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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.10.2021

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

A.S.No.287 of 2018

P.Hari Prasad

...Appellant/Plaintiff

Vs.

1.G.Duraisamy
2.S.Sharmila

...Respondents/Defendants

PRAYER: Appeal Suit filed under Section 96 of the Code of Civil Procedure read with Order 41 Rule 1 of CPC against the Judgment and Decree of the learned I Additional District and Sessions Judge, Tiruppur made in O.S.No.331 of 2013 dated 26.10.2017.

For Appellant: Mr. J.Franklin

For Respondent: M/s. K.Sukumaran for R.1
Mr. S.Sharmila for R.2

JUDGMENT

The unsuccessful plaintiff in a suit for partition is the appellant before this Court. The facts in brief necessary for disposing of the above appeal is herein below narrated. Parties are referred to in the same ranking as before the Trial Court.

2. The plaintiff had filed the suit O.S.No.331 of 2013 on the file of the I Additional District and Sessions Judge, Tiruppur seeking a partition and separate possession of his 1/3rd share in the suit schedule property. It is the case of the plaintiff that the 2nd defendant and he are siblings, and their father late is Perumalsamy. The 1st defendant is the younger brother of the Perumalsamy. The plaintiff would contend that this suit property have been allotted to the share of their father under a partition deed dated 14.03.1972, entered between his family members and the suit schedule has been described as the D-Schedule thereunder. On and from the date of the partition the plaintiff has been exclusively in possession and enjoyment of the same.

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3. It is a further case that the 2nd defendant was born on 18.04.1980 and he was born on 14.11.1984 and by reason of the Hindu Successions Act he and the 2nd defendant had therefore become coparceners in respect of the suit property alongwith their father each being entitled to a 1/3rd share. The plaintiff's father passed away on 09.02.2009 and on the demise of their father they had enquired with their uncle, the 1st defendant as to what were the properties that belonged to their father. However, the 1st defendant had given evasive replies constraining the plaintiff to apply for an encumbrance certificate in respect of the suit property. It is only then that the plaintiff came to know that his father has alienated the suit property in favour of the 1st defendant under a registered sale deed dated 25.03.1985.

4. The plaintiff would contend that his father had no authority to sell the entire extent of the suit property to the 1st defendant particularly when the plaintiff and the 1st defendant has a share each in the said property. The plaintiff and the 2nd defendant therefore called upon the 1st defendant by a legal notice dated 22.08.2013 to partition and allot their 2/3rd share in the suit schedule property. Though the 1st defendant had received the notice he did not issue any reply. Therefore the plaintiff is filing the above suit. Since the 2nd defendant has not joined him filing the suit, she has been impleaded as the 2nd defendant.

5. The 1st defendant had filed a written statement alongwith a counter claim in which he has stated that the sale of the property in his favour was well known to the plaintiff and the 2nd defendant. He would further contend that he has been in possession and enjoyment of the suit property right from the date of its purchase. On the date of sale in his favour, the plaintiff was 4 months old and the 2nd defendant was 5 years old. The defendant would submit that he has been carrying on agricultural operations in the said land from the date of its purchase. Since the land was a rain fed land the defendant had to work extensively to make the lands arable. He had, with the help of the well water from his other lands converted the suit lands into a Mango thope just 5 years ago and has led a pipe line to a length of 2500 feet and has been enjoying the property as his absolute property.

6. The defendant denied the contention of the plaintiff that they had been in possession along with him. The defendant would further submit that his brother, the father of the plaintiff had

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sold the suit property to him for his family necessities and for starting a business in manufacturing wet Grinders. The father of the plaintiff did not want to sell the property to third parties and therefore he sold the same to his brother and has received valid consideration for the same. The sale is not a sham and nominal one but one backed by valuable consideration. The plaintiff and the 2nd defendant are well aware that the property is in the exclusive possession and enjoyment of this defendant.

7. The 1st defendant would further submit that even assuming that the property is joint family property, the plaintiff's father being a Karta had alienated the ancestral property for the family benefits and necessity and therefore there was no necessity to seek the leave of the Court to sell the property. The defendant would further submit that after the partition in the year 1972 his brother Perumalsamy has been living at several places and doing business and has never enjoyed the suit property. The revenue records have been mutated in the name of the 1st defendant and allegations to the contra are false. The suit filed for partition without seeking to have the sale deed executed in favour of the 1st defendant declared as null and void is not maintainable. The defendant therefore filed a counter claim to have his absolute right to the suit property declared.

8. The learned I Additional District and Sessions Judge Tiruppur, had framed the issues and thereafter additional issues which were subsequently re-arranged as follows and formed the basis on which parties had proceeded to trial:

i) Whether the suit valuation and court fee paid by the plaintiff u/s. 32(2) TNCF Act is correct?

ii) Whether the plaintiff is entitled for a decree to partition of 1/3rd share in the suit properties?

iii) Whether the 1st defendant is entitled to a decree of declaration as prayed for in the counter claim?

iv) To what relief the parties are entitled to?

9. The plaintiff had examined himself as P.W.1 and one Mr. Ganeshan as P.W.2 and marked Ex.A.1 to Ex.A.10. On the side of the defendants the 1st defendant had examined himself as D.W.1 and one Thangavelu and Chinnadurai as D.W.2 and D.W.3 respectively, in support of his contention he has marked Ex.B.1 to Ex.B.9.

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10. The learned Judge held that the property in question was an ancestral property and that the same was not alienated for a necessity but however dismissed the suit on ground that the same was filed 28 years after the execution of the sale deed and 11 years after the plaintiff had attained majority and therefore, held that the suit property was barred by limitation. The learned Judge held that the 1st defendant from the date of his purchase has been in exclusive possession and enjoyment of the property and had developed the same. The plaintiff has also not rebutted the said possession and therefore had allowed the counter claim.

11. Challenging the decree in the suit O.S.No.331 of 2013 the plaintiff is before this Court. However, no appeal has been filed against the counter claim and a perusal of the grounds also indicates that there is no challenge to the counter claim.

12. Mr. N. Ramesh appearing on behalf of the plaintiff would contend that after holding that the property was an ancestral property and that the sale was not for family necessity the Court below has erred in dismissing the suit. He would further submit that though the property had been purchased in the year 1985 the revenue records had been mutated only in the year 2009 which clearly went to show that the sale was only a sham and nominal one. The learned counsel would rely on the Judgements reported CDJ 2013 SC 601 - Rohit Chauhan V. Surinder Singh & Others, in support of his arguments that if the property has not been alienated for legal necessities then the sale would be illegal, null and void. In the same lines he has also relied on the Judgement reported in CDJ 2019 SC 746 - Arshnoor Singh V. Harpal Kaur & Others.

13. Mr. K.Sukumaran learned counsel appearing on behalf of the respondent/1st defendant would take a preliminary objection that since no appeal has been filed against the counter claim and only an appeal has been filed against the Decree in the suit, the appeal has to be dismissed. In support of the above argument he has relied on the Judgement reported in 2015 3 SCC page 624 - Sri Gangai Vinayagar Temple and Another V. Meenakshi Ammal and others. He would further submit that a mere perusal of Ex.B.1 would show that the property has been sold in order to meet the family necessities and for the business purposes and the finding of the learned Judge was per se erroneous.

14. He would further argue that the suit has been filed nearly 28 years after the execution of the sale deed and 11 years after the plaintiff had attained majority. He would submit

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that the plaintiff has not taken any steps to file a suit during the life time of his father. The father had died 7 years after the plaintiff had attained majority. He would submit that since there is no challenge to the counter claim the appeal has to to dismissed.

15. On hearing the arguments of both the learned counsels the following points for consideration arises in the above appeal:

a) Whether the appeal is maintainable as the appellant/plaintiff has not challenged the decree passed in the counter claim?

b) Whether the plaintiff is entitled to a partition especially when the property in question has been alienated as early as in the year 1985 by his father for meeting certain family necessities and for his business purposes?

16. The suit has been filed for a partition and separate possession of the plaintiff's 1/3rd share in the suit property. The counter claim has been filed for a declaration that the 1st defendant is the absolute owner of the suit schedule property. The suit filed by the plaintiff has been dismissed and the counter claim filed by the defendant has been allowed. The plaintiff has not challenged the Decree allowing the counter claim but has only challenged the dismissal of a suit for partition. A perusal of the grounds of appeal clearly indicates that there is no challenge to the Decree allowing the counter claim whereby, the 1st defendant's title to the suit schedule property has been declared. The Hon'ble Supreme Court in the Judgement reported in 2015 (3) SCC page 624 - Sri Gangai Vinayagar Temple and Another V. Meenakshi Ammal and others, was called upon to consider the maintainability of the appeal by the respondents tenants who had not challenged the finding of the Trial Court with reference to the trust's ownership of the demised property which was the conclusion arrived at in 2 other suits. After discussing the legal principles and the Judgements the learned Judge has observed as follows:

> 27. Procedural norms, technicalities and processual law evolve after years of empirical experience, and to ignore them or give them short shrift inevitably defeats justice. Where a common judgement has been delivered in cases in which consolidation orders have specifically been passed, we think it irresistible that the filing of a single appeal leads to the entire dispute becoming sub

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> judice once again. Consolidation orders are passed by virtue of the bestowal of inherent powers on the courts by Section 151 CPC, as clarified by this Court in Chitivalasa Jute Mills V. Jaypee Rewa Cements. In the instant of suits in which common issues have been framed and a common trial has been conducted, the losing party must file appeals in respect of all adverse decrees founded even on partially adverse or contrary speaking judgements. While so opining we do not intend to whittle down the principle that the appeals are not expected to be filed against every inconvenient or disagreeable or unpropitious or unfavourable finding or observation contained in a judgement, but that this can be done by way of cross-objections if the occasion arises. The decree not assailed thereupon metamorphoses into the character of a "former suit". If this is not to be so viewed, it would be possible to set at naught a decree passed in Suit A by only challenging the decree in Suit B. Law considers it an anathema to allow a party to achieve a result indirectly when it has deliberately or negligently failed to directly initiate proceedings towards this purpose. Laws of procedure have picturesquely been referred to as handmaidens of justice, but this does not mean that they can be wantonly ignored because, if so done, a miscarriage of justice inevitably and inexorably ensues. The statutory law and the proceesual law are two sides of the judicial drachma, each being the obverse of the other. In the case in hand, had the tenant diligently filed an appeal against the decree at least in respect of O.S.No.5 of 1978, the legal conundrum that has manifested itself and exhausted so much judicial time, would not have arisen at all.

The above dicta would apply on all fours to the facts of the instant case, therefore, the appeal filed without challenging the decree passed in the counter claim would therefore render the appeal as not maintainable.

17. Regarding the merits of the case, a perusal of Ex.B.1 clearly indicates that the property has been sold as early as in the year 1985 by the father for family necessities. The plaintiff has not chosen to file a suit during the life time of his father. It is rather strange that the plaintiff would plead that on the death of his father he had enquired with the 1st

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defendant about his father's property. This exercise could well have been done when the father was alive particularly when he was alive for 7 years after the plaintiff has attained majority and the 2nd defendant had attained majority 11 years prior to the death of her father.

18. Therefore, it is clear that this statement is made for the purpose bringing the suit within the period of limitation. The plaintiff as P.W.1 had admitted that the suit property is in the exclusive possession of the 1st defendant who has developed the said property by drawing water from the well situate in another property of the 1st defendant by drawing a pipe line to the length of about 2500 ft. Therefore, it is amply clear that the 1st defendant has been in possession and enjoyment of the property, ever since the date of his purchase and his possession has not been disturbed by the plaintiffs till the demise of his father as the plaintiff was very much aware about the sale of the property by the plaintiff's father in favour of the 1st defendant. The Judgements relied upon by the plaintiff would not apply to the facts of the instant case since the sale has been for valuable consideration and has been for family necessities.

19. The defendant had pleaded that the money had also utilised by the plaintiff's father in setting up a business in manufacture of wet Grinders which statement has not been controverted by the plaintiff by filing a re-joinder.

20. Therefore, on a conspectus of the above reasoning the appeal suit, therefore deserves to be dismissed and is accordingly dismissed. The Judgment and decree of the learned I Additional District and Sessions Judge, Tiruppur in O.S.No.331 of 2013 is confirmed. However there shall be no order as to costs.

Sd/-
Assistant Registrar

// True Copy//

Sub Assistant Registrar

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To

1. The I Additional District and Sessions Judge
   Tiruppur.

+1 CC to Mr.J. Franklin, Advocate sr 55257.

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