

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.12.2018

CORAM : THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.390 of 2008
and M.P.No.1 of 2008

1.Perumal
2.Bellam

..... Appellants /Defendants 1 & 2

Vs

1.Madhammal
2.Lakshmi
3.Rathna
4.Nagappan

..... Respondents/Plaintiffs, 3rd Defendant

[R3 dismissed Vide Court order dated 04.09.2015]

Prayer : Second Appeal filed under Section 100 of CPC against the judgment and decree dated 31.10.2006 made in A.S.No.38 of 2005 on the file of the Sub Court, Dharmapuri, confirming the judgment and decree dated 13.04.2005 made in O.S.No.289 of 1998 on the file of the District Munsif Court, Palacode, by allowing this Second Appeal.

For Appellants : Mr.A.Manoj Kumar

For Respondents : No Appearance [R1, R2 & R4]
R3 - Dismissed
vide order date:04.09.2015

JUDGMENT

The defendants 1 and 2 in O.S.No.289 of 1998 on the file of District Munsif Court, Palacode, have preferred this appeal. The suit was laid for declaration of plaintiffs' title over three items of suit properties, for recovery of property and for other ancillary relief of injunction. Parties would be referred to by their rank before the trial Court.

2. The case of the plaintiffs is that:

The defendants Perumal, Bellam and Nagappan are brothers.

They owned certain properties in common. On 09.03.1972, under Ext.A1, the third defendant has released his share in favour of his brothers, the first and second defendants herein, on receiving a consideration of Rs.2,000/-. On the same day, the suit properties were purchased jointly in the names of the third defendant and his mother-in-law, Muniyammal. The plaintiffs are the daughters of the third defendant. All of them are married. While so, under an oral partition, the suit properties were partitioned and accordingly, the plaintiffs 1 to 3 were respectively allotted items 1, 2 and 3 of the suit properties. So far as Item No.1 is concerned, the first plaintiff is in possession of the same. The second plaintiff has leased out the 2nd item allotted to her under the oral partition to the second defendant, and he has been paying 2/3 share of the harvest to the second plaintiff. The third plaintiff too has leased out the 3rd item of the suit property to the first defendant and he too has been paying rent. None of the defendants have any subsisting interest in the suit properties. While so, on 01.09.1998, the second plaintiff required the second defendant to pay the rent due on the second item of suit property and similarly on 05.09.1998, when the third plaintiff demanded rent for the third item of the suit property from the first defendant, both refused to pay the rents. Subsequently, on 10.9.1998, when the first plaintiff was carrying on some agricultural activity in Item No.1, defendants 1 and 2, entered into the suit property forcibly and caused some damages. They asserted right in them. Hence, the suit is laid by the plaintiffs.

3. The third defendant, the father of the plaintiffs has filed his written statement in support of the plaintiffs. Only defendants 1 and 2 contested the suit. Denying the allegations in the plaint, these defendants would plead in the written statement that, even though the third defendant had executed a release deed on 09.3.1972, receiving a sum of Rs.2,000/-, the said release has not taken effect. The consideration received under Ext.A-1 was utilised by the third defendant to purchase the suit properties jointly in his, and his mother-in-law's names. However, the third defendant's mother-in-law, Munniyammal, is only a name lender and she has neither claimed any right nor was she in enjoyment of the property at any time. After purchasing the suit property, the third defendant has blended the suit property along with the other ancestral properties, and hence it assumed the character as a family properties in the hands of defendants. While so, some 20 years prior to the filing of the suit, suit properties were divided among the defendants orally and in the suit properties, defendants 1 and 2 were allotted 70 cents each, whereas the first plaintiff's husband Thimman was allotted 67 cents. While so, during UDR scheme that took place in 1984, the third defendant's name was wrongly included in the patta along with them.

4.1 Based on the pleadings, the trial Court has framed as many as eight issues, of which, issue Nos. 1 and 2 are critical to resolve the dispute issue raised in the suit. Before the trial Court, the plaintiffs 1 and 2 were respectively examined as P.W.1 and P.W.2, and for the defendants, first defendant was examined as D.W.1. They also examined one Nanjundan as D.W.2, besides Thimman, the husband of the first plaintiff as D.W.3. Both sides have produced necessary title deeds, of which, the release deed and the sale deed bearing the same date (i.e., 09.3.1972) are marked as Ext.A1 and Ext.A2.

4.2 The trial Court disbelieved the case of the contesting defendants that Ext.A-1 has not taken effect and proceeded to hold that the suit properties which the third defendant had purchased are his personal properties and accordingly decreed the suit as prayed for. Aggrieved by the said decree, the defendants 1 and 2 had preferred A.S.No.38 of 2005 before the Sub Court, Dharmapuri and the first Appellate Court came to an identical view as has been taken by the trial Court, and dismissed the appeal.

5. This second appeal has not been admitted and notice has been ordered to the respondents. However, none of the respondents entered appearance. The learned counsel for the appellants argued that the trial Court has missed a crucial aspect in Ext.B-4, the patta, which was jointly issued in the names of defendants 1 to 3 and third defendant's son-in-law Thimman. This Thimman is the husband of the first plaintiff. He was also examined as D.W.3. Secondly, nowhere in the plaint, the year of the alleged oral partition has been stated in the suit for declaration of title. It is imperative to state in the plaintiffs' plea, as to how and when the partition has taken place, since they trace the title to the partition. Again, none of the plaintiffs have come forward with any categorical statement as to why their names were not included in Ext.B4, patta. In this context, the conduct of the third defendant is critical, in that he sails with the plaintiffs, yet he chose not to enter the witness box, and instead he has sent his son-in-law, Thimman to be examined on his behalf. Whether the properties were blended as alleged by the defendants 1 and 2, is something within the personal knowledge of the third defendant, and necessarily the Courts below ought to have drawn adverse inference.

6.1 On a careful appreciation of the submissions made by the learned counsel for the appellants, this Court must state that it is less convinced as to the preponderating probability of the case put forward by the defendants 1 and 2. To start with, these defendants would first admit that the third

defendant had executed a release deed in 1972, but still would say some Rs.2,000/- derived under it was not utilised for the purpose of purchasing the suit property under Ext.A-2. It is stated in Ext.A-2, sale deed, that part of the sale consideration has come from third defendant's mother-in-law, Muniyammal, and hence she was also included in the sale deed. It is not given to the defendants 1 and 2, now to contend that Munniyammal was a mere name lender, since Sec. 4 of the Benami Transactions (Prohibition) Act, 1988 prohibits the defendants 1 and 2 to take a plea such as that. This would imply that the suit properties should be considered as one belonging to the third defendant and his mother-in-law, Muniyammal. The only aspect which can take these defendants ashore is their plea of blending of the suit properties with other properties. Here both the Courts below have found that these defendants 1 and 2 could not establish the same. The theory of blending of suit property with other family properties of defendants 1 to 3 is also least likely when part of the title to the property rests with third defendant's mother-in-law Muniyammal.

6.2. On perusal of the records, even this Court is satisfied that the defendants 1 and 2 have not been able to establish the said fact, necessarily, their contest on title should fail. Turning to Ext.B-4, on which the learned counsel has laid considerable emphasis, on the face of documents of title available on record, the patta can never be considered as a document of title. Even if it were to be considered as a documents of possession, there is no defence founded on pure possession in their written statement.

7. Appreciating the entire materials available before this Court, this Court does not consider that there exists any substantial questions of law for this court to consider, and warranting an interference with the judgment and decree of the first Appellate Court and consequently, this appeal is dismissed, and the judgment and decree dated 31.10.2006 made in A.S.No.38 of 2005 on the file of the Sub Court, Dharmapuri, confirming the judgment and decree dated 13.04.2005 made in O.S.No.289 of 1998 on the file of the District Munsif Court, Palacode is hereby confirmed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS iii)

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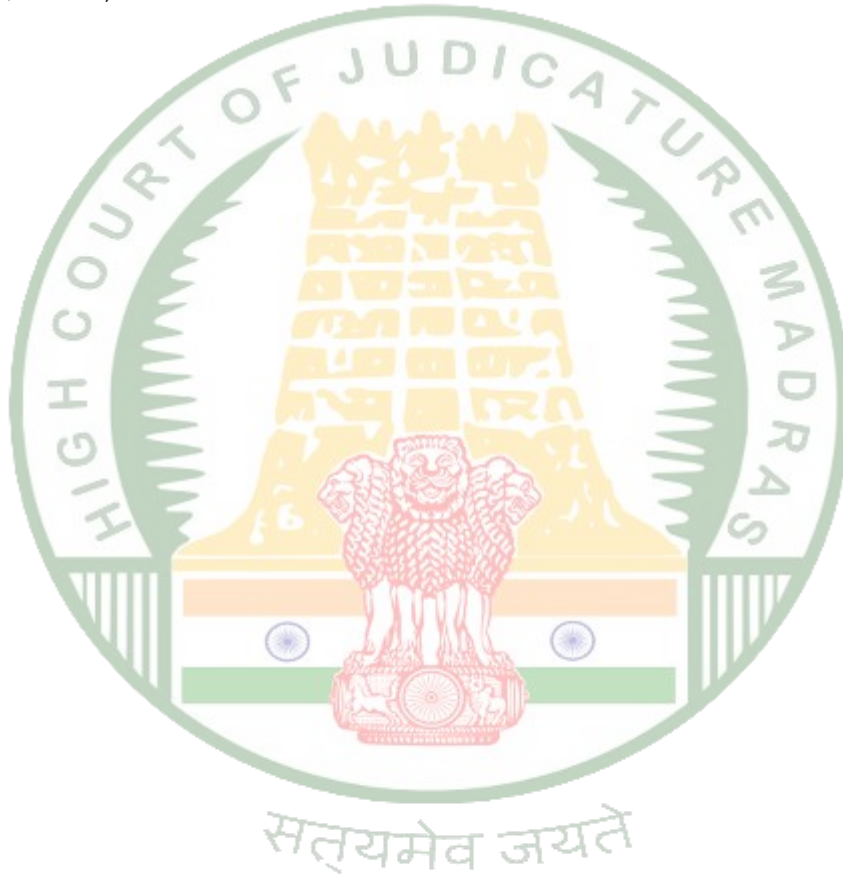
1. The Subordinate Judge, Dharmapuri
2. The District Munsif Court, Palacode

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The Section Officer, VR Section, High Court, Madras

S.A.No.390 of 2008

A.SK(05/02/2019)



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