



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 24.03.2021

CORAM:

WEB COPY

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

S.A. (MD)No.714 of 2013
and M.P. (MD)No.2 of 2013

R.Sujendran

... Appellant/Appellant/Plaintiff

Vs.

1.K.Kumara Pillai (Died)
2.Komala Kumari
3.Aji
4.Anj
5.Ajitha
6.Bhagavathi Amma
7.Sarojini Amma
8.Indiravathi Amma
9.Balakrishnan
10.Joseph
11.Rajamony
12.Mary
13.Lekshmi
14.Monikantan
15.Senthil
16.Ganesan
17.Ramesh
18.Sudha
19.Anisha
20.Thankappan
21.Rajaram
22.Velayudhan

..1st to 22nd Respondents/Respondents/
Defendants

23.K.Saju
24.K.Viju
25.K.Raju

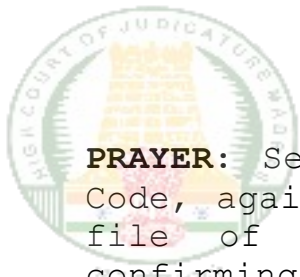
(Respondents 23 to 25 are brought on
record as LR's of the deceased first respondent
vide order dated 24.03.2021 in C.M.P. (MD)
Nos.8389 to 8391 of 2016)

26.K.Girija Kumari
27.R.Geetha

...23rd to 27th Respondents

(Respondents 26 & 27 are impleaded vide Court
order dated 24.03.2021 made in C.M.P. (MD)

No.1972 of 2021)



PRAYER: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree in A.S.No.2 of 2010, on the file of Subordinate Judge, Padmanabhapuram dated 27.07.2010 confirming the judgment and decree passed in O.S.No.55 of 2007 on the file of the Principal District Munsif-cum-Judicial Magistrate, Eraniel dated 17.08.2009.

For Appellant : Mr.M.P.Senthil
For Respondents : Mr.K.N.Thampi for R23 to R27
R2 to R22-Ex-parte

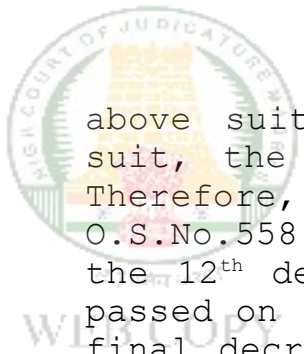
JUDGMENT

Aggrieved over the concurrent findings of the Courts below, this Second Appeal is filed.

2. The parties are referred to as per their rank before the trial Court.

3. It is the case of the plaintiff that the suit property originally belonged to one Madhavan Thampi and he has gifted the same to his daughter one Omana, under Ex.A1 and thereafter, the said Omana has gifted the same to her husband one Ramakrishnan Thampi, under Ex.A4. After the death of Omana, the said Ramakrishnan Thampi married one Sumathiamma and gifted the suit property in favour of her, under Ex.A6. Thereafter, the suit property has been sub-divided and resurvey number has been allotted. The said Sumathiamma, during her life time, executed a sale deed in respect of 10 cents to one Rajamony and the remaining 25 cents was inherited by her son Ramakrishnan. The plaintiff has purchased 25 cents under Ex.A17, from Ramakrishnan, who is the son of Sumathiamma. It is the further case of the plaintiff that the first defendant had earlier filed a suit for partition in O.S.No.3 of 1981. The above suit was dismissed, on the ground that the exact shares have not been identified. As against which, an appeal in A.S.No.13 of 1983 was filed and the same was also dismissed. Subsequent to the dismissal of the above suit, the first defendant has filed another suit in O.S.No.558 of 1995, for the similar relief of partition. Such a suit was decreed ex-parte, though the plaintiff was one of the defendant in the above suit, the decree was obtained by suppressing the earlier judgment. Hence, a suit has been filed to declare the decree and judgment passed in O.S.No.558 of 1995 as null and void on the ground of fraud and also for declaration in respect of 'A' schedule property and for other consequential reliefs.

4. The first defendant in his written statement admitted that he has filed a suit in O.S.No.3 of 1981 and the same was dismissed. It is the contention of the first defendant that the



above suit was dismissed on technical ground and in the above suit, the rights of the parties have not been finally decided. Therefore, a subsequent suit for partition was also filed in O.S.No.558 of 1995, wherein, the present plaintiff was arrayed as the 12th defendant. In the above suit, a preliminary decree was passed on 14.11.1997 and there was no appeal filed. Thereafter, a final decree was also passed on 23.12.2003 and delivery was also effected on 18.11.2006. Hence, it is the contention of the first defendant that the present suit is nothing, but an abuse of process of law and the earlier judgment is operating as *res judicata* and hence, prays for dismissal of the suit.

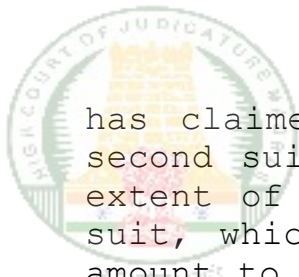
5. Based on the above pleadings, the trial Court has framed the following issues:

1. *Whether the suit is barred by res judicata?*
2. *Whether the present suit is maintainable?*
3. *Whether the plaintiff is entitled for the relief of declaration that the judgment and decree in O.S.No.558 of 1995 as null and void?*
4. *Whether the plaintiff is entitled for the relief of recovery of possession of suit 'B' schedule property?*
5. *Whether the plaintiff is entitled to be declared as absolute owner of the suit 'A' schedule property?*
6. *Whether the plaintiff is entitled to the relief of permanent injunction?*
7. *To what other reliefs, the plaintiff is entitled?*

6. Before the trial Court, on the side of the plaintiff, two witnesses were examined as P.W.1 and P.W.2 and Exs.P1 to P29 were marked. On the side of the defendants, no witness was examined and Exs.B1 and B2 were marked. After considering the evidence and materials, the trial Court had dismissed the suit. The first appellate Court has also considering the facts and circumstances, dismissed the appeal holding that the earlier judgment is operating as *res judicata* and the alleged fraud has not been established. As against the concurrent findings, the present second appeal is filed.

7. The second appeal is pending at the stage of admission.

8. It is the main contention of the appellant is that despite the fact that earlier suit in O.S.No.3 of 1981 was dismissed and the appeal in A.S.No.13 of 1093 was also dismissed, in O.S.NO.558 of 1995, the judgment and decree of the earlier suit was not filed. That itself is a clear case of suppression of earlier judgment and the decree and the same is nothing, but a fraudulent one. In the earlier suit in O.S.No.3 of 1981, the first defendant



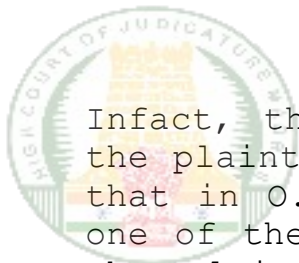
has claimed shares to an extent of 4 ½ cents, whereas, in the second suit in O.S.No.558 of 1995, he has claimed shares to an extent of 10 ½ cents. At any event, the suppression of earlier suit, which was already dismissed and reached its finality would amount to fraud. However, Courts below have not considered these aspects and therefore, question of law is involved. Hence, prays for allowing the appeal.

9. On the other hand, the learned counsel appearing for the respondents 23 to 27 submitted that the suit is nothing, but an abuse of process of law and there is no suppression of facts of earlier suit. The earlier suit in O.S.No.3 of 1981 was dismissed on the ground of not establishing the identification of the property. Therefore, a subsequent suit was filed in O.S.No.558 of 1995 for partition and the Court has entertained the above suit. In the said suit, the present plaintiff was also arrayed as 12th defendant and he was represented by a counsel. Thereafter, decree was not challenged, which resulted in passing of a final decree and also allotment of shares in the final decree proceedings. All these proceedings were known to the plaintiff herein. Without challenging the preliminary decree and final decree in O.S.No.558 of 1995, the present suit is filed, as if the decree granted in O.S.No.558 of 1995 is a fraudulent one. However, in the plaint, there is no pleadings whatsoever with regard to the alleged fraud etc. It is the further submission of the learned counsel appearing for the respondents 23 to 27 that the plaintiff has also filed a suit in O.S.No.156 of 2002 for bare injunction, which was also dismissed and the appeal in A.S.No.47 of 2007 was also dismissed. Hence, prays for dismissal of the appeal.

10. This Second Appeal is in admission stage.

11. This Court heard the learned counsel appearing for the appellant and the learned counsel appearing for respondents 23 to 27 and also perused the materials.

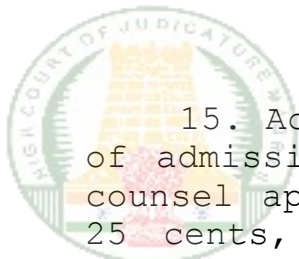
12. On a perusal of the entire pleadings, it is seen that the suit is primarily filed to declare the decree and judgment passed in O.S.No.558 of 1995 as null and void, on the ground that the same has been obtained by fraud. It is to be noted that in O.S.No.558 of 1995, the present plaintiff was arrayed as 12th defendant and he was represented by a counsel. Thereafter, he remained *ex parte*. Be that as it may, there is no particular whatsoever specifically pleaded in the plaint as required under Order VI Rule 4 of C.P.C., as to the nature of the fraud for obtaining the decree. It is also to be noted that in the plaint in O.S.No.558 of 1995, it is clearly averred that the earlier suit filed for partition in O.S.No.3 of 1981 was dismissed. Therefore, it cannot be said that earlier suit was suppressed in entirety.



Infact, the dismissal of the earlier suit has been disclosed in the plaint in O.S.No.558 of 1995. It is also to relevant to note that in O.S.No.558 of 1995, the present plaintiff was arrayed as one of the defendant viz., 12th defendant. It is not the case of the plaintiff that in the subsequent suit, decree was passed without arraying the present plaintiff as a party to the suit. He was arrayed as 12th defendant in the suit and a preliminary decree was passed. Thereafter, a final decree was passed and a commissioner was also appointed and the property was also allotted as per the preliminary decree.

13. The main grievance of the appellant appears to be with regard to the excessive allotment of the shares in favour of the respondents in O.S.No.558 of 1995. It is the contention of the appellant that the first defendant has claimed 4 ½ cents in the earlier suit filed by him for partition, wherein, in the subsequent suit, he has claimed 10½ cents, which is the primary grievance of the appellant. It is to be noted that the decree in O.S.No.558 of 1995 was not passed behind the back of the appellant herein. He was one of the defendant therein. He was also aware of the proceedings and he was represented by a counsel. If aggrieved by any of the decision in the above decree, the proper course would be to file an appeal challenging the preliminary decree and final decree. However, no such step whatsoever has been taken to challenge the above decree, despite the appellant being a party in the above suit. It is also not disputed by both sides that final decree was passed on 23.12.2003. Pursuant to which, delivery was also effected on 18.11.2006 and immediately, within a month, the present suit is filed. Therefore, what the plaintiff could not achieve directly, now he tried to achieve it by way of indirect method, challenging the very decree on the ground of fraud and etc. The plaint is bereft of particulars as to the nature of the fraud played by the respondents. It is mandatory on the part of the plaintiff to show the nature of the particulars as to the fraud played as required under Order VI Rule 4 of C.P.C. Except contending that earlier suit in O.S.No.3 of 1981 was suppressed and subsequently, O.S.No.588 of 1995 was filed, no other details whatsoever was pleaded in the plaint. At the same time, the very contention of the plaintiff that the earlier suit was suppressed appears to be false. The very plaint in O.S.No.558 of 1995 shows that there was a clear disclosure of the earlier suit.

14. In such view of the matter, I do not find any substantial question of law involved in this Second Appeal, since the Courts below rightly concluded that the suit is not maintainable to challenge the decree and judgment, wherein, the appellant is also one of the party.



15. Accordingly, this Second Appeal is dismissed at the notice of admission stage itself. It is the contention of the learned counsel appearing for the appellant that though he had purchased 25 cents, already 10.5 cents have been allotted to the first defendant as per the preliminary decree and therefore, the remaining 14.5 cents, atleast he is entitled to, for which, it is open to the appellant to file necessary application for passing a supplementary preliminary decree in the same suit, as per law. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (T&P)

// True Copy //

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Sub Assistant Registrar(CS)

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Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

1.The Subordinate Judge, Ramanathapuram.

2. The Principal District Munsif cum
Judicial Magistrate, Eraniel.

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The Section Officer-2 copies
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to Mr.K.N.THAMPI, Advocate (SR-13363[F] dated 24/03/2021)

+1 CC to Mr.M.P.SENTHIL, Advocate (SR-13691[F] dated 25/03/2021)

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