

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 31.01.2017

Date of Verdict : 07.02.2017

CORAM

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

S.A.No. 1662 of 2008
and M.P.No.1 of 2008

1. A.P.Thangavelu ...1st Appellant/Appellant/1st Plaintiff
2. Nagammal ...2nd appellant/3rd Appellant/3rd Plaintiff
3. G.Natarajan
4. N.Baby
5. N.Mallika
6. N.Rani
7. N.Jothimani
8. N.Dhanushkodi
9. N.SivakumarAppellants 3 to 9/3 to 10 Appellant LRS
of the deceased Senniammal
/2nd Respondent

Vs.

1. G.M.Venkatesan ...1st Respondent/2nd Respondent
/2nd Defendant
2. Manager
South Indian Bank,
Gobichettipalayam Branch,
Main Road,
Gobichettipalayam. ...2nd Respondent/3rd Respondent
/3rd Defendant

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree passed in A.S.No.43 of 2005 dated 29.08.2008 on the file of the learned First Additional Subordinate Judge, Gobichettipalayam, confirming the judgment and decree passed in O.S.No.75 of 1997 dated 02.06.2005 on the file of the learned District Munsif of Gobichettipalayam.

For Appellants : Dr.A.Thiyagarajan, Sr.C
for Mr.S.Ramesh Kumar

For Respondents: No appearance for R1

Mr.V.Bhiman for M/s.Sampath Kumar
& Associates for R2.

JUDGMENT

This second appeal is directed against the concurrent findings of the Courts below in the suit filed by the appellants for the relief of declaration of the settlement deed, dated 01.11.1993 and the family arrangement dated 14.06.1993 are not binding on consequential relief of injunction.

2. The factual matrix of the case is that :- One Palanichetty died intestate on 16.08.1973 and the plaintiffs are his son and daughters. In the partition between the said Palanichetty and his brother Ponnanchetty, 4.01 acre of land at Kalingiam Village was allotted to Palanichetty vide a registered deed dated 14.07.1959. This property was inherited by the plaintiffs on the demise of their father Palanichetty, which is now the subject matter of the suit. Earlier one Venkiammal, the first defendant in this suit under appeal filed O.S.315 of 1960 against Palanichetty claiming 2.50 acres out of 4.01 acres in this suit property. This suit was dismissed and further appeals ended in L.P.A.No.48 of 1970 on the file of the High Court, Madras. Though the first defendant Venkiammal at last succeeded in L.P.A.No.48 of 1970, the decree was passed after the demise of Palanichetty, hence according to the plaintiffs the said decree has become a nullity. Though in the plaint, it is stated that the first defendant has filed necessary application to set aside abatement the fate of it not been placed before the Courts. However, admittedly no further appeal against the judgment and decree passed in L.P.A.No.48 of 1970 is filed or pending.

3. The grievance of the plaintiffs is that the first defendant has settled 1.43 acres of the suit property in favour of his son Venkatesan who is the second defendant vide a settlement deed dated 01.11.1993 and also created a family arrangement deed dated 14.06.1993 covering the suit property, which is illegal and pre-judicial to the interest of the plaintiffs. Based on these documents the third defendant had advanced loan to the second defendant and the said transaction will not bind the plaintiffs. Hence the suit.

4. The second defendant while admitting the relationship of the said Palanichetty and the plaintiffs, denied the other allegations. He defends the action of the first defendant settling 1.43 acres in common in the suit property and delivery of possession to him. Justifies his further transaction with the third defendant Bank availing loan against deposit of the title deed on the ground that the decree passed in L.P.A.No.48 of 1970 has become final. The plaintiffs have no locus to sustain the suit.

5. The third defendant Bank in its written statement has placed on record that they advanced loan to the second defendant based on the title deed of the suit property which is traced through the sale deed dated 04.08.1951 executed by Peria Raman Chetty and Chinna Raman Chetty in favour of the first defendant Venkittammal. She in turn has settled the property in favour of her son Venkatesan, the second defendant. The bank has initiated recovery proceedings against the second defendant to defeat the lawful claim of the bank the plaintiffs and the defendants have filed this collusive suit. No civil suit is pending in respect of the title over the suit property.

6. The trial Court and the first appellate Court dismissed the suit and the appeal holding that the judgment and decree passed in O.S.No.315 of 1960 pursuant to the judgment in L.P.A.No.48 of 1970 has become final. The High Court has held that the first defendant hold 13/42 share in the property and that share is heritable and transferable. Since the plaintiffs have not placed any document to prove the actual date of death of their father Palanisamy, it cannot be presumed that on the 13.04.1974, when judgment delivered in L.P.A.No.48 of 1970, it was passed against the dead person. Further the share of the first defendant already ascertained and declared in S.A.No.1645 of 1965, dated 03.10.1969, which has become final and not questioned by the plaintiffs or their father, what was decided in L.P.A.No.48 of 1970 is only the right of the alinee of the alienee of an undivided share.

7. Aggrieved by the concurrent findings against them, the second appeal is preferred on the following substantial question of law :-

- a) Are the Courts below are correct and justified in dismissing the suit?
- b) Is the lower appellate correct and justified in assuming that no death certificate was produced in L.P.A. Especially when it is admitted that factum of death was not denied?

8. The learned senior counsel appearing on behalf of appellants submitted that the Courts below overlooked Exs.A.18 A.20, A.21 and A.23 which are relevant to decide whether the judgment in L.P.A.48 of 1970 marked as Ex.A.25 was passed against a dead person and have any enforceability in the eye of law.

9. Per contra the learned counsel appearing for the third respondent Bank submitted that the sole intention of the parties is to defeat the bank from recovery of loan advanced against the suit property. The execution petition filed by the Bank pursuant to the money decree in C.S.No.152 of 1997 still pending in view of this frivolous appeal. The appellants and the second and third respondents in order to prolong the repayment has also filed another vexation suit in O.S.No.367 of 1999 through wife of the first appellant, which was also taken note by the Courts below to expose the malafide tainted in this litigation.

10. Having gone to the judgement and the submissions made by the respective counsel, this Court find no substantial question of law involved in this case. As held by the Courts below till date the appellants could not place before this Court the exact date of death of their own father Palanichetty. None of the exhibits relied by them disclose this vital fact. The earlier suit O.S.No.315 of 1960 filed by Venkatammal for redemption of a mortgage, partition and possession, while the trial Court held that the said Venkatammal has no right to seek redemption and partition, but she can only claim damages for breach of covenant of title since she was only an alienee from the alienee. On appeal the lower appellate Court held that second alienee could acquire right of the first alienee viz., the right to sue for partition however, the suit being barred by limitation under Article 144 dismissed the appeal. In the second appeal, the single judge of this Court reverse the finding by holding that the suit is not barred by limitation and the plaintiff (Venkatammal) have right to sue for redemption and remanded the matter to the trial Court for ascertaining the amount due by the plaintiff for redemption. Since the plaintiff was denied the right to sue for partition further intra Court appeal L.P.A.No.48 of 70 preferred seeking right to sue for partition of her share.

11. The Division Bench of this Court considered the question whether an alienee from the alienee of a coparcener's share is entitled to enforce his right to claim partition and

allotment of the coparcener's share to him and decided as under :-

".... in considering the right of an alienee of an alienee of a share from an undivided coparcener we have to take note of the changed circumstances of society and law. Great inroads had been made into the Hindu joint family system by legislation, as for instance, the right of the widow of an undivided coparcener to property and also an undivided coparcener's rights to dispose of his undivided interest by a will. Taking all these into consideration, we feel that it is proper to hold that the right of an alienee of an alienee of the share from an undivided coparcener has a right by himself to maintain a suit for working out his equitable right of asking for a partition and allotment of the share of the alienating coparcener. Such a right, in our opinion, is heritable and transferable. The Hindu law principal that the equitable right of an alienee from an undivided coparcener should not be extended, could equalified to this extent by permitting an alienee of an alienee of a share to maintain a suit by himself. They are not concerned with the right of an alienee of alienee of a specific item of property from an undivided coparcener, we refrain from expressing any final opinion....."

12. Thus, it is very clear that the appellants have no absolute right over the suit property as pleaded and they have no locus to challenge the settlement deed or the family arrangement entered among the first and second defendants. By the verdict of the Division Bench in L.P.A.No.48 of 1970 it is well found that the first defendant who has purchased the 1/7th share from Periya Raman and Chinna Raman on 04.08.1961, which was marked as Ex.A.14 in O.S.No.315 of 1960 has right to enforce partition as alienee of an alienee and also right to deal with 1/7th share in the larger extend of land which includes 4.01 acres of the suit property share absolutely in the manner known to law.

13. In the result, this second appeal is dismissed. The judgement of the trial Court in O.S.No.75 of 1997 as confirmed in A.S.No.43 of 2005 is confirmed. Consequently, connected miscellaneous petition is closed. No order as to costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

To

1. The First Additional Subordinate Judge,
Gobichettipalayam,
2. The District Munsif,
Gobichettipalayam.

+lcc to Mr.S.Rameshkumar, Advocate sr.7693

in S.A.No. 1662 of 2008
and M.P.No.1 of 2008

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srg 2/3/2017

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