

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.03.2019

CORAM

THE HONOURABLE MR. JUSTICE M.GOVINDARAJ

C.M.S.A. NO.9 OF 2006
AND CMP NO.3458 OF 2006

1.Jaya
2.Dhanushkoti
3.Poovaragavan
4.Minor Rajiv Gandhi
5.Minor Mahaalakshmi
6.Savithri
(Minors 4 & 5 rep. by mother and
next friend Savithri) .. Appellants /
Appellants/ Petitioner

Versus

1.Balamurugan
S/o. Rangasamy Padaiyachi
2.Kaliya Perumal
3.Balamurugan
S/o. Vedhamanickam .. Respondents
Respondent/ Respondents

PRAYER : Civil Miscellaneous Second Appeal is filed under Order 21 Rule 58 and 151 read with 100 of Civil Procedure Code against the judgment and decree made in A.S.No.4 of 2005 dated 15.09.2005 on the file of Principal Subordinate Court, Virudhachalam, confirming the judgment and decree made in E.P.No.148 of 2000 in S.C.No.174 of 1996 dated 28.11.2003 on the file of Principal District Munsif, Virudhachalam.

For Appellants : Mr.D.Ravichandran
for Mr.T.R.Rajaraman

For Respondents: No appearance

J U D G M E N T

Aggrieved over the orders passed by the Courts below rejecting the contention of the appellants, the above Civil Miscellaneous Second Appeal is preferred, on the basis of the following substantial questions of law:

"a) Whether the Courts below were right in dismissing the application without considering the vital aspect that the properties are the joint family properties of the judgment debtor ?

b) When it is settled in law that the admitted fact need be proved and in the instant case, the 1st respondent himself admitted that the judgment debtor and appellants herein are living under one roof, still are the Courts below right in disbelieving the properties are not joint family properties?

c) When Order 21 Rule 58 envisages to take all proceeding as much as a suit, still are the Courts below right in dismissing holding that the appellants have not taken steps to set aside the exparte decree in S.C.No.174 of 1996 ?

2. The admitted facts of the case is that the properties were purchased in the name of the first appellant's husband, by way of a registered sale deed dated 18.08.1972. The husband of the first appellant borrowed loan from the first respondent and failed to repay the same. The first respondent filed a suit for recovery of money and brought the property of the first appellant's husband for auction in the execution proceedings and it was sold in favour of the third respondent. Once the appellants came to know of the sale of the property, they filed an application under Order 21 Rule 58 of the Civil Procedure Code claiming right over the property.

3. The first appellant contended that originally the properties belonged to one Samikannu, who is the father of her husband. The properties which stand in the name of her husband were purchased out of the sale proceeds of the ancestral property and therefore, the appellants are

entitled to 2/7th share in the property. Therefore, they claimed that the sale will not bind their title.

4. The Courts below have considered the claim of the appellants and found that the appellants in their evidence have categorically admitted that they were not aware of the transaction with regard to the ancestral properties and that the property was purchased in the name of first appellant's husband. Since the claim of ancestral properties was not proved by any evidence, the application was rejected. On appeal, the Courts below also confirmed the finding of the Execution Court, against which, the Civil Miscellaneous Second Appeal is preferred.

5. According to the appellants, the order passed by the Courts below is contrary to Order 21 Rule 58 of Civil Procedure Code. A perusal of Order 21 Rule 58 of Civil Procedure Code clearly shows that in respect of the property which was attached and sold in auction, application under Order 21 Rule 58 of Civil Procedure Code is not maintainable. Further, the contention of the appellants that they have filed a separate suit for partition and that the order shall be set aside subject to the result of the decree in the partition suit is not maintainable for the reason that the right and title over the property shall be decided in the very same application under Order 21 Rule 58 of Civil Procedure Code and not by a separate suit. Since there is a bar for suit, the appellants cannot agitate it independently. Since the appellants have failed to prove that the property is ancestral property or joint family property, in which, the first appellant and the children are entitled to share, this Court do not find any reason to interfere with the findings of the Courts below. Since there was no merits in the appeal, the substantial questions of law raised by the appellants are answered against the appellants.

6. In fine, the Civil Miscellaneous Second Appeal is dismissed. No costs. Consequently, connected civil miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

TK

To

1.The Principal Subordinate Court
Virudhachalam.

2.The Principal District Munsif
Virudhachalam.

Copy to:
The Section Officer,
VR Section,
High Court, Madras

C.M.S.A. NO.9 OF 2006

VG I
A.SK(25/09/2019)



WEB COPY