta in respect of the suit survey, where the property is situated remains joint. The suit property admittedly has not been divided by metes and bounds. Even according to the defendants, only oral partition has been effected between Periyammal and Chinnathayee. Therefore, it could be seen that only after effecting partition by metes and bounds by appointing an Advocate Commissioner, the property could be equally divided and therefore, the plaintiffs have laid the suit.

10. In the light of the admitted position that the plaintiffs have purchased the half share belonging to Periyammal and the other half share belongs to the other sister Chinnathayee and when it is also admitted that the suit property has not been divided by metes and bounds and considering the evidence of DW1, as found by the trial Court, that the patta in respect of the suit property remains joint and that the suit property has not been divided by metes and bounds through surveyor, as rightly argued by the plaintiffs' counsel, in order to put at rest the dispute between the parties concerned and also any dispute that may arise, in future, in respect of the possession and enjoyment of the suit property, as well as in the interest of justice, I am of the considered opinion that the property should be divided by metes and bounds. It is also found from the evidence adduced by the parties concerned in this matter that the suit property has not been divided by measurement through a proper surveyor.

In the light of the above, the judgement and Decree of the first appellate court are set aside and the Jugment and decree

of the trial Court are restored. Accordingly, the second appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Asst.Registrar (CS II)

/true copy/

Sub Asst. Registrar

To

1. The II Additional Subordinate Judge,
Salem.

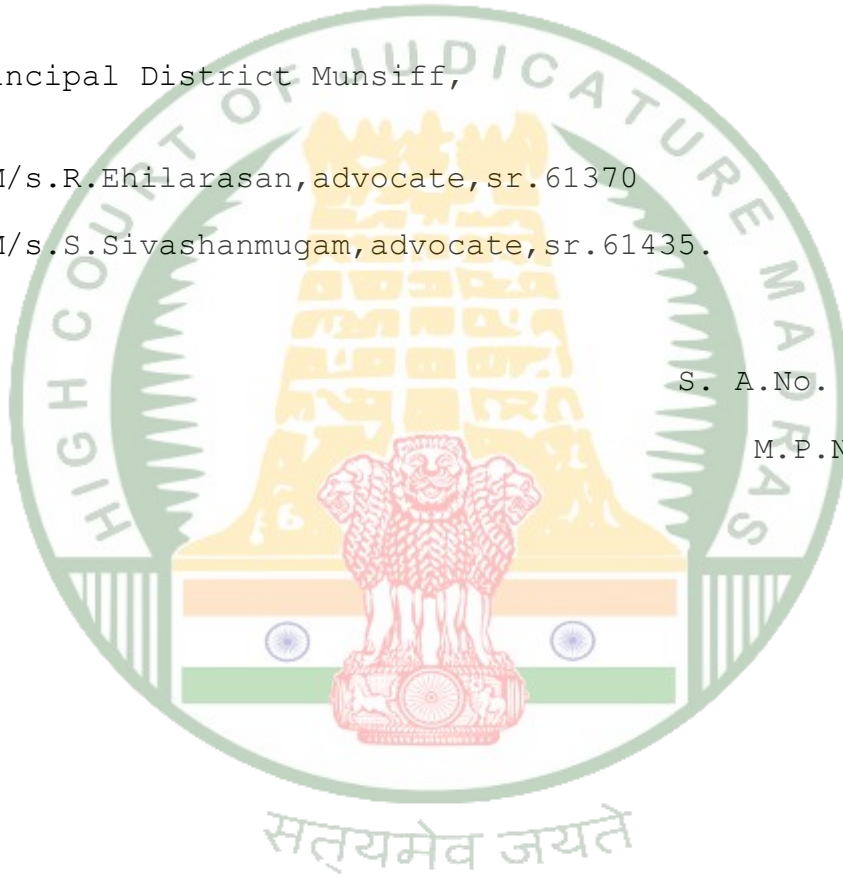
2. The Principal District Munsiff,
Salem.

+1 cc to M/s.R.Ehilarasan,advocate,sr.61370

+1 cc to M/s.S.Sivashanmugam,advocate,sr.61435.

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