



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.03.2020

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.1957 of 2002

1.Saraswathi
2.Padmavathi
3.Ravichandran
4.Gururajan
5.Narasimhan ...Appellants / Appellants / Plaintiffs 2 to 6

Vs

1.Pichamuthu
2.Muthukrishnan
3.Kaliyaperumal
4.Jagadhambal ... Respondents / Respondents / Defendants
5.Kanagasabai Chettiar (Died)
6.Narasammal (Died)
7.Booramurthi (Died)
8.Pattammal
9.Kumuthini
10.Ranganayaki
11.Latha ... Respondents

[Respondents RR8 & 9 are brought on record as L.Rs. of the deceased 5th respondent Kanagasabai Chettiar and RR10 & RR11 for 7th respondent Booramurthi, Vide Order of Court dated 22.08.2019 made in CMP.Nos.15654 to 15659/2018 in S.A.No.1957 of 2002]

Prayer : Second Appeal filed under Section 100 of CPC, to set aside the judgment and decree dated 28.1.2000 made in A.S.No.155 of 1992, on the file of Sub Court, Ariyalur, confirming the judgment and decree dated 31.12.1991 made in O.S.No.216 of 1987, on the file of the District Munsif Court, Jayankondam.

For Appellants : Mr.S.Parthasarathy, Senior Counsel for
M/s.Sarvabhauman Associates

For Respondents : Ms.M.Nagalakshmi [R2 & R3]

JUDGMENT

The plaintiffs who had lost their suit for partition successively before the Courts below are the appellants herein. The first plaintiff died during the pendency of the suit and his legal heirs are impleaded as plaintiffs 2 to 6. Parties would be referred to by their ranks before the trial Court.



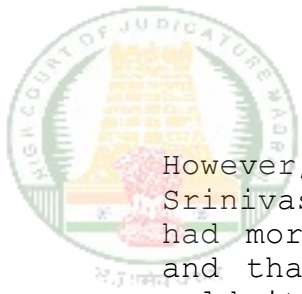
2.1 There are five items of suit properties, of which, items 1 to 4 are agricultural lands having a combined extent of 1.22 acres. Item 5 is a house-site measuring 8,640 sq.ft., with a house thereon, which lie contiguously with the other items of suit properties. These properties originally belonged to one Sethachar. He had two sons namely, Boorachar and Narasimachar.

2.2 The case of the plaintiffs is that, on the demise of Sethachar, the entire properties were divided equally on his two sons. Boorachar had one son namely Srinivasachar, whereas Narasimachar's only son is Ragothamachar, the first plaintiff herein. Srinivasachar died leaving behind him surviving his widow, the seventh defendant, and their only son Booramurthy, the eighth defendant. Both of them are now dead and the respondents 10 and 11 are impleaded as the heirs of Booramurthy, and they remained exparte.

2.3 While so, under Ext.A1=Ext.B1, mortgage deed dated 01.07.1954, Srinivasachar mortgaged his half share in the suit properties in Item Nos. 1 to 4 to the first defendant. Subsequently, under Ext.B3, sale deed dated 20.06.1988, Srinivasachar's only son Booramurthy (8th defendant) sold the half share in Item Nos.1 to 4 to the second defendant, who is the son of the mortgagee, under Ext.A1. The mortgagee himself was arrayed as the first defendant. His other heirs other than the second defendant were impleaded as the third and the fourth defendants. So far as the fifth item of property is concerned, the sixth defendant claims to have obtained an agreement of sale from the seventh defendant, the widow of Srinivasachar, and it is marked as Ext.B5.

3. In the written statement of the first defendant and adopted by defendants 2 and 3, it was alleged that the suit property was an inam land, and after abolition of inam land, he was issued patta for the suit property. However, during trial the second defendant admits that he has purchased only half share in Item Nos.1 to 4 under Ext.B-3. So far as the defendants 7 and 8 are concerned, they took up a plea that there was an oral partition between Boorachar and Narasimachar, in which the suit properties came to be allotted exclusively to the share of Boorachar. In the written statement of the fifth and sixth defendants, the sixth defendant claim that they are in possession of the fifth item of the suit property, pursuant to Ext.B5, sale agreement, dated 29.04.1976, executed by the seventh defendant in his favour.

4.1 The dispute went to trial, and before the trial Court, defendants 7 and 8 did not adduce any oral evidence to prove the alleged oral partition between Boorachar and Narasimachar.



However, the trial Court came to the conclusion that Srinivasachar is the kartha of the joint property, and that he had mortgaged the property under Ext.A1 for pious obligations, and that his son Booramoorthy (8th defendant) had subsequently sold it to the second defendant under Ext.B3. It proceeded to hold that notwithstanding the pleading in the written statement of the first defendant, which was adopted by the second defendant, who is the purchaser in Ext.B3 himself had admitted that he has purchased only northern half of Item Nos.1 to 4, taken together.

4.2 So far as the fifth item of suit property is concerned, the trial Court has held that the sixth defendant was in exclusively possession of the property in part performance of Ext.B-5 agreement of sale, and hence the suit is barred by limitation against them. Ultimately, it dismissed the suit, which came to be confirmed by the first Appellate Court and hence, the present second appeal.

5. The appeal is admitted only as against the defendants 7 and 8 alone to consider the following substantial question of law:

"Whether the Courts are correct in not decreeing the suit as against defendants 7 and 8, when they remained ex-parte?"

6. The learned counsel for the appellants submitted that both the Courts below have not bestowed adequate care in appreciating the evidences on record, vis-a-vis, the right of the plaintiffs in Item Nos.1 to 4, and got their law wrong with regard to their right in Item No.5. Expatriating his arguments, the learned counsel argued that, so far as the Item Nos.1 to 4 are concerned, Ext.B3, sale deed makes a categorical statement that what was sold to the second defendant under Ext.B3 was only half of Item Nos.1 to 4. However, the trial Court laboured to discover a non-existing fact to dismiss the suit in entirety for Item Nos.1 to 4. This has also been endorsed by the first Appellate Court. So far as the fifth item of suit property is concerned, Section 53A of the Transfer of Property Act, 1882, can operate only against the persons who has executed the sale agreement and it cannot affect the right of the other co-sharer of item No.5, and they are not bound by Ext.B5 sale agreement. Surprisingly, the Courts below have held that the suit is barred by limitation, which is untenable in law. So far as the defendants 1 to 3 are concerned, inasmuch as they have already conceded other half share to the plaintiffs, their presence before this Court is not required, and insofar as the fifth defendant is concerned, he has died (indeed he had died and his legal representative appears to be none other than sixth defendant. And, the sixth defendant was arrayed as fifth respondent in this appeal, and on his death, his heirs are impleaded as respondents 8 and 9). Neither they choose to



contest the appeal, nor their legal representatives (impleaded as respondents 10 and 11) opted to contest on the death of the former during the pendency of the appeal.

7. This Court perused the entire records and finds that the approach of the trial Court and first Appellate Court is appalling. Their attitude epitomises their abject neglect in not even perusing Ext.B3, which would have helped averting a catastrophe such as this.

8. So far as the fifth item of the suit property is concerned, can an agreement of sale bind the co-sharer who has never executed it? This Court is amazed by the conclusion arrived by the Courts below, as to how it invoked Section 53A of the Transfer of Property Act, and brought in limitation against the plaintiffs who indisputably did not execute any sale agreement in favour of the sixth defendant (fifth respondent in this appeal).

9. The only fact that could deny a decree to the plaintiffs is the proof of an oral partition in which the entire properties came to be allotted to the share of Boorachar. When this fact was not proved by defendants 7 or 8, there is little difficulty in holding that the oral partition as pleaded by them as not proved. The conclusion is to state the most obvious: That there exist adequate materials to hold that every inch of the reasoning of the Courts below drenched in non application of mind and requires to be interfered with, and this Court has accordingly done it.

10. In the result, this appeal is allowed and the judgment and decree dated 28.1.2000, in A.S.No.155 of 1992, on the file of Sub Court, Ariyalur, confirming the judgment and decree dated 31.12.1991 made in O.S.No.216 of 1987, on the file of the District Munsif Court, Jayankondam, is hereby set aside, and plaintiffs' half share in the suit property is hereby declared. No costs.

Sd/-
Assistant Registrar

//True copy//

Sub Assistant Registrar

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To:

1. The Sub Judge
Ariyalur.
2. The District Munsif
Jayankondam

Copy To
The Section Officer
VR Section High Court, Madras.

S.A.No..1957 of 2002

GP (CO)
GMY (17/04/2021)