

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 31.07.2018
Pronounced on : 18.12.2018

CORAM:

THE HON'BLE MR.JUSTICE P.RAJAMANICKAM

S.A.No.1722 of 2002

Kaliya Perumal ... Appellant/3rd defendant

Vs.

1.Dhanalakshmi
2.Sarala
3.Sasikala
4.Shanthi
5.Rajendran
6.Saravanan

... Respondents/Plaintiffs 1 to 4,
Defendants 1 & 2

Prayer:-Second Appeal filed under Section 100 of C.P.C, to set aside the judgment and decree made in A.S.No.30 of 2002 dated 23.04.2002 on the file of the Additional District Judge, Additional District Fast Track Court No.1, Tindivanam, reversing the judgment and decree made in O.S.No.99 of 1995 dated 30.06.1997 on the file of the District Munsif, Vanoor.

For Appellant : Mr.S.Balasubramanian
Mr.P.G. Padmanabhan

For Respondents : Mr.V.Raghavachari
RR1 to 4 and
R5 - set exparte

J U D G M E N T

This second appeal has been filed by the third defendant against the judgment and decree passed by the Additional District Judge (FTC-I) Tindivanam in AS.No.30 of 2002 dated 23.04.2002 reversing the judgment and decree passed by the District Munsif, Vanoor in O.S.No.99 of 1995 dated 30.06.1997.

2. The respondents 1 to 4 herein have filed a suit in O.S.No.99 of 1995 on the file of the District Munsif, Vanoor, to divide the suit property into six equal shares and allot

four such shares to them and for permanent injunction to restrain the appellant herein from trespassing into the suit property. The learned District Munsif by the Judgment dated 30.06.1997 has dismissed the said suit with costs. Aggrieved by the same, the plaintiffs therein/respondents 1 to 4 herein have filed an appeal in A.S.No.67 of 1997 on the file of the Additional District Judge, (FTC No.1) Tindivanam. The learned Additional District Judge by the Judgment dated 23.04.2002 has allowed the said appeal without costs and set aside the judgment and decree passed by the trial court and passed a preliminary decree to divide the suit property into six equal shares and allot four such shares to the plaintiff and also granted permanent injunction as prayed for in respect of the aforesaid shares. Feeling aggrieved, the third defendant has filed the present second appeal. For the sake of convenience, the parties are referred to as described before the trial court.

3. The averments made in the plaint are, in brief, as follows:

The marriage between the first plaintiff and the first defendant was solemnized on 03.07.1966 as per the Hindu Rites. The plaintiffs 2 to 4 are their daughters and the second defendant is their son. The suit property is an ancestral property in which the plaintiffs and the second defendant also got shares. The first defendant had been addicted to bad habits and taking advantage of the same, the third defendant, without giving any amount, had obtained a sale deed in his favour in respect of the suit property. The said sale deed will not bind upon the plaintiffs. The defendants tried to dispossess the plaintiffs from the suit property and hence, the plaintiffs had issued lawyer's notice to the defendants 1 and 3 demanding for partition. After receipt of the said notice, the defendants 1 and 3 did not come forward to divide the suit property amicably. Hence, the plaintiffs are constrained to file the suit for partition and for permanent injunction.

4. The averments made in the written statement filed by the first defendant and adopted by the second defendant are, in brief, as follows:

The first defendant had sold the suit property for valid consideration of Rs.17,000/- to the third defendant on 24.07.1991. From the date of sale, the third defendant is in exclusive possession and enjoyment of the suit property. Originally, the defendants 1 and 2 were alone in possession and enjoyment of the suit property and after sale, the third defendant is in possession of the suit property. The plaintiffs are not in possession of the suit property. Hence, they are not entitled to the relief of permanent injunction. Since the plaintiffs are not having any right over the suit property, they are not entitled to seek for partition also. Therefore, the

defendants 1 and 2 prayed to dismiss the above suit.

5. The averments made in the written statement filed by the third defendant are, in brief, as follows:

The third defendant is the bonafide purchaser for value without notice and he has purchased the suit property for Rs.17,000/- on 24.07.1991 from the first defendant and from that date onwards, he has been in possession and enjoyment of the suit property. The plaintiffs are not in possession of the suit property. The sale deed executed by the first defendant in favour of the third defendant is true, valid and bind on the plaintiffs. The allegation that the defendants are trying to dispossess the plaintiffs from the suit property is false. The plaintiffs are not having any right over the suit property and therefore, he prayed to dismiss the suit.

6. The averments made in the additional written statement filed by the third defendant are, in brief, as follows:

The plaintiffs are not in possession of the suit property. So the court fees paid by the plaintiffs is not correct. The plaint has not been properly valued. Therefore, the third defendant prayed to dismiss the suit with exemplary costs.

7. Based on the aforesaid pleadings, the learned District Munsif, Vanoor, has framed necessary issues and tried the suit. During trial, on the side of the plaintiffs, the plaintiffs 1 and 2 were examined as PW1 and PW2. They also examined one more witness as PW3. They have marked Exs.A1 to A8 as exhibits on their side. On the side of the defendants, the third defendant was examined as DW1 and three more witnesses were examined as DW2 to DW4. They have marked Exs.B1 to B5 as exhibits on their side.

8. The learned District Munsif, after considering the materials placed before her, found that since the first defendant had got suit property through partition, the said property is his exclusive property in which the plaintiffs cannot claim any share. She further found that Ex.B1 sale deed was executed for valid consideration to the third defendant and from the date of sale, the third defendant is in exclusive possession of the suit property. Accordingly, she dismissed the suit with costs. Aggrieved by the same, the plaintiffs have filed an appeal in A.S.No.30 of 2002 on the file of the Additional District Judge (FTC No.1), Tindivanam. The learned Additional District Judge has allowed the said appeal and set aside the judgment and decree passed by the trial court. He passed a preliminary decree to divide the suit property into six equal shares and allot four such shares to the plaintiffs and also granted permanent injunction in respect of the aforesaid shares. However, he directed the parties to bear their costs. Feeling aggrieved, the third defendant has filed the present

second appeal.

9. This court at the time of admitting the second appeal has formulated the following substantial questions of law:

"i) Whether the judgment and decree of the First Appellate Court in characterising in suit property as joint family property of the respondents is legally sustainable inasmuch as the suit property was allotted to the fifth respondent in a family portion, which becomes is separate and absolute property?

ii) Whether the decree and judgment of the First Appellate Court is legally sustainable inasmuch as it has failed to take into consideration that the respondents 1 to 4 will have no right in the suit property as the same was allotted in a partition to the fifth respondent?

iii) Whether the judgment and decree of First Appellate Court is legally sustainable inasmuch as it has failed to take into consideration that the respondents 1 to 4 have not challenged the sale executed by the fifth respondent in favour of the father of the appellant, and so the respondents 1 to 4 are estopped in claiming a share in the suit property.?"

10. Heard Mr.S.Balasubramanian, learned counsel for the appellant and Mr.P.G. Padmanabhan, learned counsel for the respondents.

11. Substantial Questions of Law Nos.1 to 3:

Learned counsel for the appellant/third defendant has submitted that the first appellate court erred in reversing the well considered judgment of the trial court. He further submitted that since the first defendant got the suit property in the partition, it is his separate property, in which, the plaintiffs cannot claim any share. He further submitted that the plaintiffs have not challenged the sale deed/Ex.B1 and therefore, they are estopped from claiming any share in the suit property. He further submitted that the trial court has considered the evidence adduced by both parties in a proper perspective and dismissed the suit, but the first appellate court has erroneously interfered in the said judgment and decree and granted decree as prayed for and therefore, he prayed to allow the second appeal and set aside the judgment and decree passed by the first appellate court and restore the judgment and decree passed by the trial court.

12. Per contra, learned counsel for the respondents 1 to 4 and 6 has submitted that admittedly the first defendant got the suit property in the partition took place between himself and his brother and hence, it has to be treated as a joint family property. He further submitted that the appellant herein while examining himself as DW1 has categorically admitted that the suit property is the ancestral property to the first defendant and as such, the plaintiffs and the second defendant are each entitled to get one-sixth share in the suit property. He further submitted that in Ex.B1 sale deed itself, it is clearly stated that the market value of the suit property was Rs.31,050/-, but the sale deed was executed for Rs.17,000/- only and that itself would show that the suit property was not sold for valid consideration. He further submitted that eventhough the first defendant had executed Ex.B1 sale deed in favour of the third defendant, possession was not handed over to him and the plaintiffs continue to be in possession of the suit property and taking into consideration of all the aforesaid facts, the first appellate court has granted decree as prayed for and in the said factual findings, this court cannot interfere and hence he prayed to dismiss the second appeal.

13. It is an admitted fact that the first plaintiff is a legally wedded wife of the first defendant. It is also an admitted fact that the plaintiffs 2 to 4 are their daughters and the second defendant is their son. It is also an admitted fact that the first defendant sold the suit property to the third defendant under Ex.B1 sale deed dated 24.07.1991.

14. According to the plaintiffs, the first defendant got the suit property in the partition which took place between him and his brother and hence the suit property is the ancestral property.

15. The second defendant has not filed a separate written statement. Before the trial court, the second defendant and his father (first defendant) had engaged a common counsel and adopted the written statement which was filed by the first defendant. In the said written statement, the defendants 1 and 2 have categorically stated that the first defendant had sold the suit property to the third defendant for valid consideration of Rs.17,000/- and the said sale deed will bind upon the plaintiffs. It is also stated that even on 27.07.1990, a sale agreement was entered into between the defendants 2 and 3 and only in pursuance of the said sale agreement, the first defendant had executed the Ex.B1 sale deed in favour of the third defendant. So, it is clear that the second defendant had supported the case of the defendants 1 and 3 before the trial court. But before this court, he joined with the plaintiffs and engaged the common counsel and claimed share in the suit

property. It appears that since the first appellate court has granted decree for partition, he also claims right over the suit property. Since he has already taken a stand that Ex.B1 sale deed was executed for valid consideration and the same will bind upon the plaintiffs, he is estopped from claiming any share in the suit property.

16. In Ex.B1 sale deed, it is clearly stated that the suit property is an ancestral property to the first defendant. The appellant herein while examining himself as DW1 also admitted in his cross examination that the suit property is the ancestral property of the first defendant. In the appeal memorandum also, the appellant/third defendant has taken a stand that the first defendant had got the suit property through partition but his only contention is that since the first defendant got the suit property in the partition, it is his separate property. The said contention cannot be accepted. If the father got the property in the partition which took place between himself and his children, then he can claim that the share which was allotted to him as his separate property. But if he got the property in the partition which took place between himself and his brothers, he cannot claim that property is his separate property because he got the property for himself and his family members. Therefore, that property should be treated as joint family property.

17. In this case admittedly, the first defendant got the suit property in the partition which took place between himself and his brother. Therefore, the suit property has to be treated as joint family property in which the plaintiffs 2 to 4 and the defendants 1 and 2 got equal shares. The first defendant being wife, she cannot claim any right over the suit property during the life time of her husband i.e., first defendant. So the findings of the first appellate court that the plaintiffs are entitled to get $\frac{4}{6}$ th share in the suit property is not correct. It has to be modified to the effect that the plaintiffs 2 to 4 are entitled to get $\frac{3}{5}$ th share in the suit property.

18. Since the second defendant has sailed with the first defendant before the trial court, he is estopped from claiming any share in the suit property. Therefore, the Ex.B1 sale deed will bind upon him.

19. In Ex.B1 sale deed itself, it is clearly stated that on the date of execution of the said sale deed, possession of the suit property was given to the second defendant. The house tax was also transferred in the name of the third defendant. Patta also transferred in the name of the third defendant. Therefore, the contention of the plaintiffs that they are in possession of the suit property cannot be accepted. So, the decree granted by

the first appellate court restraining the third defendant in respect of the plaintiffs' share from trespassing into the suit property is not sustainable and therefore, the said portion of the decree is liable to be set aside. Accordingly, substantial questions of law are answered.

20. In the result, second appeal is partly allowed. The judgment and decree passed by the first appellate court are modified as follows:

i) that the suit property be divided into five equal shares and allot three such shares to the plaintiffs 2 to 4;

ii) that the suit is dismissed in respect of other reliefs and

iii) The parties are directed to bear their respective costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

gv

To

1. The Additional District Judge,
Additional District Fast Track Court No.1, Tindivanam,

2.The District Munsif,
Vanoor.

3. The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr. P.G.Padmanabhan, Advocate, S.R.No. 87741

+1cc to Mr. V.Raghavachari, Advocate, S.R.No. 87636

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