



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : 25.06.2019

CORAM :

THE HONOURABLE MR.JUSTICE **S.S.SUNDAR**

Second Appeal (MD) No.17 of 2015

and

M.P.(MD) No.1 of 2015

Ganesan : Appellant/Appellant/Defendant
-Vs-

1.Indhurani

2.Anbarasan : Respondent 1& 2/Respondents 1 & /Plaintiffs

Prayer: Second Appeal filed under Section 100 of the Code of the Civil Procedure, praying to set aside the judgment and decree of the lower Appellate Court, dated 18.06.2014 passed in A.S.No.1 of 2011 on the file of the Subordinate Judge, Theni, confirming the judgment and decree of the trial Court, dated 30.11.2009, passed in O.S.No.32 of 1999 on the file of the District Munsif cum Judicial Magistrate, Andipatti and allow the Second Appeal.

For Appellant : Mr.R.Subramanian

For Respondents : No appearance

JUDGMENT

The defendant in the suit in O.S.No.32 of 1999 on the file of the District Munsif-cum-Judicial Magistrate, Andipatti, is the appellant in this Second Appeal.

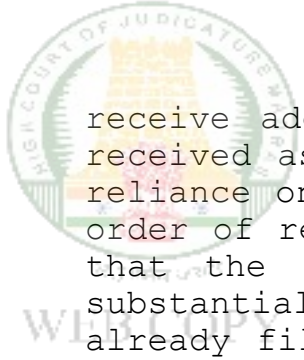
2.The respondents in this appeal, as plaintiff, filed a suit in O.S.No.32 of 1999 for declaration that the suit first item of property belongs to the plaintiffs and defendant jointly and for a declaration that the suit items 2 and 3 belong to the plaintiffs separately and for consequential injunction. Though the suit was dismissed in of the suit first item, there is no further appeal by the plaintiffs and therefore, this Court is not concerned with regard to item No.1 of the suit property. With regard to the second item of suit property, it is the case of the plaintiffs that the same was assigned by the Government on 22.11.1984 in favour of the first plaintiff and that the plaintiffs are in enjoyment of the said item. Regarding 3rd item of suit schedule, it is the case of the plaintiffs that the property was purchased by the second plaintiff by a registered sale deed dated 22.05.1985 for a sum of Rs.7,000/-. The first respondent is the mother and the second respondent is the son. It is also the specific case of the plaintiffs that they are in possession and enjoyment of the suit properties. Stating that the defendant is trying to interfere with the possession of the plaintiffs based on fabricated records, the suit came to be filed.

3.The appellant filed a written statement contending that the suit first item belong to his wife Tamilarasi by virtue of a sale deed dated 31.05.1988. The case of assignment pleaded by the



plaintiffs was specifically denied by the appellant and it was stated that the assignment even if it is true, would be illegal. With regard to third item of suit property, the case of the appellant is that the same belonged to his wife by virtue of a registered Will in favour of his wife dated 18.01.1977. It is further stated that the mortgage and encumbrances over the property was redeemed by the appellant by paying substantial amount and that electricity service connection, drinking water supply connection were taken in the name of his wife. The trial Court dismissed the suit with reference to item No.1, however, gave liberty to the plaintiffs to file a suit for partition even though the suit itself was for declaration that the suit property belong to the plaintiffs and defendant jointly. With regard to the second and third items, the suit was decreed as prayed for holding that the suit second item belongs to the first plaintiff by virtue of the assignment which was marked as Ex.A2. Though the appellant set up title in favour of his wife on the basis of the sale deed dated 31.05.1988 under Ex.B10, executed by one Parvathi Ammal @ Nacharammal, it is found by the trial Court that the property that was conveyed under Ex.B10 is not in respect of suit item No.2. With regard to the item No.3, the trial Court found that the property had been purchased in the name of the second plaintiff by virtue of a registered sale deed dated 22.05.1985 from Parvathi Ammal @ Nacharammal. The document is marked as Ex.A3. However, the defendant claimed that the said property was bequeathed in favour of his wife by a Will dated 18.01.1977 executed by Parvathi Ammal @ Nacharammal. However, the respondents produced before the lower Court a document Ex.A6 to show that the Will executed by Parvathi Ammal @ Nacharammal on 18.01.1977 had been cancelled. Since the Will executed in favour of the defendant's wife had been cancelled by a subsequent document Ex.A6, the lower Court found that the defendant's wife cannot claim any right over the suit third item and that the sale deed executed by the said Parvathi Ammal @ Nacharammal in favour of the second plaintiff is valid. The appellant also filed an additional written statement stating the the defendant's wife has also obtained title by a oral sale from the said Parvathi Ammal @ Nacharammal. Hence, the trial Court found that the said oral sale was not proved and that it is not valid to get any title to the defendant's wife. Thus the suit in respect of items 2 and 3 was decreed as prayed for. Aggrieved by the same, the appellant preferred an appeal in A.S.No.1 of 2011 on the file of the Sub Court, Theni. The appellate Court also confirmed the findings of the trial Court and dismissed the appeal. Aggrieved by the same, the present Second Appeal has been preferred by the defendant in the suit.

4.The lower Appellate Court has found that the item 2 was assigned in favour of the first plaintiff and item 3 has been sold by the original owner in favour of the second plaintiff. The Appellate Court also found that the Will under Ex.B12 had been cancelled and that therefore, the defendant's claim that the property devolved on his wife cannot be accepted. During the pendency of the of the appeal, the appellant filed a petition to



receive additional documents and accordingly, Exs.B19 to B26 were received as additional documents by the Appellate Court. Placing reliance on these additional documents, the appellant prayed for an order of remand before the lower Appellate Court. However, finding that the additional documents were after the suit and that no substantial document has been produced to discredit the documents already filed by the plaintiffs to prove their title, dismissed the appeal. The appellant has raised the following substantial questions of law:

(a) Whether in law the Courts below are right in holding that Tamilarasi in whose name the title deeds namely Ex.B10 and Ex.B12 stand is not a necessary party?

(b) Whether in law the Court below are right in overlooking to see that the suit is hit by Order 1, Rule 9 of C.P.C. and liable to be dismissed?

(c) Whether in law the First Appellate Court is right in disposing the appeal without even framing points for determination as per Order 41, Rule 31 of C.P.C.?

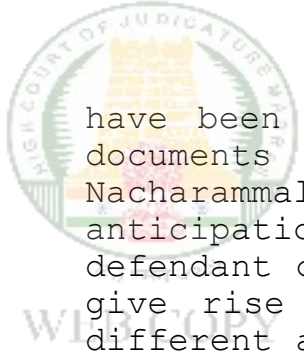
(d) Whether in law the judgment of the appellate Court is vitiated as the same was delivered without following the dictum laid down by this Hon'ble Court in 1997 (1) LW 174?

(e) Whether in law the Courts below are right in rejecting Ex.P10 sale deed in favour of Tamilarasi and granting decree upholding the Ex.A2-Patta?

5.The learned Counsel appearing for the appellant mainly contented that the suit ought to have been dismissed on the short ground that the plaintiffs failed to implead the necessary and proper parties to the suit. It is the specific case of the defendant that the wife of the defendant had purchased item 2 from Parvathi Ammal @ Nacharammal and entitled to the property by virtue of a Will executed by Parvathi Ammal @ Nacharammal. Since the defendant specifically pleaded the sale deed and the Will under Exs.B10 and B12 to disprove the title of the plaintiffs, it is contended by the learned Counsel for the appellant that the suit is liable to be dismissed on the ground of non-joinder of defendant's wife, particularly, when the lower Appellate Court has rejected the documents Exs.B10 and B12 on facts. When the Court has to give a finding in favour of the plaintiffs as against a person who is not a party to the suit, the lower Appellate Court ought to have seen that the defendant's wife is a proper and necessary party to the suit. It is further stated that the suit is, therefore, liable to be dismissed for non-joinder of necessary party. The learned Counsel appearing for the appellant further submitted that the document Ex.A2 is only a patta and that the registered sale deed in favour of the defendant's wife cannot be rejected on the basis of the assignment or patta in favour of the first plaintiff. This Court

considered the submissions of the learned Counsel appearing for the appellant.

6. This is a case where the suit is for declaration of plaintiffs' title over suit items 2 and 3. The plaintiffs have come forward with a definite case and the title of the first plaintiff was on the basis of the assignment under Ex.A2 and the title in respect of the suit third item in favour of the second plaintiff is on the basis of a registered sale deed obtained from original owner Parvathi Ammal @ Nacharammal under Ex.A3. The defendant has set up title in favour of his wife relying upon Ex.B10 sale deed obtained from Parvathi Ammal @ Nacharammal and a Will stated to have been executed by Parvathi Ammal @ Nacharammal. With regard to the suit second item, it is the finding of both the Courts that the property belong to Government and that it was assigned in favour of the first plaintiff under Ex.A2. The sale deed relied upon by the defendant is held to be a document pertaining to some other property and not in respect of suit item No.2. Similarly, with regard to item 3, it is admitted that the property originally belong to Parvathi Ammal @ Nacharammal. Assuming that Parvathi Ammal @ Nacharammal had executed a Will in favour of the defendant's wife under Ex.B12 dated 18.01.1977, it is not disputed that the same Parvathi Ammal @ Nacharammal executed a subsequent sale deed under Ex.A3 dated 22.05.1985. Even accepting the case of the defendant regarding the execution of the Will under Ex.B12, when there is subsequent sale deed executed by the testator in favour of the second plaintiff, the sale is valid and the Will become invalid as the testator had every right to deal with the property till her life time. It is in the said circumstances, the question whether the defendant's wife is a necessary party or proper party has to be decided on the basis of the facts admitted and proved before the Court. Since the plaintiffs have established their title and the contention that the wife of defendant had acquired the property from Parvathi Ammal @ Nacharammal under the Will, is not acceptable, the suit cannot be dismissed for non-joinder of necessary party, namely, the defendant's wife. The plaintiffs cannot be compelled to implead any one to whom the defendant sets up title. In a case where complicated issue arise, the Court may implead any one whose presence may be necessary for an effective adjudication of all issues that may arise for consideration. However, when the Court find that the party whose presence is made as an issue, on the basis of certain documents and materials produced by the parties to the lis has no semblance of right, it cannot entertain the plea of non-joinder. In this case, both the Courts have concurrently, upheld the title of the plaintiffs in respect of items 2 and 3 based on substantial documents. No doubt, the appellant produced before the lower appellate Court several documents to show that the property was dealt with on the basis of the Will. However, those documents cannot discredit the title documents produced by the plaintiffs to prove their title and possession. It is to be seen that the suit was filed in 1999 and the additional documents were filed to show that some prior encumbrances created in respect of the properties



have been discharged by the appellant. These documents are only documents to show that the Will executed by Parvathi Ammal @ Nacharammal under Ex.A12 had been believed and relied upon in anticipation of getting the properties under the Will. The defendant or his wife might have discharged the mortgage. This may give rise to a cause of action for the appellant's wife for a different action. However, that will not help her out to establish the title based on the Will which was superseded by a sale deed by the testator in favour of the second plaintiff. The learned Counsel appearing for the appellant also submitted that the appellate Court failed to frame points for determination as required under Order 41, Rule 31 of CPC and that the judgment of the lower Court is not sustainable in law. A perusal of the judgment would show that the appellate Court considered all the points raised by the parties and came to the conclusion upholding the title of the plaintiffs over items 2 and 3. It is not the case that the lower Appellate Court has not considered any other documents or materials produced before the Court. In these circumstances, this Court find no merit in the submission of the learned Counsel appearing for the appellant relying upon Order 41, Rule 31 of C.P.C.

7.As a result, this Court find no merits in the appeal and the substantial questions of law raised by the appellant are answered against him. Hence, this Second Appeal is dismissed. The judgment and decree of the learned Sub Judge, Theni, in A.S.No.1 of 2011 confirming the judgment and decree of the trial Court in O.S.No.32 of 1999 are confirmed. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS III)

// True Copy //

Sub Assistant Registrar(CS)

To

- 1.The Subordinate Judge, Theni.
- 2.The District Munsif cum Judicial Magistrate, Andipatti.
- 3.The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.(2 Copies)
+1 cc Mr.R.SUBRAMANIAN ,Advocate, SR.No. 71358

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