



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : 09.04.2021

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THE HONOURABLE MR. JUSTICE A.A.NAKKIRAN

SA(MD)No.333 of 2017

1.Guruvaiya

2.Gurusamy

...Appellants 1 & 2/Respondents 1 & 2/
Defendants 1 & 2

3.Pitchiammal

4.Guruvammal

5.Veerammal

...Appellants 3 to 5/Respondents 3 to 5/
3rd Party

Vs.

Vellai Samy

.. Respondent/Appellant/Plaintiff

PRAYER:- Second Appeal filed under Section 100 of Civil Procedure Code against the Judgment and Decree dated 14.03.2017 in A.S.No.57 of 2009 on the file of the Sub Court, Sankarankovil reversing the judgment and decree dated 07.10.2009 in O.S.No.74 of 2006 on the file of the District Munsif-cum-Judicial Magistrate Court, Sivagiri.

For Appellants : Mr.F.X.Eugene

For Respondent : Mr.M.Thirunavukkarasu

JUDGMENT

The appellants have come up with this Second Appeal challenging the Judgment and Decree dated 14.03.2017 in A.S.No.57 of 2009 on the file of the Sub Court, Sankarankovil reversing the judgment and decree dated 07.10.2009 in O.S.No.74 of 2006 on the file of the District Munsif-cum-Judicial Magistrate Court, Sivagiri.

2. The present suit in O.S.No.74 of 2006 on the file of the District Munsif-cum-Judicial Magistrate Court, Sivagiri, was laid by the plaintiff seeking a declaration that the second schedule property belongs to the plaintiff and for possession of the same. On failure to hand over the same, the defendants would be removed at their cost by the court.



3. The suit was resisted by the defendants and they prayed for dismissal of the suit.

4. At trial, the plaintiff was examined as P.W.1 and Ex.A1 to Ex.A.5 were marked. The first defendant was examined as D.W.1 and Ex.B.1 to Ex.B.4 were marked. Upon consideration of the evidence on record, the learned trial Judge concluded that the plaintiff has not proved that 32 cents of land belonged to him through oral and documentary evidence. On the above conclusion, the learned trial Judge dismissed the suit.

5. Aggrieved, the plaintiff preferred an appeal in A.S.No.57 of 2009. The Appellate Court, on re-appreciation of the evidence on record, allowed the appeal. Aggrieved, the defendants 1 and 2 and the third parties have come up with this Second Appeal.

6. The following questions of law have been framed by this Court at the time of admission:

i) Whether the first Appellate Court is correct in giving a finding, as if the gift or settlement could not be revoked unilaterally?

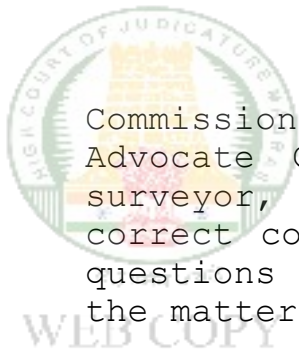
ii) Whether the first Appellate Court is correct in holding that the recovery of possession of property could be granted, in the absence of specific property mentioned, as contemplated under Order 7 Rule 3 C.P.C

iii) Whether the first Appellate Court is correct in holding that an oral exchange in the family arrangement is required to be registered under the Registration Act and for stamp duty as contemplated in Section 54 of Transfer of Property Act and liable Section 35 of Stamp Act and Section 17 of the Registration Act?

7. I have heard Mr.F.X.Eugene, learned counsel appearing for the appellants and Mr.M.Thirunavukkarasu, learned counsel appearing for the respondent. I have also perused the materials placed on record.

8. The learned counsel for the appellant would contend that the first Appellate Court need not have interfered with the well analyzed judgment and decree of the trial court and the judgment of the first appellate court is against law, evidence and probabilities of the case. Therefore, he prays for setting aside the same.

9. On hearing the submissions made on either side, I am of the view that without having a definite boundaries, identification of the property could not be done properly. The first appellate court ought to have allowed the Interlocutory Applications in I.A.No. 248 of 2010 and I.A.No.66 of 2011 for appointment of Advocate



Commissioner and for marking additional documents. In the event of Advocate Commissioner measuring the property with the help of surveyor, then, it would be possible for the court to come to a correct conclusion. Therefore, this Court, without going into the questions of law framed by this Court, is inclined to remand back the matter to the first appellate court for fresh consideration.

10. In view of the above, the Judgment and Decree dated 14.03.2017 in A.S.No.57 of 2009 on the file of the Sub Court, Sankarankovil reversing the judgment and decree dated 07.10.2009 in O.S.No.74 of 2006 on the file of the District Munsif-cum-Judicial Magistrate Court, Sivagiri, is set aside. The matter is remanded back to the first Appellate Court. I.A.Nos.248 of 2010 and I.A.No.66 of 2011 are allowed. An Advocate Commissioner shall be appointed. The Advocate Commissioner shall measure the property with the help of the surveyor and file his report along with sketch and plan. On filing of his report and plan, the first appellate court shall take fresh evidence only in respect of the report and plan of the Advocate Commissioner and the additional documents sought to be marked. After completion of all the formalities, the first Appellate Court shall pass a fresh judgment, in the light of the evidence both oral and documentary, already on record and in the light of the report and plan of the Advocate Commissioner and the additional documents to be marked, on merits and in accordance with law, within a period of six months from the date of receipt of a copy of this judgment.

11. In the result, this Second Appeal is allowed to the extent indicated above. No costs.

Sd/-

Assistant Registrar ()

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

CM

To:

1.The Sub Judge, Sankarankovil.

2.The District Munsif-cum-Judicial Magistrate,
Sivagiri.



3.The Section Officer, VR Section-2 copies
Madurai Bench of Madras High Court,
Madurai.

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