

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 03.01.2020

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

S.A.No.1885 of 1997
and C.M.P.No.18991 of 1997

1. Thirugnanam (died)
2. Neelavathi
3. T.Kumaravelu
4. Revathi

(Appellants 2 to 4 brought on
record as LRs of the deceased
sole appellant vide order dated
17.07.2019 in C.M.P.Nos. 3031
to 3033/2019 in S.A.No.1885/1997)

...Appellants/2nd Respondent/2nd Defendant

Vs.

G.Ramalingam ...Respondent/Appellant/Plaintiff

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 03.11.1997 made in A.S.No.68 of 1987 on the file of the Principal District Court, East Thanjavur at Nagapattinam, reversing the considered judgment and decree dated 24.11.1986 made in O.S.No.82 of 1981 on the file of the Subordinate Court, Nagapattinam.

For Appellants : Mr.K.Sridhar

For Respondent : Notice served
: No appearance

JUDGMENT

This second appeal has been filed as against the judgment and decree dated 03.11.1997 passed in A.S.No.68 of 1987 on the file of the Principal District Court, East Thanjavur at Nagapattinam, reversing the considered judgment and decree dated 24.11.1986 made in O.S.No.82 of 1981 on the file of the Subordinate Judge, Nagapattinam.

2. For the sake of convenience, the parties are referred to as per their ranking in the trial Court.

3. The case of the plaintiff in brief is as follows :-

3.1. The suit is filed for partition, declaration and separate possession. The suit schedule property is a tiled brick built house in T.S.No.1363 within Nagapattinam Municipality ad measuring 2056 sq.ft. Originally, the suit property belonged to one Velayutham Chettiar and he had two sons viz., Govindaswamy Chettiar and Chinnaiyan Chettiar. After demise of the said Velayutham Chettiar, his two sons derived the suit property and they are entitled half of the share. The Govindaswamy Chettiar died in 1949 and the plaintiff is his son. Therefore, the suit property was the ancestral property of the plaintiff and his paternal uncle viz., Chinnaiyan Chettiar, who is the first defendant herein. All other ancestral properties belonging to them were divided between them by a partition deed dated 02.03.1967, which was marked as Ex.A.1. But the suit property was kept undivided in that partition deed itself. Therefore, in the suit property, the plaintiff and his paternal uncle ie., the first defendant are entitled half of the share.

3.2. While being so, the first defendant causing inconvenience and difficulty in the join management of the suit property. The first defendant was also attempted to sell the entire suit house to the second defendant as if the first defendant is the exclusive owner of the entire suit property. In spite of repeated demands, the first defendant had not cared to divide the suit property and to give the plaintiff his half share. Therefore, the plaintiff issued notice dated 03.08.1979 to the defendants 1 & 2 for division of the suit property. The second defendant gave a reply on 28.08.1979, falsely setting up a plea of ouster and adverse possession and denying the title of the plaintiff. Hence, the suit is filed for partition and separate possession.

4. Resisting the same, the first defendant filed a written statement by stating that immediately after the partition of all other properties under the partition deed dated 02.03.1967, the plaintiff took a gold chain belonging to the family weighing 96 gms, for temporary use and he agreed to return the same. When the suit house was sought to be divided subsequently, it was agreed that the gold chain should be sold and the sale proceeds should be divided equally between the plaintiff and the first defendant. The value of the gold chain had to be adjusted in the share of the plaintiff in the suit house. After partition of all other properties, the first defendant and the plaintiff became divided in status and discontinued to be co-owners in respect of the suit property also. The first defendant was in exclusive possession of the suit house by paying municipal taxes in his name. The entire suit property was sold by the first defendant

to the second defendant by a sale deed dated 27.01.1979, which was marked as Ex.B.1. In any event, the plaintiff has to make good for the present market value of the gold chain weighing 96 gms entrusted to him before laying any claim to the suit property.

5. The second defendant also filed separate written statement by denying the case of the plaintiff that all other properties jointly owned by the plaintiff and the first defendant were divided by a partition deed dated 02.03.1967, which was marked as Ex.A.1. It is also incorrect to allege that the suit house was jointly owned by the plaintiff and the second defendant. In any event, the first defendant who is the vendor of the second defendant has prescribed title to the suit property. The second defendant is a bonafide purchaser of the entire suit property for valuable consideration and without notice of the title of the plaintiff. Subsequent to his purchase of the suit property on 27.01.1979, the second defendant has improved the suit property by spending a sum of Rs.20,000/- to the knowledge of the plaintiff. The plaintiff knows fully well about the sale of the entire house to the second defendant and hence the plaintiff is estopped by law and by conduct from either questioning or challenging the same. In any event, under law of equity and natural justice, the second defendant is entitled to the improvements made by him to the tune of Rs.20,000/- payable by the plaintiff before the plaintiff gets a decree for partition, if any in the suit property.

6. On the side of the plaintiff, he himself examined as P.W.1 and the four documents were marked as Ex.A.1 to Ex.A.4. On the side of the defendants, they examined D.W.1 to D.W.3 and were marked Ex.B.1 to Ex.B.14. Based on the material produced on record and considering both the oral and documentary evidence adduced by the respective parties and also the submissions made, the trial Court partly decreed the suit and concluded that the suit property is an ancestral property and it is liable to be divided in equal shares and dismissed the suit insofar as the profits. Aggrieved by the same the plaintiff filed appeal suit in A.S.No.68 of 1987 before the learned District Judge, East Thanjavur, Nagapattinam and the first appellate Court remanded back the matter to the trial Court insofar as the issues No.6 for fresh consideration, after framing specific issue as to whether the plaintiff is entitled only to half of the market value of the suit and the super structure then existing and also to find out whether there was specific knowledge on the part of the plaintiff about the improvement made by the second defendant. As against which, the second defendant filed an application before this Court in AAO.No.242 of 1988, in which this Court by an order dated 13.02.1997, set aside the judgment and decree passed by the first appellant court and remanded back

the appeal to the first appellant Court to decide the said issued by the first appellate Court itself on merits. After remanding back by this Court, the first appellate Court allowed the appeal and decreed the suit in favour of the plaintiff. Aggrieved by the same, the second defendant filed this present second appeal.

7. At the time of admission of this second appeal on 06.12.2018, the following substantial question of law were formulated for consideration:-

"1. Whether the first appellate Court had committed grave error in proceeding with the appeal without impleading the legal heirs of the first respondent Chinnaiyan, who was one of the vendors under Ex.B.1 Sale deed?

2. Whether the first Appellate Court was right in giving a finding at the time of remanding the matter to the trial Court and later reversing its own findings? "

8. The learned counsel appearing for the second defendant/appellant raised first and foremost ground that while pending the first appeal before the first appellate Court in A.S.No.68 of 1987, the first defendant died. The plaintiff did not take any steps to implead the legal heirs of the deceased first defendant. When the suit filed by the plaintiff for partition, the legal heirs of the deceased first defendant ought to have been impleaded as party in the partition suit. Even assuming that the plaintiff failed to implead the legal heirs of the deceased first appellant, the appeal suit is abated as against the first defendant and the first appellate Court ought to have been dismissed the appeal as abated as against the first defendant. Instead of that, the first appellate Court decreed the suit as against the first defendant also.

9. He further submitted that when this Court while disposing the application in A.A.O.No.242 of 1988, directed the first appellate Court to decide the appeal by itself on merits. When there is a specific direction, the first appellate Court failed to consider the same and without deciding the issue completely, allowed the appeal on the ground that the second defendant is not a bonafide purchasers of the suit schedule property and also the plaintiff is entitled for partition. When the first appellate Court already decided the appeal in favour of the second defendant, the first appellate Court ought not to have decided as against the second defendant once again.

10. Heard Mr.K.Sridhar, learned counsel appearing for the appellants/legal heirs of the second defendant. Though notice was served, no one has appeared on behalf of the respondent/plaintiff.

11. The plaintiff filed suit for partition in respect of the suit property, which is a tiled brick built house comprised in T.S.No.1363, ad measuring 2056 sq.ft. One Govindaswamy Chettiar and the first defendant are the sons of one Velayutham Chiettiar. The said Govindaswamy Chettiar died in the year 1949 and the plaintiff is his son. The suit property is the ancestral property along with other properties. All the properties are divided between the family members by partition deed dated 02.03.1967, which was marked as Ex.A.1. In respect of the suit schedule property, it was kept undivided in that partition deed itself. Therefore, the suit property belongs to the plaintiff as well as the first defendant, who is his paternal uncle, in which the plaintiff is entitled to get half share. The first defendant took a plea that all the properties were partitioned under the partition deed dated 02.03.1967. Thereafter, the plaintiff took a gold chain belonging to the family members weighing 96 grm and subsequently agreed that the gold chain should be sold and the proceeds to be divided between the plaintiff and the first defendant. The half of the value of the gold chain should be adjusted in the share of the plaintiff in the suit property. Therefore, the first defendant is exclusive possession of the suit property by paying municipality taxes in his name.

12. While being so, the first defendant sold out the entire suit schedule property in favour of the second defendant by a sale deed dated 27.01.1979, which was marked as Ex.B.1. The second defendant took a specific plea that under Ex.A.1, dated 02.03.1967, the entire family properties have been partitioned between the plaintiff and the first defendant. Thereafter, the first defendant alone entitled to have entire share of the suit schedule property. On the strength of the same, the second defendant purchased the suit property for a valid sale consideration and as such he claimed to be a bonafide purchaser of the suit property. Thereafter, he spent more money to develop the suit schedule property and the plaintiff had full knowledge about the purchase of the property from the first defendant. The trial Court upheld the claim of the plaintiff for half share of the suit property, but instead half of the value of the property, chosen to be given to the plaintiff in lieu of his half share to be payable by the first defendant. In other respects the suit was dismissed without costs. In respect of the preliminary decree for partition, the trial Court awarded

compensation alone to the plaintiff. Aggrieved over the same, the plaintiff preferred an appeal.

13. In the appeal suit, the plaintiff took a specific plea that the trial Court directed the first defendant to pay the value of the plaintiff's half share in the suit as it existed prior to the sale deed even without framing an issue on this aspect. Further there is absolutely no scope in granting a money decree in a suit for partition and separate possession. The first appellate Court confirmed the issues answered by the trial Court and in the absence of any evidence to show that the first defendant had prescribed title to the entire suit property by adverse possession or ouster, the plaintiff is entitled to half of the share in the suit property, as such, the first defendant does not prescribe any title in the suit property.

14. The other issue is that the first defendant had sold out the entire suit property to the second defendant and the subsequent purchaser i.e., the second defendant made improvement to the tune of Rs.20,000/-. Therefore, whether the plaintiff is liable to pay the value of improvements made by the second defendant and if so what is the value of improvements? But there is no finding given by the trial Court. Though the trial Court framed specific issue No.6 that "whether the plaintiff is liable to pay the value of the improvements effected by the second defendant, if so what is the value of improvement?", the trial Court did not consider the said aspect and no specific finding given by the trial Court whether the plaintiff is liable to pay the value of the improvement or not. Therefore, the first appellate Court concluded that the findings of the trial Court on issues 1 to 3 are confirmed and the matter requires to remand back to the trial Court for fresh consideration in respect of the issue No.6, in the light of the available evidence and additional evidence. Accordingly, the first appellate Court remanded back the matter to the trial Court for consideration of issue No.6 a fresh with available evidence.

15. Aggrieved by the same, the second defendant filed A.A.O.No.242 of 1988 before this Court and this Court by an order dated 13.02.1997, concluded that the reasons given for remanding back the suit is not adequate, on account of the fact that the first appellate Court has not set aside the findings of the trial Court that the second defendant is a bonafide purchaser for valuable consideration and without notice the plaintiff's title. Further he has also made improvements by remodeling and reconstructing the property. Therefore, this Court set aside the order passed by the first appellate Court and directed the first appellate Court to decide the appeal by itself with the available evidences. Further observed that if

the first appellate Court feels that any fresh evidence is necessary on any particular issue, it is open to the first appellate Court to call for such a finding and then decide the appeal by itself on merits, instead of sending the suit to the trial Court.

16. Again the first appellate Court allowed the appeal concluded that the second defendant failed to prove that he is a bonafide purchaser that too after verifying the ownership of the property and he did not produce any evidence to prove the same. Further concluded that the second defendant did not produce any evidence to show that he spent a sum of Rs.20,000/- for developing the suit property after purchasing the same and also did not produce any evidence to show that the plaintiff had full knowledge about of his purchase of the suit schedule property. Further held that the second defendant also did not produce single piece of evidence to show that after purchase of the suit property, he obtained planning permission and constructed the building in the suit schedule property. Therefore, allowed the suit filed by the plaintiff as prayed for.

17. Pending the appeal suit before the first appellate Court, the first defendant, who is none other than the paternal uncle of the plaintiff died. Even then, the plaintiff did not take any steps to implead the legal heirs of the first defendant. When the plaintiff claimed half share of the suit property, that too by way of partition, he has to necessarily implead the legal heirs of the second defendant, since according to the plaintiff the first defendant is having half share over the suit property. If the first appellate Court recorded that the plaintiff failed to take necessary steps to implead the legal heirs of the deceased first defendant, the appeal has to be dismissed as against the first defendant as abated. But the first appellate Court allowed the appeal and decreed the suit as prayed for by the plaintiff as against both the defendants. Even the suit was decreed as against the death person it cannot be executed. When the plaintiff did not take any steps to implead the legal heir of the first defendant, the first appellate Court ought to have dismissed the suit as against the first defendant as abated.

18. That apart, after purchase of the suit schedule property, the second defendant is in possession and enjoyment of the property. After obtaining planning permission, he remodeled the brick house and all the revenue records were mutated in his name. Therefore, the first appellate Court completely erred in holding that the plaintiff has proved his case, that too on the evidence and the materials produced by the second defendant.

When the plaintiff filed suit for partition, the entire burden is on the shoulder of the plaintiff and he has to prove his case. But the first appellate Court concluded that the second defendant failed to prove his purchase as well as failed to prove the development made by him in the suit schedule property.

19. Further this Court while remanding back the first appeal, specifically directed the first appellate Court to decide the issue, for which earlier the first appellate Court remanded the matter to the trial Court, by itself after giving opportunity to the parties concerned. But the first appellate Court leaving this issue, which is for the reason for remanding the suit to the trial Court, for the issue which was already decided by the first appellate Court has been once again decided as against the second defendant without giving any opportunity.

20. In the light of the above discussions, this Court is of the considered opinion that the finding of the first appellate Court is nothing but perverse and it is liable to be interfered with. Accordingly, all the substantial questions of law, formulated by this Court in this Second Appeal are answered in favour of the second defendant and as against the plaintiff.

21. In fine, this Second Appeal stands allowed and the judgment and decree of the first appellate Court as well as the trial Court are set aside and subsequently, the suit filed by the plaintiff in O.S.No.82 of 1981 is dismissed. Consequently, connected miscellaneous petition is closed. There shall be no order as to costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

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Sub Assistant Registrar.

To

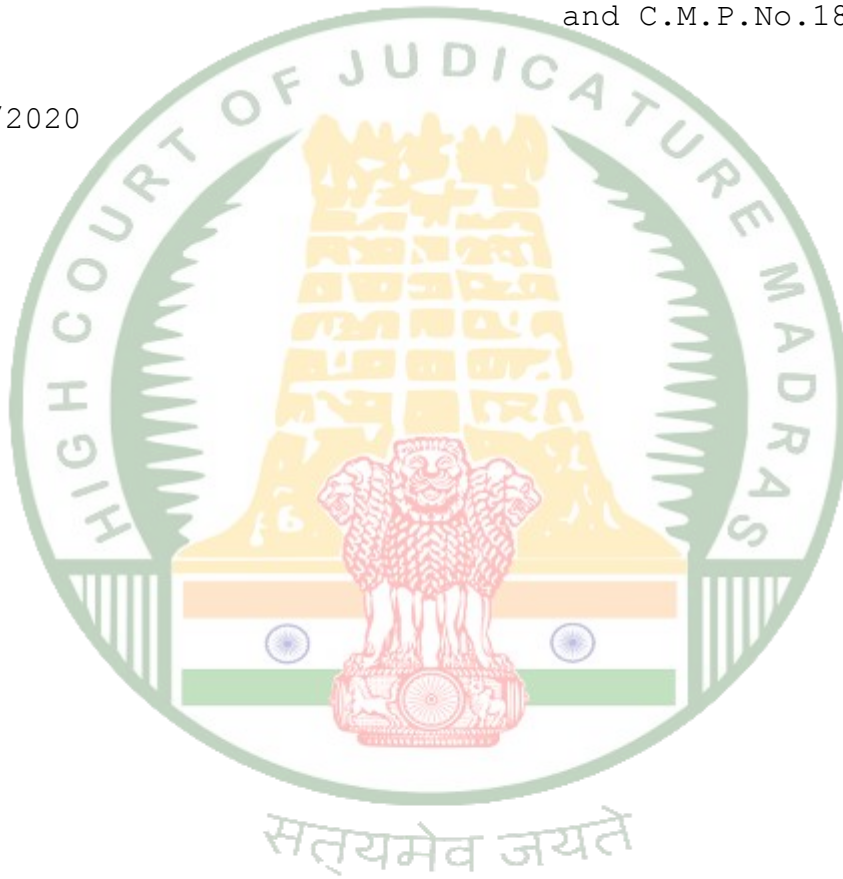
1. The Principal District Judge,
Principal District Court,
East Thanjavur,
Nagapattinam.
2. The Subordinate Judge,
Nagapattinam.

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

+1cc to Mr.K.Sridhar, Advocate Sr.921.

S.A.No.1885 of 1997
and C.M.P.No.18991 of 1997

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