

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.10.2019

CORAM:

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

S.A.Nos.1007 and 1008 of 2014
and MP Nos.1 & 1 of 2014
and CMP Nos.4135 and 4138 of 2019

B.Thirugnanasampanthan ..Appellant in both the Appeals

Vs.

S.Perumal ...Respondent in both the Appeals

PRAYER in SA No.1007 of 2014: Second Appeal filed under Section 100 of C.P.C., to set aside the judgment and decree dated 04.03.2014 in A.S.No.88 of 2012 on the file of I Additional Subordinate Judge of Erode confirming the judgment and decree dated 08.02.2012 in OS No.434 of 2008 on the file of II Additional District Munsif of Erode.

PRAYER in SA No.1008 of 2014: Second Appeal filed under Section 100 of C.P.C., to set aside the judgment and decree dated 04.03.2014 in A.S.No.90 of 2012 on the file of I Additional Subordinate Judge of Erode confirming the judgment and decree dated 08.02.2012 in OS No.490 of 2002 on the file of II Additional District Munsif of Erode.

For Appellant : Mr.Anil Sandeep
(in both the Appeals)

For Respondent : No appearance

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

The two appeals arise out of two cross suits in OS No.434 of 2008 was filed by the respondent Perumal, seeking partition and separate possession of his half share in the suit property and OS No.490 of 2002 was filed by Thirugnanasampanthan, the appellant herein, seeking permanent injunction restraining the defendant, who is the plaintiff in OS No.434 of 2008, from interfering with his common user and enjoyment of the suit properties by putting up any further construction and making use of the Septic Tank, illegally put up and for a mandatory injunction directing the respondent to remove the Septic Tank put up in a 'A' Schedule Property.

2. The suit properties originally belonged to Chenniappa Mudaliar, the grandfather of the plaintiff in OS No.490 of 2002/appellant herein. At a partition that took place between Chenniappa Mudaliar and his sons on 30.01.1942, marked as Ex.B1, the suit properties were kept in common to be enjoyed by Chenniappa Mudaliar himself and one of his sons Thiagarajan. The suit property measures an extent of 1148 ½ sq. feet. It is not in dispute that Chenniappa Mudaliar settled his undivided half share in the suit property in favour of the appellant herein under a registered Settlement Deed dated 07.03.1974.

3. As regards the half share that belonged to Thiagarajan, it devolved on his three sons Sivaprakasam, Schithananthan and Sivasamy. Sivasamy and Schithananthan, released their interest in the suit property along with other property under a registered Release Deed dated 19.09.1971 in favour of Sivaprakasam. Sivaprakasam in turn sold the suit property along with other property to Perumal, the respondent herein, under the registered Sale Deed dated 15.07.2002. Claiming that he is entitled to half share in the suit property by virtue of the purchase under the Sale Deed dated 15.07.2002, Perumal came up with the suit in OS No.434 of 2008, seeking partition and separate possession of his half share.

4. The defendant in the said suit namely, OS No.434 of 2008 resisted the suit contending that the suit property impartible, inasmuch as, it was kept in common between Thiagarajan and Chenniappa Mudaliar. Relying upon the recitals in the partition deed dated 30.01.1942, the defendant would contend that the intention of the parties was keep the property in common and enjoy it in common without putting up any construction therein. Therefore, according to the defendant, the plaintiff who is the purchaser of undivided half share in the suit property cannot seek partition.

5. Even before the suit for partition was filed by Perumal, the respondent herein, the appellant had filed a suit in OS No.490 of 2002, seeking a permanent injunction restraining the defendant from interfering with his common enjoyment of the suit property. The case of the plaintiff in the suit for injunction is that the suit property is impartible and that it is provided as a passage to his house property situate on the North. He would bank on the recitals in the Partition Deed of the year 1942, to contend that the suit property cannot be partitioned and the defendant, who is a purchaser of undivided half share and has no right to put up any construction therein.

6. The Courts below, on a consideration of the evidence rejected the claim of the appellant that the suit property is impartible and it was intended to be kept in common. The Trial Court came to the said conclusion on the ground that at the time of the partition in 1942, the properties surrounding the suit property were allotted to the members of the erstwhile joint family and the suit property was set apart as a common property.

Now that the joint family has disintegrated and the parties are living separately and the fact that one of the members of the erstwhile joint family, namely, Sivaprakasam had parted with his interest in favour of a third party in the year 2002, the circumstances that prevailed at the time of execution of the Partition Deed no longer existed.

7. On the said finding, the Trial Court concluded that the suit property is partible irrespective of the conditions found in the Partition Deed dated 30.01.1942. On the said conclusion, the trial Court decreed the suit for partition and dismissed the suit for injunction filed by the appellant. Aggrieved the appellant preferred two appeals in AS Nos.88 and 90 and 2012.

8. The Lower Appellate Court confirmed the judgment and decree of the Trial Court on a slightly different reasoning. While acknowledging the fact that in view of the recitals contained in the Partition Deed dated 30.01.1942, the suit property was kept in common to be enjoyed by Thiagarajan and Chenniappa Mudaliar and they were prohibited from putting up any construction in the suit property. The Lower Appellate Court found that the absence of such restriction in the subsequent documents executed by Schithananthan and Sivasamy in favour of Sivaprakasam and the Sale Deed executed by Sivaprakasam in favour of the respondent would show that the common enjoyment was abandoned by the parties. On the said conclusions, the Lower Appellate Court dismissed the appeals upholding the judgment and decree of the Trial Court. Aggrieved the plaintiff in OS No.490 of 2002 who is also defendant in OS No.434 of 2008 has come up with this Second Appeal.

9. The respondent though served is not appearing either in person or through counsel duly instructed.

10. The following questions of law were framed at the time of admission.

In SA No.1007 of 2014:

1. Whether the trial Court and the first appellate Court was correct in totally ignoring the partition deed dated 30.01.1942?
2. Whether the trial Court and the first appellate Court was correct in holding that the sale deed executed by plaintiff's vendor to the plaintiff thus not contain any recitals of such restriction found under Ex.B1?

In SA No.1008 of 2014:

1. Whether the trial Court and the first appellate Court was correct in totally ignoring the partition deed dated 30.01.1942?
2. Whether the trial Court and the first appellate Court was correct in holding that the relief of permanent injunction by one co-owner against the abother co-owner is not sustainable?

11. I have heard Mr.Anil Sandeep, learned counsel appearing for the appellatant.

12. Mr.Anil Sandeep, learned counsel appearing for the appellatant elaborating on the questions of law would contend that the recitals in the Partition Deed of the year 1942, marked as Ex.B1 in OS No.434 of 2008, particularly, the recitals restricting the enjoyment of the property and preventing the sharers from putting up any construction therein would show the intention of the parties to retain it as a common property for common enjoyment between Chenniappa Mudaliar and his son Thiagarajan. According to the learned counsel, the mere fact that those recitals are not specifically spelt out in the subsequent documents would not cloth the purchaser with the right to have the property partitioned and also raise constructions therein. It is his further contention that Thiagarajan, got only a limited right over the property under the Partition Deed and his successors cannot convey anything more than what they had inherited from their father. The learned counsel would also submit that whatever the sons of Thiagarajan, namely, Sivaprakasam, Schithananthan and Sivasamy, inherited was only the property that is allotted to Thiagarajan and they would not get a better right than what Thiagarajan himself possessed. Therefore, according to the learned counsel, the Courts below had erred ignoring the recitals in the Partition Deed marked as Ex.A1 and granting the relief of partition.

13. I have considered the submissions of the learned counsel.

14. Ex.B1 is a Partition Deed dated 30.01.1942. The recitals in Ex.B1 as regards the suit property read as follows:

இதனடியில் ரூஇ ரூ/செடியூல்களில் கண்ட தென் வடல்
33¹/₄ அடி கீழ்மேல் 28³/₄ அடி உள்ள வாசலையம் கீழ்மேல் 53 அடி,
தென் வடல் 5¹/₂ அடி உள்ள இடத்தையம் இதில் கீழ் கோடியிலுள்ள
கக்கூலையம் நம்மில் 1, 2 இலக்கமிட்டவர்கள் தனியாக எவ்வித
கட்டிடம் முதலானதும் கட்டாமல் 1, 2 இலக்கமிட்டவர்கள் பொதுவில்
அனுபவித்து வருவோமாகவம்.
(emphasis supplied)

15. The above recitals would conclusively demonstrate that the intention of the parties was to preserve the suit property as a common property without putting up any construction. It necessarily flows from the recitals that the property was not meant to be divided between the co-owners. If Thiagarajan had got only a right to enjoy the property without putting up any construction thereon and his right to seek partition was also curtailed under the document his successors i.e., his sons namely, Sivaprakasam or Schithananthan or Sivasamy would not get a better right. The mere non-mentioning of the restrictions contained in Ex.B1 in the subsequent documents viz., Exs.B3, B4 and B5 would not any way affect the right of the appellant, inasmuch as, he is not a party to any of those documents. The appellant had derived an interest in the property on the execution of Settlement Deed by Chenniappa Mudaliar on 07.03.1974, under Ex.A2 in OS No.490 of 2002.

16. The Trial Court gave a peculiar reason that since the joint family had ceased to exist the requirement of keeping the property in common has also ceased. The joint family ceased to exist on the date of the partition, viz., 30.01.1942, however, the parties chose to reserve the suit property as a common property and also gave up their right to put up any constructions therein at the partition dated 30.01.1942 meaning thereby that they necessarily intended that the property should be kept in common for the use of the two sharers namely, Chenniappa Mudaliar and Thiagarajan. While the appellant claims under Chenniappa Mudaliar, the respondent is a purchaser from the successors in interest of Thiagarajan. Both of them would be bound by the recitals in the document of partition dated 30.01.1942 as they claim under the parties to the said instrument.

17. Both the Courts below, in my considered opinion, had not considered the recitals in Ex.A1 Partition Deed in the proper perspective. The Trial Court presumed that the suit property was kept in common for enjoyment by the members of the joint family overlooking the fact that the joint family status was disrupted by the partition dated 30.01.1942. The Lower Appellate Court introduced the theory of abandonment. Abandonment can be at the instance of all the parties who have a right and it cannot be at the instance of one of the parties or some of the parties. The Lower Appellate Court had held that requirement of keeping the property intact was abandoned based on the recitals in the subsequent documents namely, the Release Deed executed by Schithanathan and Sivasamy in favour of Sivaprakasam marked as Ex.B4 and the Sale Deed by Sivaprakasam in favour of Perumal marked as Ex.B5. The appellant is not a party to either of the documents. Therefore, the recitals therein cannot bind the appellant.

18. I am therefore, constrained to conclude that the findings of the Lower Appellate Court, with reference to abandonment of the right are perverse and are based on misinterpretation/misreading in the recitals of the documents. Once it is found that the original parties to the Partition Deed dated 30.01.1942, clearly intended that the properties should be kept in common and the sharers were prohibited from putting up any construction in the property, the said property cannot be made subject matter of the partition merely because there is some alienation of the property by the sharers, unless it is shown that the sharers had agreed to have the property divided and to have the restrictions regarding the enjoyment of the property lifted forever.

19. In the absence of any such evidence, the Lower Appellate Court particularly was not right in concluding that the parties are abandoned the rights over the common property. In view of the above, the first question of law is answered in favour of the appellant to the effect that the restrictions based on the enjoyment of the property under the Partition Deed dated 30.01.1942 would hold good and the respondent cannot seek partition and separate possession of his half share. He would however be entitled to enjoy the property in common with the appellant.

20. On the second question of law, the Sale Deed executed by Sivaprakasam in favour of Perumal, the respondent herein, only conveys an undivided half share, of course the restrictions

regarding enjoyment contained in 1942 document have not been reproduced therein. The mere non-reproduction of the restrictions would not defeat the rights of the appellant. Whatever Sivaprakasam got was only the right which Thiagarajan had, which were subject to the restrictions, unless it is shown that the restrictions were waived by all the parties to the instrument, the said restrictions would continue to be in force.

21. No doubt the judgment and decree of the Trial Court has been confirmed by the Lower Appellate Court but on a different reasoning. I have already pointed out that the Trial Court had misdirected itself in concluding that the restrictions were placed only because the property was in enjoyment of the joint family members and on the disruption of the joint family status, the restrictions would become invalid. The Trial Court had overlooked the important fact that the restriction came to be placed in a Partition Deed which resulted in disruption of the joint family that existed. The non-mentioning of the restrictions in the Sale Deed executed by Sivaprakasam in favour of Perumal, would not convey a better title to Perumal than what Sivaprakasam himself possessed.

22. Apart from the above, the Release deed executed by the brothers of Sivaprakasam in his favour and the Sale Deed executed by Sivaprakasam in favour of Perumal, have also been produced as Exs.B4 and B5, before the Lower Appellate court. They simply conveyed an undivided half share in the suit property in favour of the settlor, the releasee and the purchaser respectively. They do not recite that the restriction placed under 1942 document, viz. Ex.B1 are lifted or they would no longer apply.

23. The second question of law is also answered in favour of the appellant to the effect that mere non-mentioning of the restrictions in the subsequent documents, namely, the Release Deed and the Sale Deed would not in anyway affect the right of the appellant herein, as the successor in interest of the sharer namely, Chenniappa Mudaliar.

24. In view of the above findings, both the Second Appeals are allowed. The judgment and decree of the Courts below are liable to be set aside and they are accordingly set aside. The suit in OS No.490 of 2002 will stand decreed as prayed for and the suit in OS No.434 of 2008 will stand dismissed. Consequently, the connected miscellaneous petitions are closed. Considering the facts and circumstances of the case, there will be no order as to costs.

25. It is now stated that the respondent after the suit for partition was decreed by the Trial Court had put up a wall in October 2018, dividing the property in two halves. It is obvious that such an action is illegal. A preliminary decree in a suit for partition only declares the rights of the sharers and it has to be essentially followed by a final decree in which exact portions are allotted to the sharers. The respondent cannot take Law in his own hands and effect a division by putting up a Compound Wall. This Court cannot shut its eyes to the developments that had taken place during the pendency of the appeal. Hence invoking the Power of the Court of Appeal in Order XLI Rule 33 of the Code of Civil Procedure, there will be a mandatory injunction directing the respondent to remove the compound wall put up during the pendency of the appeal within a period of three months from the date of receipt of a copy of this order.

Sd/-
Assistant Registrar (CCC)

//True copy//

Sub Assistant Registrar

jv

To

1.The I Additional Subordinate Judge,
Erode.

2.The II Additional District Munsif,
Erode.

Copy To: The Section Officer,
V.R.Section,
High Court of Madras.

+4cc to Mr.S.Anilsandep, Advocate SR.No.89716, 89715

S.A.Nos.1007 and 1008 of 2014
and MP Nos.1 & 1 of 2014
and CMP Nos.4135 and 4138 of 2019

GJ (CO)
GMY (03/02/2020)