

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.01.2017
PRONOUNCED ON : 31.01.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.1059 of 2012
and
M.P.No.1 of 2012

Thoppuli Ammal ..Appellant/Appellant/Defendant-3

Vs.

1. Kandan
2. Kannu ..Respondents/Respondents/
Plaintiff & Defendant-2

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree of the Subordinate Court at kallakurichi dated 07.02.2007 in A.S.No.150 of 2004, confirming the judgment and decree of the II Additional District Munsif (Incharge) III Additional District Munsif Court at Kallakurichi, dated 30.06.2003 in O.S.No.304 of 1999.

For Appellant : Mr.S.Mukundan
for M/s.Sarvabhauman Associates

For Respondent-1 : Mr.P.Vasanth

For Respondent 2 : Exparte

JUDGMENT

Challenge in this second appeal is made by the third defendant against the judgment and decree dated 07.02.2007 passed in A.S.No.150 of 2004 on the file of the Sub Court, Kallakurichi, confirming the judgment and decree dated 30.06.2003 made in O.S.No.304 of 1999 on the file of the II Additional District Munsif, (incharge) III Additional District Munsif Court, Kallakurichi.

2. The second appeal has been admitted and the following substantial question of law is formulated for consideration in this second appeal.

" Whether in the light of the facts and circumstances the Courts below are right in law in holding that the appellant is entitled to only 2/32 share in the suit property by totally overlooking Ex.B7, the registered sale by which the share of the deceased Sevi was sold to the appellant?

3. The suit has been laid by the plaintiff for partition.

4. According to the plaintiff, the suit property and the other properties are the ancestral and joint family properties of the plaintiff and the defendants 1 & 2. The plaintiff and the defendants 1 & 2 are the sons of Ponnann Maistry. As regards the above character of the suit property as well as the relationship between the above said parties, there is no dispute. Thus, according to the plaintiff, he is entitled to claim 1/3 share in the suit property and accordingly, inasmuch as the defendants, without any authority, refused to accede to demand of the plaintiff for amicable partition, it is stated that the suit has come to be laid.

5. Per contra, it is the case of the defendants that the plaintiff has given up his right in respect of his share in the suit property by receiving a sum of Rs.500/- and further according to the defendants, by way of ouster and long possession, the defendants have excluded the plaintiff from the possession and enjoyment of the suit property and thus, they have prescribed title to the suit property by way of adverse possession. It is also stated that the suit property had been alienated in favour of the third defendant.

6. From the respective evidence adduced in the matter, it could be seen that the third defendant is the daughter of Ponnann Maistry. In this second appeal, the appellant's counsel has not placed any submission as regards the defendants' case of relinquishment of the share of the plaintiff in respect of the suit property and also, the defence put forth by them, as regards the plea of ouster and thereby, prescribing title to the suit property by way of adverse possession. The only point that has been urged by the appellant's counsel is that the quantum of share determined by the courts below holding that the plaintiff is entitled to 15/32 share in the suit property is wrong and the same is liable to be reversed.

7. Inasmuch as the character of the suit property has not been controverted, it could be seen that the deceased Ponnai Maistry and his three sons would be entitled to obtain $\frac{1}{4}$ share in the suit property on the death of Ponnai Maistry. It is admitted that Ponnai Maistry died during the year 1959. Therefore, it could be seen that on his death, the share, to which, he is entitled to, would devolve upon his three sons and one daughter. So calculated, it could be seen that the plaintiff and the defendants 1 & 2 would be each entitled to $\frac{5}{16}$ share in the suit property and the third defendant would be entitled to $\frac{1}{16}$ share in the suit property. Pending the suit, it appears the first defendant had died. Now, it is the case of the defendants that the first defendant had alienated the suit property in favour of the third defendant and according to the appellant's counsel, the sale effected in favour of the third defendant, as regards the entire suit property may not be correct and it would be valid to the extent of the share, to which, the first defendant would be entitled to in the suit property and so seen, according to him, the third defendant would be entitled to claim even the share of the first defendant along with her due share in the suit property. As regards the above argument put forth by the appellant's counsel, no serious issue has been raised by the respondents' counsel. No doubt, the sale deed effected in favour of the third defendant marked as Ex.B7 has been determined by the Courts below as invalid on the footing that the first defendant is not entitled to convey the whole of the suit property in favour of the third defendant. However, when it is found that the first defendant is entitled to $\frac{5}{16}$ share in the suit property, it is obvious that the sale deed marked as Ex.B7 would be valid, in so far as the share, to which, the first defendant would be entitled to in the suit property. In such view of the matter, it could be seen that as the appellant / the third defendant is found to be entitled to $\frac{1}{16}$ share, as the daughter of Ponnai Maistry adding to the same, the share, which she had purchased under Ex.B3 i.e. the share of the deceased first defendant, it could be seen that the appellant / the third defendant would be totally entitled to get $\frac{6}{16}$ share, the second defendant is entitled to $\frac{5}{16}$ share and the plaintiff is entitled to $\frac{5}{16}$ share in the suit property. Therefore, the courts below have, as rightly put forth by the appellant's counsel, erred in declaring that the plaintiff is entitled to $\frac{15}{32}$ share in the suit property and therefore, to the above extent, it is seen that the judgment and decree of the courts below have to be modified.

8. In conclusion, the substantial question of law formulated in this second appeal is answered in favour of the appellant and against the respondent.

In fine, the plaintiff is entitled to obtain 5/16 share in the suit property and accordingly, the preliminary decree is granted in favour of the plaintiff and accordingly, the judgment and decree of the courts below are modified and thus the second appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

sms

To

1. The Sub Judge, Kallakurichi.
2. The II Additional District Munsif (Incharge)
III Additional District Munsif Court,
Kallakurichi.

+1cc to M/s. Sarvabhauman Associates, Advocate, S.R.No.5635

+1cc to M/s. P. Vasantha, Advocate, S.R.No.6301

CNR(CO)
EU 22.3.17

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