

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.04.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.334 of 2013
and
M.P.No.1 of 2013

Velandasamy @ Vel Kondasamy ... Appellant / Defendant

Vs.

Vidhyabharathi (minor)
Rep by Guardian Mother
Mrs.Kanagaselvi

... Respondent / Plaintiff

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the judgment and decree passed in A.S.No.71 of 2010 on the file of the Principal District Court, Coimbatore dated 18.11.2011 confirming the judgment and decree passed in O.S.No.135 of 2007 on the file of the Sub-Court, Pollachi dated 20.08.2009 to set aside the same.

For Appellant : Mr.B.Gopala Krishnan
for Mr.S.Gunalan

For Respondent : Mr.D.R.Arun Kumar
for M/s.V.Anandha Moorthy

JUDGMENT

This Second Appeal has been filed by the defendant against the judgment and decree passed by the Principal District Judge, Coimbatore in A.S.No.71 of 2010 dated 18.11.2011 confirming the judgment and decree passed by the Sub Judge, Pollachi in O.S.No.135 of 2007 dated 20.08.2009.

2. The respondent herein had filed a suit in O.S.No.135 of 2007 on the file of the Sub-Judge, Pollachi, to divide the suit properties into two equal shares by metes and bounds and to allot one such share to him; to direct the defendant to pay a sum of Rs.50,000/- per annum as future mesne profits.

3. The learned Sub Judge, Pollachi by the judgment dated 20.08.2009 passed a preliminary decree to divide the suit properties in to two equal shares by metes and bounds and to

allot one such share to the plaintiff and also granted permanent injunction restraining the defendant from in any way alienating or encumbering the suit properties. In so far as future mesne profits is concerned, he has directed for separate enquiry under Order 20 Rule 12 of C.P.C. However, he directed the parties to bear their respective costs.

4. Aggrieved by the same, the defendant had filed an appeal in A.S.No.71 of 2010 on the file of the Principal District Judge, Coimbatore. The Principal District Judge, Coimbatore by the judgment dated 18.11.2011 had dismissed the said appeal confirming the judgment and decree passed by the Trial Court. He also directed the parties to bear their respective costs. Feeling aggrieved, the defendant has filed the present second appeal.

5. For the sake of convenience, the parties are referred to as described before the Trial Court.

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

The defendant is the father of the plaintiff. The suit properties are the ancestral properties of the plaintiff and the defendant. The suit properties are originally owned by one Kaliappa Gounder, S/o.Kariakkara Gounder. The said Kaliappa Gounder had three sons viz 1) Ponnusamy, 2) Palanisamy and 3) Subramania Gounder. Palanisamy and Subramania Gounder died long back. The available heirs of Kaliappa Gounder including the defendant partitioned the ancestral properties under the registered partition deed dated 22.05.1985. In the said portion, "B" schedule properties were allotted to the defendant, his brother and their mother. The defendant, his brother and their mother had partitioned the aforesaid properties under a partition deed dated 02.11.1995 and in the said partition the suit properties were allotted to the share of the defendant. The defendant married the mother of the plaintiff on 11.11.2002 and out of the said wedlock, the plaintiff was born on 21.08.2003. Thereafter, the defendant has harassed the plaintiff's mother and driven out from the family and hence, the plaintiff and his mother are living in the maternal grand parents house. The defendant attempted to encumber the suit properties and hence the plaintiff, through her mother had asked for amicable partition, but the defendant has not come forward for amicable partition and hence the plaintiff was constrained to file the suit for partition and other reliefs.

7. The averments made in the written statement are in brief as follows:

The averment that the plaintiff is the daughter of the defendant is admitted, but, the averments that the suit properties are ancestral properties of the plaintiff and the defendant are not correct. It is true that on 11.11.2002, the defendant got married the plaintiff's mother and out of the said wedlock, the plaintiff was born on 21.08.2003. It is false to state that the defendant caused harassment to the plaintiff's mother and driven out them from the family. The plaintiff's mother voluntarily left the family and she is living with her parents and the plaintiff also living with her mother. The plaintiff's mother gave a false complaint before the Police alleging that the defendant had demanded dowry. Based on the said complaint, the police had arrested the defendant and his brother and remanded to judicial custody. Further, the plaintiff's mother had taken away patta, pass book and other articles from the house. The defendant is maintaining his aged mother by spending huge amount towards medical expenses. It is false to state that the defendant has encumbered the suit property. The plaintiffs had already filed a case before the Judicial Magistrate claiming for maintenance and in the said case, the plaintiff's mother had categorically stated that she is not willing to stay with the defendant. This suit has been filed with a view to harass the defendant and also to take the property of minor plaintiff. Therefore, the defendant prayed to dismiss the suit.

8. Based on the aforesaid averments, the learned Sub Judge, Pollachi had framed necessary issues and tried the suit. During Trial, on the side of the plaintiff, the plaintiff's mother namely Tmt.Kanagaselvi was examined as P.W.1 and marked Exs.A.1 to A.4 as exhibits. On the side of the defendant, the defendant examined himself as D.W.1 and also examined one more witness as D.W.2. He had marked Ex.B.1 as exhibit on the side.

9. The learned Sub Judge, Pollachi, after considering the materials placed before him found that the suit properties are ancestral properties and hence, the plaintiff is entitled to half share in the suit properties. He also found that the defendant tried to alienate the suit properties and accordingly, he passed a preliminary decree to divide the suit properties in to two equal shares and allot one such share to the plaintiff and also granted permanent injunction restraining the defendant from alienating the suit properties. In so far as the mesne profits is concerned, he directed for separate enquiry under Order 20 Rule 12 of C.P.C. However, he directed the parties to bear their respective costs. Aggrieved by the same, the defendant had filed an appeal in A.S.No.71 of 2010 on the file of the Principal District Judge, Coimbatore. The learned Principal District Judge, Coimbatore had dismissed the said appeal confirming the judgment and decree passed by the Trial

Court. He also directed the parties to bear their respective cost. Feeling aggrieved, the defendant has filed the present second appeal.

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

" Whether the Courts below are right in decreeing the suit when the property is a separate property of the defendant, the plaintiff did not prove the suit property is an ancestral property? "

11. Heard Mr.B.Gopala Krishnan for M/s.Gunalan, the learned counsel for the appellant. Mr.D.R.Arun Kumar for M/s.V.Anandha Moorthy, the learned counsel for the respondent.

12. Substantial Question of Law :

The learned counsel for the appellant has submitted that the courts below failed to consider that the plaintiff has not proved that the suit properties are ancestral properties. He further submitted that the Courts below failed to consider that the defendant had borrowed a sum of Rs.4,00,000/- and spent the same for the development of the suit properties and deepen the well. He further submitted that D.W.2 is an independent witness who corroborated the evidence of D.W.1, but, the courts below failed to consider his evidence and decreed the suit. He further submitted that the suit properties were allotted to the defendant under the partition deed dated 02.11.1995 and hence, the suit properties are separate properties of the defendant. He further submitted that the plaintiff was born only after the said partition i.e., on 21.08.2003 and hence, he cannot claim any share in the suit properties and therefore he prayed to allow the second appeal and set aside the judgments and decrees passed by the courts below and dismiss the suit.

13. Per contra, the learned counsel for the respondent/plaintiff has submitted that Ex.A.1 would show that the properties were ancestral properties of the defendant and the properties which were allotted under Ex.A.1, subsequently subjected to partition under Ex.A2 Partition Deed dated 12.11.1995 and in the said partition the suit properties were allotted to the share of the defendant and hence, the suit properties are ancestral properties of the defendant. He further submitted that since the defendant got the suit properties in the partition, he cannot claim that the suit properties are his separate properties. He further submitted that the defendant has not produced any documentary evidence to show that he had spent huge amount of Rs.4,00,000/- to develop the lands and deepen the

well and taking into consideration of all the aforesaid facts, the trial Court has rightly decreed the suit for partition and also granted permanent injunction restraining the defendant from alienating the suit property and the same has been confirmed by the First Appellate Court and in the said factual concurrent findings, this Court cannot interfere. Therefore, he prayed to dismiss the second appeal.

14. It is an admitted fact that the plaintiff is the legitimate daughter of the defendant. It is also an admitted fact that the suit properties originally belonged to one Kaliappa Gounder. The said Kaliappa Gounder had three sons viz Ponnusamy, Palanisamy and Subramania Gounder. Palanisamy and Subramania Gounder died long back. The available heirs of Kaliappa Gounder including the defendant partitioned the ancestral properties under Ex.A.1 Registered partition deed dated 22.05.1985. It is also an admitted fact that the suit properties were allotted to the defendant under Ex.A.2 Partition Deed dated 02.11.1995.

15. According to the plaintiff, since the defendant got the suit properties under Ex.A.1 and A.2 Partition Deeds, the suit properties are ancestral properties. The defendant has not specifically denied the said averments in the written statement and therefore, it has to be presumed that the defendant has admitted that the suit properties are ancestral properties. The Courts below taking into consideration of oral and documentary evidence, have concurrently found that the suit properties are ancestral properties of the plaintiff and the defendant and as such, the plaintiff is entitled to get half share in the suit properties. In the said concurrent factual findings, this Court cannot interfere.

16. Since the plaintiff is entitled to get half share in the suit properties, she is entitled for injunction in respect of her half share only. But the Courts below granted permanent injunction restraining the defendant from alienating or encumbering the entire suit properties. Therefore, the decrees of the Courts below have to be modified to the extent that the defendant shall be restrained by means of permanent injunction from alienating the suit properties including the plaintiff's share. Accordingly, the substantial question of law is answered.

17. In the result, the second appeal is partly allowed. The judgments and decrees passed by the courts below are modified to the effect that the defendant is restrained by means of permanent injunction from alienating the suit properties including the plaintiff's share. In other aspects, the judgments and decrees of the courts below are confirmed.

Considering the relationship between the parties, the parties are directed to bear their respective costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

Vv

To

1. The Principal District Court,
Coimbatore
2. The Sub Judge,
Pollachi.
3. The Section Officer, VR Section,
High Court, Madras.

+1 cc to M/s.S.Gunalan, Advocate, S.R.No.36876

+1 cc to M/s.V.Anandhamurthy, Advocate, S.R.No.37330

S.A.No.334 of 2013
and
M.P.No.1 of 2013

SVI (CO)
SSM(17/10/2019)



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