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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	29.03.2021
PRONOUNCED ON	01.04.2021

CORAM

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

S.A.NO.1308 OF 2010

AND

M.P.NO.1 OF 2010

1.Sundarambal

2.Rajasekar

... Appellants/Plaintiffs

..Vs..

1.Shanmugam

2.Palanisamy

3.Raju

... Respondents/Defendants

PRAYER : The Second Appeal filed under Section 100 of C.P.C., against the Judgement and Decree dated 11.01.2010 in A.S.No.87 of 2009 on the file of the II Additional Subordinate Judge, Salem reversing the judgement and decree dated 15.04.2009 in O.S.No.361 of 2008 on the file of the Principal District Munsif Court, Salem.

For Appellants : Mr.S.Kalyanaraman

For Respondents: Mr.Dhalapathy

for M/s.P.Sathish & A.Tamilvanan

JUDGEMENT

(Heard through Video Conferencing)

This Second Appeal has been filed against the Judgement and Decree dated 11.01.2010 passed in A.S.No.87 of 2009 on the file of the II Additional Subordinate Judge, Salem reversing the judgement and decree dated 15.04.2009 passed in O.S.No.361 of 2008 on the file of the Principal District Munsif Court, Salem.

2. The first plaintiff is the mother of the second plaintiff. The suit property was purchased by the first plaintiff by virtue of a registered sale deed dated 12.02.1976



from one Thangavel son of Muthusamy Gounder and his minor sons Boopathy and Saravanan represented through their father and his wife Lakshmiammal. From then onwards, the first plaintiff was enjoying the suit property along with the second plaintiff. The defendants have filed a false suit in O.S.No.178 of 1997 against one Manickkam and others for partition and separate possession in respect of 1/4th share. The defendants were aware that the first plaintiff's vendor (who is 9th defendant in O.S.No.178 of 1997) has sold his 1/4th share in favour of the first plaintiff. Hence on the date of suit the first plaintiff's vendor Thangavel had no right in the suit property. But the defendants have filed the said suit without impleading the first plaintiff as a party.

3. The defendants colluded with the plaintiffs and consequently, got an admission decree for partition passed in O.S.No.178 of 1997 and final decree was also passed according to the choice of the defendants. On the basis of the final decree, the defendants have filed execution proceeding for delivery of the property in the enjoyment of the plaintiffs. At that point only, the plaintiffs came to know about the fraudulent decree got in O.S.No.178 of 1997 by collusion between the defendants and others. After purchasing the suit property from Thangavel, the plaintiffs have made several improvements by spending large amount of money. As against these plaintiffs, the decrees passed in O.S.No.178 of 1997 are null and void. Hence the plaintiffs have filed this suit for declaring both preliminary decree and final decree passed in O.S.No.1843 of 2004 and in I.A.No.528 of 2005 are null and void and also for consequential injunction for restraining the defendants from executing the final decree and restraining them from interfering with the plaintiffs' possession and enjoyment of the suit property.

The written statement:-

4. It is false to state that the plaintiffs are in possession and enjoyment of the suit property. It is true that the defendants have filed the suit for partition in O.S.No.178 of 1997 on the file of Sub Court, Salem. Since Thangavel being one of the co-parcener, he was also added as a party to the suit. The preliminary decree, 1/4th share was allotted to Thangavel. The defendant is not aware of any sale affected by Thangavel in favour of the plaintiff. The final decree was passed in pursuance of the preliminary decree and thereafter, the defendants have filed the execution petition. The plaintiffs have colluded with the other legal heirs who were unwilling to give possession to the defendants. The defendants were not able to enjoy the fruits of the decree passed in their favour. There is no separate division or enjoyment and hence the alleged sale deed does not confer any right, title or interest over the



property. The suit is misconceived in law and is not maintainable. The vendors of the plaintiffs are necessary parties but they are not included as a party to the suit. Hence the suit is bad for non-joinder of necessary parties. Hence the suit has to be dismissed.

5. On the side of the plaintiffs, two witnesses were examined as P.W.1 & P.W.2 and Exs.A1 to A9 were marked. On the side of the defendants, one witness was examined as D.W.1 and documents were marked as Exs.B1 & B2.

6. After the trial, the Trial Court has granted the decree as prayed for. Aggrieved over that, the defendants have filed the first appeal and the First Appellate Court has allowed the appeal and set aside the Judgment and decree of the Trial Court. Now the plaintiffs have filed this second appeal and the second appeal has been admitted on the three substantial questions of law. However on 23.03.2021, the substantial questions of law were reframed and restricted to the following:-

1. Whether the lower appellate court misdirected itself in reversing the findings of the trial court when in the plaintiff had established that the decree obtained in O.S.No.178/1997 was fraudulent and when through acceptable evidence it was established that the plaintiff was not made party to the suit O.S.No.178/1997 deliberately despite the defendants knew that long prior to the said suit the first plaintiff had purchased 1/4th share in the suit properties involved in the said suit?

7. The respondents/defendants have filed an earlier suit in O.S.No.178 of 1997 on the file of the Sub Court, Salem for partition. The said suit was inclusive of the suit property. The above facts are not denied by both the parties. According to the appellants/plaintiffs, 9th defendant in O.S.No.178 of 1997 has sold his undivided share of 1/4th share in the suit property in favour of the first plaintiff as early as on 12.02.1976. Though there was no division of properties by meets and bounds, it seems that the first plaintiff was put into possession of the suit property. Despite the plaintiffs' vendor was also added as a party to the earlier partition suit in O.S.No.178 of 1997, he did not contest the suit and remained exparte.

8. The appellants have submitted that in the plaint filed in O.S.No.178 of 1997, the address of 9th defendant has been wrongly given with an ulterior motive of getting a decree by collusion between the parties. The first and foremost grievance of these appellants would be against their vendor Thangavel, who alone have the obligation to clear the encumbrance/disputes if any, in



respect of the property sold by him. But the appellants have not chosen to implead him as a party to this suit. According to the appellants even on the date of the filing of the earlier suit for partition in O.S.No.178 of 1997, Thangavel did not have any right in the suit properties since he had sold them in favour of the first appellant.

9. One of the defendants to O.S.No.178 of 1997 viz., Manickkam has filed a written statement and the certified copy of his written statement was marked as Ex.A6. In Ex.A6, the said Manickkam has stated that this first appellant/first plaintiff is a necessary party because she has purchased 1/4th share in the suit properties. So, at the time of pendency of O.S.No.178 of 1997 itself, it was within the knowledge of the respondents/defendants that the first appellant/first plaintiff has purchased a portion of the suit properties. In that case, she could have been impleaded as a party to the proceedings.

10. In fact, it has been observed by the Trial Court that the first respondent/first defendant who was examined as D.W.1 has stated in his evidence that the first plaintiff is in enjoyment of more extent than 1/4th share. When it was within the knowledge of the defendants who were the plaintiffs in the earlier suit about the enjoyment of the first plaintiff, she could have been added as a party to the proceedings for an effective adjudication. Though the Trial Court has accepted that there was fraudulent collusion between the parties and chosen to decree the suit, the First Appellate Court reversed the Judgment for the following reasons. According to the First Appellate Judge, the defendants being co-owners of the suit properties, they are entitled to file a suit for partition by impleading other co-parceners and the sale in favour of this first appellant/first plaintiff was without the knowledge and consent of the other co-owners.

11. It has been further observed by the learned First Appellate Judge that though the first plaintiff have purchased an undivided interest of co-owner and she is a third party to the joint family. However it is further observed that she could have filed an appeal against the Judgment of O.S.No.178 of 1997 by getting leave of the Court. So, it is concluded by the First Appellate Court that the first plaintiff had an effective appeal remedy and she need not have filed a suit to declare the decree passed in O.S.No.178 of 1997 as null and void.

12. According to the appellants/plaintiffs, the existence of the preliminary decree and final decree passed in O.S.No.178 of 1997 came to her knowledge only during the execution proceedings. Had the appellants/plaintiffs had the knowledge



about the Judgment and decree passed in O.S.No.178 of 1997, there is a possibility that they would have filed an appeal by getting leave. When the Judgment passed in O.S.No.178 of 1997 was not within the knowledge of these appellants/plaintiffs, they cannot be expected to challenge the same by preferring an appeal. Even though the appellants have purchased the properties in the year 1976 itself and had been in the portion of the suit properties under the presumption that it was the share allotted to their vendors, the sale in her favour was not challenged by any of the members of the joint family who were parties to O.S.No.178 of 1997.

13. As stated earlier, there are materials available on record to show that the defendants have knowledge of the first plaintiff's purchase and her enjoyment in the suit properties at the time of pendency of O.S.No.178 of 1997. However the respondents/defendants have not chosen to pray that the sale in favour of the first appellant/first plaintiff was null and void or filed a petition to implead her as a party to the proceedings. The conduct of the respondents/defendants and other parties to O.S.No.178 of 1997 would show that they have in a way approved the sale executed by Thangavel in favour of the first appellant/first plaintiff.

14. Even during the course of the arguments, the learned counsel for the respondents did not dispute the entitlement of 1/4th share to the vendor of the appellants. So the course of the proceedings would show that there was no fraudulent intention in the minds of the respondents/defendants for not impleading the first appellant/first plaintiff as party to the earlier suit in O.S.No.178 of 1997. It would have fairly thought that whatever share allotted to her vendor as a member of the joint family, would be the entitlement of the first plaintiff who is his purchaser.

15. So, it would have served the ends of justice if the First Appellate Judge has partly allowed the appeal by setting aside the final decree and allowed the first appellant/first plaintiff to participate in the final decree proceedings by impleading herself as a party and get the 1/4th share (which was sold in her favour) divided by meets and bounds. In fact, the learned counsel for the respondents also suggested the same at the time of hearing of this second appeal. Since the respondents/defendants did not deny the entitlement of 1/4th share of the vendor of the first plaintiff, it shows that they did not have any intention to deceive either her vendor or the first plaintiff.



16. The first appellant/first plaintiff being the purchaser of the undivided 1/4th share of Thangavel, her entitlement can be protected. As stated already, none of the members of the joint family has challenged the sale executed by Thangavel in favour of the first appellant/first plaintiff. Hence the first appellant/first plaintiff is in the shoes of one of the erstwhile co-owner of the suit properties namely Thangavel. In that capacity, she should have allowed to participate in the final decree proceedings. In view of the same, I feel that the Judgment and decree of the First Appellate Court can be modified in the interest of justice to the extent of setting aside the final decree.

17. In the result, the Second Appeal is partly allowed and the Judgment and Decree of the First Appellate Court is modified to the effect of setting aside the final decree passed in O.S.No.361 of 2008 and the matter is remanded to the Trial Court with liberty given to the first appellant to file a petition to implead herself as a party to the final decree proceedings and on filing of such petition, the trial Court shall allow to get herself impleaded as a party and participate in the final decree proceedings and then pass the final decree after the shares of respective parties have been divided by meets and bounds and to place the first appellant/first plaintiff in possession of 1/4th share so allotted and divided. No costs. Connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

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

S.A.No.1308 of 2010

RLD(CO)
CS/22/10/2021