

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.02.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

SECOND APPEAL NO.72 OF 2008
M.P.NO.1 OF 2008

A.Ilangovan ... Appellant/7th Defendant

Vs.

1.K.Vel Murugan
2.K.Ganesan
3.S.Nagappan
4.S.Dharmalingam
5.M.Krishnamurthy
6.T.Manimagali
7.Govindamal

... Respondents/Plaintiff
and Defendants 1 to 6

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 31.07.2007 made in A.S.No.28 of 2003 by the Subordinate Court at Chidambaram, reversing the judgment and decree dated 30.01.2003 made in O.S.No.99 of 2000 by the District Munsif Cum Judicial Magistrate Court at Kattumannarkoil.

For Appellant	:	Mr.Srinath Sridevan
For Respondent-1	:	Mr.A.Muthukumar
For Respondent-5	:	Mr.R.Sethuvarayan
For Respondents 2 & 6	:	Died
For Respondents 3,4 & 7	:	No appearance

WEB COPY J U D G M E N T

The seventh defendant is the appellant in the suit. The suit was filed by the first respondent / plaintiff for declaration of title and recovery of possession. There are two items of suit properties viz., (i) in R.S.No.49/2A-1-1; (ii) R.S.No.49/3, measuring an extent of 1.56 acres. The appellant herein contesting the case in respect of 1.48 cents in R.S.No.49/2, mentioned as item no.1.

2. Originally, the suit properties were owned by one Kuppusamy, father of the first respondent. The said Kuppusamy had a wife by name Nagammal. Since there were no issues to them, he married the mother of the first respondent, namely Pachaiyammal. On 29.07.1956, an extent of 1.56 cents in R.S.No.49/3 was purchased in the name of the first wife Nagammal. The said Nagammal, by virtue of a registered settlement deed dated 02.07.1958, settled an extent of 0.66 cents in favour of Pachaiyammal for life and absolute right to her descendants. Thereafter, on 03.03.1981, she executed another settlement deed in favour of the first respondent for the remaining extent of 0.90 cents in R.S.No.49/3. The first respondent is the only son of Pachaiyammal and thereby, he is the only legal representative of Kuppusamy, Nagammal and Pachaiyammal. Since the first respondent was minor at the time of execution of the settlement deeds, the said Pachaiyammal was appointed as a guardian to maintain the properties.

3. It appears that on 12.08.1981, the said Pachaiyammal executed an agreement for sale in favour of the mother of the appellant in respect of one acre and 48 cents of the suit properties. The appellant claims that they were put in possession towards part performance of the agreement.

4. The Trial Court framed three issues. The main issue is that whether the suit is hit by non-joinder of parties. The first respondent/ plaintiff examined two witnesses and marked 5 documents. The appellant/ seventh defendant, examined two witnesses and marked 4 documents. The Trial Court, without going into the merits of the case, dismissed the suit for non-joinder of parties.

5. Aggrieved over the dismissal of the suit by the Trial Court, the first respondent/plaintiff preferred an appeal. The Lower Appellate Court, on consideration of oral and documentary evidence, framed the following issues:

(i) Whether the mother of the first respondent/plaintiff Pachaiyammal has any right to sell a portion of the property settled on 02.07.1958 vide Ex.A2 ?

(ii) Whether the sale agreement executed on 12.08.1981 vide Ex.B1 is binding on the first respondent/plaintiff ?

(iii) Whether the appellant/seventh defendant had taken action for getting the agreement of sale vide Ex.B1 dated 12.08.1981 executed ?

(iv) To what relief the parties are entitled to ?

6. On perusing the oral and documentary evidence, the Lower Appellate Court has found that the mother of the first respondent Pachaiyammal had only a limited right of life estate and she was not entitled to sell the property. Further, the appellant/seventh defendant having failed to get the sale executed within the time specified in the agreement, cannot enforce the same. Therefore, the Lower Appellate Court reversed the finding of the Trial Court and decreed the suit as prayed for. Challenging the order passed by the Lower Appellate Court, the appellant / seventh defendant preferred the above Second Appeal.

7. The Second Appeal was admitted by this Court on 24.01.2008 on the following substantial question of law:

"a) Whether the judgment of the appellate Court is not vitiated by the failure to consider the issue of non-joinder and also failure to consider the relevant aspect such as cross examination of P.W.1 ?"

8. From the perusal of the documents, it is seen that originally the property belonged to one Kuppusamy, father of the first respondent/plaintiff. He was holding the title of the property mentioned in item no.1 of the suit property. In respect of item no.2 of the suit property, it was purchased in the name of his first wife Nagammal. The said Nagammal by virtue of settlement deed dated 02.07.1958 settled 0.66 cents in favour of Pachaiyammal for life and absolutely to her descendants. Thereafter, on 03.03.1981, by another settlement deed, settled the property in favour of the first respondent/plaintiff giving the enjoyment right in favour of Pachaiyammal, till the first respondent attains majority. Thus, it is seen that in respect of second item of the suit schedule property, the exclusive right was vested in favour of the first respondent/plaintiff. Even though the appellant has marked a sale agreement dated 12.08.1981 with respect to second item of the suit property in RS.No.49/3, in the written statement, he claimed that he had paid consideration towards first item of the suit property in R.S.No.49/2 to an extent of 1.48 acres out of 2.61 acres.

9. As discussed above, in respect of item no.1 of the suit property, the said Kuppusamy, father of the first respondent was holding absolute right over the property. He died intestate in the year 1979. In that event, his first wife Nagammal and his son, the first respondent would be the legal heirs. Even assuming that the second wife, the mother of the first respondent/plaintiff is entitled to a share, she will be entitled to only 1/3rd share of the suit property. Therefore,

the claim that the mother of the first respondent has a right to enter into an agreement for sale for more than 1/3 share is not sustainable.

10. On the other hand, the appellant has taken a stand that the sale agreement was entered only in respect of second item of the suit property. The agreement was not entered between the parties for the benefit of the minor. In the event of settlement deeds conferring life estate in favour of Pachaiyammal and absolute right in favour of the first respondent, the sale can be only for enjoyment rights till the life time of Pachaiyammal. Even though it is contended that the sale agreed was for the welfare and maintenance of the minor, no such evidence has been adduced before the Courts below. The said Pachaiyammal having only limited right through the settlement deeds dated 02.07.1958 and 03.03.1981, has no right to alienate or encumber the property. Therefore, in the absence of any proof that the property was sought to be alienated for the welfare of the minor, the agreement to sell the property, as rightly found by the Lower Appellate Court is not valid.

11. The appellant in his evidence as P.W.1 has categorically stated that it was agreed to get the sale deed executed within one year on payment of Rs.400/-. He would also depose that on clearing the encumbrance and the loan, he was willing to get the sale deed executed. However, admitted in his evidence that he has not taken any steps for getting the sale deed executed pursuant to the agreement. In the absence of any action on the part of the appellant / seventh defendant, he cannot claim any right for execution of the sale deed after the lapse of time specified in the agreement.

12. It is also further seen that as per the sale agreement, if the appellant/seventh respondent does not take any action to get the sale deed executed within the period, the said Pachaiyammal is entitled to sell it to the third parties after forfeiting Rs.1000/- from the advance paid to the sale consideration. Since the appellant has not taken any steps, at the most, he would be entitled to get refund of advance amount, a sum of Rs.10,255/- after deducting Rs.1000/- from the amount advanced, a sum of Rs.11,255/-. Since it is found that the said Pachaiyammal, mother of the first respondent, has no right to alienate the property, the non-joinder of Pachaiyammal will not render the suit bad. Further, it is not proved in evidence that the sale agreement was entered for the welfare and benefit of the minor, Pachaiyammal is not competent to execute the sale deed in favour of the first respondent/plaintiff. Therefore, the issue of non-joinder of parties, will not affect the maintainability of the suit. A contesting party to the suit

shall establish his / her case on the strength of his own evidence and shall not endeavour to succeed on the weakness of the other side. Since the appellant failed to corroborate his case with clinching evidence, he is not entitled to find pit falls on the evidence of the other side. Therefore, the questions of law raised by the appellant are answered in the negative.

13. However, during the course of arguments, the learned counsel appearing for the first respondent would offer to return the sale advance received by his mother to the tune of Rs.11,255/-. The appellant is entitled to receive the said amount from the first respondent / plaintiff.

14. The Second Appeal is dismissed with the above observation. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

TK
To

1.The Subordinate Judge,
Chidambaram.

2.The District Munsif
Cum Judicial Magistrate Court
Kattumannarkoil.

Copy to

The Section Officer,
VR Section, High Court, Madras.(2 copies)

+1cc to Mr.A.Muthukumar, Advocate Sr.8928

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srg 14/12/2018