

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.01.2019

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.425 of 2018
and
S.A.SR.No.35926 of 2018
and C.M.P.No.11638 of 2018

1.Krishanan
2.K.Subramanian
3.Rajeswari
4.Palanisamy

...Appellants/Defendants 1,5,9&10

Vs.

1.K. Venkatesan
2.Alamelu
3.Kaveriammal
4.Manimegalai
5.Chinnappapa
6.Murugesan

...1st respondent/Plaintiff

... Respondents 2 to 5/
Defendants 2,4,6,7 and 8

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 25.02.2013 in A.S.No.28 of 2011 on the file of the learned II Additional District Judge, Salem, confirming the Judgment and decree dated 17.02.2011 in O.S.No.15 of 2006 on the file of the learned Principal Subordinate Judge, Salem.

For Appellants : Mr.D. Shivakumaran

JUDGMENT

The defendants 1, 5, 9 and 10 are the appellants before this Court. The Second Appeal is filed challenging the concurrent Judgment and Decree in O.S.No.15 of 2006 on the file of the learned Principal Subordinate Judge, Salem.

2.The brief facts of the case are narrated hereinbelow:

The plaintiff, who is the 1st respondent herein, had filed a suit O.S.No.15 of 2006 on the file of the learned District Munsif, Salem, for a Partition and separate possession of his 1/7th share in the Item - I of the suit property and 1/3rd share in the Items II and III of the suit schedule properties. The

case of the plaintiff was that the defendants 1 and 5 are his brothers, defendants 2 to 4 are his sisters and the defendants 6 to 8 are the children of his predeceased sister Chinnaponnu. The plaintiff has contended that the I item of the suit schedule property was purchased by his father N. Kandasamy under a Sale Deed dated 04.09.1936. Item - II of the property was purchased by the plaintiff along with the defendants 1 and 5 under a Sale Deed dated 23.10.1972 and likewise Item - III of the property was purchased on 30.05.1983. The father of the defendants died intestate and the plaintiff and the defendants 1 to 5 along with the legal representatives of Chinaponnu were in the common possession and enjoyment of Item - I of the properties. The plaintiff had come forward with the case that he was employed in the Postal Department, the 1st defendant was employed in Thiyagaraja Polytechnic and the 5th defendant was employed in the Telephone Department and from out of the self-earning, all the three had purchased the Items 1 and 3 of the properties.

3.The plaintiff would submit that in the year 1982, the father of the plaintiff Kandasamy had died. Thereafter, on 03.10.1996, the plaintiff's mother Chinnammal had died intestate leaving behind her surviving the plaintiff, defendants 1 to 5 and the deceased Chinnaponnu, and they became entitled to the properties. Thereafter, Chinnponnu died leaving behind her surviving defendants 6 to 8 as her legal representatives. Therefore, they inherited the share of Chinnammal in the "A" schedule property.

4.On 03.10.1996, the mother of the defendants 1 to 5 died. Pending the suit, the 3rd defendant had also passed away and his legal representatives have been impleaded as defendants 9 and 10 in the suit. The plaintiff has sought for a Partition and separate possession of 1/7th share in the Item - I of the suit property and 1/3rd share in the Items II and III of the suit schedule properties.

5.The defendants had resisted the above suit inter alia admitting the fact that the father had purchased the properties and that the other properties were purchased by the plaintiff and the defendants 1 and 5. The specific case was that after the demise of the father, and during the lifetime of the mother, the suit properties were divided amongst the plaintiff and the defendants in the year 1984. A certain extent of land was kept in common. The division was made orally and from the said day each have been enjoying the properties separately. The portions that were kept in common are pathway, well portion and house in Survey No.48/6 which measured 0.07 cents in which their mother lived till her death in the year 1996. It was a tacit understanding that after the demise of their mother, the 1st

defendant would be entitled to the house since he was the elder son and in pursuance of this understanding, the 1st defendant had also taken possession of the house property after the mother's demise. It was the case of the defendants that the revenue records had also been mutated in their names and the partition taken had been 19 years prior to the execution of the Settlement Deed by the 5th defendant in favour of his wife and daughter in the year 2003. Therefore, there was no merit in the suit and they sought for a dismissal of the suit. The written statement which was filed by the 2nd defendant was adopted by the defendants 4 and 6 to 8. They had no objection to the suit being decreed and were also willing to pay the necessary Court fees.

6.The plaintiff had filed a reply denying the various allegations that had been put forward by the defendants 1, 3 and 5 and contended that the 5th defendant did not obtain permission of the other co-owners prior to the executing the Settlement Deed in favour of his daughter. The learned trial Judge, considering the evidence on record both oral and documentary, granted the 1/7th share to the plaintiff in all schedule of properties. Challenging the decree granting only a 1/7th share in the suit 2 and 3 items of properties, the plaintiff had filed A.S.No.12 of 2012 and the 1, 3 5, 9 and 10 appellants had filed A.S.No.28 of 2011. The plaintiff had filed A.S.No.12 of 2012 challenging the decree granting only a 1/7th share in the suit 2 and 3 items of the properties, when the plaintiff had sought for a decree with reference to a 1/3rd share each. The Appellate Court dismissed A.S.No.28 of 2011 filed by the defendants 1, 5, 9 and 10 and partly allowed A.S.No.12 of 2012 granting a 1/7th share each to the plaintiff, defendants 1, 2, 4, 5 and a 1/7th share to the defendants 6 to 8 in the I Item and a 1/3rd share each to the plaintiff and defendants 1 and 5 in the suit items 2 and 3. Challenging the Judgment in A.S.No.28 of 2011 and A.S.No.12 of 2012, the defendants 1, 5, 9 and 10 are before this Court.

7.Heard Mr.D.Shivakumaran, learned counsel for the appellants and perused the material available on record.

8.The only issue which has been put forward by the defendants to the suit for partition is that in the year 1984, there was an oral partition between the parties and each of them had taken possession of their respective shares. This partition has not been proved by the defendants. In fact, D.W.1 in his cross examination has stated that there was no partition while their father was alive and thereafter, there is no document to evidence the oral partition. The Courts below have also taken note of the fact that the defendants have not produced any document to support the case of the defendants that the

Panchayat had taken place between the parties.

9. Admittedly, the suit Item - I of the property is the ancestral property and Items II and III have been purchased by the plaintiff and the defendants 1 and 5 under Ex.A.2 and Ex.A.3. Therefore, the Appellate Court had modified the Judgment and Decree of the learned Principal Subordinate Judge, Salem, in O.S.No.15 of 2016 by granting a decree for 1/7th share in the suit Item - I of the property and 1/3rd share each in the suit Items - II and III of the properties. The appellant had not made out any Substantial Question of Law warranting interference of this Court under Section 100 of the Code of Civil Procedure.

This Second Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

mps

To

1.The II Additional District Judge,
Salem.

2.The Principal Subordinate Judge,
Salem.

+1 cc to M/s.D.Shivakumaran, Advocate, Sr.No. 5993

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and

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AD(CO)

CSL/23.07.2019