

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.03.2020

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.720 of 2001

D.Periasamy ... Appellant/ Appellant / Plaintiff

Vs

1.Angappa Gounder

2.Chenniammal

3.Valliammal

4.N.E.Kumarasamy (Died)

5.Annadurai

6.Pappathi` Respondents / Respondents / Defendants

7.Kolandaiammal

8.N.K.Govindasamy

9.N.K.Duraisamy ... Respondents

(Respondents 7 to 9 are brought on record as LRs of the deceased 4th respondent viz., N.E.Kumarasamy, Vide Order of Court dated 21.08.2019 made in CMP.Nos.2853 to 2855/2018 in S.A.No.720/2001)

Prayer :- Second Appeal filed under Section 100 of the Civil Procedure Code, preferred against the judgment and decree passed by the learned Principal District Judge, Erode, District of Erode, made in A.S.No.161/1999 dated 01.02.2000, confirming the judgment and decree of the District Munsif-cum-Judicial Magistrate of Perundurai, made in O.S.No.203/1996, dated 03.8.1998.

For Appellant : Ms.R.Shase
for Mr.R,Marudhachalamurthy

For Respondents: Mr.K.S.Jeya Ganesh [R1]
Ms.P.T.Ramadevi [R5 & R6]
R4 [Died - Steps taken]
R2, R3, R7, R8 & R9 [No Appearance]

JUDGMENT

The plaintiff in a suit for partition, having been unsuccessful successively before both the Courts below, has come forward with this appeal. Parties would be referred to by their rank before the trial Court.

2. The facts that gave rise to the dispute are brief and they are stated as below :

One Sennaiah Gounder was entitled to 1.17 acres in Survey No.689/4. On his demise, the property devolved equally on his four daughters viz., Chellammal, Nallammal, Chenniammal and Valliammal, and each became entitled to an undivided 29 cents each. While so, under Ext.A4, dated 14.05.1982, Chellammal and her daughter Pappathi had settled their share of 29 cents in favour of Chellammal's husband Kuttiappa Gounder. Subsequently, Kuttiappa Gounder had executed Ext.A5, a joint Power of Attorney dated 14.08.1991, in favour of one Kandasamy. On 20.08.1991, on the strength of Ext.A5, Power of Attorney, Kandasamy had executed a sale deed [Ext.A1] in favour of the plaintiff. Ever since, the plaintiff became entitled to an undivided 1/4th share of Chellammal along with her sisters. Complaining that the fourth defendant is posing some hindrance to his peaceful possession, the plaintiff has laid the suit for partition and for permanent injunction.

3. Defendants 1 to 3 remained exparte, and the suit was contested only by the fourth defendant. The fourth defendant admits the title of Kuttiappa Gounder per se, but alleges that Kuttiappa Gounder had entered into a sale agreement with this defendant on 21.06.1991. This is marked during trial as Ext.B1. Since Kuttiappa Gounder did not perform his part of contract, the fourth defendant was constrained to institute a suit in O.S.No.83/1992, for specific enforcement of Ext.B1, contract. That suit came to be decreed exparte on 11.03.1992. Thereafter, the fourth defendant herein (plaintiff in O.S.No.83/1992) moved the Sub Court, Erode, with E.P.No.123/92, for execution of the decree passed in O.S.No.83/1992. Pursuant to the order passed therein, on 10.03.1993, Vide Ext.B5, the Execution Court has executed the sale deed in favour of the fourth defendant, on behalf of the judgment debtor (Kuttiappa Gounder). It is further alleged by the fourth defendant that the present plaintiff has colluded with Kuttiappa Gounder and has instituted a false case. The suit is barred for non-joinder of necessary parties, since Chellammal, who is the co-sharer of the property, still has 1/12th share in the property, and she is not impleaded in the suit.

4. The suit went to trial, and before the trial Court both the plaintiff and the fourth defendant examined themselves as P.W.1 and D.W.1. Necessary title documents on which both these parties litigate have been referred to already. To prove his possession pursuant to the sale in his favour, the plaintiff has produced tax receipts pertaining to the property Vide Ext.A6 to Ext.A9, of which, Ext.A6 and Ext.A7 are prior to suit.

5. The only issue framed by the trial Court was, is the plaintiff entitled to a decree of partition. While dealing with this issue, the trial Court has held that Ext.A1 sale deed in favour of the plaintiff is validly executed and that the fourth defendant did not derive any title under Ext.B5, sale deed. However, it dismissed the suit on the ground that the suit property was not properly described. The trial Court significantly held that the fourth defendant is not in possession of the property.

6. When the matter reached the first Appellate Court at the instance of the plaintiff, he filed I.A.No.21/2000 and I.A.No.22/2000, for amending the schedule of the property. The first Appellate Court took the view that, with Ext.A1 sale deed which supports plaintiff's title facing resistance from Ext.B5, sale deed, which the Execution Court has executed in favour of the fourth defendant, the suit ought to have been one for declaration of title. Once this finding was entered into, the first Appellate Court did not enter into any other issues, and dismissed even the applications for amendment in I.A.Nos.21 and 22/2000.

7. The present appeal is admitted on the following substantial questions of law :

1. Whether the findings of the Court below are vitiated by perversity?
2. Whether a "sale deed" executed for good consideration and thereby acted upon by the parties is affected by a decree passed in a specific performance suit instituted much later than the date of sale deed, even without impleading the purchaser under the sale deed?
3. Whether a sale deed executed without setting aside or holding as void of an earlier sale deed executed for good consideration, has any rival force to the validity of the earlier sale deed?

8. The learned counsel for the appellant/plaintiff submitted that when the plaintiff has already acquired title under Ext.A1, sale deed dated 20.08.1991, he was not arrayed as a party defendant in O.S.No.83/1992, which the fourth defendant has instituted against Kuttiappa Gounder, for specific enforcement of Ext.B1, contract. Therefore, as found by the trial Court, the sale deed itself is invalid and the first Appellate Court had gone wrong in prima facie believing that Ext.A5 is valid. Unless there is in existence a sale deed which is capable of creating a cloud over the title of the

plaintiff, a suit for declaration of title may not be necessary. Here, in this case, inasmuch as the plaintiff's vendor is not even made a party to the suit for specific performance, the title of the suit property cannot be said to be validly conveyed under Ext.B5. Reliance was placed on the authority of the Hon'ble Supreme Court in Durga Prasad and another Vs. Deep Chand and Others [AIR 1954 SC 75 : 1954 SCR 360]. Secondly, the learned counsel submitted that the description of property in the plaint was not exactly wrong, since it gives the schedule of the property as 1.29 hectares instead of 1.17 acres, the suit is valid, in that, when the title extent is described in terms of hectares, the correct measurement is given, whereas only when it is described in terms of acres, it is stated to be 1.29.

9. In this case, the fourth defendant is dead and his legal heirs are brought on record, and they chose not to appear to contest this appeal.

10.1 This Court finds merit in the submissions of the learned counsel for the appellant/plaintiff. Here is a scenario where Kuttiappa Gounder, who is admitted as the owner of the suit property by both the litigating parties, has executed the sale deed in favour of the plaintiff through his Power of Attorney, Vide Ext.A1 sale deed dated 20.08.1991, and the trial Court has entered a finding that this document is a genuine document. The fourth defendant did not choose to challenge this finding by preferring a cross-objection before the first Appellate Court. Secondly, the fourth defendant relies on an unregistered sale agreement dated 21.06.1991 (Ext.B1), which is about two months prior to Ext.A1, sale deed dated 20.08.1991. Later, the fourth defendant laid O.S.No.83/1992 for specific enforcement of this agreement, by which time, the title in this property has already vested in plaintiff. Necessarily, in terms of the dictum laid by the Hon'ble Supreme Court in Durga Prasad and another Vs. Deep Chand and Others [AIR 1954 SC 75], the plaintiff is a necessary party to convey title to the suit property in favour of the fourth defendant. Now, under Ext.B5, the Court has executed the sale deed only on behalf of Kuttiappa Gounder, who admittedly did not have any right, even as on the date of filing the suit. Therefore, as rightly held by the trial Court, the fourth defendant did not derive any title under Ext.B5. When the decree in O.S.No.83/92 itself is incapable of being executed for conveying title of Kuttiappa Gounder to the fourth defendant, the plaintiff is in a legally advantageous position to ignore the said decree. It now follows, that the plaintiff need not go for a suit for declaration impugning the decree passed in O.S.83/1992 in the manner viewed by the trial court. The third of the substantial questions raised here should necessarily be decided in favour of the plaintiff/appellant.

10.2 Turning to the wrong description or mis-description of the property in the schedule, first, the fourth defendant has not pleaded it in his written statement nor he was seen cross-examining the plaintiff on this. Reading a description plainly, this Court does not find anything wrong therein as the suit property was described as 0.11.5 h out of 0.47.0 h. Once this goes, necessarily the plaintiff is entitled to seek partition vis-a-vis co-owners of the property.

11. In view of the discussions herein above, all the substantial questions of law are decided in favour of the appellant. Accordingly, the present appeal is allowed, the suit is decreed and the plaintiff's 1/4th share in the suit property is hereby declared, in terms of which a preliminary decree is passed. The Judgment and decree of the Courts below in A.S.No.161/1999 dated 01.02.2000 on the file of the Principal District Judge, Erode, District of Erode, confirming the judgment and decree of the District Munsif-cum-Judicial Magistrate of Perundurai, made in O.S.No.203/1996, dated 03.8.1998, is hereby set aside. No costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To:

- 1.The Principal District Judge,
Erode, Erode District.
- 2.The District Munsif-cum-Judicial Magistrate,
Perundurai.
- 3.The Section Officer
VR Section, High Court, Madras.

+1cc to Mr.M.Guruprasad, Advocate Sr.20969
+1cc to Mr.K.S.Jayaganeshan, Advocate Sr.20908
+1cc to Ms.P.T.Ramadevi, Advocate Sr.20923

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