



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 20.01.2021

CORAM

THE HONOURABLE MR.JUSTICE **R.SUBRAMANIAN**

S.A.(MD)No.189 of 2015

M.S.Abdul Kader

: Appellant/Appellant/Plaintiff

Vs.

1.M.Naina Mohamed @ Mothi

2.Meeraas Maraikayar

: Respondents/ Respondents/Defendants

PRAYER:- Second Appeal filed under Section 100 of Code of Civil Procedure, to set aside the judgment and decree passed in A.S.No.34 of 2012 on the file of the Sub Court, Ambasamudram, dated 03.12.2013 confirming the judgment and decree passed in O.S.No.103 of 2008 on the file of the District Munsif-cum-Judicial Magistrate Court, Cheranmahadevi, dated 12.04.2012.

For Appellant

:Mr.Sivadharsana Kannappan
for Mr.M.P.Senthil

For Respondents

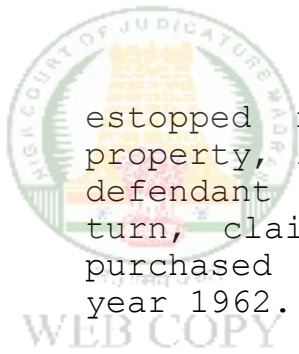
:No Appearance

JUDGMENT

The plaintiff in O.S.No.103 of 2008, a suit for declaration and recovery of possession, has come with this second appeal, since the suit was dismissed by the trial Court and the same was confirmed by the appellate Court in A.S.No.34 of 2012.

2.The plaintiff has filed the suit for declaration of title claiming that the suit property was allotted to him at a partition, that took place between him and his brothers, on 05.05.1970. The plaintiff would also plead that a portion of the land, ie., about 23 cents was acquired by the Government and the first defendant has received the compensation taking advantage of the fact that the sale certificate issued by the Government in respect of the said land stood in his father's name. The sale by the first defendant in favour of the second defendant was also termed as invalid, since the property was allotted to the plaintiff at a partition, where the father of the first defendant, Mohideen Pitchai, in whose name, the sale certificate has been issued, was party. The plaintiff has also disclosed the fact that he had earlier filed a suit in O.S.No.370 of 2001 seeking permanent injunction and its dismissal.

3.The suit was resisted by the defendants contending that the suit is barred by *res judicata* in view of the findings rendered in O.S.No.370 of 2001. It was also contended that the plaintiff is



estopped from claiming title to the remaining extent of the property, in view of the dismissal of the earlier suit. The second defendant would trace his title through first defendant, who in turn, claimed title under his father, Mohideen Pitchai, who had purchased the property at an auction held by the Government in the year 1962.

4.At trial, the plaintiff was examined as PW-1 and Ex-A1 to Ex-A7 were marked. The first defendant was examined as DW-1 and Ex-B1 to Ex-B25 were marked.

5.The trial Court, upon consideration of the evidence on record, concluded that in view of the Ex-B2, the sale certificate, issued in favour of the first defendant's father, the first defendant would be the absolute owner of the property and the sale by the first defendant in favour of the second defendant is valid. The trial Court also concluded that the partition deed, dated 05.05.1970 was not acted upon. The trial Court rejected the claim of the defendants that the suit is barred by *res judicata* and estoppel.

6.Aggrieved by the dismissal of the suit, the plaintiff preferred an appeal in A.S.No.34 of 2012. The appellate Court, upon re-examination of the evidence, concurred with the findings of the trial Court and dismissed the appeal. Hence, the above second appeal.

7.The following substantial questions of law were framed at the time of admitting the second appeal:

1.Whether the judgments and decree of the Courts below could be sustained in law in rendering a finding with regard to the document under Ex.A.8, the partition deed dated 05.05.1970 on mere surmises and conjectures absolutely without any cogent evidence or even a pleading?

2.Whether the Courts below are right in law in holding that the documents under Ex.A.8 has not been acted upon without advertting that it is not even the very plea of the respondents, besides, it is not permissible under law to contend contrary to the very recitals of the registered document under Ex.A.8 in view of Section 92 of the Indian Evidence Act?

3. Whether the Courts below are right in law in declining to grant a decree after having held that the earlier proceedings under Ex.A.1 & A.2 will not constitute res judicate as per Section 11 of C.P.C as well as will not attract the bar provided under Order 2, Rule 2?



4. Whether the Courts below are right in law in dismissing the suit without advertng that the appellant as plaintiff has substantiated his plea on the basis of cogent evidence under Ex.A.2 to A.8 corroborating the oral testimony of P.W.1?

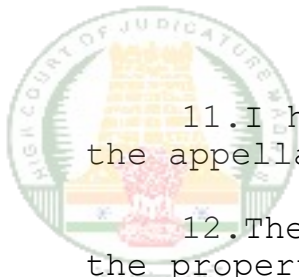
5. Whether the Courts below are right in law in rendering a finding traversing beyond the pleadings as well as brushing aside the very admission of D.W.1 which itself would suffice to grant the decree for the appellant?

6. Whether the judgment and decree of the lower appellate Court could be sustained in law which has mechanically accepted the findings of the trial Court absolutely without any independent consideration of either the pleadings or the evidence after framing the proper points for consideration has contemplated under Order 41, Rule 31, which is held to be mandatory?"

8. I have heard Ms.Sivadharsana Kannappan for Mr.M.P.Senthil, learned Counsel for the appellant. The respondent, though served, does not appear either in person or through Counsel duly instructed.

9. Elaborating on the questions of law, Ms.Sivadharsana Kannappan, learned Counsel for the appellant would contend that the Courts below were not right in concluding that the partition deed, dated 05.05.1970 was not acted upon in the absence of any plea regarding the same in the written statement filed by the first defendant or the second defendant.

10. She would also point out that the father of the first defendant, Mohideen Pitchai, in whose name the sale certificate, under Ex-B2, stands, was a party to the partition deed. Pointing out the trial Court's reference to certain documents, which were not marked as documents during trial, the learned Counsel for the appellant would contend that the trial Court had referred to documents which were not marked, would by itself vitiate the findings of the trial Court. She would further contend that having held that the suit is not barred either by *res judicata* or the plaintiff would be precluded from claiming title by estoppel, the Courts below were not right in dismissing the suit on the premise that Ex-A8, the partition deed, has not been acted upon. She would also draw my attention to Section 92 of the Indian Evidence Act, 1872, which provides that a party or person claiming under a registered instrument cannot claim title contrary to the recitals in the instrument.



11.I have considered the submissions of the learned Counsel for the appellant.

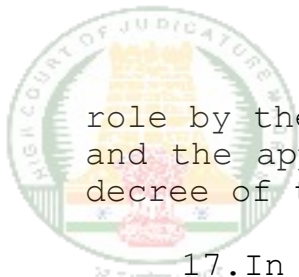
12.The plaintiff has come to Court with a specific case that the property was purchased by family and at a partition in the year 1970 under Ex-A8, dated 05.05.1970 was allotted to the plaintiff. A perusal of Ex-A8 shows that the property of a larger extent measuring about 51 cents, was allotted to the plaintiff. The father of the first defendant, Mohideen Pitchai, in whose name the property was purchased at an auction held by the Government, was a party to the said instrument. Once it is shown that the father of the first defendant was party to the partition deed, the first defendant cannot claim title *de hors* the said instrument.

13.Mohaideen Pitchai purchased the property in the year 1962, as evident from Ex-B2, the sale certificate. But the said property was made subject matter of the partition, to which, the father of the first defendant was party and the property purchased by him was allotted to the plaintiff at the partition. Therefore, the first defendant, who is claiming title under his father, cannot contend that the partition deed is not valid or that the allotment is not true. It is not his case that the partition deed was not acted upon.

14.Though a specific plea was raised by the plaintiff in the plaint that the property was allotted to him under the partition deed, dated 05.05.1970, there is no plea regarding invalidity or otherwise of the partition deed in the written statement. This is the reason why there is no issue relating to the invalidity of the partition deed before the trial Court.==The trial Court, however, concluded that the partition deed was not acted upon, on the basis that the first defendant has chosen to receive compensation from the Government for the land acquired by the Government. It is not demonstrated that the plaintiff had notice of such acquisition and payment of compensation. That by itself would not prevent the plaintiff from establishing title over the suit property. In fact, the Courts below have held that the plaintiff would not be estopped from setting up title, merely because, the compensation has been paid to the first defendant.

15.The conclusion of the Courts below that the partition deed, dated 05.05.1970 was not acted upon is not supported by any pleadings or evidence and such finding is erroneous and therefore, I am of the considered opinion that the first and second questions of law have to be answered in favour of the appellant to the effect that the partition deed, dated 05.05.1970, Ex.-A8 is valid and the findings of the Courts below that the partition deed, Ex-A8 was not acted upon is not supported either by pleadings or evidence.

16.Once the first and second substantial questions of law relating to the validity of Ex-A8 are answered in favour of the appellant, the other questions of law relating to validity of the



role by the first defendant and second defendant are insignificant and the appeal will have to be allowed set aside the judgment and decree of the Courts below.

17. In fine, the second appeal is allowed and the judgment and decree of the Courts below are set aside and the suit in O.S.No.103 of 2008 will stand decreed as prayed for, declaring the title of the plaintiff to the suit second schedule property and granting a decree for recovery of possession to the plaintiff in respect of the suit second schedule property. The plaintiff would be entitled to move the Court under Order 20 Rule 12 C.P.C. seeking mesne profits. No costs.

Sd/-

Assistant Registrar (AD-II)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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To

1. The Subordinate Judge, Ambasamudram,
Tirunelveli District.
2. The District Munsif-cum-Judicial Magistrate,
Cheranmahadevi, Tirunelveli District.
3. The Section Officer, (2 copies)
Vernacular Record Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to Mr.M.P.SENTHIL, Advocate (SR-1695[F] dated 21/01/2021)

Judgment made in
S.A.(MD)No.189 of 2015
20.01.2021

VB (09.03.2021) 5P 6C