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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.07.2021

CORAM

THE HON'BLE MR.JUSTICE C.SARAVANAN

S.A.NO.1113 OF 2012

(THROUGH VIDEO CONFERENCING)

1.Babuji Rao
2.Mrs.Rukmani

... Appellants/
Defendants

.Vs.

J.Baskar Rao

... Respondent/
Plaintiff

Second Appeal filed under Section 100 of C.P.C., against the Judgment and Decree dated 04.07.2012 made in A.S.No.32 of 2011 on the file of Subordinate Judge, Arni in confirming the Judgment and Decree dated 29.11.2011 made in O.S.No.226 of 2007 on the file of District Munsif at Arni.

For Appellants : Mr.A.Gouthaman

For Respondent : Mr.P.Satheesh Kumar

JUDGMENT

The appellants have filed this appeal. They were the defendants in O.S.No.226 of 2007 who are the appellants herein, remains unsuccessful both before the Trial Court and before the First Appellate Court.

2. The respondent/plaintiff herein had filed a suit in O.S.No.226 of 2007 before the District Munsif Court at Arni to declare that the respondent was the owner of the schedule C suit property and to direct the appellants/defendants to deliver the possession of the same to the respondent/plaintiff through Court. The said suit was also filed for directing the appellants/defendants to pay a sum of Rs.18,000/- for the damages of the use and occupation of schedule C suit property and also to pay a sum of Rs.500/- per month as monthly rent from the date of filing of the suit till the date of delivery of the possession.



3. The case was filed on the strength of Exhibit A2 Settlement Deed dated 14.02.2002 executed by J.Kamalaibai Ammal in favour of the respondent/plaintiff (1st appellant/respondent's mother). The suit was partly decreed by the Trial Court vide Judgment and Decree dated 29.07.2011 by holding that the respondent/plaintiff was the owner of the schedule C suit property in view of Exhibit A2 Settlement Deed dated 14.02.2002. The Trial Court however dismissed the suit as far as the other relief or payment of Rs.18,000/- towards damages for use and occupation of the aforesaid property and for payment of Rs.500/- per month towards monthly rent of the aforesaid property.

4. The appellants therefore filed A.S.No.32 of 2011 vide Judgment and Decree dated 29.07.2011 passed by the Trial Court in O.S.No.226 of 2007.

5. Aggrieved by the same, this appeal has been filed by the appellants/defendants.

6. This appeal was not admitted when it was listed for admission. As was the practice of this Court, this court had ordered notice of admission on the respondent/plaintiff. After the notice was served on the respondent/plaintiff, the respondent/plaintiff appeared through his counsel.

7. In this appeal, the appellants/defendants has raised the following questions of law as substantial questions of law:-

“(i) Whether courts below right in holding that the defendant did not filed an application under section 10 of civil procedure code to stay the present suit because the earlier suit is partition pending between the parties ignoring the well settled position of law that legal points can be raised at any stage of the suit?

(ii) Whethe courts below right in decreeing the suit overlooking the position of law that the plaintiff is to prove his case instead of taking advantage of the defendant case, the plaintiff never proved by way of oral or documentary evidence that the properties were purchased by the respondent mother from her independent source of income?

(iii) Whether courts below right in decreeing the suit after knowing that the earlier suit is for



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partition between the parties even pending today and the plaint schedule property also shown as 1st item of property in that partition suit, ignoring the position that the present court became functio officio, when it had knowledge of the earlier suit for partition?

(iv) Whether the courts below right in ignoring the facts from the oral evidence of the respective parties that till the death of the parents of the appellant the properties were treated as joint family property and the appellant was in possession and enjoyment of the property as a joint family member overlooking this aspect of evidence, whether court below right in coming to an conclusion that the property is separate property of the appellant's mother?

(v) Whether the courts below right in decreeing the present suit ignoring the position of law, the partition suit between the brother is a major suit, where the nature of property and right of the parties in the suit property can be decided overlooking this aspect court below are not erroneous giving finding that the properties are self acquired property of the respondent's mother?"

8. The defence of the appellants/defendants before the Trial Court was that the appellants/defendants had already filed a suit in O.S.No.240 of 2001 before the Subordinate Judge's Court, Arani which was re-numbered as O.S.No.104 of 2004. The said suit is still pending in view of the Judgment and decree passed in O.S.No.226 of 2007 and dismissal of the appeal filed by the appellants/defendants in A.S.No.32 of 2011 vide impugned Judgment and decree dated 04.07.2012.

9. The case of the appellants/defendants before the Trial Court in O.S.No.226 of 2007 was that the suit schedule property was purchased in the year 1959 in the name of the J.Kamalabai Ammal (The mother of respondent/plaintiff and 1st appellant/1st defendant). It is the specific case of the appellants/defendants in O.S.No.226 of 2007 and as also in O.S.No.240 of 2001 which was re-numbered as O.S.No.104 of 2004 was that the 1st appellant/1st defendant and respondent/plaintiff mother had no independent income of her own and therefore the suit schedule property was a joint family property and therefore the appellants/defendants was entitled to a share along with the respondent/plaintiff herein.



10. Pending O.S.No.104 of 2004 for partition of the suit schedule property, the respondent/plaintiff herein sold the suit schedule property to one N.Sankar sale deed dated 05.11.2003. The said N.Sankar is not a party to the proceedings in the present appeal and the connected suit. The subsequent buyer namely N.Sankar is a party to the proceedings in O.S.No.104 of 2004 filed by the 1st appellant/1st defendant. The respondent/plaintiff sold another part of Schedule B suit property having entrance facing big street to one Mrs.Chandrika by a registered sale deed dated 30.12.2005.

11. The learned counsel for the appellants/defendants submits that though the appellants/defendants had taken a categorical stand that prior suit in O.S.No.104 of 2004 (formerly in O.S.No.240 of 2001) was pending, the Trial Court ought to have proceeded with the trial in subsequent suit in O.S.No.226 of 2007 which now give rise to the impugned Judgment and decree of the Trial Court and the Appellate Court. He further submits that Section 10 of Civil Procedure Code puts an embargo on the Trial Court from proceedings with the Trial where issues are substantially same between the same parties and therefore the Trial Court committed an error in decreeing the suit in O.S.No.226 of 2007. He submits that the Appellate Court compounded by dismissing the appeal filed by the appellants/defendants in A.S.No.32 of 2011 vide its Judgment and decree dated 04.07.2012.

12. Defending the Judgment and decree passed by the Trial Court and the Appellate Court, the learned counsel for the respondent submits that the appellants/defendants had filed I.A.No.174 of 2013 in O.S.No.104 of 2004 to stay the proceedings due to the pendency of the present appeal and therefore submits that there is no error in the impugned Judgment and decree of the Appellate Court by affirming the Judgment and decree of the Trial Court in O.S.No.226 of 2007.

13. I have considered the arguments advanced by the learned counsel for the appellants and the respondent.

14. The facts are not in dispute in this case. The 1st appellant/1st defendant and the respondent are the sons of one Jeevaji Rao and J.Kamalaibai Ammal. The suit schedule property was purchased in the year 1959 in the name of their mother J.Kamalabai Ammal vide Ex.A1. The appellants/defendants are in possession of the suit schedule property.

15. The case of the respondent/plaintiff before the Trial Court was that the appellants/defendants are permissive user. Since the dispute arose between the parties, the appellants/defendants herein filed O.S.No.240 of 2001 before the



Subordinate Judge's Court at Arani to partition the suit schedule property. The said suit was subsequently re-numbered as O.S.No.104 of 2004.

16. During the pendency of the suit for partition in O.S.No.104 of 2004, the respondent/plaintiff herein sold the property to one N.Sankar sale deed dated 05.11.2003 and the respondent/plaintiff also sold one portion of schedule B suit property to one Mrs.Chandrika by a sale deed dated 30.12.2005 and thereafter filed O.S.No.226 of 2007 to declare title over the suit schedule property and to direct the appellants/defendants to vacate the same.

17. It is noticed that both O.S.No.226 of 2007 and O.S.No.104 of 2004 (formerly in O.S.No.240 of 2001) were pending before the same Court namely the District Munsif Court, Arani. The suit filed by the respondent/plaintiff in O.S.No.226 of 2007 being subsequent suit in respect of the same property ought to have been suo motu stayed by the Trial Court under Section 10 of C.P.C.

18. In fact, the Trial Court should have ordered a combined trial in both proceedings to give a quietus to the dispute between the appellants/defendants and the respondent/plaintiff. Instead, the Trial Court has allowed the creation of 3rd party rights as is evident from the fact that the respondent/plaintiff has executed the sale deeds dated 05.11.2003 and 30.12.2005 in favour of one N.Sankar and one Mrs.Chandrika.

19. In the light of the above, this Court is of the view that the impugned Judgment of the Trial Court and that of the Appellate Court are liable to be set aside and O.S.No.226 of 2007 filed by the respondent/plaintiff is restored on the files of the District Munsif Court at Arani. The District Munsif Court, Arani is directed to take up O.S.No.104 of 2004 and O.S.No.226 of 2007 and dispose the same in accordance with law.

20. Since the dispute is pending from 2001, the Trial Court shall endeavour to dispose both the suits as expeditiously as possible by observing the proper covid protocols.

21. This Second Appeal stands allowed with the above observations. No costs.

Sd/-
Assistant Registrar

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Sub Assistant Registrar



1. The learned Subordinate Judge,
Arni.

2. The District Munsif,
Arni.

3. The Section Officer,
VR Section, High Court,
Madras-104.

+2cc to Mr.P.Satheesh Kumar, Advocate, S.R.No.33686

+1cc to Mr.M.Suresh, Advocate, S.R.No.33611

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NMI (CO)
CS/18/11/2021