

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.11.2016

PRONOUNCED ON:15.12.2016

CORAM :

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.428 of 2011

&

MP.No.1 of 2011

1.Meganathan
2.Thirupathi
3.Govindaraji
4.Manikandan

... Appellants/Defendents

Vs.

1.Amudha
2.Ambika

... Respondents/Plaintiff

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 22.09.2009 passed in A.S.No.53 of 2009 on the file of the Subordinate Court, Vaniyambadi confirming the judgment and decree dated 28.11.2008 passed in O.S.No.21 of 2000 on the file of the District Munsif Court, Vaniyambadi.

For Appellants : Mr.A.K.Venkatesan

For Respondents : Mr.D.Balachandran

J U D G M E N T
सत्यमेव जयते

Challenge in this Second Appeal is made by the defendants against the Judgment and decree dated 22.09.2009 passed in A.S.No.53 of 2009 on the file of the Subordinate Court, Vaniyambadi confirming the judgment and decree dated 28.11.2008 passed in O.S.No.21 of 2000 on the file of the District Munsif Court, Vaniyambadi.

2.Suit has been laid by the plaintiffs for declaration and permanent injunction.

3.The first plaintiff is the wife and the second plaintiff

is the daughter of late. Marimuthu. The defendants 2 to 4 are the sons of the first defendant Meganathan. The late. Marimuthu and the first defendant Meganathan are the sons of Ponnusamy Gounder. Now according to the plaintiffs, the suit property is the joint family property of Ponnusamy Gounder and his two sons, Marimuthu and Meganathan and it is also stated that out of the income derived from the sale proceeds of the ancestral property, the suit property has been purchased by Ponnusamy Gounder and enjoying alongwith his sons as joint family property. Further, according to the plaintiffs, Ponnusamy Gounder and his two sons and the first plaintiff effected the oral partition in respect of the joint family properties belonging to the family and under the same, the suit property was allotted to the plaintiffs and thus the plaintiffs are in the exclusive possession and enjoyment of the suit property.

4.It is the further case of the plaintiffs that in order to avoid the family dispute, after the death of Marimuthu, the division of joint family properties under the oral partition was recorded in the Memorandum of Agreement dated 10.07.1998, in which Ponnusamy Gounder, the first defendant Meganathan and the first plaintiff have signed and it is therefore stated that also based upon the Memorandum of Agreement above mentioned, the oral partition pleaded by the plaintiffs could be evident and thus according to the plaintiffs, the suit property is the property owned and enjoyed by the plaintiffs. The Memorandum of Agreement dated 10.07.1998 has been marked as Ex.A4.

5.To establish the authenticity of Ex.A4, the plaintiffs have examined one of the attestors to the same Shanmugam as PW2. The Courts below have analysed the evidence of PW2 and found that his evidence is satisfactory and convincing and reliable and therefore based upon the evidence of the first plaintiff, examined as PW1 and PW2 held that the oral partition, subsequently, reduced into the Memorandum of Agreement under Ex.A4 have been established by the plaintiffs and pursuant to the same the suit property has been allotted to the plaintiffs. However, the defendants had projected the Will dated 12.05.1995, alleged to have been executed by Ponnusamy Gounder in respect of the suit property bequeathing to the first defendant's sons namely the defendants 2 to 4. Therefore, according to the defendants, in as much as Ponnusamy Gounder had bequeathed the suit property to his grandsons, the plaintiffs would not be entitled to claim any right over the suit property. The plaintiffs have disputed the validity of the Will projected by the defendants.

6.However, the defendants did not evince any interest to establish the validity of the Will and it could be seen that after the evidence of the plaintiffs' side was closed, when the

matter stood adjourned for the defendants' side evidence and DW1 was examined on the side of the defendants and when his cross examination was midway, it could be seen that the defendants had remained ex-parte and the trial Court further proceeded with the conduct of the suit in as much as the Court appointed guardian to the minor D4 was prosecuting the matter and therefore proceeded with the trial and pronounced the judgment on merits. In as much as the defendants have failed to establish the validity of the Will in the manner known to law, it could be seen that the Courts below have disbelieved the Will and upheld the plea of partition putforth by the plaintiffs.

7. Further, the Courts below also found that the suit property had been purchased by Ponnusamy Gounder, out of the sale proceeds derived by him by the sale of his properties allotted to him under the partition to one Marimuthu and others on 21.11.1962 and the copy of the same has been marked as Ex.A2. The registration copy of the Partition Deed effected between Ponnusamy Gounder and Others had been marked as Ex.A1. Therefore, the Courts below have held that the suit property is only the joint family property.

8. Now the defendants have projected the Will dated 12.05.1995. The Memorandum of Agreement is dated 10.07.1998. Therefore the Courts below have found that in view of the arrangement effected by Ponnusamy Gounder under Ex.A4, the Memorandum of Agreement allotting the suit property to the plaintiffs, the Will executed by him on 12.05.1995 even if it be true is legally unsustainable and unenforceable. In any event, as found earlier, the defendants have not established the validity of the Will in the manner known to law and therefore the defendants cannot claim any right over the suit property under the Will in question.

9. The only point i.e., urged by the learned counsel for the appellants is that in as much as the defendants had remained ex-parte, the Court should not have proceeded with the suit and disposed of the same on merits and therefore the judgment and decree of the Courts below have to be set aside and the matter be remitted back to the Courts below for fresh consideration.

10. However, the above contention does not merit acceptance. As rightly argued by the learned counsel for the respondents, it could be seen that the as against the judgment of the trial Court, the defendants have preferred the regular appeal and contested the regular first Appeal on merits. However, not succeeding in the first appeal, there after they have preferred the present second appeal. Therefore to contend that the trial Court should not have proceeded with the suit on setting the defendants ex-parte cannot be accepted in any manner. As found

earlier, the Court guardian appointed for D4 minor had been prosecuting the suit. Therefore it could be seen that the trial Court is justified in proceeding with the suit and concluding the same on merits with the evidence available on record.

11.Barring the above aspects, nothing has been projected to sustain the Second Appeal. It could therefore be seen that the Second Appeal has no involvement of any substantial question of law. Resultantly, the Second Appeal fails and is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

sd/

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The Subordinate Judge,
Vaniyambadi

2.The District Munsif Court,
Vaniyambadi

+1cc to Mr.A.K.Venkatesan Advocate, SR.No.73067
+1cc to Mr.D.Balachandran Advocate, SR.No.73228

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