

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 23.01.2017

Coram:

The Honourable Mr.Justice M.M.SUNDRESH

S.A.No.826 of 2015
& M.P.No.1 of 2015

R.Subbaiyan .. Appellant/6th defendant
Vs.
1.Radha
2.Latha ... Respondents/plaintiffs 1&2

Second Appeal is filed under Section 100 C.P.C., as against the judgment and decree dated 11.02.2014 made in A.S.Nos.36 of 2013 on the file of Sub Court, Sathyamangalam, confirming the judgment and decree dated 11.03.2013 made in O.S.No.474 of 2004 on the file of District Munsif Court, Sathyamangalam.

For Appellant : Mr.N.Manokaran

For respondents : Mr.I.C.Vasudevan

JUDGMENT

The defendant No.6, who suffered a decree at the hands of the Courts below, is the appellant herein and seeking to reverse the same, he has filed the above second appeal.

2. The second appeal was admitted on 29.09.2015 with the following substantial questions of law.

1. Whether the Courts below were right in ignoring the documentary evidence relating to the variations in the description of the suit properties with that of the description given in Ex.A1 to Ex.A3?

2. Whether the conclusions of the Courts below are vitiated by non-consideration of the material difference in description of the properties given in Ex.A1 to Ex.A3 marked by the plaintiffs to trace their title, and Ex.B1 and Ex.B10 marked by the appellant to trace his title?

3. Before advertng into the substantial questions of law, the admitted background facts governing the case are recorded hereunder.

3.1. The properties, which inclusive of the suit property, originally belonged to the first defendant and his deceased wife Kannammal. The first defendant has purchased 3 acres out of 5.33 acres in survey Nos.151, 159 and 160A and 150. He has also purchased common 12 cents out of 48 cents reserved for well, cart track, channel etc. Similarly, the wife of the first defendant viz, Kannammal(since deceased), has also purchased an extent of 2.33 acres out of 5.33 acres in the very same survey numbers. Both the sale deeds have been registered on the same day. She has also purchased common 12 cents out of 48 cents reserved for well, cart track and channel as in the earlier case. Thereafter, the first defendant and his wife purchased another extent of 24 cents out of 48 cents reserved for well, cart track and water channel. Thus, the entire extent of 48 cents meant for the abovesaid purpose has been purchased by the first defendant and his wife under Ex.B10, A1 and A2 separately and jointly.

3.2. The deceased Kannammal executed a Will under Ex.A3 bequeathing her share by giving life interest to two of her sons viz., D.W.2 and D.W.3. After their life time, the properties are meant to be used and enjoyed absolutely by her grand children viz., the plaintiffs being the daughters of second defendant and the fourth defendant being the son of the third defendant. The subject matter of the Will is to an extent of 2.33 acres out of 5.33 acres in the four survey numbers mentioned above along with 12 cents purchased under Ex.A1 and thereafter, commonly purchased along with her husband for an extent of another 12 cents under Ex.A2. The properties owned by the first defendant was partitioned between himself and his sons viz. D2 and D3. Accordingly, "A" schedule property has been retained by him. This "A" schedule property also includes 22 cents in survey Nos.150, 151, 159 and 160 A(New survey Nos.426/1) along with common 1/5 right in the well, cart track etc. This property was sold in favour of the appellant being the sixth defendant under Ex.B3 dated 09.06.2004. About five months thereafter, the plaintiffs being the grand daughters of Kannammal, have filed the suit seeking to declare their vested remainder right under Ex.A3 Will dated 07.06.1990. This is for 21 cents in survey No.426.

3.3. Thus, though Kannammal has given more extent, the suit claim was restricted only to 21 cents. The appellant being the sixth defendant, contended that this 21 cents, which the plaintiffs are seeking, is the one he has purchased it under Ex.B3. The Courts below decreed the suit on the premise that

the appellant has admitted all the documents. Much reliance has been made that the trial Court did not advert to the question as to whether the property covers under Ex.A3 is the same as the one purchased by the appellant under Ex.B3. The lower appellate Court also dismissed the appeal by taking note of the admissions made by the appellant that the execution of the documents coupled with the recitals contained in Ex.A1. Aggrieved over the same, the present appeal has been filed.

4. As rightly submitted by Mr.N.Manokaran, the learned counsel for the appellant, that the trial Court has not considered the issue as to whether the property conveyed under Exs.A3 and B3 are one and the same. Both the Courts have specifically relied upon the statement made by the appellant. In the case on hand, there is no dispute about the execution of the document, but it revolves around identifying the property coupled with the entitlement. Curiously, defendants 2 and 3 for the reasons known, did not appear before the Court. If the documents relied upon by both sides are true and genuine, the result will be both the plaintiffs and the fourth defendant on the one hand and the appellant being the sixth defendant on the other hand are entitled to $\frac{1}{2}$ share each out of 48 cents. Unfortunately, this crucial bone of contention has not been taken note of by both the Courts.

5. Mr.I.C.Vasudevan, learned counsel appearing for the respondents/ plaintiffs submits that the plaintiffs are concerned with the suit property which has been given to them under Ex.A3 by the grandmother and nothing else. There is no difficulty in appreciating the said position. Otherwise the plaintiff would have laid claim to the entire property which is covered under Ex.A3, which is not the case. Therefore, there is no difficulty, as rightly submitted by the authorities, in modifying the judgment and decree granted by the Courts below by holding that both the plaintiffs and the fourth defendant forming the first part and the appellant forming the second part are entitled for $\frac{1}{2}$ share out of 48 cents mentioned under Exs.B10, A1 and A2 put together. Though Ex.B3 speaks about the specific boundaries, as contended by the learned counsel appearing for the respondents/plaintiffs, there appears to be no material to hold that actual partition has taken place, so that, the said extent may not be amendable for partition. However, the fact as on today remains that the appellant on the one side and the plaintiffs and the fourth defendant on the other side are the co-owners of the property to a total extent of 48 cents. It is for them to work out the remedy in the manner known to law. Now there is a dispute as to whether the actual extent is 48 cents or 42 cents. To resolve the said

dispute, it is hereby held that the extent available as indicated above under Exs.B10, A1 and A2 has to be enjoyed equally with the proportionate share of 50% by both sides.

6. The power of the civil Court is plenary. When it is an admitted case of the parties, the civil Court can always mold the relief instead of driving to a fresh litigation. The substantial questions of law are answered accordingly. The judgment and decree of the Courts below is set aside and the second appeal stands allowed. No costs. Consequently, it is hereby declared that the plaintiffs and the fourth defendant are entitled to $\frac{1}{2}$ share in the available common extent of 48 cents, which is covered under Exs.B10, A1 and A2 and so is the case of the appellant. It is well open to the parties to file a suit for partition if so advised with the status of co-owners. All the other issues are left open. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

raa
To

1.The Subordinate Judge,
Sathyamangalam.

2.The District Munsif,
Sathyamangalam.

Copy to: The Section Officer, Vr Section,
High Court, Madras.

+1cc to M/s. I.C. Vasudevan, Advocate, S.R.No.4477

+1cc to M/s. N. Manokaran, Advocate, S.R.No.4526

SAI(CO)

EU 16.3.17

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