

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved Date : 28.11.2019

Pronounced Date : 19.05.2020

Coram:

THE HONOURABLE MR.JUSTICE P.RAJAMANICKAM

S.A.No.662 of 2006

R.Devaraj ... Appellant/3rd Defendant

Vs.

1.G. Narayanasamy
2. G.Jagannadhan
3. G. Venugopal
4.S.Seethalakshmi
5.N. Raja Naidu

... Respondents/Plaintiff and
Defendants 1,2 & 4

PRAYER: Second Appeal has been filed under Section 100 of Code of Civil Procedure to set aside the judgment and decree of the Principal District Judge, Coimbatore in AS.No.109 of 2003 dated 28.12.2004, reversing the judgment and decree of the I Additional District Munsif, Coimbatore in OS.No.1584 of 1992 dated 26.11.2002.

For Appellant : M/s.Niranjana Rajagopal
for M/s.G.R. Associates

For Respondent : Mr.N. Elumalai
for M/s.J.Pothiraj (for R1 & R4)
R2, R3 & R5 set exparte
by this Court dated
28/11/2019 in
S.A.No.662 of 2020

JUDGMENT

This Second Appeal has been filed by the third defendant against the judgment and decree passed by the Principal District Judge, Coimbatore in AS.No.109 of 2003 dated 28.12.2004 reversing the judgment and decree passed by the First Additional District Munsif, Coimbatore in OS.No.1584 of 1992 dated 26.11.2002.

2. The respondents 1 and 2 herein had filed a suit in OS.No.1584 of 1992 on the file of the First Additional District Munsif, Coimbatore to divide the suit property into

four equal shares and to allot two such shares to them. The learned District Munsif by the judgment and decree dated 26.11.2002 had dismissed the said suit. However, he directed the parties to bear their respective costs. Aggrieved by the same, the plaintiffs had filed an appeal in AS.No.109 of 2003 on the file of the Principal District Judge, Coimbatore. The learned Principal District Judge, by the judgment and decree dated 28.12.2004, had allowed the said appeal without costs and set aside the judgment and decree passed by the trial court and passed a preliminary decree to divide the suit property into 4 equal shares and to allot 2 such shares to the plaintiffs. Feeling aggrieved, the third defendant has filed the present second appeal.

3. For the sake of convenience, the parties are referred to as described before the trial court.

4. The averments made in the plaint are in brief as follows:-

a) The plaintiffs and the first defendant are the sons and the second defendant is the daughter of one Ganga Naidu and Ammulu Ammal. As per the final decree passed in I.A.No.1834 of 1977 in OS.No.698 of 1975, on the file of the Sub-Court, Coimbatore, a property measuring 1.82 acres in SR.No.417 of Vilankurinchil Village was allotted to the share of Ammulu Ammal. Thereafter, on 21.06.1987, the said Ammulu Ammal died intestate leaving behind her husband Ganga Naidu and 3 sons (plaintiffs and first defendant) and a daughter (second defendant). On 21.09.1989, the said Ganga Naidu, the plaintiffs and the defendants 1 and 2 partitioned the said property under a registered partition deed. As per the said partition deed 'A' schedule property (suit property) measuring 22 cents was allotted to the share of Ganga Naidu with a specific condition that he could enjoy the property without any right of alienation and that after his death it shall devolve on the four children equally. Ganga Naidu died on 10.03.1992 and hence the suit property had devolved on his 4 children viz., plaintiffs and the defendants 1 and 2 in equal shares. The plaintiffs have asked several times for a partition but the defendants 1 and 2 have not agreed for the same. Hence the plaintiffs were constrained to file the suit for partition.

b) The third defendant is claiming that he got a sale deed in respect of the suit property executed by the said Ganga Naidu and the defendants 1 and 2. Even if there is any such sale deed, the same can take effect only to the extent of the half share that the defendants 1 and 2 are entitled to. Since Ganga Naidu had only a life interest any conveyance by him cannot convey any title in the property. Further, the fourth defendant claims to have acquired some right to a portion of the suit property by virtue of some transaction with the third defendant. Since the third defendant himself had no right in the suit property,

the fourth defendant cannot have a better claim. The defendants 3 and 4 are not in possession of any part of the suit property. In view of their claim, they are made as parties to the suit.

5. The averments made in the written statement filed by the first defendant and adopted by the second defendant are in brief as follows:

The plaintiffs have wantonly suppressed the true facts. On the same day of the partition deed referred to in the plaint, the plaintiffs and the defendants 1 and 2 had executed a deed in favour of their father Ganga Naidu waiving the restrictions placed on him in the said partition deed and agreed that he can sell his share of the property if it is necessitated for expenses in case of his illness and other expenses if his issues fail to spend or refuse to do so. Prior to the sale, Ganga Naidu was bed ridden with illness for quite some time. The plaintiffs did not care for him and refused to spend any amount for his treatment. The defendants 1 and 2 unable to spend on that account, they agreed with their father, when he decided to sell the suit property for his medical treatment and other necessary expenses. The plaintiffs are quite aware of the said sale. The sale of the suit property by Ganga Naidu is true, valid and binding one and all. Therefore, the defendants 1 and 2 prayed to dismiss the suit.

6. The averments made in the written statement filed by the third defendant are in brief as follows:-

a) The plaintiffs have suppressed a very material document which come into existence on the very same date viz., 21.03.1989 (wrongly stated as 21.09.1989 in the plaint), when the registered partition deed was executed among Ganga Naidu and his children, the plaintiffs and the defendants 1 and 2. The material document is the Varthamana letter executed by the plaintiffs and defendants 1 and 2 in favour of Ganga Naidu, to the effect that Ganga Naidu had a right to sell absolutely the suit property in the event of his children failing or being unable to meet urgent medical expenses. Ganga Naidu, being an old man suffered from illness, but none of his children could meet his medical expenses. Hence, the said Ganga Naidu executed a sale deed on 06.09.1990 by exercising the right conferred under the Varthamana letter and received Rs.2,750/- as sale price and utilised the same for his treatment. The said Varthamana letter has been referred to in the sale deed itself. By virtue of the said sale deed, the third defendant has become an absolute owner of the suit property and also took possession.

b) The plaintiffs were fully aware of the above sale deed. The sale deed was acted upon. Further, in respect of a portion of the property, the third defendant and his father as first party and Raju Naidu (fourth defendant) and his sons and Geetha as second party executed an exchange deed. The said fact also

known to the plaintiffs. The said Ganga Naidu was popularly known as Chinna Naicker or Chinnasamy Naicker. He took treatment as in patient in Kovai Medical Centre Hospital, Coimbatore in the year 1991 and his name was recorded as Chinnaswami. Even there was no improvement and ultimately, the said Ganga Naidu passed away in 1992. The sale amount was utilised for the treatment of Ganga Naidu. There is no cause of action for the suit. Therefore, the third defendant prayed to dismiss the suit.

7. The averments made in the additional written statement filed by the third defendant are in brief as follows:

Apart from the fourth defendant, Balakrishnan Jagannathan, Geetha and Sulochana are also necessary parties to the suit as they all claim 4 cents of land in S.R.No.417/3 by virtue of the registered exchange deed dated 30.05.1992. The suit is bad for non-joinder of the above parties.

8. The averments made in the written statement filed by the fourth defendant are in brief as follows:

The plaintiffs are not in joint possession of the suit property and hence they should have valued the suit under Section 37 (1) of the Court fees and Suits Valuation Act. The suit as framed is not maintainable. The description of property is misleading and incorrect. An extent of 4 cents in the suit property was annexed with the existing road. The said portion was exchanged with the property of the fourth defendant. As per the rights conferred under the Varthamana letter dated 21.03.1989 the said Ganga Naidu had sold the suit property to the third defendant to meet out his medical expenses. The third defendant, had exchanged 4 cents with the fourth defendant. Therefore, the fourth defendant also prayed to dismiss the suit.

9. Based on the aforesaid pleadings, the learned District Munsif, had framed the following issues:-

- "1) Whether the plaintiffs are entitled for partition in the suit property?
- 2) Whether the plaintiffs are entitled to ask $\frac{1}{2}$ share in the suit property?
- 3) To what other relief?"

10. During trial on the side of the plaintiffs, the second plaintiff was examined as PW1 and two documents were marked as Exs.A1 and A2. On the side of the defendants, the second defendant was examined as DW1 and third defendant was examined as DW2 and five documents were marked as Exs.B1 to B5.

11. The learned District Munsif after considering the materials placed before him found that on the date of Ex.A1 partition deed itself, the plaintiffs and the defendants 1 and 2

had executed Ex.B2 Varthamana letter giving right to Ganga Naidu and accordingly the said Ganga Naidu had sold the suit property to the third defendant vide Ex.B1 sale deed for valuable consideration and hence the plaintiffs are not entitled to ask for partition. Accordingly, he dismissed the suit. Aggrieved by the same, the plaintiffs had filed an appeal before the Principal District Judge, Coimbatore. The learned Principal District Judge had allowed the said appeal and set aside the judgment and decree passed by the trial court and passed a preliminary decree to divide the suit property into 4 equal shares and allot two such shares to the plaintiffs. Feeling aggrieved, the third defendant has filed the present second appeal.

12. This court at the time of admitting the second appeal, has formulated the following substantial questions of law:-

1) Whether the finding of the lower appellate court holding that Varthamana letter (Ex.B2) dated 21.03.1989 is not valid is sustainable in law?

2) Whether the deceased (Ganga Naidu) had no saleable right in 'A' schedule property in terms of partition deed (Ex.A4) and Varthamana letter (Ex.B2)?

3) Whether Ex.B2 requires registration?".

13. Heard Mr.Niranjan Rajagopal for M/s.G.R.Associates, the learned counsel for the appellant/third defendant, Mr.N.Elumalai for Mr.J.Pothiraj. The learned counsel for the respondents 1 and 2 / plaintiffs.

14. Substantial questions of law 1 to 3:-

The learned counsel for the appellant/3rd defendant has submitted that the First Appellate Court erred in reversing the well considered judgment of the trial court. He further submitted that the First Appellate Court failed to consider the fact that the PW1 had admitted in his evidence that he had knowledge about the existence of Exs.B1 and B2 even before the filing of the suit, but the plaintiffs had taken a plea that Ex.B2 was a fabricated document. He further submitted that the First Appellate Court failed to consider that since the said Ganga Naidu refused to sign in Ex.A1 partition deed, on the same day Ex.B2 was executed by giving right to Ganga Naidu to sell the suit property in case his children refused to meet out his medical expenses. He further submitted that the first appellate court failed to consider that both the Exs.A1 and B2 were drafted by the same person and the attestors also the same in both the documents. He further submitted that since Ex.B2 is a Varthamana letter evidencing the family arrangement, the same

does not require registration. He further submitted that the trial court taking into consideration of the aforesaid facts had rightly dismissed the suit, but the First Appellate Court had erroneously reversed the findings of the trial court and therefore, he prayed to allow this second appeal and set aside the judgment and decree passed by the First Appellate Court and restore the judgment and decree of the trial court.

15. The learned counsel for the appellant in support of his contentions relied upon the following decisions:-

- 1) Gowri Shankar Vs. Nathulal and Others, AIR 1951 (Allahabad) 5589;
- 2) Poongavanam VS. Perumal Pillai, (1997) 1 MLJ 169;
- 3) Syndicate Bank Vs. Estate Officer & Manager, APIIC Ltd and others (2007) 8 SCC 361;
- 4) Thulasidhara and another Vs. Naryanapa and others (2019) 6 SCC 409.

16. Per contra, the learned counsel for the respondents 1 and 2 /plaintiffs submitted that in a registered partition deed (Ex.A1) it was clearly stated that the said Ganga Naidu will have only a limited right of enjoyment of the suit property till his death and thereafter the property shall devolve on his four children and that being so, the alleged Varthamana letter (Ex.B2) which is being an unregistered document has been fabricated by the defendants 1 and 2 and Ganga Naidu only with a view to grab the plaintiffs' share in the suit property and hence no reliance can be placed upon the said Varthamana letter. He further submitted that in Ex.B2, the plaintiffs have not signed and it was falsely created by forging the signatures of the plaintiffs. He further submitted that if really the plaintiffs and the defendants 1 and 2 had executed Ex.B2 in favour of their father Ganga Naidu, the defendants would not have signed in Ex.B1 sale deed. He further submitted that Ex.B1 sale deed will not bind upon the plaintiffs. He further submitted that without taking into consideration of the aforesaid facts, the trial court had dismissed the suit and hence the First Appellate Court had rightly reversed the same and passed a preliminary decree for partition as prayed for and in the said factual findings this court cannot interfere and therefore he prayed to dismiss the second appeal.

17. It is an admitted fact that the plaintiffs and the first defendant are sons and the second defendant is a daughter of Ganga Naidu and Ammulu Ammal. It is also an admitted fact that the said Ammulu Ammal got a property in a partition suit in S.F.No.417 of Vilankurichi village measuring 1.82 acres and subsequently she died intestate leaving behind her husband Ganga Naidu and 3 sons and one daughter (plaintiffs and defendants 1 and 2) as her legal heirs. It is also an admitted fact that

after her death, the said Ganga Naidu, the plaintiffs and the defendants 1 and 2 had divided the aforesaid property through a registered partition deed dated 21.03.1989 (Ex.A1)

18. A perusal of Ex.A1 shows that the suit property measuring 22 cents was allotted to the share of Ganga Naidu with a condition that he could enjoy the said property till his life time without alienating the same and after his death, the said property shall devolve on his four children equally. With regard to the said facts also there is no dispute.

19. According to the defendants, after drafting Ex.A1 partition deed, the said Ganga Naidu refused to sign as only a limited right was given to him and hence on the same day the plaintiffs and defendants 1 and 2 had executed a Varthamana letter (Ex.B2) giving a right to Ganga Naidu to sell his share, if his children refused to meet out his medical expenses. Their further case is that subsequently the said Ganga Naidu fell ill and hence he sold the suit property under Ex.B1 sale deed to the third defendant and utilised the sale proceeds to meet out his medical expenses.

20. Though the plaintiffs, in their plaint have not specifically denied the execution of the alleged Varthamana letter (Ex.B2), second plaintiff while examining himself as PW1 has categorically denied the execution of the said Varthamana letter (Ex.B2) Under the said circumstances, the defendants should have taken steps to get handwriting expert's opinion. But they have not taken any such steps.

21. It is also to be pointed out that in the plaint itself, the plaintiffs have stated that the fourth defendant claims to have acquired some right to a portion of the suit property by virtue of some transaction with the third defendant. So, it appears that the plaintiffs have filed the above suit, only after knowing about Ex.B3 Exchange deed. A perusal of Ex.B3 shows that on 30.05.1992, the third defendant and his father Rangasamy as first party had exchanged a portion of the suit property to one Raju Naidu (Fourth defendant), his two sons namely Balakrishnan and Jegannathan, his daughter in law Geetha and one Sulochana wife of Bakthavachalam as second party and in turn the third defendant and his father got some other property from the aforesaid persons. In pursuance of the said Exchange deed (Ex.B3), according to the defendants, a road was widened from 15 feet to 30 feet in the suit property. PW1 also admitted in his evidence that the road has been widened from 15 feet to 30 feet. Under the said circumstances, all the parties to the said Exchange Deed (Ex.B3) should have been added as parties in the suit.

22. The third defendant also raised this plea specifically in his additional written statement, but the trial court failed to frame an issue on this point. The first appellate court also failed to notice this point. This is being a partition suit, all the parties having subsisting interest are necessary parties. In their absence, if any decision is taken in the suit that would affect their right. Hence, this court is of the view that the matter should be remitted back to the trial court to enable the plaintiffs to implead all the persons concerned in the said Exchange deed and also to enable the defendants to take steps to get hand writing expert's opinion with regard to the disputed signatures found in Ex.2 Varthamana letter. Accordingly, the substantial questions of law are answered. Since, this court has decided to remand the matter to the trial court, the other points are not discussed.

23. In the result, the second appeal is allowed. The judgments and decrees of the courts below are set aside. The matter is remitted back to the trial court. The trial court is directed to restore the suit on file and give an opportunity to the plaintiffs to implead the persons concerned in Ex.B3 Exchange deed as parties and also give an opportunity to the defendants to take steps to get handwriting expert's opinion by comparing the disputed signatures of the plaintiffs found in Ex.B2 Varthamana letter with their admitted signatures found in Ex.A1 partition deed and also to give an opportunity to both parties to adduce additional oral and documentary evidence, if any and dispose of the case in accordance with law. Considering the facts and circumstances of the case, the parties are directed to bear their respective costs.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

gv

To

- 1.The Principal District Judge,
Coimbatore.
2. The I Additional District Munsif,
Coimbatore.

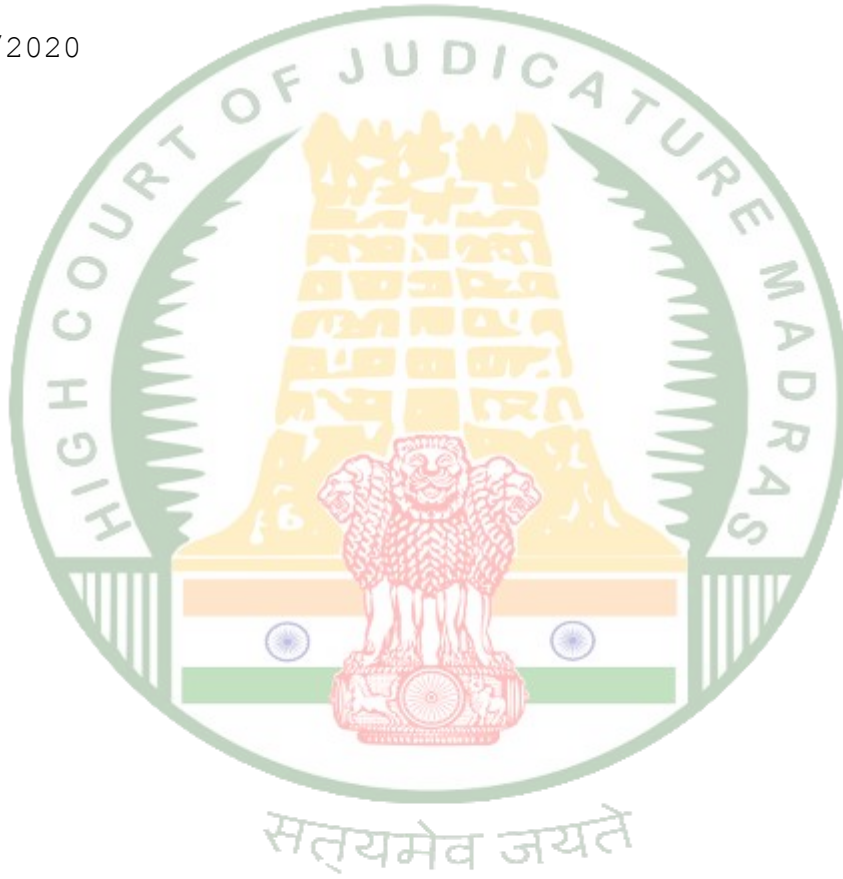
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