

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.03.2020

CORAM:

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.899 of 2014
and MP No.1 of 2014

1. S.Periasamy
2. S.Ulaganathan ..Appellants/Defendants 1 & 2

Vs.

1. Indrani
2. S.Chinnapillai
3. S.Sivaraj
4. Neelambal @ Neela ..Respondents /Plaintiff and
Defendants 3 to 5

PRAYER: Second Appeal filed under Section 100 of C.P.C., to set aside the judgment and decree dated 19.08.2013 in A.S.No.70 of 2012 on the file of I Additional District Judge, Salem confirming the judgment and decree in O.S.No.55 of 2011 dated 12.03.2012 on the file of Sub Court, Mettur, Salem.

For Appellants : Mr.R.Subramanian

For Respondents: Mr.D.Selvaraju for R1

Mr.K.Vijayasekar for RR2 to 4

J U D G M E N T

The defendants 1 and 2 in OS No.55 of 2011, who suffered a decree for partition and separate possession of the plaintiff's 1/6th share in the suit properties, upon its affirmation by the Appellate Court in AS No.70 of 2012, has come with this Second Appeal.

2. The suit was laid for partition by the plaintiff claiming that the suit properties belonged to one Shanmugam

father of the plaintiff, defendants 1, 2, 4 and 5 and the husband of the third defendant. While the defendants 1 and 2 are the sons of Shanmugam through his first wife, viz., Chinnathayammal @ Chinnathayee, defendants 4 and 5 are the children of Shanmugam through his second wife Chinnapillai. It is not in dispute that Shanmugam married the third defendant, after the death of his first wife Chinnathayammal. Claiming that defendants 1 and 2 are not co-operating for peaceful division of the property between the heirs of Shanmugam, the plaintiff came up with the suit.

3. The defendants 1 and 2 remained ex-parte before the Trial Court. The fifth defendant filed a written statement practically conceding the claim of the plaintiff, the same was adopted by the other defendants.

4. At trial, the plaintiff was examined as P.W.1 and Exhibits A1 to 11 were marked.

5. Upon a consideration of the oral and documentary evidence on record, the learned Trial Judge concluded that the plaintiff has established her claim to partition. On the said conclusion, the learned Trial Judge decreed the suit as prayed for. Aggrieved the defendants 1 and 2 preferred an appeal in AS No.70 of 2012 on the file of the I Additional District Judge, Salem.

6. In the Appeal, an application in IA No.556 of 2013 was filed under Order 41 Rule 27 seeking leave to produce a document styled as a Partition Deed dated 29.08.1997 entered into between defendants 1 and 2 and the fourth defendant viz. the male heirs of Shanmugam. The Appellate Court allowed IA. No.556 of 2013 and received the said document. The Appellate Court, however, went into the question of absence of sufficient cause for the absence of defendants 1 and 2 before the Trial Court. The discussion on that aspect is wholly unwarranted, inasmuch as, the defendants, though having remained ex-parte can question the decree on merits. Fortunately, the Appellate Court also went into the question of validity of the Partition Deed which was produced in the Appellate Court as Ex.B1 and concluded that since the female heirs of Shanmugam were not made parties to the said document, the same will not bind them. On the said conclusion, the Appellate Court dismissed the appeal confirming the judgment and decree of the Trial Court, aggrieved the defendants 1 and 2 are on appeal.

7. The following questions of law were framed for consideration at the time of admission.

1. Whether in law is not the judgment of the Lower Appellate Court vitiated in deciding the question regarding ex parte decree when the regular appeal has been filed under Section 96 of CPC?
2. Have not the Courts below failed to see that the defendants 2 and 4 have colluded with the plaintiff and collusive decree has been obtained?

8. I have heard Mr.R.Subramanian, learned counsel appearing for the Appellants, Mr.D.Selvaraju, learned counsel appearing for the first respondent and Mr.K.Vijaysekar, learned counsel appearing for the respondents 2 to 4.

9. Mr.R.Subramanian, while elaborating on the questions of law framed would contend that the Lower Appellate Court was not right in going into the sufficiency or insufficiency of the reasons assigned by the appellants for their non-appearance before the Trial Court. He would also further contend that the defendants 2 to 4 have colluded with the plaintiff and had obtained a collusive decree. True, the Lower Appellate Court need not have gone into the sufficiency or otherwise of the reasons assigned by the appellants for their non appearance before the Trial Court, as their right to file an appeal against an ex-parte decree under Section 96 of Code of the Civil Procedure, is well protected, despite the fact that they are remained ex-parte before the trial court. Therefore, even while answering the first question of law in favour of the appellants, I do not think that the appellants could succeed in this Appeal.

10. The additional documents produced by them as defence to the claim of the partition made by the plaintiff is not a complete partition as it does not include the female heirs of Shanmugam. It will not be binding on the plaintiff and defendants 3 and 5, viz. the daughters and wife of Shanmugam. Therefore, the Lower Appellate Court was justified in concluding that dehors the production of Ex.B1, the plaintiff would be entitled to her 1/6th share in the suit property as Ex.B1, would not be binding on her.

11. On the second question of law, I do not actually find that there was any collusion between the plaintiff and defendants 3, 4 and 5. Defendants 3, 4 and 5 being the heirs of Shanmugam have supported the claim of the plaintiff. If defendants 1 and 2 wanted to resist the claim of the plaintiff for any other ground, they could have done so during trial. Having remained ex parte before the trial Court and having projected an incomplete instrument of partition as evidence of partition in the Appellate Court, the defendants 1 and 2 cannot be heard to contend that the Courts below were not right in granting a decree for partition.

12. I therefore see no merits in the Appeal, the Second Appeal therefore fails and it is accordingly dismissed. There shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

jv

To

1. The I Additional District Judge,
Salem
2. The Subordinate Judge, Mettur,
Salem.

Copy to:

The Section Officer, सत्यमेव जयते
V.R.Section,
Madras High Court.

+1cc to Mr.Subramanian, Advocate, S.R.No.22909

+1cc to Mr.D.Selvaraju, Advocate, S.R.No.23634

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MG(CO)
CB(28/08/2020)