

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.04.2019

PRONOUNCED ON : 25.04.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.1423 of 2005

1.Solaimuthu (died)
2.Malliga
3.Thamizhmani
4.Ganesamurthi
5.Saroja
6.Ilavarasi
7.Ilavazhagi

...Appellants

(Appellants 2 to 7 brought on record as LRs of the deceased sole appellant vide order of Court dated 20.03.2019 made in CMP.No.6881,6883 and 6886/2019 in S.A.No.1423 of 2005)

Vs.

1.Velayutham
2.Jagadambal
3.Kolanjiappan
4.Durai
5.Sankar
6.Nilavu Rani
7.Ponni

...Respondents

(No notices to respondents 2 to 7 are necessary as they remained exparte before the Trial Court and the Lower Appellate Court)

Prayer :- Second Appeal has been filed under Section 100 of the Civil Procedure Code against the Judgement and Decree dated 20.05.2004 passed in A.S.No.68 of 2003 on the file of the Additional District Judge, Fast Track Court No.II, Cuddalore, confirming the judgement and decree dated 28.02.2002 passed in O.S.No.93 of 1998 on the file of the Principal Subordinate Court, Virudhachalam.

For Appellants : Mr.K.Janani
For Mr.V.Ambika

For Respondent : Ms.V.Srimathi
No.1

Respondent 2 to 7 : Set exparte

JUDGMENT

In this second appeal, challenge is made to the Judgement and Decree dated 20.05.2004 passed in Cross appeal in A.S.No.68 of 2003 on the file of the Additional District Judge/ Fast Track Court No.II, Cuddalore, confirming the judgement and decree dated 28.02.2002 passed in O.S.No.93 of 1998 on the file of the Principal Subordinate Court, Virudhachalam.

2.The second appeal has been admitted on the following substantial questions of law:

"(i).Whether the Courts below are correct in law in holding that recitals in Exhibit A2 Sale Deed dated 28.04.1976 would not disclose that the Appellant/Plaintiff's father was having share in the schedule of property?

(ii).Whether the Courts below are correct in law in placing reliance upon Commissioner's Reports and plans - Exhibits C1 to C6 without considering the objections filed to it?

(iii).Whether the Courts below are correct in law in dismissing the cross appeal filed by Appellant/Plaintiff's even though it dismissed the appeal in A.S.No.68/2003 filed by first respondent?"

3.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.

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

5.Suffice to state that the plaintiff has laid the suit against the defendants for partition and permanent injunction.

6.The partition had been sought for by the plaintiff in respect of three items of the suit properties. The Courts below had granted the relief of partition in favour of the plaintiff in respect of item 1 of the plaint schedule properties. As regards the items 2 & 3 of the plaint schedule properties, the suit laid by the plaintiff has come to be dismissed by the trial Court. It is also seen that the 7th defendant and his wife had laid the separate suit against the plaintiff in O.S.No.332 of 2000 for the reliefs of declaration and permanent injunction. The suit laid by the plaintiff as well as the suit laid by the 7th defendant and his wife in O.S.Nos.93 of 1998 and 332 of 2000 respectively were taken up for joint trial by the trial Court and on an appreciation of the materials placed on record, as abovenoted, granted the relief of partition in favour of the plaintiff only as regards the first item of the plaint schedule properties and accordingly, also granted the relief of permanent injunction prayed for by the plaintiff in respect of the first item of the plaint schedule properties against the 7th defendant and in other aspects, the suit laid by the plaintiff has come to be dismissed by the trial Court and the trial Court has also dismissed the suit laid by the 7th defendant and his wife in O.S.No.332 of 2000.

7.Impugning the judgment and decree of the trial Court in O.S.No.93 of 1998, the 7th defendant preferred the first appeal in A.S.No.68 of 2003 and as against the dismissal of the suit in respect of the items 2 & 3 of the plaint schedule properties, the plaintiff is found to have preferred the cross appeal in the abovesaid first appeal laid by the 7th defendant. As against the judgment and decree passed in O.S.No.332 of 2000, the 7th defendant and his wife had preferred the first appeal in A.S.No.67 of 2003. The first appellate Court, on an appreciation of the materials placed on record, was pleased to confirm the judgment and decree passed by the trial Court in both the suits and accordingly, dismissed the first appeals preferred by the 7th defendant and his wife and equally also dismissed the cross appeal preferred by the plaintiff. Impugning the judgment and decree passed by the first appellate Court in the cross appeal, the plaintiff has come forward with the present second appeal.

8.The plaintiff has laid the suit against the defendants for partition. The relief of partition is sought for as against the defendants 1 to 6 and according to the plaintiff, the plaint schedule properties, equally, belonged to Gopal Padayachi, the plaintiff's father and one Ponnusamy Padayachi in equal moieties. It is further stated that Ponnusamy Padayachi had sold his share in the suit properties to Muruga Mudaliyar by way of a sale deed dated 28.04.1976 and it is stated that the defendants 1 to 6 are the legal representatives of Muruga Mudaliar. Further, it is also put forth by the plaintiff that

in the partition effected amongst his family members, $\frac{1}{2}$ share in the suit properties had been allotted to the plaintiff in the partition deed dated 27.06.1989. Thus, according to the plaintiff, he is entitled to $\frac{1}{2}$ share in the suit properties and the remaining $\frac{1}{2}$ share belongs to the defendants 1 to 6. The further case of the plaintiff is that the 7th defendant has no right, title or interest in respect of the suit properties and on the other hand, the 7th defendant, who is having the property on the western and northern side of the suit properties, is attempting to encroach into the suit properties one way or the other and accordingly, to restrain him from committing any of waste act and intending into the suit properties, the plaintiff has sought for the relief of permanent injunction against the 7th defendant.

8.The 7th defendant alone contested the plaintiff's suit and put forth the case that the plaintiff is not entitled to the suit properties as put forth in the plaint, in particular, the 7th defendant has disputed the entitlement of the plaintiff in respect of the items 2 & 3 of the plaint schedule properties. Further, according to the 7th defendant, he is having the right of way of an extent of 2' width on the western side of the first item of the plaint schedule properties to a length 36' 9" and the plaintiff is not entitled to obstruct his access through the said lane portion and accordingly, it is found that in respect of the abovesaid lane portion, the 7th defendant and his wife had also levied the suit against the plaintiff in O.S.No.332 of 2000.

9.To sustain that Gopal Padayachi and Ponnusamy Padayachi have equal share in the plaint schedule properties, the plaintiff mainly relied upon the sale deed dated 28.04.1976 executed by Ponnusamy Padayachi and others in favour of Muruga Mudaliyar marked as Ex.A2. As rightly found by the Courts below, from the recitals contained in Ex.A2 sale deed, it could not be inferred and concluded that Gopal Padayachi had equal share in the plaint schedule properties. On the other hand, it is found that by way of Ex.A2 sale deed, Ponnusamy Padayachi and others are found to have alienated their $\frac{1}{2}$ share in the properties described therein to Muruga Mudaliar. That apart, there is no indication contained therein that the remaining $\frac{1}{2}$ share in the properties comprised in the said sale deed belongs to Gopal Padayachi. Equally, from the partition deed relied upon by the plaintiff dated 27.06.1989 marked as Ex.A3, it cannot be inferred that Gopal Padayachi had equal share in the plaint schedule properties and the same had come to be allotted to the plaintiff under the abovesaid partition deed. Apart from Ex.A3 partition deed, there is no other material worth acceptance placed on the part of the plaintiff to evidence that Gopal Padayachi had any right or interest in the plaint schedule properties as described in the plaint.

10. However, as abovenoted, the contesting defendant viz., the 7th defendant resisted the plaintiff's suit for partition, mainly, contending that the plaintiff is not entitled to the items 2 & 3 of the plaint schedule properties and on that premise, it is found that the Courts below had proceeded that the plaintiff has $\frac{1}{2}$ share in the first item of the plaint schedule properties shown as ABCD in the plaint plan marked as Ex.A1 and accordingly, by holding that the plaintiff has not placed any material to show his entitlement to the items 2 & 3 of the plaint schedule properties, accordingly, determined that the plaintiff is not entitled to claim partition in respect of the items 2 & 3 of the plaint schedule properties.

11. As rightly determined by the Courts below, absolutely, there is no material to hold that the plaintiff's predecessor in interest viz., Gopal Padayachi had equal share in the plaint schedule properties, particularly, the items 2 & 3 of the plaint schedule properties. Merely because, Ponnusamy Padayachi had conveyed his $\frac{1}{2}$ share in the plaint schedule properties by way of Ex.A2 sale deed to Muruga Mudaliar, it cannot be inferred and determined that the other $\frac{1}{2}$ share belonged only to Gopal Padayachi as sought to be made out by the plaintiff. Therefore, it is evident that as rightly determined by the Courts below, the plaintiff has miserably failed to establish that he and his predecessor in interest had title, right or interest in respect of the items 2 & 3 of the plaint schedule properties and in such view of the matter, the Courts below are found to be justified in negating the reliefs sought for by the plaintiff in respect of the items 2 & 3 of the plaint schedule properties. The commissioner's report and plan marked in the proceedings would not be relevant for determining the entitlement of the plaintiff to the items 2 & 3 of the plaint schedule properties.

12. In the light of the abovesaid discussions, the Courts below are found to have analysed the materials placed on record by both parties in the right perspective and rightly determined that the plaintiff is not entitled to claim partition in respect of the items 2 & 3 of the plaint schedule properties. No interference is warranted with reference to the same. In my considered opinion, no substantial question of law is involved in the second appeal. Be that as it may, the substantial questions of law formulated in the second appeal are accordingly, answered against the plaintiff and in favour of the 7th defendant.

019)

Additional District Judge,
Circuit Court No.II, Cuddalore.

Principal Subordinate Court, Virudhachalam.

Commissioner,
Circuit Court, High Court, Madras.

Mr.V.Raghavachari, Advocate sr 39607.
Mrs.V. Ambika, Advocate sr 40385.

S.A.No.1

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