

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.11.2016

PRONOUNCED ON : 01.12.2016

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.474 of 2011

and

M.P.No.1 of 2011

Seethammal

...
Vs.

Appellant

1.Mathammal

2.Vasantha

3.Minor Moorthy

4.Minor Malarkodi

Minors are rep.by NF and mother

2nd respondent Vasantha

Pachiammal (Died) (Lr's already on record)

Mathappan (Died) (Lr's already on record)

5.Thimmaraj

6.Muniraj

7.Thekkan @ Devaraj

8.Ellappa

9.Rajammal

10.Susila

...

Respondents

(Respondents 5 to 10 remained exparte
in both O.S and in A.S.)

Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and decree of the Court of Subordinate Judge, Dharmapuri in A.S.No.44 of 2008 dated 19.11.2010 in reversing the well considered judgment in O.S.No.144 of 1996 on the file of the District Munsif Court, Palacode dated 04.04.2007.

For Appellant : Mrs.V.Srimathi

For Respondent : Mr.R.Selvakumar
No.I

JUDGMENT

The plaintiff in this second appeal has challenged the judgement and decree dated 19.11.2010 made in A.S.No.44 of 2008 on the file of the Subordinate Court, Dharmapuri, reversing the judgment and decree dated 04.04.2007 made in O.S.No.144 of 1996 on the file of the District Munsif Court, Palacode.

2. The suit has been laid by the plaintiff for declaration, permanent injunction and possession.

3. The second appeal has been admitted and the following substantial questions of law are formulated for consideration:

(i) Whether the lower appellate court is justified in dismissing the suit for declaration and permanent injunction where the first defendant has no title over the suit property after executing the settlement deed in favour of the plaintiff?

(ii) On the absence of any title

over the property, whether the first defendant was capable of alienating the property in favour of the eighth defendant?

4. The first defendant is the husband of the plaintiff. The plaintiff claims title to the suit "A" Schedule property based upon the settlement deed executed by her husband, the first defendant, in her favour on 15.02.1969 and the same has been marked as Ex.A1. According to the plaintiff's case, the defendants 2 to 5 are the sons of one Gandhi @ Munusamy. The 6th defendant is the wife of the second defendant and 7th defendant is the wife of the third defendant. It is also the case of the plaintiff that the first defendant had obtained the suit "A" Schedule property as his share by virtue of the partition deed dated 31.01.1966 effected amongst his family members.

5. Further, according to the plaintiff's case the suit "B" Schedule property forms part of the suit "A" Schedule property and it is stated that after the first defendant had settled the suit property in favour of the plaintiff under Ex.A1, the first defendant is not having any salable interest over the suit property or any portion thereof and therefore, even if the first defendant had executed any portion of the suit property or the suit property as such, in favour of the 8th defendant or

the other defendants, such alienations would not be valid and binding upon the plaintiff. Now, according to the plaintiff, the defendants took forcible possession of the "B" Schedule property and also making fervent attempts to disturb her possession and also attempting to trespass into the "A" schedule property, hence, she has been necessitated to lay the suit against the defendants for suitable reliefs.

6. The relationship between the parties is not disputed. The case of the defendants is that the plaintiff is not entitled to the "A" schedule property by virtue of the settlement deed dated 15.02.1969. It is stated that the first defendant did not gift the suit property in favour of the plaintiff and the settlement deed did not come into force and never acted upon and therefore, it is contended that the settlement deed Ex.A1 does not convey any title to the suit property in favour of the plaintiff. It is also stated that Ex.A1 settlement deed is a sham and nominal document and that the plaintiff has never been in possession and enjoyment of the suit property, pursuant to the above mentioned settlement deed. Further, the case of the defendants is that the first defendant continued to be the owner of the property allotted to him under the partition and the first defendant had alienated 1 acre of lands in survey No.27/3 and 1/3 common share in the Well under the sale deed dated 27.10.1969

in favour of the 8th defendant and pursuant to the above said sale, the 8th defendant has been in possession and enjoyment of the conveyed property and it is also stated that the 8th defendant has prescribed title to the same on account of her long possession and enjoyment of the same for more than the statutory period quite adverse to all others including the plaintiff. Further, their case is that the 9th defendant purchased 2.55 acres of land and 1/3 common share in the Well under the registered sale deed dated 16.09.1968 from Venkatasamy and also purchased common 1/3 share in the Well in survey No.27/3 from Gandhi @ Munusamy and the second defendant under the registered sale deed dated 09.09.1976. Therefore, it is stated that the plaintiff is not entitled to seek the reliefs sought for in the suit.

7. As regards the properties purchased by the 9th defendant from Venkatasamy, Gandhi @ Munusamy and the second defendant under the sale deeds dated 16.09.1968 and 09.09.1976 marked as Exs.B2 & 3, it could be seen that the properties covered in those sale deeds do not pertain to the suit property and therefore, it is unnecessary to dwell on the same for deciding the issues involved between the parties in the present litigation. Similarly, Exs.B4 to 7 also do not provide assistance to solve the issues arising between

the parties in the present suit.

8. The plaintiff claims title to the suit property under Ex.A1 and the same has been disputed and challenged by the defendants. It is not in dispute that the suit "A" schedule property has been allotted to the first defendant under the partition deed dated 31.01.1966. From the evidence adduced by the parties, it could be seen that the first defendant, Gandhi @ Munusamy and Venkatasamy are brothers and the sons of Naavitha Muniappan. It is also admitted that the above said three brothers effected partition of their family properties under the partition deed dated 31.01.1966 and by virtue of the same, the suit property has been allotted to the share of the first defendant. Therefore, it could be seen that as pleaded by the plaintiff, the suit property, particularly, the property described as "A" Schedule property has been allotted to the first defendant under the partition. The principal question that is to be answered in this appeal is whether the plaintiff has derived title the suit "A" schedule property under the settlement deed marked as Ex.A1. It is the case of the plaintiff that the entire "A" schedule property has been settled upon her by her husband under Ex.A1. The above plea of the plaintiff has been accepted by the trial Court. However, the first appellate court has disagreed with the said findings of the trial Court and thereby,

negatived the reliefs sought for by the plaintiff.

9. In the light of the above position, it has to be seen as to what is the property that has been settled upon the plaintiff under Ex.A1. It could be seen that as rightly found by the first appellate court, the first defendant has not settled the suit "A" schedule property, as such, in favour of the plaintiff under Ex.A1. On the other hand, it is seen that out of the total extent of 2.94 acres described in the suit "A" schedule property, the first defendant had only settled undivided 1 acre therein with $1/3^{\text{rd}}$ right in the common Well. Therefore, it could be seen that under Ex.A1, in the suit survey No.27/3, the first defendant has settled only an extent of common 1 acre out of 2.94 acres, to which, he is entitled to along with $1/3$ share in the common Well. Even in the property settled upon the plaintiff under Ex.A1, i.e. 1 acre has not been specifically described with boundaries. Therefore, it could be seen that the first defendant has not settled the entire extent of the property derived by him from the partition upon the plaintiff under Ex.A1. On a perusal of Ex.A1 along with statement sheet attached thereto, it could be seen that as rightly found by the first appellate court along with another house site property, the first defendant has settled only an extent of undivided 1 acre of land in 2.94 acres with $1/3$ share right in the

common Well under Ex.A1 in favour of the plaintiff and the value of the properties settled upon the plaintiff is mentioned as Rs.2500/-. i.e. the value of the 1 acre is stated to be Rs.1500/-, the value of the Well is stated to be Rs.500/- and the value of the house site property is stated to be Rs.500/-. In such circumstances, as rightly held by the first appellate court, when the plaintiff has been given only an extent of 1 acre, out of 2.94 acres, under Ex.A1 by the first defendant, her case that her husband, the first defendant is not entitled to alienate any portion of the suit property to others, as such, cannot be readily accepted.

10. It is the specific case of the defendants that the first defendant had alienated an extent of 1 acre of land in the suit survey number under the sale deed dated 27.10.1969, which has been marked as Ex.B1. Therefore, the argument put forth by the plaintiff's counsel that after the settlement deed Ex.A1, the first defendant has no saleable interest over the suit "A" schedule property as such cannot be accepted.

11. As adverted to earlier, the extent of 1 acre settled upon the plaintiff under Ex.A1 has not been demarcated with clear boundaries. In such circumstances, the plaintiff having come forward with the suit seeking the necessary reliefs, as rightly found by the first appellate

court, should have endeavoured to produce acceptable and reliable evidence to establish as to the nature and extent of the property convey to her under Ex.A1. The best person to throw light on the issue would be only her husband viz., the first defendant. However, it could be seen that the first defendant has conveniently remained ex parte in the suit. Further, it is not the case of the plaintiff that she is not having good terms with her husband viz., the first defendant. In such circumstances, if really the first defendant had settled any extent of the suit property in her favour under Ex.A1 and the same forms part of either the "A" Schedule property or the "B" schedule property as such, it is for the plaintiff to take steps to examine her husband to buttress her case. However, the first defendant has not been examined on behalf of the plaintiff nor any reason has been given for not examining the first defendant.

12. As found earlier, according to the defendants, the settlement deed Ex.A1 has not been acted upon and the plaintiff has not taken possession and enjoyment of the property in the suit survey number and never enjoyed the suit property at any point of time. To evidence that the settlement deed Ex.A1 has been acted upon and pursuant to the same, the plaintiff has taken possession and been enjoying of the suit property, no acceptable and reliable

evidence is forthcoming on the side of the plaintiff. To prove the settlement deed, the plaintiff has examined one of the attestors as PW2. As rightly found by the first appellate court, PW2 is unable to throw light as to whether the plaintiff had taken possession and been in enjoyment of the property conveyed to her under Ex.A1 or in enjoyment of the suit property pursuant to Ex.A1. It has been found that PW2 is not a resident of the suit village and he had never seen the suit property and that he does not know as to who is cultivating the suit property. Therefore, it could be seen that the evidence of PW2 is of no assistance to the plaintiff's case. The other witnesses examined on behalf of the plaintiff, PW3 did not choose to withstand the cross examination and remained absent. His piecemeal evidence was therefore not taken into consideration by the courts below. No exception could be taken to the same. The Kist receipts marked as Exs.A2 to 5 on the side of the plaintiff stand in the name of the first defendant.

13. As found earlier, the whole of the property obtained by the first defendant under the partition has not been settled upon the plaintiff under Ex.A1. Therefore, it could be seen that the first defendant has retained to himself further extent in the suit "A" schedule property, after settling the property in favour of the plaintiff

under Ex.A1. The position is that when the plaintiff is unable to clearly identify and demarcate the property that has been actually settled in her favour by the first defendant under Ex.A1 and when the plaintiff is also unable to establish that the property conveyed by the first defendant in favour of the 8th defendant under Ex.B1, is the property settled upon her by the first defendant under Ex.A1 and when the best person to throw light on the issue, being the first defendant, has remained ex parte and when the plaintiff has also not endeavoured to summon and examine her husband, the first defendant to sort out the issues, it could be seen that as rightly found by the first appellate court, the plaintiff has miserably failed to establish that the suit property particularly the suit "A" Schedule property had been settled upon her by her husband under Ex.A1. Equally, the plaintiff has also failed to establish that the property sold by the first defendant under Ex.B1 is the property that had been settled by him in her favour under Ex.A1.

14. The plaintiff having come forward with the suit seeking appropriate reliefs, as rightly put fourth, has to stand or fall on the strength of her own case. The plaintiff cannot be allowed to seek support for her case, the weakness of the defendants case. In such circumstances, when it has not been established by the plaintiff that

she has valid title or possession and enjoyment of either the suit "A" schedule property or the entitlement to recover possession of the suit "B" schedule property as such by tendering clear and acceptable evidence, no exception could be taken to the findings and conclusions of the first appellate court for negating the reliefs sought for by the plaintiff.

15. In such circumstances, the decision relied upon by the plaintiff's counsel reported in **79 LW page 459 (S.Thirupathi Pillai V.Ganthimathi Ammal and another)**, **XXI LW page 637 (Subbiah Moopanar Vs. Ponnammal and others)** and **100 LW page 750 (Bole Naidu V.N.Kothandarama Pillai and others)** as rightly argued by the defendant counsel would not be applicable to the facts and circumstances of the present case. Be that as it may, the principles of law outlined in the above decisions are taken into consideration and followed as applicable to the facts and circumstances of the case at hand.

In conclusion, the substantial questions of law formulated in this second appeal are answered against the appellant /plaintiff and in favour of the respondents. Resultantly, the second appeal fails and it is dismissed. No cost. Consequently, connected miscellaneous

petition is closed.

01.12.2016

Index : Yes/No
Internet: Yes/No
sms

To

1. The Subordinate Court,
Dharmapuri.
2. The District Munsif Court,
Palacode.

T.RAVINDRAN,J.

sms

Pre-delivery order in
S. A.No.474 of 2011
and
M.P.No.1 of 2011

01.12.2016