



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 27.06.2016

CORAM:

THE HONOURABLE Ms.JUSTICE R.MALA

Second Appeal (MD) No.1009 of 2011

WEB COPY

1.Barathan

2.Chinna Kalimuthu

3.Subbayan

...Appellants

versus

1.Gurusamy Pillai (Expired)

2.Periya Kalimuthu

3.Gurusamy

4.Subash Chandra Bose

5.R.Krishnaveni

...Respondents

(R5 impleaded as per order dated
02.12.2015 made in M.P.No.1/2015)

Prayer: Second Appeal is filed under Section 100 of Code of Civil Procedure against the judgment and decree passed by the Sub Court, Virudhunagar in A.S.No.03/2011 dated 28.04.2011 in confirming the judgment and decree passed by the District Munsif Court, Virudhunagar in O.S.No.284 of 2007 dated 10.06.2010.

For Appellants :Mr.M.Jothi Basu

For Respondents :Mr.G.Mariappan for RR2 and 3

R1 died

R4 No appearance

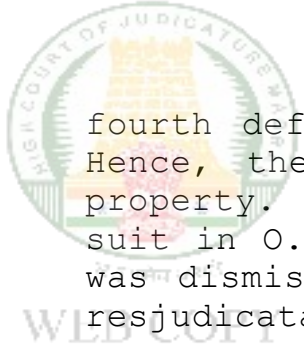
R5 P.Arun Jeyatram

JUDGMENT

The plaintiffs, who lost the legal battle before both the Courts below, have filed the present second appeal against the judgment and decree in A.S.No.03/2011 dated 28.04.2011 by confirming the judgment and decree passed by the District Munsif, Virudhunagar in O.S.No.284 of 2007 dated 10.06.2010, dismissing the suit filed for partition and separate possession.

2.The appellants, as plaintiffs, filed a suit for partition and separate possession of 3/4 share in the suit property against their father and brothers stating that the suit properties were purchased out of the income from the joint family. Even though the properties were purchased in the name of the first defendant/father, they filed simple suit for partition and separate possession of their $\frac{3}{4}$ share.

3.The defendants raised a plea stating that there was partition on 1970 and the suit properties were allotted to the share of the first defendant and he executed a Will in favour of third and



fourth defendants. After his death, the Will came into effect. Hence, the plaintiff's are not having any right over the suit property. However, it was stated that the third defendant filed a suit in O.S.No.107 of 1996, claiming share in the property, which was dismissed for non prosecution and hence, the suit is hit by resjudicata and prayed for dismissal of the suit.

4.The trial Court considering the plaint and written statement framed necessary issues and after considering the oral and documentary evidence, has held that the suit properties are allotted to the father/first defendant, who bequeathed his properties in favour of third and fourth respondents and dismissed the suit stating that the plaintiffs are not entitled any share in the suit properties, against which, the plaintiff have preferred an appeal in A.S.No.3 of 2011. In the appeal also, the findings of the Trial Court are upheld and the appeal was dismissed, against which, the present second appeal has been preferred by the plaintiffs.

5.Heard the learned counsel appearing for the appellants and perused the materials available on record.

6.The learned counsel appearing for the appellants would submit that no proper issues have been framed by the trial Court and also the first appellate Court.

7.It is well settled dictum that dismissal of the suit will not be hit by resjudicata as per Section 11 of C.P.C., wherein, it is specifically mentioned that if the issue has been substantially tried, then only, it was hit by resjudicata. Both the Courts have not held that merely because the suit in O.S.No.107 of 1996 was dismissed for default, the suit was hit by resjudicata. Proving of the will is only a question of fact and that has been considered by both the Courts below. Both the Court have held that the Will is true and genuine. Therefore, I am of the view that both the Courts below have rightly dismissed the suit and no question of law arises in this second appeal and the same is liable to be dismissed on the admission stage itself.

8.Accordingly, this second appeal is dismissed at the stage of admission. No costs.

Sd/-

Assistant Registrar(P&A)

/True Copy/

Sub Assistant Registrar(CS)
Madurai Bench of Madras High Court,
Madurai-23.



To

1.The District Munsif, Virudhunagar

2.The Subordinate Judge, Virudhunagar.

Copy to : The Section Officer, VR Section,
Madurai Bench of Madras High Court, Madurai.

+1cc to M/s.G.Mariappan, Advocate in SR.33165

+1cc to M/s.D.Sakkaravarthi, Advocate in SR.33141

+1cc to M/s.G.Marimuthu, Advocate in SR.33781

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PBK/SK-SKN/SAR-I 11/07/2016 ::2P-7C::