



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.03.2019

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Second Appeal No.652 of 2008 &
M.P.No.1 of 2008

1. Mrs.Janaki (deceased)
2. Mr.J.Dhanapal ..Appellant/2nd Respondent/2nd Defendant
3. J.Ravichandran ..2nd & 3rd Appellant/LRs of the
1st Appellant/2nd Respondent

(Appellants 2 and 3 brought on record as LRs of
deceased sole appellant vide Order of court
dated 20.02.2019 made in CMP No.4226, 4229
and 4231 of 2019 in S.A.No.652 of 2008 (NSKJ)

-Vs-

1. Mr.Mani
2. Mr.Ravi ..Respondents 1 & 2/Appellants/Plaintiffs
3. Mr.M.Kannan ..3rd Respondent/1st Respondent/1st Defendant

Prayer:- Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree in A.S.No.118 of 2004 dated 16.04.2005 by the learned Principal District Judge, Erode reversing the judgment and decree dated 05.08.2004 made in O.S.No.869 of 2002 by the Principal Sub Court, Erode.

For Appellant : Mr.Suganthan
for Mr.N.Manokaran

For Respondents: Mr.P.Valliappan - R1 & R2
No appearance - R3

JUDGMENT

Aggrieved over the finding of the first appellate Court reversing the finding of the trial Court in dismissing the suit for partition and passing of preliminary decree in favour of the plaintiff, the present Second Appeal came to be filed by the second defendant in the suit.

2. The parties are arrayed as per their own ranking before



the trial Court.

3. Brief facts leading to filing of the suit is as follows :-

The first plaintiff is the father of the second plaintiff and the first defendant. The suit property is an ancestral property and the plaintiffs are entitled to 1/3rd share in the suit property. The first defendant was in inimical terms with the plaintiffs and had not looked after the family affairs. Knowing very well that the first defendant is entitled to 1/3 share in the suit property, he has entered into an agreement with the second defendant for sale of ½ share in the suit property. The second defendant has filed a suit in O.S.No.1429 of 94 for specific performance. Hence, the suit for partition.

4. The second defendant filed a written statement contending that the first defendant is the kartha and manager of the family and he is entitled to ½ share in the suit property and entered into an agreement on 26.02.1991 and received the advance. Therefore, a suit has been filed by this defendant to enforce the agreement. The suit has also been decreed. The plaintiffs have filed an application in I.A.No.1562 of 1997 to implead them as parties to the suit. The above application was dismissed 08.12.1997. No further application has been filed by the plaintiffs. Accordingly, a decree has also been passed in favour of this defendant. Hence, this suit is not maintainable.

She has filed an application for delivery of possession. As against which the present suit has been filed. Hence, prayed for dismissal of the suit.

5. The trial Court framed the following issues :

1. Whether the plaintiffs are entitled for preliminary decree for partition as prayed for?

2. Whether the plaintiffs are entitled for permanent injunction as prayed for?

3. Whether the Court fee paid is not correct?

4. To what relief?

6. On the side of the plaintiffs, P.W.1 and P.W.2 were examined and Ex.A.1 to Ex.A.13 marked. The first defendant remained exparte. On the side of the second defendant, D.W.1 and D.W.2 were examined and Ex.B.1 to Ex.B.11 were marked. The trial Court dismissed the suit on the ground that the plaintiffs have suppressed the earlier suit filed for specific performance.

However, the first appellate Court granted preliminary decree in favour of the plaintiffs. As against which, the present appeal came to be filed.

7. The main contention of the counsel appearing for the appellant is that the first defendant had entered into an



agreement for half share in favour of the second defendant. As he failed to execute the sale deed, a suit has been filed for specific performance and the same has been decreed. When the execution proceedings have been filed, the present suit has been filed in the above suit. The first defendant remained exparte. That itself clearly indicate that the suit is a result of collusion between the plaintiffs and the first defendant. It is his further contention that the sub division has also been affected and the same clearly indicate that there was a partition between the plaintiffs and the first defendant. Hence, submitted that the suit for partition is not maintainable.

8. Heard the learned counsel for the respondent.

9. This Second Appeal is pending in admission stage itself. Heard both sides at the time of admitting the appeal.

10. The suit has been filed claiming partition of the suit property. The subsequent purchaser, who purchased a portion of the property from one of the co-owner, filed the present appeal.

On perusal of pleadings of both sides, there is no dispute that the suit properties are ancestral properties. The first plaintiff is the father of the second plaintiff and the first defendant and they are co-parceners at the relevant point of time. These facts are not disputed. It is not the case of the second defendant that the first defendant has sold the property after the partition among the plaintiffs and the first defendant. Similarly, it is not her case that the first defendant has entered into an agreement to meet out the legal necessity of the family.

11. Admittedly, the first defendant has entered into a sale agreement for sale of $\frac{1}{2}$ share in the suit property. In fact, he was not entitled to $\frac{1}{2}$ share in the suit property. He is entitled to $\frac{1}{3}$ share as a co-parcener in the suit property. Therefore, merely on the basis of an agreement, which was enforced in the Court of law by filing a suit in O.S.No.1429 of 1994, the second defendant cannot seek better title than what the vendor not had in the property, as long as there is no dispute with regard to the property and relationship of the parties, I am of the view that the plaintiffs and the first defendant, who are co-parceners, each are entitled to $\frac{1}{3}$ share in the suit property.

12. The plaintiffs are claiming partition in respect of their shares in the suit property. Though the facts indicate that based on the agreement entered by the first defendant in favour of the second defendant, suit for specific performance has been decreed in favour of the second defendant in respect of $\frac{1}{2}$ share in the suit property. Merely on the basis of such a decree, the appellant cannot contend that the plaintiffs have no right to claim a share in the property. Further, there is no



materials available on record to show that the properties have already been partitioned and only after the partition, the first defendant has sold the property. In the absence of any evidence in that regard, merely on the basis of the revenue record, earlier partition cannot be inferred. The appellant being a purchaser of a share from one of the co-owner, she is utmost entitled to 1/3 share of the first defendant, since she has stepped into the shoes of the first defendant, she has to work out her share in the final decree proceedings. Therefore, from the pleadings of the parties, I do not find any error or illegality in the judgment of the first appellate Court. There is no substantial question of law involved in this appeal.

13. According, this Second Appeal is dismissed and the decree and judgment of the first appellate Court is confirmed. Consequently, the connected miscellaneous petition is closed. No cost.

vrc

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Principal District Judge,
Erode.
2. The Principal Subordinate Judge,
Erode.

Copy to:-

The Section Officer,
V.R.Section,
High Court, Madras - 104.

+1cc to Mr.P.Valliappan, Advocate, SR.No.20203/19

+1cc to Mr.N.Manokaran, Advocate, SR.No.20067/19

Second Appeal No.652 of 2008

Kak(28/08/2019)