



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.08.2021

CORAM:

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

S.A.No.671 of 2015
and M.P.No.1 of 2015

1. Yusuf Sayabu (Died)
2. Abbas
3. Pyari ... Appellants/Appellants/Defendants 1 & 3
4. Sabeena
5. Syed Suban
6. Subrabi Ansar
7. S.Sydhane Bee ... Appellants

(Appellants 3 to 7 brought on record as legal heirs of the deceased 1st appellant vide order of this Court dated 23.04.2021 made in C.M.P.Nos.1835, 1838 and 1840 of 2020 in S.A.No.671 of 2015)

Vs.

1. Ramachandran
2. Pachayammal
3. Kannan
4. Karthik
5. Shanthi ... Respondents/Respondents/Plaintiffs 2 to 6

PRAYER: The Second Appeal filed under Section 100 of the Civil Procedure Code against the Judgment and Decree made in A.S.No.8 of 2013 dated 27.03.2014 on the file of the Sub Court, Gingee, confirming the Judgment and Decree made in O.S.No.618 of 1995, dated 31.07.2012 on the file of the Principal District Munsif, Gingee.

For Appellants : Mr.C.Vediappan for M/s.C.S.Associates

For Respondents : M/s.Rajarajan for M/s.G.Rajan

J U D G M E N T

Aggrieved over the concurrent finding of the Courts below, the unsuccessful defendants have preferred the present Second Appeal.



2. Originally, the respondents filed a suit in T.O.S.No.366 of 1982, which was renumbered as O.S.No.618 of 1995. As a counter blast, the present appellants, who are the defendants in O.S.No.366 of 1982 filed another suit through his brother for partition in O.S.No.168 of 1991. In both the suits, the subject matter of the property is one and the same and the parties are also the same. Even though the present appellant has shown as defendant in O.S.No.168 of 1991, he sailed along with his brother, plaintiff therein and claimed title against the respondents herein.

3. The suit was filed by the respondents herein for declaration and injunction in O.S.No.618 of 1995. The appellants herein filed a suit in O.S.No.562 of 1995 claiming possession of the properties allotted as shares. Since the subject matter of the property is one and the same, the trial Court conducted a joint trial, in which, the suit filed by the appellants herein was dismissed and the suit filed by the respondents was decreed. Even though two decrees were passed in both the suits, the appellants had chosen to file an appeal against the decree passed in O.S.No.618 of 1995 and the decree passed in O.S.No.562 of 1995 has become final. The lower appellate Court dismissed the appeal, against which, the present Second Appeal has been preferred.

4. This Court admitted the Second Appeal on the following substantial question of law:-

i. Whether the Courts below have erred in decreeing the suit for declaration of title based on a decree for partition followed by the sale deed executed in favour of the plaintiffs in respect of the suit property which is not in consonance with the measurement shown in the decree for partition and without there being any amendment of such decree?

ii. Whether the Courts below are justified in decreeing the suit for declaration and injunction in the absence of any other document to show possession of the plaintiffs over the suit property other than the decree for partition and the sale deed?

5. Heard the learned counsel appearing on either side and perused the materials placed before this Court.

6. Originally, the suit property belonged to one Ismail. One of his wives namely, Kaathoon Bi along with his son Syed Hameed and daughter Kairoon Bi, filed a suit for partition of 1/8, 1/48, 7/96 shares respectively in O.S.No.27 of 1952. The parties had reached a compromise and on 15.11.1962, the compromise decree was passed in the partition suit, which is



marked as Ex.B1. As per the decree, Item No.13 of the schedule was allotted to one Kajah Sahib and Dasthagir Sahib. Item No.13 is the subject matter of the suits filed by both the parties.

7. As per the evidence, it is noted that Kajah Sahib and his brother Dasthagir Sahib were jointly enjoying the property in Item No.13 measuring an extent of $18 \frac{1}{2} \times 60$ Kejam. As per oral partition, both the brothers have divided the property into two and taken $9 \frac{1}{4} \times 60$ Kejam East each. The said Dasthagir Sahib has sold his share of the property viz., $9 \frac{1}{4} \times 60$ Kejam in favour of one Kathar Bake Sahib on 20.06.1956, which is marked as Ex.A1. Thereafter, on 13.12.1965, the appellants herein have purchased the same from the said Kathar Bake Sahib. Thus, the appellants have become owner of $9 \frac{1}{4} \times 60$ Kejam of the property. The other brother Kajah Sahib along with his wife Julekabee sold his share to the mother of the respondents herein namely, Adilakshmi Ammal vide registered Sale Deed dated 20.05.1972, which is marked as Ex.A3. The said Adilakshmi Ammal settled the property in favour of her son on 16.05.1980 vide Ex.A4 Settlement Deed.

8. The Trial Court, on evidence, has found that the sale made to the respondents' mother Adilakshmi Ammal vide Ex.A3, dated 20.05.1972 was proved and the possession of the respondents was admitted by Syed Hameed, who deposed as D.W.2. He would depose that the respondents were enjoying the property from 1980 onwards. When the possession has been admitted, Substantial Question of Law No.2 does not survive. It is well settled principle of law that admitted fact need not be proved.

9. The second issue is that the measurements shown in the decree for partition and the Sale Deed differs. Admittedly, the property allotted as Item No.13 in O.S.No.27 of 1952 was in Kejams whereas, the subsequent Sale Deed is marked in Feet. But, the trial Court, on evidence of D.W.1, has found that the boundaries of item No.13 mentioned in Ex.B1, Compromise Decree remain the same. When there is a discrepancy in the measurement, it is well settled that the boundaries will prevail over. There is no dispute as to the extent of land within the boundaries mentioned. When there is a categorical admission by D.W.1 that the boundaries are correct, it goes without saying that the title to the property within those boundaries vests with the purchasers. This discrepancy of mentioning Kejams as Feet will not take away the right of the purchasers. In that view of the matter, Substantial Question of Law No.1 also does not survive.

10. The most important point is that while the appellants have chosen to claim title to the suit property and delivery of possession of the same in O.S.No.562 of 1995, they have not chosen to file an appeal when the claim made by them was



negatived. It is well settled that when there are two decrees, the aggrieved person shall challenge both the decrees. In the instant case, there was a joint trial. In one case, the claim of the appellants was negatived and in other case, the claim of the respondents was granted. Both the decrees negating the right of the appellants as well as recognizing the right of the defendants must have been challenged by way of two different appeals. Not challenging one of the decrees will amount to conceding to that decree and that will amount to res judicata. The appellants cannot sustain the appeal against only one decree. Therefore, the Second Appeal fails. Since both the Questions of Law are answered in the negative, the Second Appeal merits no consideration and accordingly, the same is dismissed. There shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar (CS-V)

//True copy//

Sub Assistant Registrar

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To

1. The Sub Court, Gingee.
2. Principal District Munsif, Gingee.

+1cc to Mr.G.Rajan, Advocate SR.No.37969

+1cc to M/s.C.S.Associates, Advocate SR.No.38357

S.A.No.671 of 2015
and M.P.No.1 of 2015

SR II (CO)
GMY (07/06/2022)