

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.02.2019

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

S.A.No.496 of 2012

1. Sarasu
2. Perumayee
3. Kannaya
4. Pappayee

.. Appellants

versus

1. Athappan
2. Selvaraj

.. Respondents

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgment and decree, dated 28.09.2010 made in A.S.No.4 of 2010 on the file of the Sub Court, Tiruchengode, reversal of the judgment and decree, dated 31.08.2009 made in O.S.No.251 of 2002 on the file of the District Munsif Court, Tiruchengode.

For Appellants : Mr.N.Manokaran

For Respondents: Mr.P.R.Shivakumar for R1 & R2
for M/s.M.S.Palanisamy

J U D G M E N T

This Second Appeal is filed against the judgment and decree, dated 28.09.2010 made in A.S.No.4 of 2010 on the file of the Sub Court, Tiruchengode, reversal of the judgment and decree, dated 31.08.2009 made in O.S.No.251 of 2002 on the file of the District Munsif Court, Tiruchengode.

2. Aggrieved over the judgment of the First Appellate Court reversing the judgment of the trial Court decreeing the suit filed for declaration, the present Second Appeal is filed. At the time of admission, the following substantial questions of law were framed:-

a) Whether the First Appellate Court erred in law in dismissing the suit on the ground that the failure to mention the boundaries in Ex.A1 (dated 07.11.1968) creates a doubt about the ownership of the plaintiffs, particularly, when the plaintiffs' predecessor was

allotted the western half of the S.F.No.63 and the said partition deed has not been challenged or disputed by the plaintiffs and the defendants?

b) Whether the First Appellate Court is correct in placing the burden of proof only on the plaintiffs notwithstanding the fact that in view of the claim of rival title, both the parties are expected to prove their case by adducing oral and documentary evidence?

c) Whether the First Appellate Court is right in upholding the title of the 2nd defendant under Ex.B1 in the absence of any evidence regarding anterior title, especially when the first defendant did not choose to give evidence in support of the 2nd defendant?

d) Has not the First Appellate Court committed an error in giving preference to Ex.B1 even though Ex.A1 was anterior to Ex.B1 and that the defendants have not proved their title in the manner known to law?

e) Whether the First Appellate Court is right in placing negative burden on the plaintiffs who got title under Ex.A1 dated 07.11.1968 overlooking the fact that the 2nd defendant purchased the property under Ex.B1 only on 10.06.1985?

3. For the sake of convenience, the parties are to be referred to as per their original rank in the suit.

4. The plaintiffs 1 to 3 are the daughters of Sadayagounder@ Sadayappagounder. The fourth plaintiff is the wife of the said Sadayappagounder. Under partition deed, dated 07.11.1968, out of 8.10 acres, an extent of 2.20 acres in S.No.63 was allotted to the said Sadayappagounder. Thereafter, the above S.No.63 has been subdivided as S.No.63/1. The Sadayappagounder, who was in possession and enjoyment of the property, died on 26.03.2002, leaving behind the plaintiffs as his legal heirs. Plaintiffs had enjoyed the suit properties. The first defendant, who has no right in the suit property, created a sale deed in favour of the second defendant in respect of S.No.63/1 on 10.06.1985 and also tried to encroach the suit property. Hence, the suit.

5. The second defendant has filed a written statement denying the entire contention in the plaint in generally. Further, it is the contention of the defendants that the description of the divided property could not be identified. Hence, he prays for dismissal of the suit.

6. The Trial Court, on the basis of the pleadings, framed the following issues:

"1. Whether the plaintiffs are entitled to decree as prayed for?

2. Whether it is correct that there is no

cause of action to file the suit?

3. To what relief the plaintiffs are entitled?"

7. On the side of the plaintiffs, PWs-1 to 3 were examined and 7 Exhibits were marked as Ex.A1 to Ex.A7 and on the side of the defendants, DWs-1 and 2 were examined and 4 Exhibits were marked as Ex.D1 to Ex.D4.

8. Based on the evidence and the materials, the trial Court decreed the suit in favour of the plaintiffs. Aggrieved over the same, the defendants have preferred an Appeal in A.S.No.4 of 2010 on the file of the Subordinate Judge, Tiruchengode. The First Appellate Court allowed the appeal by dismissing the suit mainly on the ground that the plaintiffs failed to correlate S.No.63/1 with S.No.63. Aggrieved over the same, the plaintiffs are before this Court.

9. The learned counsel for the appellants would submit that the first defendant had not established any right over the property and no documents whatsoever filed. It shows that he had no right in the entire suit property. His entire written statement is only evasive denial and anyway not even put forth his case. The trial court has considered the entire evidence particularly, Ex.A1 document and subsequently, patta issued after subdivision, in favour of the plaintiffs, whereas the Appellate Court, without considering those documents, dismissed the suit on the technical ground that there is no correlation, particularly, when the defendants have not produced any piece of paper to substantiate their right in the suit property. The judgment of the First Appellate Court is not proper appreciation of evidences thereof.

10. The learned counsel for the respondents would content that the identity of the property has not been established by the plaintiffs. The plaintiffs should prove their case in the suit for declaration. They cannot rely upon the weakness of the defence case. Hence, submitted that the second appeal is not maintainable.

11. I have perused the entire materials.

12. The suit is laid by the plaintiffs for declaration against the defendants. The plaintiffs laid a claim based on their right in the suit property. To show that the suit property was allotted to Sadayappagounder, they filed Ex.A1 and the same would show that out of 8.10 acres, 2.20 acres were allotted to the said Sadayappagounder. There was no boundaries given at the time of allotment. But the fact remains that the western half of 8.10 acres i.e., 2.02 acres have been given to

the said Sadayappagounder. Though boundaries have not been mentioned at the time of allotment of the property, it makes it very clear that 2.02 acres were divided out of the western half of the entire suit property. The suit property in fact lies on the western side. It is the contention of the plaintiffs that the suit property has been subsequently subdivided under S.No.63/1. Ex.-A2 patta is also issued and filed by the plaintiffs. It is not the case of the defendants that the plaintiffs did not have any title over the property. In the entire written statement from the top to bottom, except evasive denial of the plaintiffs' rights there is no specific denial by the defendant with regard to the subsequent sub-division. The defendants have not even pleaded how they entitled to any of the portion in the suit survey field. Mere evasive denial is not all sufficient to prove their case.

13. It is further to be noted that no evidence has been produced by the defendants to prove their title. When DW-1 was examined, he has shown ignorance about the title of the so called predecessor. It is also admitted fact that DW-1, who is said to have been sold the property, is none other than his father-in-law only. His evidence also shows that he does not know the Topography of the area.

14. It is also admitted that he never used to go to the property after purchase and also shown ignorance of the plaintiffs' enjoyment, title and right over the suit property. From the admission of the defendants, it is very clear that he has no idea about the suit property and how the predecessor acquired the title. He has not verified any documents in this regard. Not even made a reasonable enquiry with regard to the title property. Further, the first defendant not even filed a written statement, except adopting, reading, contending the evasive denial, to show that he had title to sell the property with the second defendant. He absented even from examining himself in the Court. PW-2 is said to be the attesting witness of the sale deed executed by the first defendant. It is also admitted that the subject matter was conveyed under the above document is a suit property. DW-1 in his evidence has also clearly admitted that the plaintiff is in possession of the property on the western side. In fact, the above fact also probablise the plaintiff's case. Mere correlation certificate has not been filed by the plaintiffs, they cannot be non suited. Admittedly, in the suit for declaration it is always for the plaintiffs to establish his case. He cannot choose to pick up the weakness in the defence. There is no dispute with regard to the above proposition. But, here is the case where the defendants have not even denied the pleadings of the plaintiff except evasive denial. Unless the pleadings is specifically denied, it is nothing but the admission by the defendants. The

plaintiffs have produced the better title to say that they have title of the property by a partition. Thereafter, the property has been subdivided and patta was also issued. Therefore, merely because boundaries not set out the same cannot be a ground for the non suit the plaintiff, which has been identified as 1.42 acres in S.No.63/1, which is the subject matter of the suit. The same has been conveyed by D1 and D2. Since there is no dispute with regard to the identity of the property, mere not mentioning the boundaries, cannot be a ground for denial of the right of plaintiffs.

15. For the aforesaid reasons, the substantial questions of law are answered in favour of the appellants and against the respondents. The Second Appeal is therefore allowed, by setting aside the judgment and decree of the Courts below and the suit is decreed as prayed for. No costs.

Sd/-

Assistant Registrar (CS-VI)

//True Copy//

Sub Assistant Registrar

kmi

To

- 1.The Subordinate Judge,Tiruchengode.
- 2.The District Munsif,Tiruchengode.

Copy To

The Section Officer,
V.R. Section, High Court,
Madras.(2 copies)

+lcc to Mr.Manokaran, Advocate, S.R.No. 11574

+lcc to Mr.Palaniswamy, Advocate, S.R.No. 11780

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