



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 29.07.2021

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THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)No.401 of 2014

and M.P. (MD)No.1 of 2014

WEB COPY

Vincent

... Appellant/Appellant/3rd Defendant

Vs.

1.John

2.David

... Respondents 1 & 2/Respondents 1 & 2/
Plaintiff, 1st Defendant

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree passed in A.S.No.7 of 2000, dated 28.01.2003 on the file of the Sub Court, Ambasamudram confirming the judgment and decree passed in O.S.No.398 of 1991, dated 14.12.1998, on the file of the District Munsif Court, Ambasamudram.

For Appellant : Mr.V.Meenakshisundaram

For Mr.D.Nallathambi

For Respondents : Mr.R.T.Arivu Kumar for R1

R2 - Dismissed vide order of the
Court dated 09.02.2017

JUDGEMENT

The third defendant in O.S.No.398 of 1991 on the file of the learned Additional District Munsif Court, Ambasamudram, is the appellant in this second appeal. The suit was filed by the first respondent seeking the relief of partition. The plaintiff as well as defendants are brothers, being sons of Michael and Mary Grace Ammal. The suit schedule comprises three items namely., "A", "B" and "C". It appears that contest was essentially around "A" schedule, which appears to be a small shopping complex. The father/Michael as well as mother/Mary Grace Ammal have passed away. Both of them died intestate. The first respondent here had originally filed a partition suit in respect of the said property. But the said suit had either been dismissed for default or withdrawn. In the said suit, the mother was also party and that she had taken a stand that the building was purchased by her out of her own funds. Be that as it may, that issue has become academic on account of her dying intestate. Therefore, the property had devolved on all the three sons in equal share. Of course, the appellant herein had raised a plea that the property was allotted to him by the mother in a oral arrangement.



2.The plaintiff examined himself as P.W.1 and marked Exs.A1 to A9. The appellant himself as D.W.1 along two other witnesses and marked Exs.B1 to B17.

3.The learned trial judge after a consideration of the evidence on record granted preliminary decree in respect of the "A" schedule and "C" schedule.

"B" schedule relates to cultivating tenancy right and the suit was dismissed as regards "B" schedule. The plaintiff had not filed any appeal challenging the dismissal of the suit as regards "B" schedule. It was only the appellant herein, who filed A.S.No.7 of 2000, before the learned Sub Court, Ambasamudram. Vide impugned judgment and decree 28.01.2003, the first appellate court confirmed the decision of the trial court. Challenging the same, the second appeal came to be filed.

4.The second appeal was admitted on the following substantial questions of law:-

"1) Whether the Courts below have committed wrong in holding that the suit is not barred by resjudicata, since the earlier suit in O.S.No.328 of 1989 was dismissed for non-prosecution and order 9 Rule 9 debars the plaintiff to file fresh suit when the earlier suit was dismissed for non-prosecution and hence the judgments of the Courts below are liable to be set aside by this Court under Section 100 of CPC?

2) When the plaintiff willfully suppressed the fact that the eariler suit in O.S.No.328 of 1989 was dismissed for default and made a wrong statement that the same was withdrawn, did it not amount to abuse of process of Court and is it not a ground for dismissal of the suit and hence, the judgments of the Courts below warrant interference by this Court under Section 100 of CPC?"

5.Heard the learned counsel on either side.

6.It is true that the plaintiff had earlier filed O.S.No.328 of 1989 but the same had suffered a dismissal for non-prosecution. The question is whether Order 9 Rule 9 of CPC will preclude the plaintiff from instituting a second suit for partition. But Order 9 Rule 9 of CPC will not apply to partition suits. The learned counsel for the respondent brought to my notice the decision of the Madras High Court reported in **2017 (1) CTC 374 (Maria Francis and Ors. Vs. M. Varghese and Ors.)**. The said decision is clearly applicable to the case on hand. The first substantial question of law is answered against the appellant.



7.The case of the plaintiff was that "A" schedule property also belonged to father/Michael. But then, in O.S.No.328 of 1989 the stand was that "A" schedule property belonged to mother/Mary Grace Ammal. Even if the property was purchased by the mother out of her funds, still on account of dying intestate, the property will devolve in equal shares on all the three sons. The second suit for partition is based on a distinct cause of action. Therefore, failure to mention the dismissal of the earlier suit cannot result in non-suiting the plaintiff at the threshold. The second substantial question of law is also answered against the appeal. I do not find any merit in this second appeal and it stands dismissed.

8.At this stage, the learned counsel appearing for the appellant informs the Court that the mother even during her life had mortgaged the suit property as evident from Ex.B1 and that the appellant redeemed the same vide Ex.B2. Since the appellant had proved that it was he who redeemed "A" schedule property, he will be entitled to appropriate equities when the final decree is passed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-I)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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To:

- 1.The Sub Court, Ambasamudram.
- 2.The District Munsif Court, Ambasamudram.

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The Record Keeper, V.R. Section,
Madurai Bench of Madras High Court, Madurai. (2 copies)

+1 CC to M/s.R.T.ARIVUKUMAR, Advocate (SR-24647[F] dated 30/07/2021
+1 CC to M/s.D.NALLATHAMBI, Advocate (SR-24829[F] dated 30/07/2021

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SE (CO)

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