

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.10.2019

CORAM

THE HONOURABLE MR.JUSTICE P.RAJAMANICKAM

S.A.NO.1288 OF 2004

1. Chandran
2. Siddhaiyan

... Appellants/Appellants/
Plaintiffs

Vs.

1. Chendrayan
2. Vellaiyammal
3. Patchiammal
4. Chinnal
5. Alamelu

... Respondents/Respondents/
Defendants

PRAYER :

Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 25.08.2003 in A.S.No.42 of 2003 on the file of the Principal District Judge, Salem, confirming the Judgment and decree dated 20.02.2003 in O.S.No.669 of 2001 on the file of the learned Principal District Munsif, Salem.

For Appellants : M/s.S.Kalyanaraman
For Respondents : Mr.D.Sivakumar

JUDGMENT

This second appeal has been filed by the plaintiffs against the judgment and decree passed by the Principal District Judge, Salem in A.S.No.42 of 2003 dated 25.08.2003 confirming the judgment and decree passed by the Principal District Munsif, Salem in O.S.No.669 of 2001 dated 20.02.2003.

2. The appellants herein had filed a suit in O.S.No.669 of 2001 on the file of the Principal District Munsif, Salem, to restrain the defendants therein, by means of permanent injunction, from interfering with their peaceful possession and enjoyment of the suit property. The learned Principal District Munsif, Salem, by the judgment and decree dated 20.02.2003 had dismissed the said suit without costs. Aggrieved by the same, the plaintiff had filed an appeal in A.S.No.42 of 2003 on the file of the Principal District Judge, Salem. The learned

Principal District Judge, Salem, by the judgment and decree dated 25.08.2003 had dismissed the said appeal without costs confirming the judgment and decree passed by the trial court. However, he gave a liberty to the plaintiffs to work out their remedy by filing a separate comprehensive suit for partition. Feeling aggrieved, the plaintiffs have filed the present second appeal.

3. For the sake of convenience, the parties are referred to as described before the trial court.

4. The averments made in the plaint are in brief as follows:

a) The plaintiffs had purchased the suit property under a registered sale deed dated 11.07.1991 from their paternal grandfather Alavara Gounder. From the date of purchase, the plaintiffs alone are enjoying the suit properties as owners. The first defendant is the son of second defendant. The defendants 3 to 5 are daughters of the second defendant. The second defendant had illegal intimacy with the said Alavara Gounder, but the defendants 1 and 3 to 5 were not born to the said Alavara Gounder. The said Alavara Gounder died ten years ago. The said Alavara Gounder's legally wedded wife is one Meenatchi and through her, there were three sons. One son died six years ago. The LRs of the said Alavara Gounder are enjoying the properties left by the said Alavara Gounder excluding the suit property which was already sold to the plaintiffs. The defendants are not having any right over the suit properties. But with a view to grab the suit properties, they have given lot of troubles to the plaintiffs from enjoying the suit properties. Hence, the plaintiffs were constrained to file the suit for the relief of permanent injunction.

5. The averments made in the written statement filed by the third defendant and adopted by the other defendants are in brief as follows:

It is false to say that the plaintiff had purchased the suit properties from one Alavara Gounder under a registered sale deed dated 11.07.1991 and they are in possession and enjoyment of the same from the date of purchase. The said Alavara Gounder had two sons through his first wife. One such son is the plaintiff's father Kariamalai. The defendants had already filed a suit for partition and the said suit was decreed. Hence, the sale deed dated 11.07.1991 will not bind upon the defendants. The defendants already filed an application to pass final decree and the same is pending and only with a view to obstruct the final decree proceedings, the present suit has been filed and therefore, the defendants prayed to dismiss the suit.

6. Based on the aforesaid pleadings, the learned Principal District Munsif, Salem, had framed necessary issues and tried the suit.

7. During trial, on the side of the plaintiffs, the first plaintiff was examined as PW1 and one more witness was examined as PW2. They also marked Exs.A1 to A9 as exhibits. On the side of the defendants, the first defendant was examined as DW1 and they marked Exs.B1 to B13 as exhibits.

8. The learned District Munsif, after considering the materials placed before him, found that the sale deed dated 11.07.1991 is not a valid document and will not bind upon the defendants. He further found that the preliminary decree passed in the previous suit in O.S.No.1696 of 1996 will bind upon the plaintiffs. Accordingly, he dismissed the suit. Aggrieved by the same, the plaintiffs had filed an appeal in A.S.No.42 of 2003 on the file of the Principal District Judge, Salem.

9. The learned Principal District Judge found that since the plaintiffs herein are not parties in O.S.No.1696 of 1996, the preliminary decree passed in that suit will not bind upon them. However, he found that the Ex.A1 sale deed dated 22.07.1991 will bind atleast the share of Alavara Gounder and hence, the plaintiffs are only co-owners and they cannot claim exclusive possession over the suit property and finally, he dismissed the appeal. However, he gave a liberty to the plaintiffs to work out their remedy by instituting a separate comprehensive suit by partition. Feeling aggrieved, the plaintiffs have filed the present second appeal.

10. This court at the time of admitting the second appeal has formulated the following substantial questions of law:

"1. Whether the courts below misdirected themselves in dismissing the suit when the plaintiffs have established their title to the suit property through Ex.A1 and the possession thereof?

2. Whether the courts below were wrong in holding that Ex.A1 is valid only to the extent of a share of Alavara Gounder viz., the Vendor, in the property sold under Ex.A1 is not the property of Alavara Gounder and that it is a joint family property wherein Alavara Gounder is only one of the sharer"

11. Heard Mr.S.Kalyanaraman, learned counsel for the appellants and Mr.D.Sivakumar, learned counsel for the respondents.

12. Substantial questions of law Nos.1 and 2:

The learned counsel for the appellants/plaintiffs has submitted that the courts below failed to consider that the suit properties absolutely belonged to Alavara Gounder and hence he is entitled to dispose of the suit property. He further submitted that the first appellate court erred in holding that the plaintiffs herein are not parties in the previous suit, and hence, the preliminary decree passed in that suit will not bind upon the plaintiffs. He further submitted that the courts below failed to consider that the patta and the gist receipts filed by the plaintiffs would show their exclusive possession over the suit properties and therefore, he prayed to set aside the judgment and decree passed by the courts below and decree the suit as prayed for.

13. Per contra, the learned counsel for the respondents has submitted that the first appellate court has rightly come to the conclusion that the plaintiffs have to file a suit for partition and instead of that, they have filed the present second appeal. He further submitted that since the findings of the first appellate court are based on the facts, no substantial question of law arises and therefore, he prayed to dismiss the second appeal.

14. Admittedly, the said Alavara Gounder had executed Ex.A1 sale deed dated 11.07.1991 in favour of the plaintiffs and only thereafter, the previous suit i.e., O.S.No.575 of 1991 was filed by the first defendant herein for the relief of partition before the Sub-Court, Salem. Subsequently, the said suit was transferred to the District Munsif Court, Salem and re-numbered as O.S.No.1696 of 1996.

15. Though in the said suit, the plaintiffs' vendor cum grand father, Alavara Gounder and plaintiffs' father Kariamalai Gounder were shown as defendants 1 and 2 respectively, the plaintiffs herein were not impleaded as parties. Further, it is seen from the certified copy of the judgment passed in O.S.No.1696 of 1996 (Ex.B10), the plaintiffs' father Kariamalai had taken a specific stand that the suit is bad for non-joinder of the present plaintiffs. But the trial court has not framed any issue with regard to whether the suit is bad for non-joinder of necessary party. But he tried the suit in respect of the other issues and finally passed a preliminary decree on 13.01.1999 directing to divide the suit properties into 28 equal shares and allot eight such shares in favour of the first defendant herein. It appears that as against the said preliminary decree, the plaintiff's father viz., Kariamalai had filed an appeal in A.S.No.33 of 1999 on the file of the Principal Sub-Judge, Salem and the said appeal was dismissed for

default on 03.03.2001. The first appellate court taking into consideration of all the aforesaid facts, had held that since the plaintiffs herein were not parties in the previous suit i.e., in O.S.No.1696 of 1996, the preliminary decree passed in that suit will not bind upon the plaintiffs herein. As against the said findings, the respondents herein have not filed any appeal or cross objection. So, the findings of the first appellate has attained finality and the said findings will bind upon the respondents herein. Only finding adverse to the appellants herein is that since the plaintiffs claimed right over the suit property through Alavara Gounder, the rights of Alavara Gounder have to be decided in a separate comprehensive suit for partition of the properties of the family and also all the parties. Admittedly, the family is having some other properties also. But those properties were not added. The issue as to whether the said Alavara Gounder is having right to dispose the suit property has to be decided in a comprehensive suit which has to be filed by the plaintiffs by including all the properties and also all the members of the family. In the said factual findings, this court cannot interfere. Therefore, this court is of the view that the findings of the first appellate court that the plaintiffs have to work out their remedy by filing a separate comprehensive suit for partition has to be upheld. Accordingly, the substantial questions of law are answered against the appellants.

16. In the result the second appeal is dismissed. It is open to the appellants to file a separate comprehensive suit for partition including all the properties of the family and all the family members as held by the first appellate court. Considering facts and circumstances of the case, the parties are directed to bear their respective costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

gv
To

1. The Principal District Judge, Salem.
2. The Principal District Munsif, Salem.
3. The Section Officer, V.R.Section, High Court, Madras.

+lcc to Mr.D.Sivakumar, Advocate, S.R.No.85726

+lcc to M/s.S.Kalyanaraman, Advocate, S.R.No.85781

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CP(CO)

CS/22/10/2020