

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 02.01.2020

Date of Verdict : 10.01.2020

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

S.A.No.1414 of 2002

A.M.Mohammed Sultan ...Appellant/Appellant/2nd Defendant

Vs.

1. Tmt. Mahbooba (deceased)
2. Mohammed Alim
3. Rahamthunnissa
4. Kamila Banu
5. A.S.Abdul Rashid
6. A.S.Mahammed Refeek

(R6 brought on record as LR of the deceased first respondent by an order dated 04.10.2016 made in C.M.P.No.139 to 141 of 2015 in S.A.No.1414 of 2002)

...Respondents

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 18.03.2002 passed in A.S.No.63 of 2000 on the file of the Subordinate Court, Thiruvarur, confirming the judgment and decree dated 27.08.1999 passed in O.S.No.116 of 1995 on the file of the Principal District Munsif Court, Thiruthuripoondi.

For Appellant : Mr.V.Raghavachari

For Respondents

R1 : Died

For R2 to R4 : Mr.R.Prabhu
for Mr.V.Raghupathy

JUDGMENT

This appeal is directed as against the judgment and decree dated 18.03.2002 passed in A.S.No.63 of 2000 on the file of the Subordinate Court, Thiruvarur, confirming the judgment and decree dated 27.08.1999 passed in O.S.No.116 of 1995 on the file of the Principal District Munsif Court, Thiruthuripoondi.

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 injunction. The fifth plaintiff is the mother-in-law of the first plaintiff. The plaintiffs 2 to 4 are the children of the first plaintiff. The first son as well as the husband of the fifth plaintiff were died. The first defendant is the younger son of the fifth plaintiff and the second defendant is the grandson of the fifth plaintiff through her daughter. After the death of her husband, the first plaintiff had administered her family along with the younger son of the fifth plaintiff. The another son of the fifth plaintiff is residing in abroad and on behalf of him and also for his welfare, the suit has been filed by the plaintiffs.

3.2. The property comprised in Survey No. 91/15 ad measuring 10 cents of house plot and tile house belongs to the husband of the fifth plaintiff and his brother. It's door number is 4/92A. While being so, the second defendant is in possession and enjoyment of the western side of the tile house and house plot. The other portion of the said house already in a dilapidated condition and it was in a demolished condition. The eastern side of the portion is in possession and enjoyment of the other two sons of the fifth plaintiff along with their family members. The family of the first son of the fifth plaintiff was developed and as such he constructed house in the eastern portion of the tile house as well as the property purchased by him in Survey Nos. 92/10 and 90/3. Though the first son of the fifth plaintiff constructed house, the fifth plaintiff and the first defendant are residing in the eastern side portion of the tile house comprised in Survey No.91/15 at door No.4/92A. The husband of the first plaintiff and the plaintiffs 1 to 4 were enjoying the eastern side portion of the tile house.

3.3. The deceased husband of the fifth plaintiff is entitle half of the portion of the land comprised in Survey No.91/15 ad measuring 10 cents along with tile house at Door No.4/92A and said property derived by his wife i.e., the fifth plaintiff and her three sons. Under Muslim Law, the fifth plaintiff is entitled for 4/32 shares and 14/32 share is entitled by her three sons. Since the husband of the first plaintiff being the elder son of the fifth plaintiff, as said, his share of 14/32 is entitled by the plaintiffs 1 to 4 herein. The another share of 14/32 is entitled by the first defendant. As stated above the eastern side portion of the south to north is entitled by the first defendant and the other portion along with house constructed in Survey No. 92/10 and 92/3 is entitled by the plaintiffs 1 to 4 in the suit schedule property.

3.4. In fact, the husband of the first plaintiff constructed compound wall on the northern side of her house

and it is also bounded in the house situated at Door No. 4/92A on the eastern side south-north lane. Therefore, the land adjacent to the compound wall used by the plaintiffs 1 to 4 and the first defendant never used the said land. In fact, in the said land, there is a hand pump, which belongs to the plaintiffs. The plaintiffs have paid the house tax and other revenue dues for their share to the first defendant and through the first defendant, it was paid to the revenue department regularly. Thereafter, there was a dispute between the first defendant and the first plaintiff, utilizing these situations, the first defendant causing problem to the plaintiffs in respect of the suit schedule property.

3.5. In the mean time, the first defendant alone decided to sell the entire property and he prevented the plaintiffs to sell their share. Further the defendants also threatened the plaintiffs and compelled to sign in the blank stamp papers. In this regard, the plaintiffs have also lodged complaint before the concerned Police station. Therefore, till filing the partition suit between them, the prayer for injunction restraining the defendants from demolishing the house and alienating the suit schedule property is necessary. Hence the suit.

4. Resisting the same, the first defendant filed written statement and denied the entire averment in the plaint as false and frivolous. The suit property comprised in Survey No.91/15 ad measuring 10 cents along with tile house situated at Door No. 4/92A, is originally belongs to the first defendant's father as well as his brother. The western side portion of the suit property was allotted to his father Viz., Sheik Dawood Maraikayar and eastern side of the property was allotted to his father's brother viz., Ravuthar Maraikayar. The western side of the portion of the said house already in dilapidated condition and on the eastern side of the portion of the said house, the first defendant and his brother i.e., the husband of the first plaintiff were living together.

4.1. Thereafter, after purchase of the properties comprised in Survey Nos. 92/10 and 90/3 by his brother i.e., the husband of the first plaintiff, he constructed a house. In fact the said property was not belonging to the husband of the first plaintiff alone, since the said money was sent by other brothers to the fifth plaintiff i.e., their mother to purchase the property and to construct the house. Therefore the said property also belonging to all family members. Already, there was a partition in the suit schedule property and the fifth plaintiff allotted share to the first defendant and another brother, who was not impleaded as a party to the suit, by an registered deed dated 03.05.1993. Further by the gift deed dated 17.11.1986, the fifth plaintiff allotted the property in favour of the first defendant. In both deeds the down portion of the property was not mentioned, since the fifth plaintiff allotted the said property in favour of the first defendant.

In respect of the house, it was constructed recently. The western portion of the suit schedule property is in possession and enjoyment of the first defendant. Since the said portion is in dilapidated condition, the first defendant was living in a rental house. In fact, the fifth plaintiff by a release deed dated 05.10.1993, relinquished her right of her share over the suit schedule property. Though plaintiffs are initiated the suit proceedings for partition, they cannot be sought for injunction as against the co-owners and prayed for dismissal of the suit.

5. The second defendant filed written statement and averred that pending the suit the fifth plaintiff died and the second defendant has no knowledge about the partition between the husband of the first plaintiff and the first defendant. Under the Muslim Law, there is no manager or kartha to manage or administer the family property. Further under Muslim Law, after the death of the husband, his wife could not be a manager to file a suit. Further another brother of the first plaintiff's husband i.e., Mahammed Rafeek was not impleaded as party. Hence for non joinder of formal parties, the suit is liable to be dismissed. In the year 1916 itself, by the document No.1015, there was a partition between the parties and by suppressing the said facts, the present suit has been filed. Therefore, he prayed for dismissal of the plaint.

6. On the side of the plaintiff, the first plaintiff herself was examined as P.W.1 and were marked Ex.A.1 to Ex.A.11. On the side of the defendants D.W.1 & D.W.2 were examined and Ex.B.1 to Ex.B.20 were marked. The Advocate Commissioner's report and his plan were marked as Ex.C.1 and Ex.C.2. On perusal of the material placed on record, both the oral and documentary evidences of the respective parties and the submissions made, the trial Court decreed the suit in favour of the plaintiffs. Aggrieved by the same, the second defendant alone filed an appeal suit in A.S.No.63 of 2000 on the file of the Sub Court, Thiruvavur and the same was also dismissed by the first appellate Court by confirming the judgment and decree of the trial Court in favour of the plaintiff. Aggrieved over the same, the second defendant filed this present second appeal.

7. At the time of admission of this second appeal on 23.08.2002, the following substantial question of law were formulated for consideration:-

"1. Has not the suit been hit by Order 2 Rule 2 of C.P.C.?

2. Have not the Courts below and particularly the first appellate Court committed error in having failed to consider the partition deed and sale deed and just by saying that no document has been filed?"

8. The learned counsel appearing for the appellant/second defendant submitted that the suit itself is not maintainable, since the first plaintiff filed suit in the capacity of Manager/Kartha. In Muslim Law, there is no Manager or Kartha, as such the first plaintiff cannot file the suit for injunction. Further the suit is also not maintainable for injunction alone without the prayer for declaration. The findings of the Courts below that the partition was not held between the family members, as such till partition, injunction can be granted, restraining the second defendant from put up any construction and alienating the suit property. But already the partition was over between the father of the first defendant as well as the other family members. The plaintiffs instead of filing the suit for injunction, they ought to have filed suit for partition.

9. Heard Mr.V.Raghavachari, learned counsel appearing for the appellant/second defendant and Mr.R.Prabhu, learned counsel appearing for the respondents/plaintiffs.

10. Admittedly the fifth plaintiff gave birth to three sons and one daughter. Without adding another son, who lived in abroad, the plaintiff filed this suit, as such this suit is not maintainable as non joinder of the necessary parties. The first plaintiff is the wife of the elder son of the fifth plaintiff. The plaintiffs 2 to 4 are the children of the first plaintiff. Originally, the suit property comprised in Survey No. 91/15 ad measuring 10 cents along with tile house belonging to the husband of the fifth plaintiff viz., Sheik Dawood Marakaiyar and his brother viz., Ravuthar Marakaiyar. The half of the suit property is entitled for the husband of the fifth plaintiff, in which the fifth plaintiff as well as her children were derived the title in respect of their respective shares. The second defendant is the grandson of the Sheik Dawood Marakaiyar, through his daughter.

11. Even according to the plaintiffs, the said Sheik Dawood Marakaiyar and Ravuthar Marakaiyar are bothers and both are entitled half of the share in the property comprised in Survey No. 91/15 ad measuring 10 cents along with the tile house. According to the plaintiffs, due to some internal arrangements, the second defendant is also in possession and enjoyment of the suit property. Under these circumstances, the plaintiff filed suit for injunction restraining the defendants from alienating or destroying the suit property till the partition effected.

12. It is seen from Ex.B.1, the settlement deed dated 17.11.1986, executed by the fifth plaintiff in favour of the first defendant, alone with the enjoyment right. Though the

second defendant pleaded that his grandfather as well as the father of the first defendant entered into partition deed with the family members, in the recital of Ex.B.13 and Ex.B.19 there is no proof for the same. Therefore the Courts below rightly concluded that there was no partition between the family members in respect of the suit schedule property. According to the second defendant, he purchased western side of the suit schedule property by Ex.B.16, pursuant to which patta also issued in his favour for the property. Whereas no measurment was given for the suit property. Only the extent of the property mentioned as 5 cents. Therefore it is also confirmed that there was no partition between the family members. Under these circumstances the defendants 1 and 2 without any proper measurement demolished the house. It would cause prejudice to the plaintiffs.

13. Admittedly there was a suit filed by the first defendant for partition in respect of the very same suit schedule property in O.S.No.316 of 1995 on the file of the District Munsif Court, Thiruthraipoondi, which was marked as Ex.A.10. In the said suit, the present suit schedule property has been shown as Item Nos.11 to 13 and he sought for separate share in the suit property. In fact the join patta was also issued in favour of the parties concerned. It is also seen from the Advocate Commissioner's report and plan, the tile house situated in the suit schedule property is completely in dilapidated condition and roof was not there. In fact, some of the portions wall have already been demolished and the rubbish were kept on the side of the house. Therefore, it is very clear that there was no partition between the family members. Under these circumstances, if the defendants are permitted to construct new house in their portion or permitted to demolish the house, it would case prejudice to the plaintiffs, till the partition effected between them. Though second defendant claimed title by the sale deed, there is no mentioning about the measurement as such the Courts below have rightly concluded that the suit property was not partitioned, as such the suit was decreed in favour of the plaintiffs as prayed for.

14. In the light of the above discussion, this Court does not find any valid reason to interfere with the findings rendered by the Courts below as such the Courts below have analyzed the evidences both the documentary and oral in detail, adduced by the parties and by giving cogent reasons, concluded rightly and decreed the suit filed by the plaintiff. Accordingly, this Court is of the considered opinion that no substantial question of law involved in this appeal. Be that as it may, all the substantial questions of law, formulated by this Court in this Second Appeal, are answered in favour of the plaintiffs and as against the defendants.

15. In fine, the Second Appeal stands dismissed by confirming the judgment and decree of the Courts below with costs.

Sd/-
Assistant Registrar (CS-IV)

//True copy//

Sub Assistant Registrar

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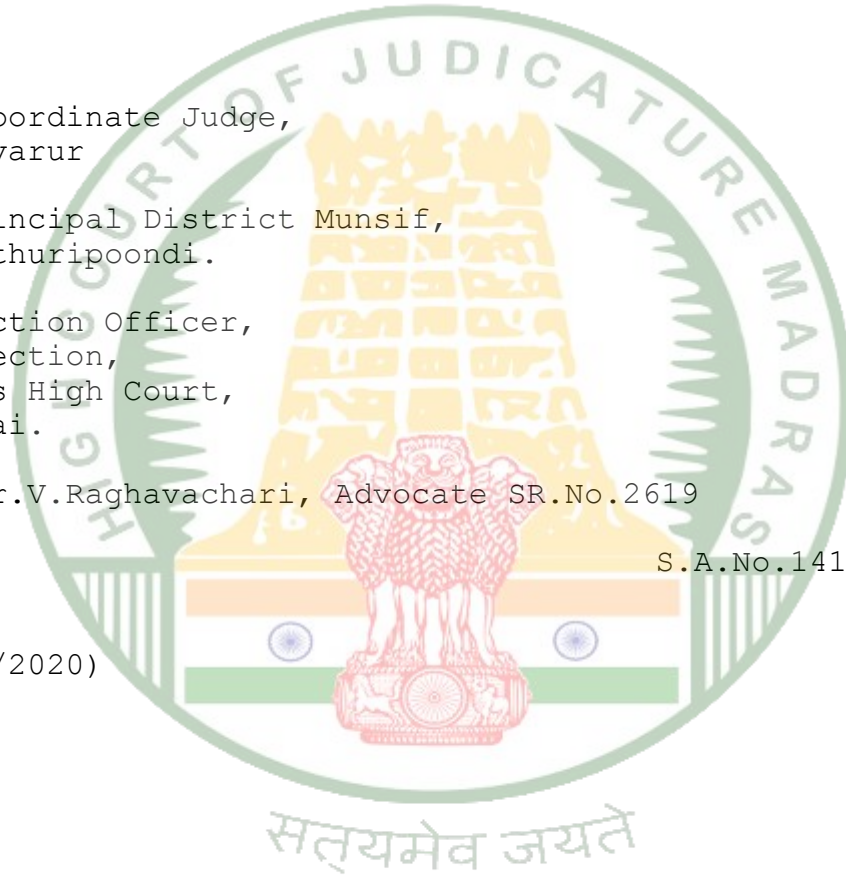
To

1. The Subordinate Judge,
Thiruvarur
2. The Principal District Munsif,
Thiruthuripoondi.
3. The Section Officer,
V.R.Section,
Madras High Court,
Chennai.

+1cc to Mr.V.Raghavachari, Advocate SR.No.2619

S.A.No.1414 of 2002

SVI (CO)
GMY (23/11/2020)



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