

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.11.2019

CORAM:

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.1082 of 2019

and

CMP.No.23630 of 2019

Shanmugasundaram

..Appellant/Plaintiff

Vs.

Shanmugam

..Respondent/Defendant

PRAYER: Second Appeal filed under Section 100 of C.P.C., to set aside the judgment and decree dated 27.02.2019 in A.S.No.14 of 2017 on the file of the II Additional District Judge, Salem confirming the judgment and decree dated 26.10.2016 in O.S.No.183 of 2011 on the file of the Subordinate Court, Mettur.

For Appellant : Mr.S.Mayilnathan

For Respondent : Mr.S.Doraisamy

J U D G M E N T

The plaintiff in O.S.No.183 of 2011 whose suit for declaration and permanent injunction was dismissed by the trial court on its affirmation by the lower appellate court has come up with this Second Appeal.

2. According to the plaintiff, he had purchased the property under the sale deed dated 09.11.1994 from one Pachiappan. It is the further case of the plaintiff that the said property was subject matter of O.S.No.333 of 1985, a partition suit filed by the said Pachiappan against the respondent and others seeking a preliminary decree. It is also claimed that the suit property was allotted to Pachiappan in the said suit. The revenue records have also been mutated pursuant to the purchase made by the plaintiff. Therefore, the plaintiff claims that he has been in possession of the property ever since purchase and seeks a declaration and injunction.

3. The suit was resisted by the defendant, who is none else than the brother of the plaintiff's vendor, contending that the

suit property along with larger extent was made subject matter of the suit in O.S.No.333 of 1985, partition suit. The suit land along with other lands measuring 3 acre 61 ½ cents was excluded and the suit was decreed only for the remaining properties. The decree in O.S.No.333 of 1985 was only a preliminary decree and not a final decree. Therefore, the claim of the plaintiff that Pachiappan was entitled to any land in S.No.23/2 at Saminaickanpatty Village is not true and hence he could not have validly effected transfer of property in favour of the plaintiff under the sale deed dated 09.11.1994.

4. At trial, the plaintiff was examined as PW1 and one Viswanathan was examined as PW2. Ex.A1 to Ex.A7 were marked on the side of the plaintiff. The defendant was examined as DW1 and an independent witness Sakthivel was examined as DW2. Ex.B1 to Ex.B4 were marked on the side of the defendant. Certain revenue documents were marked as Ex.X1 to Ex.X4.

5. The courts below upon a consideration of the evidence, found that the suit property along with a larger extent formed part of the property that was excluded from the preliminary decree in the partition suit viz., O.S.No.333 of 1985. It was also found that pursuant to the preliminary decree, the plaintiff's vendor Pachiappan had not sought for final decree, therefore, the claim that the suit property was allotted to him in the decree in O.S.No.333 of 1985 was fallacious. On the said finding, the courts below dismissed the suit. Aggrieved the plaintiff has come up with this Second Appeal.

6. Heard Mr.D.Sivakumaran for Mr.S.Mayilnathan, learned counsel appearing for the plaintiff/ appellant.

7. Mr.D.Sivakumaran, learned counsel appearing for the appellant would vehemently contend that once a partition suit is decreed and a preliminary decree has been passed, even though his vendor had conveyed specific extent, he would atleast be entitled to allotment of the property that would be allotted to his vendor in the final decree that is to be passed in the partition suit. Therefore, according to him, the courts below were wrong in dismissing the suit in its entirety.

8. The submissions of the counsel for the appellant overlook the findings of the courts below. The suit property along with larger extent of 3 acres 61 ½ cents was excluded from the decree in partition suit and the suit was decreed in respect of other properties. It was held that Kuppayammal was the owner of the property. The said Kuppayammal had executed a Will in favour of the defendant's son Venkatachalam.

9. Despite a plea having been taken in the written statement regarding the existence of the Will and the right of Venkatachalam, the plaintiff did not chose to make Venkatachalam a party to the present suit. Hence, the courts below are right in dismissing the suit concluding that the suit property was excluded from the purview of O.S.No.333 of 1985 and that Venkatachalam is a necessary party and no decree could be passed in the absence of Venkatachalam in the suit.

10. I do not find any question of law much less a substantial question of law in order to enable me to entertain this Appeal. Hence, the Second Appeal fails and is accordingly dismissed without being admitted. No costs. Consequently, the connected miscellaneous petitions are also dismissed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The learned II Additional District Judge,
Salem.
2. The learned Subordinate Judge,
Mettur.
3. The Section Officer, V.R. Section,
High Court of Madras, Chennai 600 104.

+1cc to Mr.S.Doraisamy, Advocate sr.93713
+1cc to Mr.D.Shivakumaran, Advocate sr.93804

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