

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 26.07.2019

Delivered on : 28.08.2019

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

SA.Nos. 942 and 943 of 2013

V. Subramani

...Appellant/1st Respondent/
1st Defendant in both S.As.

Vs

1. V. Renugopal

...R1/Appellant/Plaintiff
in both S.As

2. Sagunthala

...R2 in S.A.No.942 of 2013

3. Radhakrishnan

...R3 in S.A.No.942 of 2013

4. Ramesh Babu

...R4 in S.A.No.942 of 201 and
R6 in S.A.No.943 of 2013

5. Ramachandran

...R5 in S.A.No.942 of 2013

6. Rama Devi

...R6 in S.A.No.942 of 2013

7. Balaraman

...Respondents 2 to7/
Respondents 2 to 7/
Defendants 3 to 8 in
SA.No.942/13

(RR2 to 7 are set exparte
in lower court hence given up)
in SA.No.942 of 2013)

...R7 in S.A.No.942 of 2013 and
R2 in S.A.No.943 of 2013

8 Settu

...R3 in S.A.No.943 of 2013

9. Munsamy

...R4 in S.A.No.943 of 2013

10. Velu
(RR2 to 6 are set ecparte in
lower court hence given up
in SA.NO.943 of 2013)

R5 in S.A.No.943 of 2013

..Respondents

PRAYER in S.A.No.942 of 2013: The Second Appeal is filed under Section 100 of the CPC praying to prefer the Memorandum of Grounds of Second Appeal against the Judgment and Decree dated 25.03.2013 in A.S.No.12 of 2011 on the file of the Subordinate Judge, Vellore, reversing the Judgment and Decree dated 17.08.2010 in O.S.No.761 of 2009 on the file of District Munsif, Katpadi, Vellore.

PRAYER in S.A.No.943 of 2013: The Second Appeal is filed under Section 100 of the CPC praying to prefer the Memorandum of Grounds of Second Appeal against the Judgment and Decree dated 25.03.2013 in A.S.No.15 of 2011 on the file of the Subordinate Judge, Vellore, reversing the Judgment and Decree dated 17.08.2010 in O.S.No.760 of 2009 on the file of District Munsif, Katpadi, Vellore.

For Appellant : Mr. T.R. Rajaraman
for Ms. P. Veena in both S.As
For Respondents : Mr. Renugopal, party in person (R1)
in both S.As.
R2 to R7- given up S.A.No.942 of 2013
& R2 to R6 given up in S.A.No.943 of 2013

C O M M O N J U D G M E N T

The defendants are the appellants before this Court. Since the issue involved in the two Appeals emanates from the same subject matter and the same parties and also taking into consideration the fact that both the Courts below have passed a common Judgment, this Court is also passing a common Judgement. The parties are referred to in the same litigative status as in the suit.

2. The Second Appeal, S.A.No.942 of 2013 is filed challenging the Judgment and Decree in A.S.No.12 of 2011 on the file of the Learned Subordinate Judge, Vellore which has in turn is filed challenging the Judgment and Decree in O.S.No.761 of 2009 on the file of the District Munsif's Court, Katpadi,

Vellore District. The Second Appeal, S.A.No.943 of 2013 is filed challenging the Judgement and Decree in AS.No.15 of 2011 on the file of the Sub Court, Vellore which challenges the Judgement and Decree in O.S.No.760 of 2009 on the file of District Munsif's Court, Katpadi, Vellore.

3. O.S.No.760 of 2009 was originally instituted before the District Munsif's Court, Gudiyattam in O.S.No.411 of 1997 which was later transferred to the District Munsif's Court, Vellore and renumbered as O.S.No.347 of 2000 and then transferred to District Munsif, Katpadi and again renumbered as O.S.No.760 of 2009. This suit is filed for an injunction restraining the defendants from alienating the suit property to the third parties till the partition is effected and for a permanent injunction restraining the defendants 1 to 7 from putting up any construction by interfering with the plaintiff's possession of 0.88 cents and for mandatory injunction directing the defendants to remove the two houses.

4. The suit O.S.No.761 of 2009 which was a suit for partition was originally numbered as O.S.No.187 of 1998 on the file of the District Munsif, Gudiyattam and later transferred to the District Munsif, Vellore and re-numbered as 387 of 2000 and thereafter transferred to District Munsif, Kadpadi and re-numbered as O.S.No.761 of 2009 and disposed of.

5. The case of the plaintiff which is common to both the suits is that the suit property originally belonged to one R. Subba Mandiri who had two sons Veeraraghava Mandiri and Rathina Mandiri. The sons of Veeraraghava Mandiri and his wife Rukku Ammal were the first defendant Subramani, the plaintiff Renugopal, Perumal and Narayanaswamy (both of whom are dead). Rathina Mandiri had two sons Raji Mandiri, the 3rd defendant and Govindasamy Mandiri. Defendants 2 to 7 in O.S.No.761 of 2009, are the legal heirs of Govindasami Mandiri. Perumal and Narayanasami, the other sons of Veeraraghava Mandiri had died issueless as bachelors. सत्यमेव जयते

6. It is the case of the plaintiff that the property which is the subject matter of the suit was Dharkast land which was assigned to their grandfather Subba Mandiri and after the death of Subba Mandiri, his sons, Veeraraghava Mandiri and Rathina Mandiri were enjoying the said property.

7. The plaintiff would contend that as regards the properties at Samparayenellore, the same was partitioned in the year 1962 but however the suit properties situate at Ammudi Village were not partitioned. The 'A' Schedule property

consisted of 0.88 cents and the 'B' Schedule consists of 20 cents and in the 'A' Schedule property each of the parties were entitled to 22 cents and 5 cents in the 'B' Schedule property. The joint patta issued in respect of the suit property in patta No.1501 has been allotted to the plaintiff, first defendant as well as Raji Mandri, and Govindasamy Mandiri, the sons of Rathina Mandri.

8. It is the contention of the plaintiff that without partitioning the properties, the first defendant sold an extent of 8 1/2 cents to the second defendant on 26.08.1997. The plaintiff has also clearly stated that in the earlier suit O.S.No.85 of 82 on the file of the Sub Court Vellore, this suit property was not the subject matter and the plaintiff had reserved his rights to file a suit for partition. Therefore he would submit that the present suit for partition was very much maintainable.

9. The first defendant had filed a written statement inter alia contending that the original partition had taken place 55 years back between Veeraraghava Mandiri and Rathina Mandiri with each taking an extent of 44 cents of the suit property. It is the case of the defendants that in the year 1962 when the father was alive, the plaintiff had demanded partition of his share in the properties of the father and he was given 55 cents at Samparayanellore Village. It is was their further case that the suit property was never allotted to the share of the plaintiff and that it was being enjoyed only by the first defendant along with the sons of Rathina Mandri.

10. The defendants would further contend that it is only they who have been in exclusive possession and enjoyment of the property comprised in S.No.595/4 in Ammundi Village by constructing two houses there on and the plaintiff has never questioned the exclusive enjoyment by the defendants. It was also the case of the first defendant that his brothers Narayanaswami and Perumal had executed a Will each bequeathing their respective shares on him and subsequent to their death he is entitled to the ownership of the said property and accordingly exercised the right. Therefore they sought for dismissal of the suit contending that the plaintiff did not have any right, title or interest over the same.

11. The defendant would further submit that for over 25 years they have exercised absolute ownership over the suit property by constructing two houses and residing there on. It is their contention that the plaintiff has never been in possession and enjoyment of the suit property. The defendant

had also taken a defense that the earlier suit would act as a bar to the present suit since earlier was one for partition and this property was not added to the list of properties in that suit and that apart the plaintiff had not obtained the leave as contemplated under the provisions of Order II Rule 2 of the Civil Procedure Code.

12. The learned District Munsif on a detailed enquiry had observed that the suit property was not the subject matter of partition in the year 1962 and the defendants have also admitted the said contention. However, the learned District Munsif has observed that the plaintiff has been out of possession for several years and has never exercised any right, title or interest over the suit property. Further having kept quiet for over 25 years after permitting the defendants to put up construction and enjoy the property as their absolute property, it does not, now lie in the mouth of the plaintiff to claim a right over the suit property. With these observations therefore the learned Single Judge held that the plaintiff was not entitled to a partition and since he has never been in possession of the property and also that he was not entitled to the decree for injunction and mandatory injunction.

13. The said Judgment and decree was challenged by the appellant by filing AS.No.12 of 2011 and 15 of 2011 on the file of the Subordinate Court at Vellore. The learned Subordinate Judge however reversed the Judgment and decree of the Trial Court. The learned Subordinate Judge had observed that a perusal of Exs.A29 and A30 will show that the suit property continued to be a joint family property. The appellate Court has also observed that the patta Ex.A29 stands in the joint name of plaintiff and defendants 1 and 3 and therefore it is not a joint family property but a joint property. The appellate Court has also relied on the admission of DW1 that the suit property was not partitioned and the plaintiff was entitled to 11 cents there on. Therefore the Appellate Court proceeded to allow A.S.No.12 of 2011 and partially allowed A.S.No.15 of 2011. The Appellate Court had granted the decree for partition in O.S.No.761 of 2009. As regards the suit O.S.No.760 of 2009, the learned Judge had granted relief for permanent injunction but however rejected the claim for mandatory injunction. Challenging the above Judgment and decree the defendants are before this Court.

14. While admitting the above second appeals the following substantial questions of law has been raised:

- (i) When it is settled in Law that when a partition is admitted, it is total and complete, is the Learned Subordinate Judge

right in granting a Decree with reference to the suit property, when the attestation by the plaintiff of the Sale Deed executed by R.Subramani, S/o Ratina Mandiri who were sharers and parties to the partition in which partition is admitted?

(ii) Admittedly, when the suit property belonged to 2 branches, viz., Ratina Mandiri and Veeraraghava Mandiri, each of them entitled to 0.44 cents each and the plaintiff being 1/5th sharer, is the learned Subordinate Judge right in granting Decree for 1/4th share out of 88 cents?

(iii) When possession of the suit property with the Defendant having not been disputed and the partition in the year 1962 is admitted by the plaintiff, still is the learned Subordinate Judge right in negating the plea of adverse possession?

15. Mr. T. R. Rajaraman, learned counsel appearing on behalf of the defendants would contend that the present suit was clearly barred by the provisions of Order II Rule 2 of the Code of Civil Procedure since in the earlier suit for partition namely O.S.No.85 of 82, the respondent had not sought leave of the court for seeking a partition in respect of the suit property. The learned counsel would also point out the admission of the plaintiff that he had left the joint family in the year 1962 itself and had sold the suit property that has been allotted to him to a Sugar Mill and had, for this reason, procured an employment for his son in the Mill.

16. The learned counsel for the defendant would further argue that the plaintiff had demanded an extra extent of land in lieu of the suit property from his father and it was also admitted in his cross examination. He would further argue that as the plaintiff had left the joint family 2 1/2 decades ago, and he cannot seek a partition of the joint family property now. He would also bring to the notice of the court Ex.B31 which is a sale deed dated 30.11.1997 executed by Subramani Mandiri, son of Rathina Mandiri, in favour of the Govindasamy Mandiri and Raji Mandiri, who are the sons of Rathina Mandiri. In the sale deed, the plaintiff was the attesting witness. The sale is also in respect of the property comprised in Survey No.595/4 (which is the suit survey number) and an extent of 14 1/2 cents is sold which the vendor claims to be his share of the property. Therefore he would contend the appellate court had committed a grave error in reversing the Judgement and decree of the court

below.

17. The learned counsel for the plaintiff relied upon the Judgment Anil Kumar Mistra and Others Vs. Ganendra Nath Mitra and Others reported in [AIR 1997 SC 3767] in support of his arguments that unless there is a proof to show that there has been a reunion of the joint family after a partition, subsequent claim for partition is not maintainable. He would also rely upon the Judgment Keshar bai and another Vs. Terabai Prabhakar Rao Nalawade and Others reported in [(2014) 4 SCC 707], to support his argument that the burden of proof to show exclusion of certain property from the partition lies heavily on the person pleading so and the general presumption is that once a partition takes place all properties had been partitioned.

18. The party in person would argue that he had reserved his right to file a subsequent suit for partition in the earlier suit in O.S.No. 82 of 85 in respect of the property which is the subject matter of the present suit. He would further argue that the partition of the year 1962 has been narrated in Ex B1 as well as Ex.B2. He would further argue that the suit is not barred by the provisions of Order II Rule 2 since he had already sought leave in the earlier suit. He also relied on a Judgment Santhosh Hazari Vs. Purushotham Tiwai reported in [2001(1) CTC page 505] to contend that no new point can be raised in a second appeal.

19. Heard the parties and perused the documents.

20. From a perusal of the pleadings, it appears that the plaintiff has come forward with the suit for partition O.S.No.761 of 2009 on the premise that the suit property continued to remain a joint property since this property was not the subject matter in the earlier proceedings. The plaintiff would trace title to the suit property through his grandfather Subba Mandri. However during the arguments he would put forward Ex.A29 and claim that the property in question is a joint property and not a joint family property which is total contrary to the pleadings. He would claim the same to the adjacent property on the basis of Ex.A29 Patta. Having taken a stand that the suit property was a joint family property and therefore he is entitled to a share along with the others, the plaintiff has taken a totally contrary stand during the course of arguments. That apart it is the admitted case that the plaintiff had filed an earlier suit for partition. Though, the earlier suit ought to have been dismissed on the ground of partial partition since the property which is the subject matter of the present suit has not been included there, the same has been decreed. The plaintiff

would argue that the present suit is not hit by the provisions of Order II Rule 2 of the Civil Procedure Code, since in the earlier suit O.S.No.82 of 1985 the plaintiff has reserved his right to institute a separate suit with reference to the present suit schedule property.

21. A reading of Order II Rule 2 of the Civil Procedure Code would make it clear that in the event any person sues for a relief in respect of the same cause of action unless he has leave of the court, he cannot afterwards sue for the said relief. From the papers it appears that except for a statement made in the plaint the plaintiff has not obtained the leave of the court to file subsequent suit for partition in respect of the present suit property. Therefore, the suit O.S.No.761 of 2009 on the file of the District Munsif Katpadi, Vellore is clearly hit by the provisions of Order II Rule 2 of the Civil Procedure Code.

22. Further a mere perusal of the Ex.B31 which is a sale deed executed between the sons of Rathina Mandiri, it is evident that Survey No.595/4 which is the subject matter of the present suit has been already partitioned. The property which is the subject matter of sale is 14 1/2 cents in S.No.595/4 of Ammundi Village and the vendor states that the property was allotted to him under a partition. The plaintiff is a party to this document both as a attesting witness and as an identifying witness and therefore it is clearly evident that the plaintiff was aware about the partitioning of Survey No.595/4 as early in the year 1977 itself. If the property had not been partitioned, the plaintiff would have immediately lodged his objection to the same. The plaintiff has kept quiet for over 20 years and there is no mention of this in the plaint and there is a suppression on the part of the plaintiff. In the light of the above it is clearly evident that the plaintiff did not have any right to the property comprised in Survey No.595/4 as stated by the defendants. That apart since the plaintiff has not obtained leave under the provisions of Order II Rule 2 under the Civil Procedure Code, the suit is not maintainable. In the light of the above findings the Judgment and decree in A.S.No.12 of 2019 on the file of the Subordinate Judge Vellore is set aside and second appeal is allowed.

23. As regards the suit O.S.No.760 of 2019 from the records it is clearly evident that the plaintiff is not in possession of the property. There is no pleading to the effect as to date on which the construction had been put up by the defendants on the suit property. The fact that the petitioner has acknowledged the constructions being put up in the suit property by the

defendants: it is clear that he is not in possession and enjoyment of any portion thereof. In addition to this, considering the fact that the plaintiff has no right to the suit property, the plaintiff is not entitled to a decree for injunction as he is not in possession and enjoyment of the same for several decades. The appellate court has also not given any reason as to why the Judgment of the Trial Court with reference to suit O.S.No.761 of 2009 is wrong, while setting aside the Judgment and decree in O.S.No.761 of 2009.

24. In the result, the second appeals are allowed and the decree and judgment in A.S.Nos 12 and 15 of 2011 are set aside. No costs.

Sd/-
Asst.Registrar (CS II)

/true copy/

Sub Asst. Registrar

mrn

To

1.The Subordinate Judge,
Vellore

2.The District Munsif, Katpadi
Vellore

3.The section officer
VR Section
High Court Madras

+2 ccs to Mr.P.Veenasuresh Advocate sr 73912,73913

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