

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 25.02.2020

Date of Verdict : 03.07.2020

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

S.A.No. 1091 of 2005

1.Kalian

2.Myily Ammal

..Appellants/Respondents 2 and 3/
Defendants 2 and 3

Vs.

1.Ramalinga Reddiar

... 1st Respondent/Appellant/Plaintiff

2.Chandrasekaran

3.Puthagiri @ Narayanasamy

4.Ekambaram

...Respondents 2 to 4/Respondents 1,4 & 5
Defendants 1, 4 and 5

Prayer: Second Appeal filed under Section. 100 of C.P.C. against the judgment and decree in A.S.No. 243 of 2003 on the file of the II-Additional Sub-Judge, Villupuram dated 31.01.2005 in reversing the judgment and decree dated 03.04.2003 passed in O.S.No. 67 of 1998 on the file of the II-Additional District Munsif, Tirukoilur.

For Appellants : Mrs. V.Srimathi

For Respondents : Mr.T.Dhanyakumar for R1
R2 to R4 - Notice served

J U D G M E N T

This appeal has been filed as against the judgment and decree dated 31.01.2005 passed in A.S.No. 243 of 2003 on the file of the II-Additional Sub-Judge, Villupuram, reversing the judgment and decree dated 03.04.2003 passed in O.S.No. 67 of 1998 on the file of the II-Additional District Munsif, Tirukoilur.

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 for declaration and injunction with mense profit. The plaintiff and the first defendant are brothers. The suit property is their joint family property. In the year 1977, the plaintiff and the first defendant have orally partitioned their family property before the panchayathars. According to their oral partition, the suit property was allotted in favour of the plaintiff and immediately after partition, the plaintiff was put in possession and enjoyment of the suit property. He was also issued Patta in Patta No. 634 and 790 and he is also paying Kist for the property. In respect of Item 1 to 3 of the suit properties, the defendants 2 and 3 created forged sale deed as if it was executed by the first defendant on 05.11.1990 and were trying to trespass into the Item 1 to 3 of the suit property on 25.11.1990. Therefore, the plaintiff filed a suit in O.S.No. 862 of 1990 for declaration and injunction in respect of Item 1 to 3 of the suit property against the defendants 1 to 3 herein. It was decreed in favour of the plaintiff by the decree dated 09.07.1993. When the plaintiff was out of town, utilizing the said circumstances, the defendants 2 to 5, who are influential persons in the locality, in respect of Item 2 of the suit property, executed sale deed by the first defendant in favour of 5th defendant on 25.08.1994. In respect Item 4 of the suit property, the 4th defendant trespassed into the property and he is in possession from 25.08.1994. The 2nd and 3rd defendants trespassed into the Item 1 and 3 of the suit property on 25.08.1994 and possessed the same. Hence, the suit.

4. Resisting the same, the first defendant filed a written statement and stating that except the relationship between the plaintiff and the first defendant, other averments and allegations are denied as false and frivolous. The suit property along with other properties originally belonged to one Sambasiva Chettiar, who is none other than their mother's father namely, grand father. While he was alive, there was a suit between the said Sambasiva Chettiar and the plaintiff and the first defendant along with their parents filed suit in O.S.No. 235 of 1956 in which there was a compromise decree. Accordingly, their parents were given life estate and after their life time, the plaintiff and the first defendant were given absolute right over the suit property along with other properties. Accordingly, they were in possession and enjoyment of the property and while being so, some item of the property were sold out by their father in favour of third parties. Thereafter, their mother Lakshmi Ammal along with Vaiyapuri Mudaliyar have exchanged their properties and the properties allotted in favour of Lakshmi Ammal was settled in favour of the wife of the plaintiff herein. Therefore, the sale deeds and the settlement deed executed by the parents of the first defendant

along with the plaintiff will not bind the first defendant. Further, there is no partition between the plaintiff and the first defendant either by oral or by registered document. Thereafter, the plaintiff also executed sale deed in respect of some properties in favour of one Ramanatha Mudaliyar, Perumal Gounder and Kuppan. Likewise, the first defendant also executed sale deed on first item of the property ad measuring 81 cents in favour of 3rd defendant.

5. In respect of 2nd Item measuring 58 cents executed sale deed in favour of the 5th defendant and remaining 58 cents in the Item 2 of the suit property was conveyed in favour of one Murugesan by the registered sale deed. The property mentioned in the 3rd Item of the suit property and 81 cents of the second item of the suit property were conveyed in favour of the 2nd defendant by oral sale deed. Therefore, there was no partition between the plaintiff and the first defendant at any point of time. Now, the plaintiff is being elder brother, he taught as if he is the owner of the property and filed the present suit. In fact, the first defendant also filed a suit for partition and prayed for dismissal of the suit.

6. The 2nd and 3rd defendants filed a separate written statement and stated that the suit properties originally a joint family property of the plaintiff and the first defendant. In the year 1977, there was a partition. The suit property was not allotted to the plaintiff. On 29.09.1979, the suit A schedule property was allotted to their mother Lakshmi Ammal, B schedule property was allotted in favour of the plaintiff and C schedule property was allotted in favour of the first defendant. The first item of the suit property ad measuring 1.62 acres in which there is a Well with motor pumpset and also electric connection in SC.No. 75. Well is situated in the land ad measuring 12 cents in which 6 cents and 75 cents from the remaining land was allotted to the plaintiff and the first defendant each. Eastern side was allotted to the plaintiff and western side was allotted to the first defendant. Therefore, in respect of the first item of the suit property, 51 cents was on the Western side along with $\frac{1}{2}$ share in the Well was allotted to the plaintiff and the Eastern side portion was allotted to the first defendant. Now, the plaintiff filed a suit for entire property. Even after demise of their mother, the share originally was allotted to the first defendant in respect of Item 1 in the A schedule property comprised in Survey No. 91/4 ad measuring 64 cents and also share from the Well was conveyed in favour of the plaintiff's wife. To compensate the same, the property which was allotted in the first item of the suit property allotted in favour of the first defendant. Therefore, first item of the suit property was allotted in favour of the first defendant and he had absolute right over the entire suit

property. In respect of the 2nd Item of the suit property, he is in possession and enjoyment namely, the first defendant. While being so, ½ portion of the first item of the suit property was sold out in favour of the 3rd defendant and after purchase, the 3rd defendant is in possession and enjoyment of the first item of the suit property. The remaining property of the first item of the suit schedule property, the first defendant executed mortgage deed in favour of second defendant and he is in possession and enjoyment of the said portion of the first item of the suit schedule property. He is in possession and enjoyment of the suit property by the second defendant for adjusting of interest. Therefore, the plaintiff has no title over the first item of the suit schedule property. After purchase of the ½ portion in the first Item, the 3rd defendant would claim Patta and also paying Kist for the suit property to the officials concerned. The portion which was originally allotted in favour of the first defendant in the first item of the suit schedule property along with share in the Well was sold out by the first defendant in favour of Subramanian by the registered sale deed. If at all, the plaintiff has case and filed a suit, definitely, he would have left him the purchaser, Subramanian, who is also a party to the suit. Therefore, the suit itself is liable to be dismissed for non-joinder of necessary party. In respect of Item 2 of the suit schedule property, though it was allotted in favour of the plaintiff by the partition deed dated 29.09.1977, the share of their mother Lakshmiammal and after her life time conveyed in favour of the wife of the plaintiff and to compensate the same, the second item of the suit property was allotted in favour of the first defendant. In fact, he would also listed out the same in favour of the second defendant on 05.11.1990. In respect of 3rd item of the suit property ad measuring 32 cents was allotted by the partition deed dated 29.09.1977 in favour of their mother Lakshmi Ammal. After her life time, it was allotted in favour of the first defendant. The suit property also listed out in favour of the second defendant by the first defendant dated 05.11.1990. In so far as the 4th item of the suit property, the defendants 2 and 3 are no way connected with the suit property.

7. The decree obtained by the plaintiff in O.S.No. 862 of 1990 is ex-parte decree and the said decree was challenged before this Court by way of civil revision petition and it is pending. In fact, other than suit property which was allotted in favour of the first defendant was sold out to various persons. Likewise, the property was allotted in favour of the plaintiff also sold out to various third parties. Now, the plaintiff filed a suit to grab the property which was allotted in favour of the first defendant and as such prayed for dismissal of the suit.

8. On the side of the plaintiff, he examined P.W.1 and were marked Exs.A1 to A21. On the side of the defendants, they examined D.W.1 to D.W.3 and marked Exs.B1 to B9. On perusal of the evidence available on record, the Trial Court partly decreed the suit in so far as the ½ portion in the first item of the suit property and B schedule property of the partition deed dated 29.09.1997, Ex.B4 in which ad measuring 81 cents of land and the suit was dismissed in respect of other properties. Aggrieved by the same, the plaintiff alone preferred A.S.No.243 of 2003. The first Appellate Court allowed the appeal and decreed the suit in respect of all properties. Aggrieved by the same, the defendants 2 and 3 filed this second appeal.

9. At the time of admission, the following substantial questions of law were formulated for consideration :-

" Whether the Courts below ought not to have applied the principles laid down by the Supreme Court in the judgment reported in (1994) 1 SCC 1 and dismissed the suit as fraudulent, especially when the plaintiff is attempting to impeach a concluded division among the sharers after having admitted its execution?"

10. Heard, Mrs.V.Srimathi, learned counsel appearing for the appellants and Mr.T.Dhanyakumar for 1st respondent. Though respondents 2 to 4 were served, none appears.

11. The suit is filed for declaration and injunction with mense profit of the suit property. The plaintiff and the first defendant are brothers. The suit property is the joint family property belonged to the plaintiff and the first defendant. Thereafter, by the oral partition between them before the Panchayathars held in the year 1977, the suit properties were allotted in favour of the plaintiffs. Thereafter, he was also issued Patta in respect of the properties which was allotted in his favour. The Patta was marked as Ex.A1 thereafter, the plaintiff filed a suit as against the defendants 1 to 3 for declaration and injunction in respect of the Item 1 to 3 of the suit properties in O.S.No. 862 of 1990 and the same was decreed in his favour by the judgment and decree dated 09.07.1993 which was marked as Ex.A3. According to the defendant, there was a partition between the plaintiff and the first defendant and their mother on 29.07.1977 and the said deed was marked as Ex.B4.

12. On perusal of the Ex.B4, it was not a partition deed and it was only an agreement for partition. Therefore, the said document was not acted upon between the parties, it was not a registered one. Further, the first defendant claimed titled over the first item of the suit property by oral exchange between the plaintiffs and the first defendant. On the strength

of the same, he executed lease deed in favour of the second defendant. Whereas, the plaintiff already filed a suit for declaration and injunction in respect of the suit Item 1 to 3 in O.S.No. 862 of 1990 and the same was decreed in favour of the plaintiff. Though it was an ex-parte decree, the defendants 1 to 3 filed petition to set aside ex-parte decree along with condone delay petition. It was dismissed, and as against the dismissal order, they preferred Civil Revision Petition before this Court and the same was also dismissed. Therefore, the decree passed in O.S.No. 862 of 1990 has become final. In so far as the Item 4 of the suit property is concerned, the D.W.1 deposed and categorically admitted that the said property was allotted in favour of plaintiff and same was not allotted to him. Also deposed that he never claimed possession and it was in possession and enjoyment of plaintiff. That apart, in respect of the suit property, the plaintiff was also issued Patta which was marked as Ex.A1 and A2. Therefore, after the decree obtained by the plaintiff in O.S.No. 862 of 1990, the first defendant executed sale deeds in favour of the other defendants. Thereafter, the 4th defendant trespassed into the 4th item of the suit property and had took possession. Therefore, the first Appellate Court rightly reversed the findings of the Trial Court and decreed the suit in favour of the plaintiff.

13. In view of the discussion, this Court does not find any valid reason to interfere with the reasonings and findings rendered by the first Appellate Court. Therefore, this Court is of the considered opinion that no substantial question of law is involved in this second appeal. Be that as it may, the substantial question of law is accordingly answered in favour of the respondents and as against the appellants. In fine, this second appeal is dismissed. Consequently, connected miscellaneous petitions are closed. No costs.

Sd/-

Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

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To:-

1. The II-Additional Sub-Judge,
Villupuram.
2. The II-Additional District Munsif,
Tirukoilur.

3.The Section Officer,
VR Section,
High Court, Madras.

S.A.No. 1091 of 2005

CNR (CO)
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