

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 30.04.2019
PRONOUNCED ON : 03.06.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.Nos.615 of 2006 and 1527 of 2007

S.A. NO.615 OF 2006

Nandagopalakrishnan ...Appellant/5th Defendant

Vs.

1. Rani
2. Kanagam
3. Sankaran
4. Venugopal
5. Arumugham
6. Savithiri Ammal
7. Illavarasan

...Respondents/Plaintiffs 1 & 2 &
Defendants 1 to 4 & 6

S.A. NO.1527 OF 2007

1. Venugopal
2. Savithiri Ammal

...Appellants/Defendants 2 & 4

Vs.

1. Rani
2. Kanagam
3. Sankaran
4. Arumugham
5. Gopalakrishnan
6. Illavarasan

...Respondents/Plaintiffs 1 & 2 &
Defendants 1, 3, 5 & 6

Prayer:

Second Appeals filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 10.08.2005 passed in A.S.No.37 of 2004 on the file of the learned Subordinate Judge of Panruti reversing the judgment and decree dated 30.06.2004 passed in O.S.No.327 of 1996 on the file of the learned District Munsif of Panruti.

For Appellant : Mr.S.Sabareesh in S.A.No.615 of 2006
Mr.R.Balasubramaniam in
S.A.No.1527 of 2007

For Respondents: In S.A.No.615 of 2006
Mr.S.Kingston Gerald for R5 & R7
No appearance for R3 and R4

No representation / no appearance for
R1, R2 & R6.
R1 to R4 and R6 set exparte vide order
dated 30.04.2019

In S.A.No.1527 of 2007
No appearance for R1 to R4 & R6. Set
exparte vide order dated 30.04.2019
R5 - Not ready in notice.

COMMON JUDGMENT

Second Appeal Nos.615 of 2006 and 1527 of 2007 are directed against the judgment and decree dated 10.08.2005 passed in A.S.No.37 of 2004 on the file of the Subordinate court, Panruti, reversing the judgment and decree dated 30.06.2004 passed in O.S.No.327 of 1996 on the file of the District Munsif Court, Panruti.

2. The second appeal No. 615 of 2006 has been admitted on the following substantial questions of law.

- (1) Is not the judgment of the lower appellate court vitiated by its failure to consider the non impleading of sharer of the suit property?
- (2) Whether the judgment of the court below is vitiated by its failure to consider the relief sought for by respondents 1 and 2 in the plaint?
- (3) Whether the court below is right in granting a decree of declaration in respect of undivided share in the suit property which is against the provisions of the Specific Relief Act, 1963?

3. The second appeal No. 1527 of 2007 has been admitted on the following substantial questions of law.

- (1) Is not the judgment of the lower appellate court vitiated by its failure to consider the non impleading of sharer of the suit property?
- (2) Whether the judgment of the court below is vitiated by its failure to consider the relief sought for by respondents 1 and 2 in the plaint?
- (3) Whether the court below is right in granting a decree of declaration in respect of the undivided share in the suit property which is against the provisions of the

Specific Relief Act, 1963?

(4) Whether or not the judgment of court having concurrent jurisdiction would operate as res judicata between the same parties with regard to some other matter directly in question in another court?

4. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

5. For the sake of convenience, the parties are referred to as per their rankings in the trial court.

6. Suffice to state that the suit has been laid by the plaintiffs for declaration, possession and mesne profits.

7. The plaintiffs have put forth their case that the suit properties belonged to their father and his brothers, namely, Ramalingam and Narayanasamy and Ramalingam died unmarried and Narayanasamy left the village when he was a young boy, thereafter, his whereabouts not known and therefore, he is presumed to be dead as per law and accordingly, it is only the plaintiff's father who had been in the possession and enjoyment of the suit properties and dealing with the same as his own and after his demise, the plaintiff's mother Pushpavathi Ammal succeeded to the suit properties and enjoying the same and settled the same in favour of the plaintiffs by way of the settlement deed dated 31.03.1980 and thereby it is put forth by the plaintiffs that they are the owners of the suit properties and in the possession and enjoyment of the same. However, the defendants, without any entitlement, taking advantage of the helplessness of the plaintiffs and the absence of their husband, trespassed into the suit properties, without any right, whatsoever, and hence according to the plaintiffs they had been necessitated to lay the suit against the defendants for appropriate reliefs.

8. Though the defendants have filed independent written statements, in toto, according to the defendants, they disputed the claim of the exclusive title, possession and enjoyment of the suit properties by the plaintiffs' father as put forth in the plaint and also disputed the case of the plaintiffs that Narayanasamy, the plaintiffs' paternal uncle, left the village when he was a young boy and his whereabouts are not known and that he is presumed to be dead under law and also disputed the entitlement of the plaintiffs' mother to execute the settlement deed dated 31.03.1980 in favour of the plaintiffs in respect of the suit properties. According to the defendants, Narayanasamy is alive and in an oral partition which took place between Narayanasamy and the plaintiffs'

father Kaliaperumal, the properties had been allotted to Narayanasamy and accordingly Narayanasamy had alienated the various properties to the defendants under the sale deeds as set out in the written statements and further it is also put forth that it is only the defendants who had been in the possession and enjoyment of the properties acquired by them under the sale deeds executed in their favour by Narayanasamy and further it is also put forth that the plaintiffs suppressing the alienation of the suit properties in favour of one Jagadeesan had laid the suit falsely and it is further stated that Jagadeesan, in respect of the suit properties acquired by him, laid the suit against the defendants and others in O.S.No.467 of 1986 claiming the reliefs of declaration and possession and permanent injunction on the file of the District Munsif Court, Panruti, and the said suit has come to be dismissed and therefore, the present suit laid by the plaintiff is barred by resjudicata and the suit is also bad for non joinder of Narayanasamy, who is a necessary party and therefore, the suit laid by the plaintiffs is liable to be dismissed.

9. Based on the materials placed on record, both oral and documentary, by the respective parties and the submissions made, the trial court was pleased to dismiss the plaintiffs' suit and on appeal by the plaintiffs, the first appellate court set aside the judgment and decree of the trial court and held that the plaintiffs are entitled to 4/12 share in the items 3,4,6,7 and 9 of the plaint schedule properties and accordingly further held that the plaintiffs are entitled to obtain the possession of 4/12 share in the items 3,4,6 and 9 of the plaint schedule properties on partition and directed the plaintiffs to lay separate proceedings for claiming the mesne profits in respect of the items 3,4,6 and 9 of the plaint schedule properties and accordingly granted the reliefs in favour of the plaintiffs and declined the relief of permanent injunction sought for by the plaintiffs and on the abovesaid lines, disposed of the appeal preferred by the plaintiffs. Impugning the same, the defendants have come forward with the present second appeals.

10. As could be seen from the materials placed on record, it is found that the suit properties originally belonged to Ramalingam, Narayanasamy and Kaliaperumal, sons of Kuppusamy and it is further noted that Ramalingam had died intestate without marriage and therefore it is evident that the suit properties had been inherited by the plaintiffs' father Kaliaperumal and his brother Narayanasamy. Therefore, it is found that as per the law of succession, the suit properties belonging to Kuppusamy would equally devolve upon his sons, namely, Kaliaperumal and Narayanasamy.

11. Now, according to the plaintiffs, Narayanasamy had left the village when he was a small boy and his whereabouts are not known and therefore he is presumed to be legally dead.

The abovesaid case of the plaintiffs is seriously challenged by the defendants. On the abovesaid lines, the plaintiffs claim that the suit properties had been enjoyed in entirety by their father Kaliaperumal and after his demise by their mother and according to the plaintiffs on the basis of the settlement deed dated 31.03.1980 executed in their favour by their mother, they derived title to the suit properties and thereby it is evident that only on the basis of the abovesaid settlement deed, the plaintiffs claim the reliefs prayed for in the suit.

12. The defendants have challenged the legal competency of the plaintiffs' mother Pushpavathi Ammal to settle the suit properties in favour of the plaintiffs on the basis of the settlement deed dated 31.03.1980. Furthermore, it is also put forth by the defendants that Pushpavathi Ammal and the plaintiffs had already alienated the suit properties to one Jagadeesan and on the strength of the same, Jagadeesan had laid the suit against the defendants and the others claiming the reliefs of declaration, possession and for permanent injunction in O.S.No.467 of 1986 on the file of the District Munsif Court, Panruti and according to them, the said suit had been dismissed by the court concerned directing the parties to seek the remedies by way of the partition suit in respect of the properties and further according to the defendants, in the abovesaid suit, Narayanasamy, the plaintiffs' paternal uncle, who is claimed to have been legally dead, has been examined and even the plaintiffs' mother had been examined in the abovesaid suit and in such view of the matter, according to the defendants, when Narayanasamy is alive, the plaintiffs cannot claim that their father alone had derived the title to the suit properties as put forth by them and resultantly put forth the case that the plaintiffs' mother is not entitled to settle the suit properties in favour of the plaintiffs and also put forth the case that after they had sold the suit properties in favour of Jagadeesan, as above stated, the plaintiffs' mother is not entitled to settle the said properties infavour of the plaintiffs and accordingly contended that the present suit is legally not sustainable as per law on the principles of resjudicata in the light of the judgment and decree passed in O.S.No.467 of 1986 and also the suit laid by the plaintiffs is bad for non joinder of Narayanasamy and the plaintiffs have no title to the suit properties in any manner and sought for the dismissal of their suit.

13. As could be seen from the materials placed on record and as even found by both the courts, it is found that the plaintiffs' mother had already alienated certain suit properties in favour of one Jagadeesan and on the strength of the abovesaid sale deed, it is seen that Jagadeesan had laid the suit against the defendants and the others in O.S.No. 467 of 1986 as above pointed out. In the abovesaid suit, as could be seen from the judgment rendered in the said suit marked as

Ex.A3, Narayanasamy had been examined as P.W.4 and even the plaintiffs' mother had been examined as a witness. Therefore, when the plaintiffs' mother had already alienated certain suit properties in favour of Jagadeesan, it does not stand to reason as to how she could again settle the suit properties in favour of the plaintiffs. In addition to that, when Narayanasamy is found to have been examined as a witness in O.S.No.467 of 1986, the claim of the plaintiff that Narayanasamy had left the village when he was a young boy and is to be presumed dead legally, as such, cannot be believed and thereby the abovesaid case projected by the plaintiffs had been rightly rejected by the courts below.

14. O.S.No.467 of 1986 laid by Jagadeesan has been dismissed holding that both Kaliaperumal, the plaintiffs' father and Narayanasamy are equally entitled to the 1/2 share in the suit properties and therefore, the court concerned had refused to grant the reliefs prayed for by Jagadeesan for declaration, possession and permanent injunction and directed the parties concerned to seek the remedies by way of partition of their respective claims of right in the suit properties.

15. In the light of the abovesaid factors which are not controverted by both the parties and also determined by the courts below, it does not stand to reason as to how the plaintiffs could maintain the present suit seeking the exclusive claim of title to the suit properties. When the suit properties are found to be belonging to Kaliaperumal and Narayanasamy and Narayanasamy is found to be alive and infact has been examined as a witness in O.S.No.467 of 1986 and when there is no material placed either on the part of the plaintiffs or on the part of the defendants to substantiate that a valid partition had been effected between Narayanasamy and Kaliaperumal in respect of the suit properties, it is found that both would be entitled to equal share in the suit properties. In such view of the matter, it is found that the plaintiffs mother would be incompetent to settle the suit properties in entirety in favour of the plaintiffs. Equally, the plaintiffs' mother would be incompetent to alienate the suit properties in favour of Jagadeesan. At the most, it is found that the plaintiffs' mother and the plaintiffs would be entitled to claim only the 1/2 share in the suit properties, which Kaliaperumal would be entitled to obtain and the other 1/2 share would be belonging to Narayanasamy. Though on the part of the fifth defendant, the partition is stated to have been effected between Narayanasamy and Kaliaperumal and the other defendants having not taken such a plea and when there is no material placed worth acceptance evidencing the division of the suit properties between Kaliaperumal and Narayanasamy, it is found that the suit properties, as on date, belong to Kaliaperumal and Narayanasamy and on the death of Kaliaperumal, his half share in the suit properties would devolve upon the plaintiffs' mother and the plaintiffs together.

16. The defendants are also found to have purchased certain items of the suit properties on the strength of the sale deeds projected by them as if Narayanasamy had exclusive title to the same. When Narayanasamy is found to be only entitled to the 1/2 share in the suit properties as such and when his specific share in the suit properties had not been so far determined by way of any division with his brother Kaliaperumal, the alleged claim of purchase of the suit properties by the defendants from Narayanasamy also cannot be believed and accepted.

17. In the light of the abovesaid facts, when the alienee of the certain items of the suit properties from the plaintiffs' mother had laid the suit in O.S.No.467 of 1986 putting forth the same case against the defendants and the others and when the said suit has come to be dismissed and on the same lines, the plaintiffs have also come forward with the present suit one way or the other, in such view of the matter, as determined by the courts below, the present suit laid by the plaintiffs is found to be barred by resjudicata. After the determination that the present suit laid by the plaintiffs is barred by resjudicata only as regards the items 1,2,3,5,8 of the suit properties, but, at the same time, it is found that the first appellate court had also granted the relief in favour of the plaintiffs as determined by it in respect of item 3 of the plaint schedule properties.

18. When the suit properties are found to be undivided so far between Kaliaperumal and Narayanasamy and when it is further seen that Narayanasamy is very much alive, in such view of the matter, when the plaintiffs are not entitled to claim that they are the absolute owners of the suit properties on the strength of the settlement deed said to have been executed by their mother and when the mother is not legally competent to execute the settlement deed in respect of the suit properties, particularly, not entitled to settle the suit properties in entirety after alienating some of the suit properties in favour of Jagadeesan and as such, when it is found that as on date Narayanasamy is having legal claim of right to the suit properties i.e., he being entitled to the 1/2 share in the suit properties, in such view of the matter, for seeking the relief of declaration as claimed in the plaint, the plaintiffs should have impleaded the other lawful owner of the suit properties, namely, Narayanasamy as a party to the proceedings. The plaintiffs having not impleaded Narayanasamy as a party to the proceedings, it is found that the suit laid by the plaintiffs on that score alone is not maintainable. The first appellate court had proceeded as if, inasmuch as the plaintiffs are not claiming the relief of permanent injunction against Narayanasamy, their suit is not bad for his non joinder. But, the first appellate court has failed to note that the plaintiffs are claiming the relief of declaration of absolute title to the suit properties suppressing the existence of Narayanasamy and claiming falsely

that he is to be presumed to legally dead. When the materials placed on record point out otherwise, in such view of the matter, the other lawful owner of the suit properties, namely, Narayanasamy should have been impleaded as a party for determining the claim of title of the suit properties one way or the other and therefore, as rightly pointed out by the defendants, Narayanasamy is a proper and necessary party and without his impleadment, the suit laid by the plaintiffs is not maintainable. Without his impleadment and also without providing an opportunity to put forth his case, the first appellate court is found to be wholly unjust in granting the alleged claim of share in respect of the suit properties in favour of the plaintiffs. When the abovesaid declaration of the plaintiffs' claim of share in the suit properties is found to have been arrived by the first appellate court without putting the other lawful owner on notice and without hearing him, in my considered opinion, the abovesaid determination of the first appellate court is totally erroneous and cannot be sustained in the eyes of law and therefore, the judgment and decree of the first appellate court granting the reliefs in favour of the plaintiffs declaring their alleged claim of undivided share in the suit properties is without any basis and to be rejected forthwith.

19. In support of his contentions, the counsel for the defendants relied upon the decisions reported in 100 L.W. 426 (A. Ramachandra Pillai vs. Valliammal (died) and AIR 1965 Supreme Court 271 (Kanakarathanammal vs. V.S. Loganatha Mudaliar and another). The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the case at hand.

20. For the reasons aforesaid, the substantial questions of law formulated in both the second appeals are accordingly answered against the plaintiffs and in favour of the defendants.

21. In conclusion, the judgment and decree dated 10.08.2005 passed in A.S.No.37 of 2004 on the file of the Subordinate court, Panruti, are set aside and the judgment and decree dated 30.06.2004 passed in O.S.No.327 of 1996 on the file of the District Munsif Court, Panruti are confirmed. Accordingly, the second appeals are allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar (CCC)

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Sub Assistant Registrar

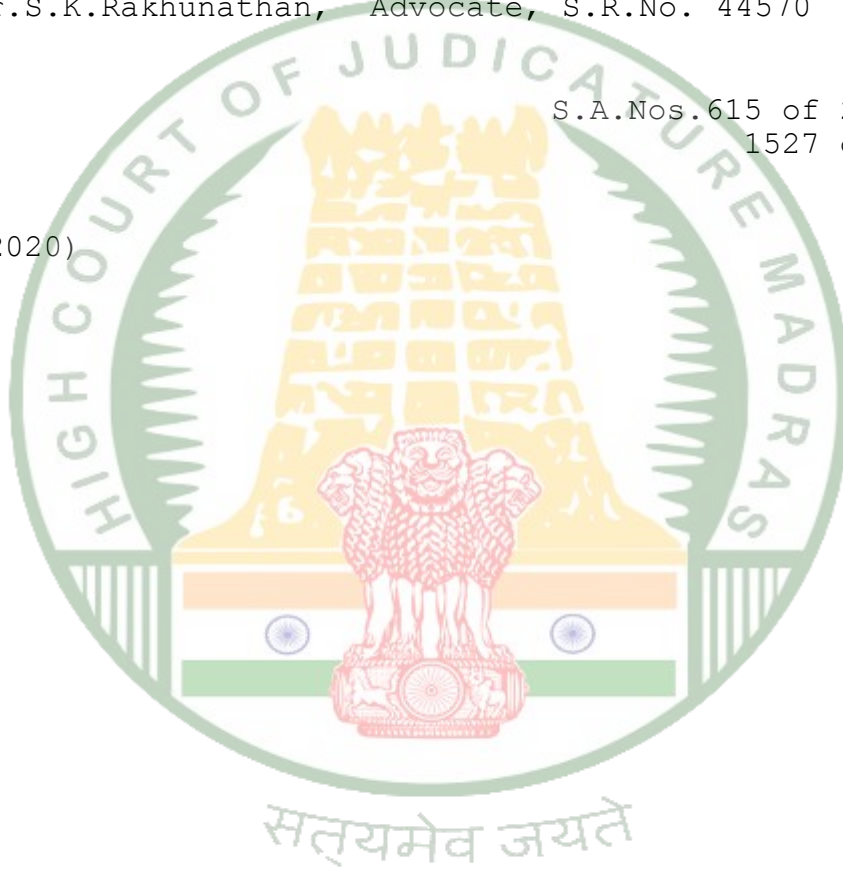
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1. The Subordinate court,
Panruti,
2. The District Munsif Court,
Panruti.
3. The Section Officer,
V.R.Section, High Court,
Madras

+1cc to Mr.S.K.Rakhunathan, Advocate, S.R.No. 44570

S.A.Nos.615 of 2006 and
1527 of 2007

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