

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :28.03.2019

CORAM

THE HONOURABLE MR.JUSTICE P.RAJAMANICKAM

S.A.No.499 of 2013

and

M.P.No.1 of 2013

1. Sivagami

2. Minor Deepa

3. Minor Sangeetha

(Minor represented by Guardian Sivagami)

... Appellants/Plaintiffs

Vs.

Kulandaivelu

... Respondent/Defendant

PRAYER: Second Appeal filed under Section 100 of C.P.C., to set aside the judgment and decree dated 29.01.2013 passed in A.S.No.27 of 2012 (District Court A.S.No.15 of 2012 on the file of the II Additional District Judge, Tindivanam) partly allowing the judgment and decree passed in O.S.No.17 of 2008 dated 23.11.2011 on the file of the Additional Sub-ordinate Judge, Tindivanam and to decreed the suit with costs.

For Appellants : Mr.S. Kothandaraman
for Mr.M.Balasubramanian

For Respondent : Set exparte

J U D G M E N T

This Second Appeal has been filed by the plaintiffs against the judgment and decree passed by the II Additional District Judge, Tindivanam in A.S.No.27 of 2012 dated 29.01.2013 modifying the judgment and decree passed by the Additional Sub-Judge, Tindivanam in O.S.No.17 of 2008 dated 23.11.2011.

2. The appellants herein have filed a suit in O.S.No.17 of 2008 on the file of the Sub-Judge, Tindivanam, to divide the suit 'A' and 'B' schedule properties into two equal shares and allotted one such share to them. The learned Additional Sub-Judge, Tindivanam, by the judgment and decree dated 23.11.2011 declared that the plaintiffs are entitled to get $\frac{1}{2}$ share in the plaint 'A' and 'B' schedule properties excluding the properties

which were already sold by Murugan and the defendant. Aggrieved by the same, the defendant had filed an appeal in A.S.No.27 of 2012 on the file of the II Additional District Judge, Tindivanam. The learned II Additional District Judge, Tindivanam by the judgment and decree dated 29.01.2013 had partly allowed the said appeal and modified the judgment and decree passed by the trial court to the effect that the plaintiffs are entitled to $\frac{1}{2}$ share in the suit 'A' schedule property alone except the portion which has been disposed of through Ex.B1 sale deed. He further held that the plaintiffs are not entitled to any share in the plaint 'B' schedule property. Further, he directed the plaintiffs to file a separate application under Order XX Rule 12 CPC for mesne profits in respect of their share in suit 'A' schedule property. Feeling aggrieved, the plaintiffs have filed the present second appeal.

3. The case of the appellants/plaintiffs is as follows:

The plaintiffs are the legal heirs of the deceased Murugan. The first plaintiff is the wife and the plaintiffs 2 and 3 are daughters of Murugan. The defendant is the brother of Murugan. The mother of the deceased Murugan and defendant is Chinnammal who is also dead. The suit properties originally belonged to the said Chinnammal and she had executed a registered settlement deed dated 27.11.2000 in favour of her sons viz., Murugan and the defendant in respect of the suit 'A' schedule property. Subsequently, the said Chinnammal had executed a Will dated 26.07.2001 and thereby, she bequeathed the suit 'B' schedule property also in favour of the said Murugan and the defendant. The said Chinnammal died on 04.10.2001 and thereafter the said Will came into force and the said Murugan and the defendant succeeded to the suit 'B' schedule property. The said Murugan and defendant had jointly executed several sale deeds in respect of the portions of the suit properties in favour of third parties and in the said sale deeds, it is clearly stated that the said Murugan and defendant got the suit properties through the said settlement deed and Will. The said Murugan died in the year 2003 and thereafter, the plaintiffs demanded partition of the suit properties, but the defendant has not come forward for amicable partition and hence, they issued a lawyer's notice dated 01.11.2006 and the defendant has received the said notice on 14.11.2006 but he has not come forward for an amicable partition and also not sent any reply for the said notice and hence they constrained to file the above suit for partition of $\frac{1}{2}$ share in the suit property.

4. The defendant contested the said suit by filing written statement. He has admitted the aforesaid settlement deed and also the Will but he claimed that after the death of their mother Chinnammal, Murugan and himself had orally partitioned the suit properties. In the said oral partition, the suit 'A'

schedule property was allotted to the said Murugan and the 'B' schedule property was allotted to him and hence the plaintiffs are not entitled to claim any share in the suit 'B' schedule property.

5. The trial court, after framing necessary issues, tried the suit. During trial, on the side of the plaintiffs, the first plaintiff was examined as PW1 and Exs.A1 to 12 were marked as Exhibits. On the side of the defendant, the defendant examined himself as DW1 and he also examined one more witness as DW2 and he marked Ex.B1 to B7 as exhibits.

6. The trial court, after considering the materials placed before it, decreed the suit declaring that the plaintiffs are entitled for half share in the suit 'A' and 'B' schedule properties excluding the properties which were already sold by the said Murugan and the defendant. Aggrieved by the same, the defendant had filed an appeal in A.S.No.27 of 2012 on the file of the Additional District Judge, Tindivanam. The learned Appellate Judge has partly allowed the said appeal and modified the judgment and decree passed by the trial court to the effect that the plaintiffs are entitled to $\frac{1}{2}$ share only in the 'A' schedule properties except the portion which has been disposed of through Ex.B1 sale deed. So far as 'B' schedule property is concerned, the appellate court has dismissed the suit. Further, it has directed the plaintiffs to file a separate application under Order XX Rule 12 CPC to ascertain the mesne profits in respect of their share in the 'A' schedule property alone. Aggrieved by the same, the plaintiffs have filed the present second appeal.

7. This court at the time of admitting the second appeal has formulated the following substantial questions of law:

"(i) Whether on admission by the defendant about the existence of Will, is the Lower Appellate Court right in casting the burden of proof about the existence of the Will on the plaintiff?

(ii) Whether the failure of the Lower Appellate Court to properly appreciate the evidence (oral and documentary) on record, which if considered properly would have led to a different conclusion is perverse?"

8. Though notice was served on the respondent and his name also has been printed in the cause list, he has not appeared either in person or through counsel and hence he has been called absent and set exparte. Hence, after hearing Mr.S.Kothandaraman for Mr.M.Balasubramanian, the learned counsel for the appellants and perusing the records, judgment is being passed in this second appeal.

9. The substantial questions of law 1 and 2:-

The learned counsel for the appellants has submitted that even though the defendant has admitted in his written statement that the said Chinnammal had executed a Will in respect of the 'B' schedule property in favour of the said Murugan and himself, the first appellate court has erroneously held that since the said Will has not been produced before the court, the plaintiffs are not entitled to get any share in the suit 'B' schedule property. He further submitted that since the original Will is in the custody of the defendant, the plaintiffs have produced a xerox copy of the Will before the trial court. He further submitted that during trial, when the plaintiffs attempted to mark the said xerox copy of the Will as Exhibit, the trial court has not permitted the plaintiffs to mark the said document. He further submitted that the defendant has stated that the said original Will is not with him and under the said circumstances, the trial court ought to have permitted the plaintiffs to mark the xerox copy of the said Will, but the trial court erred in refusing to grant permission to the plaintiffs to mark the said documents. He further submitted that since the defendant himself has admitted categorically in the written statement and also in his evidence that the said Chinnammal had executed a Will, the first appellate court should not have dismissed the suit in respect of the suit 'B' schedule property. He further submitted that the defendant failed to establish that there was an oral partition and in the said partition, the suit 'B' schedule property was allotted to him. He further submitted that the sale deeds produced by both the parties would clearly show that both Murugan and the defendant had jointly executed the sale deeds in respect of portions of the suit properties and that would show that the properties were never partitioned and therefore, he prayed to allow the second appeal and set aside the judgment and decree passed by the first appellate court and restore the judgment and decree passed by the trial court.

10. It is seen from the records that the first plaintiff while examining herself as PW1 has admitted in her evidence that the said Chinnammal had four daughters and four sons. When the plaintiffs and the defendant claiming right over the suit 'B' schedule property through a Will said to have been executed by Chinnammal, the other LRs of the said Chinnammal should have been impleaded as parties. Further, it appears that under Ex.A4, the deceased Murugan and the defendant had sold a portion of the suit property. Ex.A5 to Ex.A8 would show that the defendant and one Sambandhan had sold portions of the suit properties to the third parties, but the said purchasers also not impleaded as parties. The trial court without taking into consideration of the fact that the purchasers were not impleaded as parties, declared that the Exs.A5 to A8 will not bind upon the

plaintiffs. The said approach is not proper. Further, it appears that in the suit properties, the portions of the properties which were already sold by Murugan and Kulandaivelu also included.

11. Further, it appears that both the parties have taken a stand that the original Will is not available and under the said circumstances, the trial court should have allowed the plaintiffs to mark the xerox copy of the Will tentatively subject to proof as held by the Hon'ble Supreme Court in Bipin Shantila Panchal Vs. State of Gujarat and another, AIR 2001 SC 1158 and decide the admissibility and genuineness of the said document in the final judgment.

12. Taking into consideration of all the aforesaid facts, this court is of the view that in the absence of the other legal heirs of Chinnammal and the purchasers under Exs.A5 to A8, no final and effective adjudication can be made in the aforesaid suit. Hence, the matter has to be remanded back to the trial court.

13. In the result, the second appeal is allowed. Consequently, connected miscellaneous petition is closed. No costs. The judgments and decrees passed by the courts below are set aside and the matter is remitted back to the trial court with liberty to the plaintiffs to implead the other legal heirs of Chinnammal and also the purchasers under Ex.A5 to Ex.A8. The trial court is directed to give an opportunity to the plaintiffs to implead the aforesaid persons as parties and give an opportunity to the proposed parties to file their written statement and additional written statement by the existing defendant and adduce additional oral and documentary evidence and dispose of the suit in O.S.No.17 of 2008 in accordance with law.

-s/d-

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

gv

To

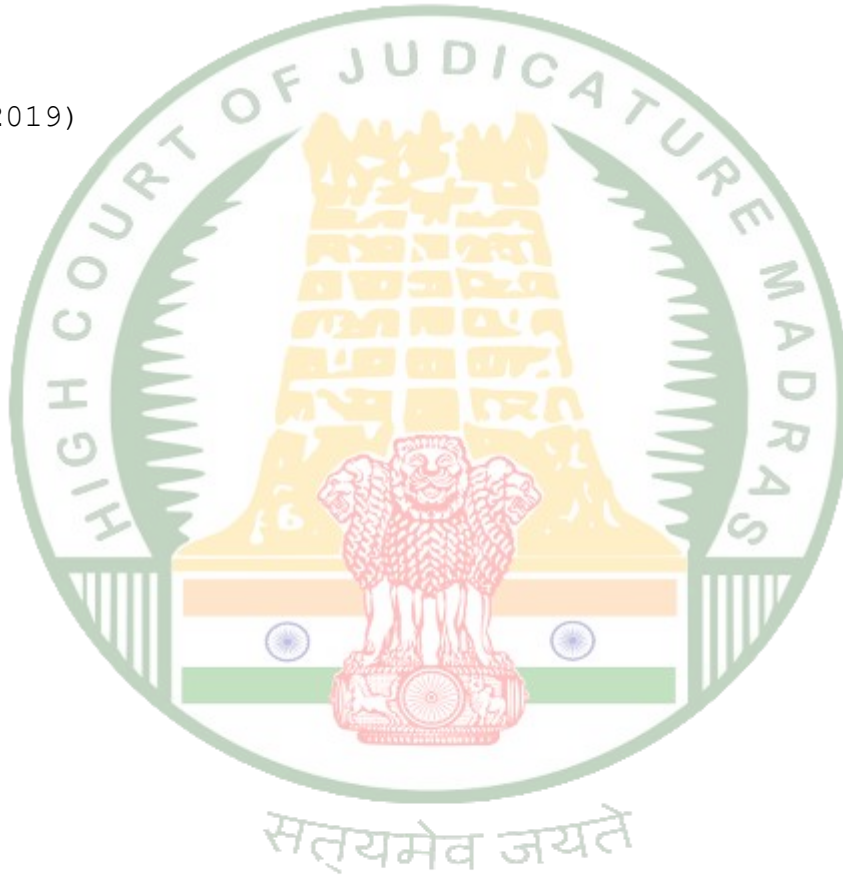
- 1.The II Additional District Judge,
Tindivanam.
2. The Additional Sub-ordinate Judge,
Tindivanam.

3.The Section Officer,
V.R. Section,
High Court, Madras.

+1 CC to Mr.M.Balasubramanian, Advocate sr 29949.

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and
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KS (CO)
SP(15/11/2019)



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