

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.09.2018

CORAM:

THE HON'BLE MRS.JUSTICE R. HEMALATHA

S.A.No.692 of 1999

1. Vimala (Deceased)

... Appellants 1 and 2 /
Appellants /Plaintiffs

2. Kousalya

3. Krishna Kumari

4. Thillai Govinda Rajan

5. Anandha Krishnan

6. Gopala Krishnan

(the above four legal heirs
are impleaded as appellants
3 to 6 of the first appellant/
deceased vide order in
CMP.Nos.2126 to 2128/2016
in S.A.No.692/1999) dated 11.02.2016

/Vs/

1. Nataraja Chettiar R1 & R2/R1 & R2 /D2 & D3

2. Sukanya Rajan

3. Maragatham Ammal (Deceased) R3/ Respondent No.3/C.R of DL

(the above four appellants 3 to 6
are legal heirs of the deceased
third respondent, who amended as
appellants 4 to 7 vide order in
S.A.No.692/1999 dated 11.02.2016)

PRAYER : Second Appeal filed under Section 100 of C.P.C.,
against the decree and judgment and the cross appeal dated
21.09.1998 in A.S.No.234 of 1991 on the file of the Principal
District Court, Cuddalore, modifying and dismissing the suit by
decree dated 05.08.1991 in O.S.No.73 of 1990 on the file of the
Principal Subordinate Judge, Cuddalore.

For Appellants : Mr.R.Sunil Kumar
For Respondents : Mrs.R.Meenal for R1 & R2
: R3- Died

JUDGMENT

The un-successful plaintiffs are the appellants in the present Second Appeal. The appellants filed the suit in O.S.No.73 of 1990 before the Principal Subordinate Judge, Cuddalore for declaration of their title to the 'A' Schedule Property, to direct the defendants to deliver vacant possession of the suit property and also for permanent injunction restraining the defendants and their men or agents from putting up any further construction. They have further prayed for past and future mesne profits.

2. For the sake of convenience, the parties are referred as per their ranking in the trial Court.

3. The suit was filed by the plaintiffs for declaration and injunction and also for mandatory injunction directing the defendants to remove the construction put up by them in the "A" Schedule Property and also for mesne profits from the date of plaint till the date of possession.

4. The case of the plaintiffs is briefly as follows:-

The Suit "A" Schedule Property was purchased by the first defendant, who is the father of plaintiffs 1 and 2. The plaintiffs and the first defendant entered into a partition deed dated 21.06.1984 (Ex.A1) and the suit property was allotted to the share of the Plaintiffs 1 and 2. The Plaintiffs also took possession of the suit property as per the partition deed. While so, the third defendant, the wife of the second defendant claimed that she had purchased the suit property from the first defendant through the sale deed dated 13.03.1989 (Ex.A2). According to the plaintiffs, the said sale deed is not valid and it would not confer any title upon the third defendant.

5. The first defendant remained absent and was set ex-parte before the trial Court. The defendants 2 and 3 filed a written statement contending that the first defendant sold the suit property in favour of the third defendant for a sale consideration of Rs.18560/- under the sale deed dated 13.03.1989. (Ex.A2).

6. It is also their contention that they have put up a super structure in the suit property and the plaintiffs, who were aware of the said construction, did not raise any objection and therefore, they are estopped from claiming any right over the suit property.

7. According to them, the partition deed (Ex.A1) is not legally valid, since the plaintiffs 1 and 2 are not co-parceners and that the suit property is the exclusive property of the

first defendant. It is further contended by them that though the partition deed was said to be executed on 21.06.1984, it was registered only on 26.02.1990 long after the execution of the sale deed (Ex.A1) in favour of the third defendant. Therefore, they prayed for dismissal of the suit filed by the plaintiffs.

8. In the trial Court, the first plaintiff examined herself and one another witness and marked as Ex.A1 to Ex.A17. The second defendant examined himself and marked Ex.B1 to Ex.B6. After full contest, the learned Principal Subordinate Judge, Cuddalore decreed the suit and partly allowed by holding that the plaintiffs are entitled to a declaration of title to the suit property. However, the suit was dismissed as regards the other reliefs.

9. Aggrieved over the same, the plaintiffs filed an appeal in A.S.No.234 of 1991 before the Principal District Judge, Cuddalore and the defendants 1 to 3 filed a cross Appeal. After analysing the entire evidence on record, the Principal District Judge, Cuddalore dismissed the suit filed by the Plaintiffs and also set aside the decree and judgment dated 05.08.1991 passed by the Principal Subordinate Judge, Cuddalore.

10. Now, the plaintiffs have filed the present appeal on the following substantial questions of law:-

"1) Whether the learned District Judge was not in error in finding that the registered partition deed in Ex.A1 was not valid in that it operated to release the father's right in the property to his daughters without consideration and failing to note that such a document would have the effect of the gift by the father to daughters and hence valid?

2) Whether the first defendant and the persons claiming through him were not estopped in setting up title in himself after he divested himself of his right over the properties sold under the original of A2 by virtue of the registered partition deed?

3) Whether the trial Court did not err in disallowing the reliefs for mandatory injunction and perpetual injunction after upholding the plaintiffs' claim to title to the suit properties, which were consequential in nature?

4) Whether the trial Court did not err in failing to note that a right in immovable property could not be lost by mere passive act of silence unless it could be shown as positive acquiescence or waiver strong enough to liquidate title?"

11. During the pendency of the first appeal, the first defendant namely, Balarama Pillai, died and his legal representative was impleaded as fourth defendant. In the present appeal, the first appellant and third respondent died and their legal heirs were brought on record.

12. It is the admitted case of both the parties that the suit 'A' Schedule Property was purchased by the first defendant through a registered sale deed dated 16.10.1964 (Ex.B4) from one Munusamy Pillai and others. It is also admitted that the suit property is self acquired property of the first defendant late Balarama Pillai.

13. Mr.Sunil Kumar, the learned counsel appearing for the appellants contended that, when the first defendant and the plaintiffs had entered into a partition deed dated 21.06.1984 (Ex.A1), the first defendant cannot execute a sale deed in favour of the second defendant. He would further submit that the plaintiffs are entitled for declaration of title over the suit properties and also other reliefs sought for by them.

14. Per contra, Mrs.Meenal, the learned counsel appearing for the respondents would contend that since the suit property is self acquired property of late Balarama Pillai, (first defendant) and he has executed a sale deed dated 13.03.1989 (Ex.A.2) in favour of the third defendant, the plaintiffs cannot claim any right over the suit property. The learned counsel appearing for the respondents also contended that though the plaintiffs claim that partition deed was executed on 21.06.1984, a perusal of Ex.A.1 partition deed would clearly indicate that the same was registered only on 26.02.1990 i.e., after a lapse of 6 years from the date of execution of the sale deed (Ex.A.1) in favour of the second defendant. She therefore, contended that the suit filed by the plaintiffs cannot be sustained and therefore, liable to be dismissed.

15. The only point that arises for the consideration in the present appeal is whether the partition deed dated 21.06.1984 (Ex.A1) would convey a title in favour of the plaintiffs. As already observed, the suit property is the self acquired property of the first defendant and he had executed a sale deed in favour of the third defendant on 13.03.1989. Subsequent to this, the partition deed (Ex.A1) was registered.

16. In the said partition, 'A' Schedule property was divided into two heads and the plaintiffs were allotted ½ share in the 'A' Schedule Property and they are shown as 'B' and 'C' Schedule Property in the plaint schedule. Since Ex.A.1 is only a partition deed it would not confer any title over the plaintiffs especially when the partition does not operate as a transfer of property within the meaning of Transfer of Property Act and further more a partition of the property cannot be among the parties who, do not have any pre-existing right. It is also to be pointed out that the first defendant had executed a sale deed in favour of his wife much before the registration of the partition deed in respect of the suit property and it is in evidence that the third defendant after the execution of the sale deed had put up construction in the suit property.

17. The learned counsel appearing for the appellants contended that since the partition deed was earlier to the sale deed, the plaintiffs cannot claim any right over the suit property. As already observed, it is seen from Ex.A.1 that though the partition deed is said to be executed on 21.06.1984 (Ex.A1), it was registered only in the year 1990 i.e., 6 years later to the execution of the sale deed. Therefore, the contention of the learned counsel appearing for the appellants that the partition deed is earlier in point of time, cannot be accepted. In any event, the plaintiffs do not have any pre-existing right over the suit property as it is the self acquired property of the first defendant. As already observed partition does not amount to transfer within the meaning of Transfer of Property Act. Therefore, in view of all these reasons, I hold that the Second Appeal is liable to be dismissed.

i) In the result, the Second Appeal is dismissed. No costs.

ii) the decree and judgment dated 21.09.1998 passed in A.S.No.234 of 1991 on the file of the Principal District Court, Cuddalore, is upheld, and O.S.No.73 of 1990 dated 05.08.1991 on the file of the Principal Subordinate Judge, Cuddalore is dismissed with costs.

Sd/-
Assistant Registrar (CS-VII)

//True Copy//

Sub Assistant Registrar

vkrr/dna

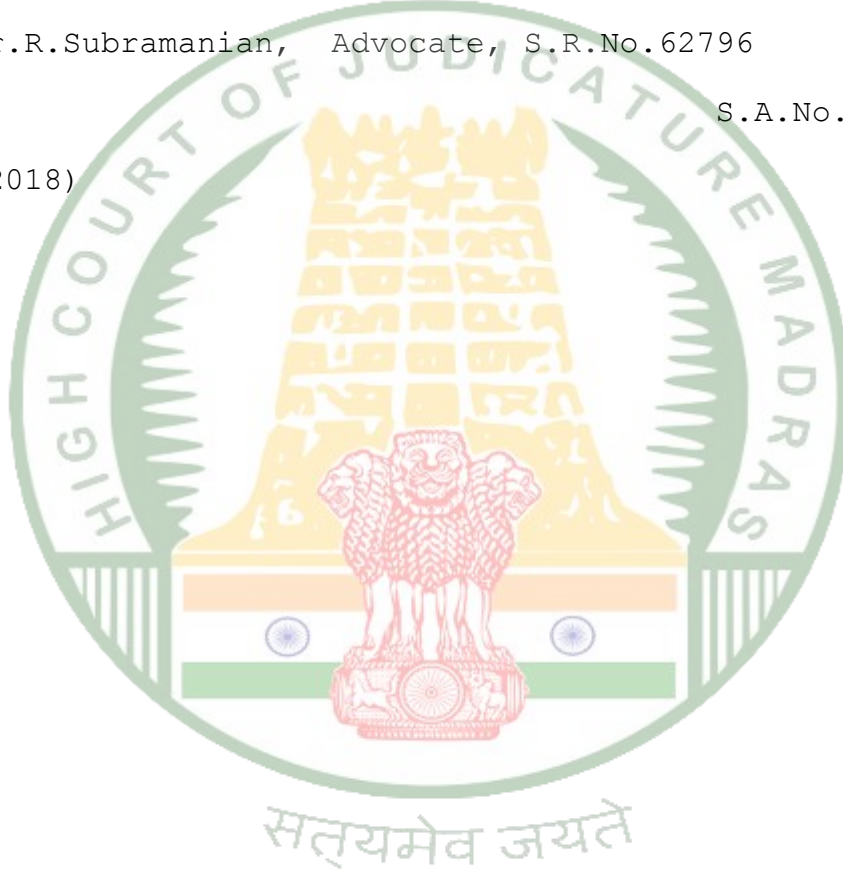
To

- 1.The Principal District Judge,
Cuddalore.
- 2.The Principal Subordinate Judge,
Cuddalore.
3. The Section Officer,
V.R. Section, High Court,
Madras.(2 copies)

+1cc to Mr.R.Subramanian, Advocate, S.R.No.62796

S.A.No.692 of 1999

BR(CO)
GN(03/12/2018)



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