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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	06.09.2021
Pronounced on	15.09.2021

CORAM

THE HON'BLE Ms. JUSTICE R.N.MANJULA

S.A.No.1166 of 2008
and M.P.No.1 of 2008

1.Sebeastian
2.Anthoni
3.Pengamine

...Appellants/Defendants

Vs.

Amalorpavameri

...Respondent/Plaintiff

Prayer: This Second Appeal is filed under Section 100 of Code of Civil Procedure to call for the records pertaining to the judgement and decree made in A.S.No.65 of 2004 on the file of the Additional Subordinate Judge Court at Virudhachalam dated 19.10.2006 in reversing the judgement and decree made in O.S.No.1451 of 1994 on the file of the II Additional District Munsif at Virudhachalam dated 30.09.2003 and to set aside the same.

For Appellants : Mr.P.K.Harinath
for Mr.V.B.Perumal Raj

For Respondent : Mr.T.S.Baskaran

JUDGEMENT

(Heard through video conferencing)

This Second Appeal is filed to set aside the Judgement and Decree dated 19.10.2006 passed by the Additional Subordinate Judge, Virudhachalam in A.S.No.65 of 2004 in reversing the Judgement and Decree dated 30.09.2003 passed by the II Additional District Munsif, Virudhachalam in O.S.No.1451 of 1994.

2. The Defendants are the Appellants herein. For the sake of convenience, the parties are referred to as the defendants and plaintiff.

3. The averments made by the parties in brief:-



The suit property and its appurtenants measuring 50 cents belonged to one Vanathaiyan and he was in enjoyment of the same. Vanathaiyan had four sons namely Adaikalam, Sowrimuthu, Anthonisamy and Mariya Sowri. The said Vanathaiyan died intestate. The suit property and other properties were managed by Adaikalam and Sowrimuthu as the elder members of the family and an extent of 9 cents out of the abovesaid 50 cents was sold by them to one Amalorpava Mary. The remaining 41 cents was enjoyed jointly by the four sons namely Adaikalam, Sowrimuthu, Anthonisamy and Mariya Sowri.

3.1 The plaintiff is the wife of Sowrimuthu. Adaikalam died intestate in 1984 leaving behind his wife Lurthu Mary and he had no issues. Anthonisamy died in 1986 leaving behind his wife Arul Mary and he also had no issues. The first item of the suit property was sold by Mariya Sowri in favour of the plaintiff. Since the particulars of the property in the sale deed was not described with re-survey numbers and proper boundaries, he executed an another sale deed in favour of the plaintiff. The plaintiff had purchased the second item of the suit property from one Arul Mary on 31.10.1994 and he is in possession of the same. The defendants have got no right in the suit properties. Since they started to interfere with the possession and enjoyment of the plaintiff, the plaintiff has filed the suit for declaration and permanent injunction.

3.2 The defendants have stated that 3 acres 64 cents in Survey No.139/8 was originally belong to one Chinnappan. Chinnappan had two sons by name Anthony and Vanathaiyan. After the demise of Chinnappan, his two sons partitioned the property between themselves. After the demise of Vanathaiyan, his four sons namely Adaikalam, Sowrimuthu, Anthonisamy and Mariya Sowri partitioned the property between themselves. After the demise of one of the sons Adaikalam, his wife Lurthu Mary has sold the share of her husband to the first defendant. In the meanwhile, the plaintiff attempted to purchase the suit property from Lurthu Mary for a rock bottom price but failed. Only with such an intention, she has filed this suit. Excepting the first defendant, none of the parties has got any right over 21 cents. The second and third defendants are unnecessary parties and the suit is liable to be dismissed.

4. Basing on the pleadings, the trial Court has framed the following issues:-

1. வாதி தாவாவில் கோரியவாறு விளம்புகை. நிலைக்கால உறுத்துக்கட்டளை பரிகாரம் பெற அருகரா?
2. வாதிக்கு கிட்டும் பரிகாரம் யாது?



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5. During the course of the trial, on the side of the plaintiff, five witnesses were examined as P.W.1 to P.W.5 and Exs.A1 to A3 were marked. On the side of the defendants, two witnesses were examined as D.W.1 & D.W.2 and Exs.B1 to B3 were marked.

6. At the conclusion of the trial, the learned trial Judge has dismissed the suit. Aggrieved over that, the plaintiff has filed the First Appeal and the same was allowed. Now the defendants in the suit have challenged the judgement and decree passed by the First Appellate Court and filed this Second Appeal and this Second Appeal has been admitted on the following substantial questions of law 1 and 2:-

1. Whether the lower appellate Court has wrongly cast the burden on the defendants to prove the title to the suit property and the finding is vitiated?
2. Whether the lower appellate Court has failed to appreciate the oral and documentary evidence in proper perspective and the judgement is vitiated?

7. The fact that the suit property along with its appurtenant belonged to one Vanathaiyan was not disputed. It is also an admitted fact that Vanathaiyan died intestate by leaving his four sons namely Adaikalam, Sowrimuthu, Anthonisamy and Mariya Sowri. The plaintiff has purchased the suit properties by virtue of two sale deeds dated 31.10.1994 and 18.08.1988 from Arul Mary (wife of one of the brothers Anthonisamy) and Mariya Sowri. The extent of properties comprised in the above sale deeds is 10 cents from the larger extent of the lands in Survey No.139/8. The first defendant has claimed title to the alleged 21 cents purchased by him on 08.09.1984 from Lurthu Mary, who is the wife of yet another brother Adaikalam.

8. However, it is the contention of the defendants that the total extent of the property was 3 acres 64 cents and out of which, Adaikalam had a share of 90 cents. Only from the alleged 90 cents, said to have fallen to the share of Adaikalam, his wife has sold 21 cents in favour of the first defendant. Vanathaiyan had another brother by name Anthoni and their father's name is Chinnappan. According to the defendants, the whole of 3 acres 64 cents in S.No.139/8 belonged to the common ancestor Chinnappan and after his demise, the same fell to the share of his both sons namely Anthoni and Vanathaiyan. Neither of the parties has produced any partition deed in order to show that a partition was effected after the life time of Chinnappan. Since both the plaintiff and the first defendant have purchased the properties from the descendants of Vanathaiyan, it should



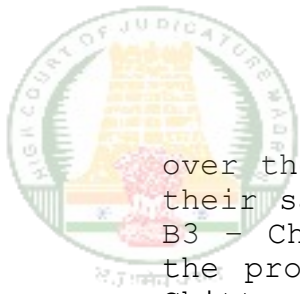
have been atleast established that after the demise of Vanathaiyan, whatever entitlement the said Vanathaiyan had in Survey No.139/8 was divided between his four sons.

9. So far as the respondent is concerned, she derived her title only out of 50 cents. In the said 50 cents, 9 cents have been already sold by the two elder brothers namely Adaikalam and Sowrimuthu in favour of a third party as heads of the family. So the remaining extent of 41 cents is said to be in the common enjoyment of the four brothers. Even if it is presumed that each brother had an entitlement of 10 cents out of 41 cents, the plaintiff being the wife of Sowrimuthu, (one of the sons of Vanathiayan), she could have inherited the undivided share of 10 cents of her husband. The plaintiff has purchased the shares of Anthonisamy and Mariya Sowri also. On 31.10.1994, she has purchased 10 cents from Arul Mary wife of Anthonisamy and on 18.08.1988, she has purchased another 10 cents from Mariya Sowri himself. As such the plaintiff has produced the documents to show that she is entitled to 30 cents out of the 41 cent. In that case, the wife of Adaikalam namely Lurthu Mary could have sold only the remaining undivided share of 10 cents for which her husband Adaikalam would have become entitled to. The said Lurthu Mary is the vendor of the first defendant.

10. Mr.T.S.Baskaran, learned counsel for the respondent/plaintiff has submitted that he was forced to file the suit since the first defendant has got a sale deed for an extent of 21 cents and for which her vendor herself did not have any title. But the fact remains that no sub-division has taken place with regard to the suit properties and its appurtenants, though alienations have been made through sale deeds at different point of time. The learned counsel submitted that though the wife of Adaikalam namely Lurthu Mary has executed a sale deed in favour of the first defendant, the possession for whole of the 41 cents is with the plaintiff only.

10.1 Given the antecedents and the title of the common ancestor, it could be possible that the plaintiff would have been in enjoyment of whole of 41 cents. Before filing the suit for declaration and permanent injunction, the plaintiff ought to have filed a suit for partition to partition her shares acquired by her through succession and purchase. Or at least the first defendant could have filed a suit for partition to partition the share of Lurthu Mary, which he claimed to have purchased. And it is the submission of the plaintiff that Lurthu Mary, wife of Adaikalam has sold the share of Adaikalam to an another person.

11. Apart from the sale deeds in favour of the plaintiff, she has not produced any other document to show her possession



over the suit properties. The defendants have also produced only their sale deed as Ex.B1. Though she has also produced Exs.B2 & B3 - Chitta and Adangal, it is not known whether it relates to the property claimed by her. It is to be noted that the said Chitta and Adangal also stand in joint names. It is confirmed from the evidence of D.W.1 that he has not produced the Adangal and Chitta pertaining to the property which he purchased vide Ex.B1.

12. Without producing any evidence as to the possession of his predecessor, the plaintiff cannot mutate the revenue records in her name and claim possession basing on documents. It is equally so, as against the plaintiff also. What places the plaintiff in a better position than the defendants is that she is the wife of one of the sons of the original owner, Vanathaiyan and the probability of her claim through succession and also through purchase of the shares of the other two sons.

13. DW2, the witness of the defendants himself has stated that the defendants have not been in the enjoyment of the property which they had purchased and even the house in the suit property is in enjoyment of the husband of the plaintiff namely Sowrimuthu. Though these evidence of the defendants' witness would go in favour of the respondent, without effecting partition, the plaintiff cannot claim a relief for declaration with regard to any specific extent in S.No.139/8.

14. Since the property still remains undivided and the first defendant also claims a share in the suit property, the learned First Appellate Judge is not right in granting the relief of declaration. The sale deeds produced by the plaintiff and the defendants also do not have any subdivided survey numbers. Though the plaintiff's enjoyment is recognized by one of the witnesses of the appellants, it is seen from the framing of the suit that the relief of injunction has been claimed by the plaintiff as a consequential relief. Though both the plaintiff and the defendants have produced sale deeds in their favour, the granting of relief of declaration would only confound the situation, which is already confused. So, I feel that the suit ought to have been dismissed. However, this will not preclude either the plaintiff or the defendants to file a suit for partition, by proving their entitlement. With the above observations, the substantial questions of law 1 and 2 are answered in favour of the appellants.

In the result, this Second Appeal is allowed and the Order dated 19.10.2006 passed by the Additional Subordinate Judge,



Virudhachalam in A.S.No.65 of 2004 is set aside. No costs.
Connected miscellaneous petition is closed.

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Assistant Registrar

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Sub Assistant Registrar

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To

1. The Additional Subordinate Judge,
Virudhachalam.
2. The II Additional District Munsif,
Virudhachalam.
3. The Section Officer,
V.R.Section,
High Court, Madras.

+2ccs to Mr.V.B.Perumal Raj, Advocate, S.R.No.46751
+1cc to Mr.T.S.Baskaran, Advocate, S.R.No.47116

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