

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 25.02.2020
Date of Verdict : 02.06.2020

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

S.A.Nos.596 & 597 of 2005

E.Thangavelu

...Appellant/Respondent/Plaintiff
both S.As.

Vs.

1. E.Subramaniam (Died)
2. Kalyani
3. Sathish Kumar
(Respondents 2 & 3
brought on record as
legal heirs of the deceased
sole respondent vide
order of the Court dated
22.07.2019 made in C.M.P.
Nos. 6226 to 6228 of 2019
in S.A.No.596 of 2005)

R2 died. R3 is recorded as LR
of the deceased R2 vide
order of the Court dated
22.07.2019 in S.A.No.596
of 2005 as per memo
dated 22.07.2019)

...Respondents/Defendants in
S.A.No.596/2005

1. E.Subramaniam (Died)
2. The Commissioner,
Vellore Municipality
Officer's Line,
Vellore -1.
3. Kalyani (Died)
4. Sathish Kumar

(Respondents 3 & 4
brought on record as
legal heirs of the deceased
first respondent vide
order of the Court dated
22.07.2019 made in
C.M.P.No. 6496 of 2019
in S.A.No.597 of 2005)

R3 died. R4 recorded as LR
Of the deceased R2 vide
order of the Court dated
22.07.2019 in S.A.No.597
of 2005 as per memo
dated 22.07.2019)

...Respondents/Defendants in
S.A.No.597/2005

Common Prayer :- These Second Appeals are filed under Section 100 of Civil Procedure Code against the judgment and decree dated 16.07.2004 made in A.S.Nos.14 of 2004 and 13 of 2004 on the file of the Principal District Court, Vellore, reversing the judgment and decree dated 30.07.2003 made in O.S.Nos.202 of 1991 and 398 of 1995 respectively, on the file of the Subordinate Judge, Vellore.

For Appellant
in both S.As. : Ms.V.Srimathi

For Respondents
in S.A.596/2005
R1 & R2 : Died
For R3 : Notice served

For Respondents
in S.A.597/2005
R1 & R3 : Died
For R2 : Mr.S.Jaganathan
Government Advocate (CS)
For R4 : No appearance

COMMON JUDGMENT

S.A.No.596 of 2005:-

This second appeal is directed as against the judgment and decree dated 16.07.2004 made in A.S.No.14 of 2004 on the file of the Principal District Court, Vellore, reversing the judgment and decree dated 30.07.2003 made in O.S.No.202 of 1991, on the file of the Subordinate Judge, Vellore.

2. For the sake of convenience, the parties are referred to as per their ranking in the trial Court in O.S.No.202 of 1991.

3. The case of the plaintiff in O.S.No.202 of 1991 in brief is as follows :-

3.1. The suit is filed for declaration and recovery of possession. The suit property originally belonged to one late V.B.Ekambara Mudaliar by virtue of registered partition deed dated 27.04.1950 entered between himself and his brothers. He executed his last registered Will on 11.06.1986 in favour of the plaintiff bequeathing the suit property. After his demise on 29.12.1988, the plaintiff has become absolute owner of the

suit property. Even then, the defendant did not allow him to occupy the suit property. The plaintiff and the defendant are brothers born to the said V.B.Ekambara Mudaliar. In fact the defendant is well aware of the Will executed by the said V.B.Ekambara Mudaliar in favour of the plaintiff. Even then the defendant has been evading to deliver the possession of the suit property. Therefore, he caused notice dated 28.08.1990 called upon the defendant to deliver the possession of the suit property. On receipt of the same the defendant replied by his reply notice dated 09.09.1990 containing false and untenable allegations. Hence the suit.

4. Resisting the same, the defendant filed written statement stating that there was no partition effected between his father and father's brother on 27.04.1950. The suit property is an ancestral one and they continued to enjoy the suit property as joint family property till the death of their father. In fact, the suit property hypothecated by their father in the year 1956 and obtained a sum of Rs.1000/- as loan. It was repaid by the defendant alone and redeemed the property and discharged the debt, since in the year 1956 the plaintiff was minor. Once against it was mortgaged with one Thirunavukkarasu, on 24.05.1968 and the defendant discharged the entire debts during the year 1974 and redeemed the suit property. Further his father never executed any Will in favour of the plaintiff in the year 1986, and during that period his father was bed-ridden due to paralytic attack and he was not in a sound and disposing state of mind to execute the Will in favour of the plaintiff. Since the property is an ancestral one, the defendant also has half share in the joint undivided Hindu family property. Therefore, the plaintiff is not entitled for any relief and prayed for dismissal of the suit. S.A.No.597 of 2005 :-

5. This second appeal is directed as against the judgment and decree dated 16.07.2004 made in A.S.No. 13 of 2004 on the file of the Principal District Court, Vellore, reversing the judgment and decree dated 30.07.2003 made in O.S.No. 398 of 1995, on the file of the Subordinate Judge, Vellore.

6. The case of the plaintiff in O.S.No.398 of 1995 in brief is as follows :-

6.1. The defendant in the suit in O.S.No.202 of 1991 filed this suit for declaration, declaring that the new property tax assessment made by the plaintiff in O.S.No.202 of 1991, in proceeding No.NT.34/90 dated 30.03.1990 is illegal. The plaintiff in O.S.No. 202 of 1991 is the second defendant and the Vellore Municipality is the first defendant. The plaintiff has been residing in the suit property, since his childhood and it was originally belonged to his grandfather Balasundara Mudaliar. After his demise his son V.B.Ekambara

Mudaliar was residing as heir to Balasundara Mudaliar. During his life time, the property was assigned in his name and the same was continued till the year 1989-1990. While being so, the second defendant viz., the plaintiff in O.S.No.202 of 1991 fabricated false document and has given an application to the first defendant for the change of name in the property tax assessment. On receipt of the same, the first defendant without verifying the documents has changed the name in the property tax assessment in favour of the second defendant dated 30.03.1990. The suit property is an ancestral property and till date no partition had taken place among the brothers. Therefore, the plaintiff filed this suit for declaration declaring the assessment made in the name of the second defendant is null and void.

7. Resisting the same the first defendant filed written statement stating that the first defendant did not aware of the dispute between the plaintiff and the second defendant. Only after due enquiry on the application presented by the second defendant, the transfer of name in favour of the second defendant was effected and as such the suit is illegal and void and prayed for dismissal of the suit.

8. The second defendant filed separate written statement and stated that entire allegations and averments made in the plaint are denied as false and frivolous and he reiterated the averments made in the plaint in O.S.No.202 of 1991 and prayed for dismissal of the suit.

9. Both the suits were clubbed together and jointly tried by the trial Court. On the side of the plaintiff in O.S.No.202 of 1991 and the second defendant in O.S.No.398 of 1995, he examined P.W.1 to P.W.4 and were marked Ex.A.1 to Ex.A.24. On the side of the defendant in O.S.No.202 of 1991 and the plaintiff in O.S.No.398 of 1995, he examined D.W.1 and were marked Ex.B.1 to Ex.B.6. On perusal of the material produced on record and on considering both the oral and documentary evidence adduced by the respective parties and also the submissions made, the trial Court decreed the suit in O.S.No.202 of 1991 and dismissed the suit in O.S.No.398 of 1995. Aggrieved by the same, the defendant in O.S.No.202 of 1991 and the plaintiff in O.S.No.398 of 1995 preferred two appeal suits in A.S.Nos.14 & 13 of 2014 respectively before the learned Principal District Judge, Vellore. The first appellate Court reversed the findings of the trial Court and dismissed the suit in O.S.No.202 of 1991 and allowed the suit in O.S.No.398 of 1995. Aggrieved by the same the plaintiff in O.S.No.202 of 1991 and the second defendant in O.S.No.398 of 1995 filed these two second appeals.

10. At the time of admission of both the second appeals on 22.07.2005, the following substantial questions of law were

formulated for consideration:-

"1. Whether the findings of the lower appellate Court that the suit property is ancestral property is vitiated and the said finding is contrary to Sections 4,8 and 30 of the Hindu Succession Act, 1956?

2. Whether the defendant (son) ceased to get any right by birth after coming into force of the Hindu Succession Act 1956?"

11. The learned counsel appearing for the appellant/plaintiff and the respondents/defendants are present and they are reiterated the averments set out in the plaint as well as the written statement.

12. Heard Ms.V.Srimathi, learned counsel appearing for the appellant/plaintiff in both S.As., and Mr.S.Jagannathan, learned Government Advocate (CS) appearing for the second respondent in S.A.No.597 of 2005. Though notice served, no one has appeared on behalf of the third respondent.

13. The suit property originally belonged to the grandfather of the plaintiff and the defendant viz., V.P.Balasundaram. It was purchased by him from one Salammal by a registered sale deed dated 12.10.1904, which was marked as Ex.B.1. He gave birth to three sons viz., Natesa Mudaliar, Ekambara Mudaliar and Sadasiva Mudaliar. The properties purchased by the said V.P.Balasundaram were partitioned among his three sons by a registered partition deed dated 27.04.1950, which was marked as Ex.A.1. As per the partition deed, the suit property along with other properties situated in door No.48, Kaghani Kattu Theru and another property situated in Narasinga Swamy Street, more fully described in B schedule property in the partitioned deed were allotted in favour of the Ekambara Mudaliar viz., the father of the plaintiff and the defendant. After partition, their father mortgaged the suit property and obtained loan. Those transactions related to the mortgage deed were marked as Ex.B.3 to Ex.B.5. Therefore, the partition deed was acted upon the said Ekambara Mudaliar and he mortgaged the suit property.

14. Admittedly, the property situated in Door No.48 at Kaghani Kattu Theru has been taken by the plaintiff and the defendant along with their father for carrying business. Thereafter in the year 1976, the plaintiff, his father and another brother Kesavan executed release deed in favour of the defendant and the defendant has taken possession of the shop and carry on business. Though the defendant had taken specific stand that no partition between their father and father's brother, the section 6 of Hindu Succession Act cannot made applicable insofar as the property received from the member of the joint family on partition. For applicability of the

Section 6 of the Hindu Succession Act, after inherited the property on the death of grandfather or should receive it by partition made by the grandfather himself during his life time.

15. In the case on hand, the father of the plaintiff and the defendant had been inherited the property on the death of the grandfather of the plaintiff and the defendant. At the same time, the partition had been taken place during the life time of their grandfather. Therefore, the suit property is not an ancestral property. After demise of their grandfather, all the properties were partitioned by their father and the father's brother by a registered partition deed dated 27.04.1950.

16. The plaintiff claims that the suit property absolutely belonged to him by virtue of the Will dated 11.06.1986 executed by his father. The said Will was executed by his father in the house owned by P.W.2 and witnessed by P.W.1. They categorically deposed that though the said Ekambara Mudaliar was suffering from paralytic attack and he was bed-ridden, he executed the Will and the same was registered and it was executed by him in sound and disposing state of mind. Therefore, the trial Court decreed the suit filed by the plaintiff in O.S.No.202 of 1991 and dismissed the suit filed by the defendant in O.S.No.398 of 1995. On the basis of the Will executed in favour of the plaintiff, the revenue records were mutated in his name and the house tax was assessed in his name.

17. The first appellate Court reversed the findings of the trial Court for the reason that the suit property is an ancestral property and as such their father Ekambara Mudaliar had no title over the property to execute any Will in favour of the plaintiff in O.S.No.202 of 1991. In this regard, the learned counsel appearing for the appellant/plaintiff cited the judgment of the Hon'ble Supreme Court of India in Criminal Appeal No. 7141 of 2008 dated 01.07.2019 in the case of Doddamuniyappa (Dead) through LRs Vs. Muniswamy and ors. In the said case the Hon'ble Supreme Court of India held as follows :-

"23. It is well settled and held by this Court in Smt. Dipo Vs. Wassan Singh and Others (supra) that the property inherited from the father by his sons becomes joint family property in the hands of the sons. The relevant portion is as under:

2. ".....Property inherited from paternal ancestors is, of course, "ancestral property" as regards the male issue of the propositus, but it is his absolute property and not ancestral property as

regards other relations. In Mulla's Principles of Hindu Law (15th Edn.), it is stated at p. 289:

"... if A inherits property, whether movable or immovable, from his father or father's father, or father's father's father, it is ancestral property as regards his male issue. If A has no son, son's son, or son's son's son in existence at the time when he inherits the property, he holds the property as absolute owner thereof, and he can deal with it as he pleases. . . .

A person inheriting property from his three immediate paternal ancestors holds it, and must hold it, in coparcenary with his sons, sons' sons and sons' sons' sons, but as regards other relations he holds it, and is entitled to hold it, as his absolute property."

Again at p. 291, it is stated:

"The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. They take an interest in it by birth, whether they are in existence at the time of partition or are born subsequently. Such share, however, is ancestral property only as regards his male issue. As regards other relations, it is separate property, and if the coparcener dies without leaving male issue, it passes to his heirs by succession."

18. The above case squarely applies to the case on hand, since the suit property originally belonged to grandfather of the plaintiff and the defendant. After their grandfather demise, his father and his father's brother have partitioned the properties by a registered partition deed. Thereafter their father has become an absolute owner of the suit property. Therefore, he can settle the property on his own as he pleases. Therefore, the first appellate Court erred in holding that the suit property is ancestral one and as such the findings of the first appellate Court are perverse and against the evidence on record. Therefore, this Court has no other option to interfere with the findings of the first appellate Court. Accordingly, the substantial question of law formulated by this Court is answered in favour of the plaintiff and as against the defendant.

19. In fine, the second appeal stands allowed and the judgment and decree dated 16.07.2004 made in A.S.Nos.14 of 2004 and 13 of 2004 on the file of the Principal District Court, Vellore, are hereby set aside and resultantly, the judgment and decree dated 30.07.2003 made in O.S.Nos.202 of 1991 and 398 of 1995 respectively, on the file of the Subordinate Court, Vellore, are restored. There shall be no order as to costs.

Sd/-
Assistant Registrar (ADI-MDU)

//True Copy//

Sub Assistant Registrar

rts

To

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

S.A.Nos.596 & 597 of 2005

EV (CO)
CB(18/12/2020)

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