

Reserved on :15.03.2019
Pronounced on :27.03.2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Second Appeal No.1415 of 2010 &
M.P.No.1 of 2010

1. Mr.Thanikachalam (deceased)
2. Mr.Sarangan ...Appellants/Appellants/Defendants 1 and 3
(Second appellant is permitted to pursue the Second
Appeal vide Order of this Court in CMP.No.3865
of 2018 dated 05.03.2019)

Vs

1. Mr.Ranganathan (deceased)
2. Mr.Veeramani
3. Mr.Kuppan
4. Mr.Palani
5. Mrs.Jayalakshmi
6. Mrs.Kalyanai
7. Mrs.Thangam
8. Mrs.Arupudhammal
9. Mrs.Mohana
10. Mrs.Yasodha
11. Mr.R.Veeraputhiran
12. Mr.R.Gnana Chandran
13. Mrs.L.Monkayarkarasi
14. Mrs.R.Selvi
15. Mr.R.Anbalagan

[Respondents 11 to 15 brought on record as LRS of the
deceased R1 impleaded as per the Order in
M.P.Nos.1 to 3 dated 25.11.2014.] ... Respondents/ Defendants

Prayer:- Second Appeal has been filed under Section 100 of
C.P.C.to set aside the judgment and decree dated 19.04.2010 made
in A.S.No.4 of 2009 on the file of the Subordinate Court,
Poonamallee confirming the judgment and decree dated 29.04.2008
made in O.S.No.233 of 2004 on the file of the District Munsif
Court, Poonamallee.

For Appellants : Mr.B.Divakaran

For Respondents : Mr.M.Chidambaram - R11 to R.15
No appearance - R2 to R.10

JUDGMENT

Aggrieved over the concurrent finding of the Courts below in decreeing the suit for declaration and recovery of possession filed by the plaintiff in O.S.No.233 of 2004 the present Second Appeal has been filed.

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

3. The brief facts of the plaintiff case is as follows :

The suit property was originally owned by joint family consisting of late Subbaraya Mudaliyar and his sons, viz., Somasundara Mudaliar, Balasundara Mudaliar, Thanikachala Mudaliar, Ramu Mudaliar and Krishnamoorthy Mudaliar. The said Subbaraya Mudaliar and his sons have partitioned the 'A' schedule property by metes and bounds as per the duly registered partition deed dated 08.01.1946. After the partition all sharers, except the first defendant sold their respective shares to Balasundara Mundaliar orally in the year 1955 itself. The said Balasundara Mundaliar has become absolute owner of the entire 'A' schedule property. However, Subbaraya Mudaliar and his other sons continued to reside in the house under leave and license of Balasundara Mundaliar. So far as vacant site in 'A' schedule property is concerned, it was equally divided among the sharers in which each of them got an extent of 24 feet north to south and 39 feet east to west. The first defendant was allotted a share to the north of the last sharer Somasundara Mudaliar. Balasundara Mundaliar sold the entire property in 'A' schedule, except the share of the first defendant, under a sale deed dated 29.11.1983 for valuable consideration. When the plaintiff wanted to occupy the property purchased by him under the above sale deed, the first defendant filed a suit in O.S.No.1710 of 1983 for partition and for other reliefs. The possession of the suit property by the first defendant is permissive in nature, The defendants are not entitled to any right in 'B' schedule property. They have not vacated the property inspite of repeated demands. The property purchased by the plaintiff is shown in 'B' schedule, which is part and parcel of 'A' schedule property. Hence, the suit for declaring the title of the 'B' schedule property and to hand over vacant possession after removing the super structure, if any, put up by them.

4. The first defendant filed a written statement contending that they have not partitioned 'A' schedule property and alleged partition on 08.01.1946 is sham and nominal. He has filed a suit in O.S.No1710 of 1997 for partition and permanent injunction. If the first defendant's brothers had wanted to sell his share in the suit property, the first defendant had preferential right to purchase their shares in the suit property and hence, any sale said to have been obtained by the plaintiff is not valid and binding on the defendant.

5. The 11th defendant filed a written statement contending that the Balasundara Mundaliar had mortgaged the suit property to one Murugappa Chetty on 21.04.1965. But he had failed to redeem the same. Later Murugappa Chetty, on receipt of the principal with interest thereon had made over the mortgage to one Manonmani Ammal on 11.12.1970. Subsequently, Manonmani Ammal on receipt of the principal with interest from this defendant had made over the mortgage through deed dated 01.02.1973. Hence, this defendant had acquired the entire property and she has been in possession and enjoyment of the same and her possession is open, continuous and uninterrupted and she has perfected her title by adverse possession.

6. The trial Court framed three issues :

1. Whether the plaintiff is entitled for declaration as prayed for?
2. Whether the plaintiff is entitled for recovery of possession?
3. To what relief?

7. The trial Court in a common judgment dated 29.04.2008 decreed the suit in O.S.No.233 of 2004 which is the subject matter of the present appeal. Along with the above suit, the trial Court has also disposed the suit in O.S.No.240 of 2006 and 605 of 1999. The first defendant carried the matter to the first appellate Court. The first appellate Court also confirmed the decree and judgment of the trial Court. As against which the present Second Appeal came to be filed.

8. The learned counsel appearing for the appellant vehemently contended that the plaintiff has claimed declaration in respect of the 'B' schedule property on the allegation that other co-owners have sold their respective shares to one of

their brother Balasundara Mundaliar by oral sale in the year 1955 itself and that the plaintiff has purchased the property from the said Balasundara Mundaliar on 29.11.1983. It is the contention of the learned counsel that the alleged oral sale by the co-sharers has not been established and therefore, the plaintiff did not get any right or title over the 'B' schedule property, without establishing the oral sale. The trial Court has not discussed the above issue while disposing the three suits in a common judgment. The first appellate Court has also not gone into the title to the suit property. Hence, it is the contention of the learned counsel that as the oral sale by other co-sharers has not been established by the plaintiff, the plaintiff, who has come to the Court for declaratory relief, cannot succeed in a suit for declaring his title, since he did not have title to the suit property.

9. Whereas, the learned counsel appearing for the respondent would submit that the trial Court while disposing the three suits, in respect of the same suit property, had analysed the entire facts in thread bare and found that the first respondent/first defendant has no right in the suit property and he is in possession of the property and the plaintiff is entitled to recover the possession under due process of law. The trial Court has also relied upon the earlier decree and judgment in O.S.No.1710 of 1983 filed by the first respondent herein for partition. In the above suit itself, the plaintiff was one of the defendant and the issue with regard to the right of the parties in the suit properties has been analysed in entirety and therefore, it is the contention of the learned counsel for the respondent that the trial Court and the first appellate Court has analysed the matter in thread bare and hence, prayed for dismissal of the appeal.

10. The arguments of the both sides have been heard at the stage of admission of this second appeal.

11. The suit has been filed for declaration and for recovery of possession of 'B' schedule property shown in the plaint. It is not in dispute that 'A' schedule property is originally owned by the joint family consisting of later Subbaraya Mudaliar and his sons as stated above and there was a partition among the members on 08.01.1946. Though the first defendant has disputed the above partition as sham and nominal, in his written statement, it is curious to note that the first defendant has already filed a suit in O.S.No.1710 of 1983 for partition claiming $\frac{1}{4}^{\text{th}}$ share wherein he has taken a specific stand that the partition in the family, i.e., on 19.01.1946 is void, sham and nominal. In the above suit, the plaintiff in the

present suit is also one of the defendant wherein he has also taken a specific defence that after such partition in the family, all the sharers sold their shares orally to one of their brother Balasundara Mundaliar in the year 1955. The said Balasundara Mundaliar has sold the property to the plaintiff in the year 1983.

12. In the above suit in O.S.No.1710 of 1973, the issue was framed whether the plaintiff, namely, the first defendant herein, was entitled to partition of 1/4th share in the suit property. In the above suit, though there was no specific issue with regard to the sale of the property to the first defendant herein and the trial Court has discussed the entire facts and decided the issue. The trial Court in the above judgment has held that the first respondent herein has purchased the property and in fact the suit properties have already been partitioned and thereafter, in respect of 'B' schedule property of the present suit was mortgaged by the said Balasundara Mundaliar and in the above mortgage deed the first respondent is also one of the attesting witness. The trial Court has also took note of the admission of the first respondent about the recital contained in the mortgage deed and Balasundara Mundaliar has mortgaged the property as his own property and thereafter, he sold the property to the first respondent therein. The trial Court in the entire judgment has discussed about the rights of the parties, namely the sale in favour of the first defendant therein dated 29.11.1983 and held that the sale is true and binding on the parties and dismissed the suit filed by the plaintiff in the above suit, who is the first defendant herein. In the above suit, the trial Court has also observed that the sale in favour of the first respondent is valid.

13. It is to be noted that the trial Court has considered the judgment passed in O.S.No.1710 of 1983 which has been exhibited as A3 in the present suit. The first respondent has carried the matter in the appeal in A.S.No.22 of 1999 and the first appellate Court has also confirmed the finding of the trial Court in O.S.No.1710 of 1983 and held that the fourth defendant, namely the first respondent in the appeal has purchased the property and he can file a suit to evict the appellant herein. The above finding has reached its finality. The respondent has not filed any second appeal challenging the decree and judgment in O.S.No.1710 of 1983, which has reached finality. Therefore, the contention of the first defendant in the present suit that there is no partition in the family and partition dated 08.01.1946 is sham and nominal cannot be pressed into service since the above issue has already been decided in O.S.No.1710 of 1983, which has reached its finality.

14. It is further to be noted that the 11th defendant in O.S.No.233 of 2004 has filed a separate suit in O.S.No.240 of 2006 for declaration in respect of the suit property by stating that she has perfected her title to the 'B' schedule property on the ground that the suit property has been mortgaged by Balasundara Mundaliar to one Murugappa Chetty on 21.04.1965 and the said Murugappa Chetty on receipt of the principal and interest had made over the mortgage to one Manonmani Ammal on 11.12.1970 and said Manonmani Ammal on receipt of the principal with interest from the 11th defendant and made over the mortgage in favour of the 11th defendant. According to the 11th defendant she is in possession and enjoyment of the suit property.

15. Another suit in O.S.No.605 of 1999 was filed by the 10th defendant herein and she has filed the suit for bare injunction against the first respondent and also the respondent herein. The trial Court had disposed all the three suits in one common judgment, since the suit property is one and same and the 11th and 10th defendants have claimed right over the suit property. The trial Court in the judgment dated 29.04.2008 had thoroughly analysed the facts and evidence

adduced by the parties in O.S.No.1710 of 1983, suit filed by the first defendant and came to the conclusion that the plaintiff in this suit has valid title to the suit property and decreed the suit.

16. It is to be noted that after the partition among the family members, others brothers have sold their share orally to their brother Balasundara Mundaliar and the said Balasundara Mundaliar has sold the property to the plaintiff. Without the oral sale, the said Balasundara Mundaliar would not have had title to the entire 'B' schedule property and sold the property to the plaintiff. The trial Court has thoroughly analysed the entire facts, particularly the mortgage executed by Balasundara Mundaliar in respect of the property wherein the first respondent is also an attesting witness besides his father was also an attesting witness. Taking note of the conduct of the parties, the trial Court infact considered the earlier judgment passed in OS.No.1710 of 1983, which reached its finality, has decreed the present suit.

17. It is also curious to note that except the first respondent and the 11th defendant, the other brothers

namely Somasundara Mudaliar, Ramu Mudaliar and Krishnamoorthy Mudaliar, who are the other legal heirs have not challenged the mortgage made by the said Balasundara Mundaliar in respect of the suit property or the partition in the year 1946. Balasundara Mundaliar has mortgaged

the properties on 21.04.1965 which has not been challenged by any of the brothers. The same clearly indicate that the suit properties are partitioned in the year 1946 and the other brothers have sold their share in the 'B' schedule property to Balasundara Mundaliar and he in turn sold the property to the plaintiff in the year 1983. The conduct of the other sharers, except the first defendant, not challenging the mortgage made by Balasundara Mundaliar and the sale made by him infact clearly probabalize the plaintiff case that Balasundara Mundaliar has enjoyed the suit property as an absolute owner and sold the property in his favour. This has been further probabalized by the very fact that in the year 1965 itself, he has mortgaged the property, wherein the first defendant is also one of the attesting witness in the above document. Ex.B.2 a copy of assignment is also filed. All these facts clearly show that Balasundara Mundaliar has already enjoyed the property as an absolute owner of the property and thereafter, sold the property. It is the specific case of the plaintiff that other sharers has given their share to Balasundara Mundaliar, except the first defendant. The other sharers have not objected Balasundara Mundaliar enjoying the property as an absolute owner and allowing him to exercise his right over the property and allowing him to mortgage the property and all these facts infact probabilize the plaintiff case. The brothers of the first defendant have not challenged either the mortgage nor denied the oral sale in the year 1955.

18. It is also to be noted that the siblings of the sharers, who have said to have sold their respective shares have not challenged the contention of the plaintiff which establishes their deemed admission on their part. Further they have not even filed any written statement denying the oral sale. There is no prohibition of oral sale when the property is below the value of Rs.100/-. The suit properties and the respective shares of the sharers is only a small strip of land and the alleged oral sale took place in the year 1955. Therefore, possibility of oral sale cannot be ruled out and the value of the property at the relevant point of time may be less than Rs.100/-. The conduct of other sharers or legal heirs in not objecting the contention of the plaintiff, in fact probabalise the plaintiff case. In the earlier judgment, the Courts have

clearly held in Ex.A.3 and Ex.A.5 that the sale made to the plaintiff by Balasundara Mundaliar is valid and binding on the first defendant. When the above findings have reached finality, now the first defendant cannot reagitate the same in this second appeal.

19. It is also curious to note that the 11th defendant who lost her suit in O.S.No.605 of 1999 filed for declaration of her title in the suit property has not filed any appeal and that has also reached finality. Hence, When the Courts below has decreed the suit on facts and also considering the earlier litigation between the parties and this Court finds that there is no substantial question of law involved in this appeal and this Second appeal is liable to be dismissed.

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

Sd/-
Assistant Registrar(CCC)

//True copy//

Sub Assistant Registrar

vrc

To

1. The Subordinate Judge, Poonamallee.

2. The District Munsif, Poonamallee.

+1cc to Mr.B.Diwakaran, Advocate SR.No.29532

+1cc to Mr.M.Chidambaram, Advocate SR.No.28953

Second Appeal No.1415 of 2010

KJ(CO)
GMY(01/04/2019)