

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.07.2017

CORAM:

THE HON'BLE JUSTICE DR.G.JAYACHANDRAN

Second Appeal No.1776 of 2000

Nallasami Gounder

.. Appellant/Plaintiff

Vs.

P.N.Ramaswami Gounder

.. Respondent/Defendent

PRAYER: This Second Appeal filed under Section 100 of C.P.C, against the decree and judgment on the file of the learned Subordinate Judge, Dharapuram, made in A.S.No.1 of 2000 dated 12.07.2000, reversing the decree and judgment on the file of the learned District Munsif, Kangayam, made in O.S.No.134 of 1998 dated 29.11.1999.

For Appellant : Mr.M.V.Krishnan

For Respondent : No Appearance

JUDGMENT

Heard the learned counsel for the appellant. The suit is filed for declaration and injunction in respect of the 1/12th share in the suit properties based on a partition which has taken place on 24.08.1955. The respondent, who is the defendant in the suit was also a signatory to the said partition. The appellant/plaintiff is brothers' son of the respondent. He has filed the suit on the premise that the respondent has tried to encroach upon the land where he has no right or title.

2. The Trial Court, after considering the pleadings and evidence including the admission of DW1, who is the son of the defendant, has held that the partition took place in the year 1955 and the defendant has no right in the suit property, who was allotted the share in some other property. While so, the interference of the respondent/defendent in the suit property with the peaceful possession of the plaintiff has to be restrained by way of injunction.

3. Aggrieved by the declaration and injunction decree was granted by the Trial Court the defendant has preferred First Appeal before the Lower Appellate Court on the ground that when admittedly the plaintiff is entitled only to a 1/12th share of the property, without impleading the co-sharers the suit is not maintainable. On the said premise, the Lower Appellate Court reversed the findings of the Trial Court and dismissed the suit and allowed the appeal.

4. Aggrieved by the reversing judgment, the present Second Appeal is filed by the appellant on the following substantial question of law:

"(i) Whether the findings of the Lower Appellate Court that the suit is bad for non-joinder of parties is vitiated by perversity?

(ii) Whether the Lower Appellate Court has erred in reversing the judgment of the Trial Court when the defendant himself admit that the suit property fell to the share of the plaintiff's father under the partition deed Ex.A1 dated 24.08.1955?

(iii) Whether the Lower Appellate Court failed to draw an adverse inference against the non-examination of the defendant."

5. On perusal of the records and hearing the submissions made by the learned counsel for the appellant, it is clear that there was a partition between the Kuppusawami Gounder and his brother P.N.Ramasawami Gounder on 24.08.1955. The suit property was allotted to the Kuppusawami Gounder and it has been inherited by P.N.Ramasawami Gounder the plaintiff in the suit. So far as the claim of the plaintiff that he is entitled to 1/12th share in the suit property, he has made out his case very clearly that among co-sharers there is no quarrel regarding their respective share. The suit averment is that the defendant P.N.Ramasawami Gounder a stranger is trying to interfere with the peaceful possession of the suit property, in which 1/12th share was allotted to the plaintiff by virtue of partition deed dated 24.08.1955.

6. The plaintiff has right over the 1/12 share in the suit property under partition deed dated 24.08.1955 and his grievance against the defendant, is that the defendants interfering with his possession without any right or title. In such circumstances, there is no necessity to implead the other co-sharers and on the ground of non impleading of co-sharers, the suit cannot be thrown out as bad in law.

7. Apart from that, there is an admission made by the defendant that partition took place between the family members in the year 1955 under a partition deed. Earlier in his testimony in O.S.No.7 of 1998 and by an affidavit filed in C.R.P.No.589 of 1999 before the High Court the defendant has accepted the partition of the year 1955. Now, the defendant/respondent try to deny the admitted factum of partition. One cannot approbate and reprobate his own version.

8. Accordingly, this Court finds merit in the Second Appeal and the Second Appeal is allowed, Lower Court decree and judgment is set aside and the Trial Court decree and judgment is restored. However there is no order as to costs.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

dm

To

1. The Subordinate Judge, Dharapuram.

2. The District Munsif, Kangayam.

+lcc to M/s.M.V.Krishnan, Advocate, S.R.No.47801

Copy to

1. The Section Ofdficer,
V.R.Section,
High Court, Madras.

Second Appeal No.1776 of 2000

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