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IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 31.03.2022

PRONOUNCING ORDERS ON : 04.04.2022

CORAM

THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

S.A.No.738 of 2015
and M.P.No.1 of 2015

R.Mohanraj ... Appellant/Plaintiff in Trial Court

vs.

O.S.Rathinasamy (Died)

1.S.Kumarasamy

2.Pushpathaal

3.Karupathaal (Died) ... Respondents/Defendants in Trial Court

[R3 died, as per memo R2 and sole Appellant recorded as legal heirs of the deceased R3 viz., Karupathaal vide Court order dated 31.03.2022 made in S.A.No.738 of 2015]

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the Judgment and Decree dated 12.03.2015 made in A.S.No.55 of 2010 on the file of the learned Third Additional District Court, Dharapuram confirming the judgment and decree dated 25.08.2009 made in O.S.No.51 of 2008 on the file of the learned Sub Court, Dharapuram.

For Appellant : Mr.N.Manokaran

For Respondents: Mr.S.Saravanan for R1
Mr.N.Ponraj for R2 & R3

J U D G M E N T

The plaintiff is the appellant in the Second Appeal.

2.The case of the plaintiff is that the suit properties are joint family properties and the 1st defendant is the father of the plaintiff. The 1st defendant was attempting to deny the right



of the plaintiff in the properties and deal with those properties. Hence, a suit was filed in O.S.No.255 of 1998 seeking for the relief of partition and allotment of the half share in the properties. On the intervention of the family members, there was a compromise and a final Decree was passed based on the compromise on 09.12.1998.

3.The further case of the plaintiff is that the 1st defendant attempted to deal with the properties that were allotted in favour of the plaintiff by entering into an agreement of sale with the 2nd defendant. A suit was filed in O.S.No.308 of 2000 by the 2nd defendant seeking for the relief of specific performance and it was decreed and E.P.No.109 of 2007 was filed to execute the said Decree. According to the plaintiff, the Decree will not bind him, since the 1st defendant did not have the right to deal with the suit properties. Hence, the plaintiff sought for the relief of declaration of title, permanent injunction and for a direction to the 1st defendant not to execute any Sale Deed in favour of the 2nd defendant in E.P.No.109 of 2007.

4.The 2nd defendant filed a written statement and took a stand that the partition suit itself is a collusive suit that was filed only to defeat the rights of the 2nd defendant under the agreement of sale. He further pleaded that the properties were not joint family properties and it was a separate property of the 1st defendant. He further stated that the suit itself has been filed only to stall the proceedings in the Execution Petition filed by the 2nd defendant to execute the decree for specific performance. Accordingly, the 2nd defendant sought for the dismissal of the suit.

5.Both the Courts below on considering the facts and circumstances of the case and after appreciating the oral and documentary evidence, concurrently held against the plaintiff and dismissed the suit. Aggrieved by the same, the Second Appeal was filed by the plaintiff.

6.When the Second Appeal was admitted, the following substantial question of law was framed:

Whether the First Appellate Court is legally right in marking Ex.A4 to Ex.A20 in I.A.No.773 of 2013 ignoring the mandatory compliance of Order XLI Rules 27 and 28 of CPC?



7. Heard the learned counsel for the appellant and the learned counsel appearing on behalf of the respondents.

8. This Court also carefully perused the materials available on record and the findings of both the Courts below.

9. In the present case, the suit properties stood in the name of the 1st defendant. After ascertaining the title of the 1st defendant, the 2nd defendant entered into an Agreement of Sale with the 1st defendant on 25.05.1998 and out of the total sale consideration of Rs.3,00,000/- (Rupees Three Lakhs only), he paid an advance amount of Rs.2,75,000/- (Rupees Two Lakh Seventy Five Thousand only). The original parent document was also handed over to the 2nd defendant as security. Since, the 1st defendant did not come forward to execute the Sale Deed, the suit for specific performance was filed on 21.11.2000 in O.S.No.308 of 2000. After contest, it was decreed on 16.06.2003. Surprisingly, the 1st defendant did not even make a whisper about the so-called partition between him and the plaintiff. Infact, the 1st defendant, after the decree for specific performance, initiated insolvency proceedings and it was dismissed for default on 31.10.2007. Thereafter, the 2nd defendant filed the Execution Proceedings on 10.12.2007 and it was pending.

10. Both the Courts below took into consideration all the above said facts and on appreciation of the evidence available on record, it was held that the suit for partition in O.S.No.255 of 1998 was filed only after the 1st defendant had entered into sale agreement with the 2nd defendant. In the present suit, the 1st defendant kept himself away from the proceedings and did not come up with any version. Therefore, the Courts below held that the so-called partition decree was a collusive decree which will not bind the 2nd defendant.

11. Both the Courts below also took into consideration the fact that the properties stood in the name of the 1st defendant and there was nothing to show that it was a joint family property in which the plaintiff also had a right.

12. When the appeal was pending, the plaintiff filed an Application under Order 41 Rule 27 for additional evidence. The 2nd defendant did not oppose the petition and hence, it was allowed. Accordingly, Ex.A4 to Ex.A20 were marked. Even as per the Sale Deeds marked as Ex.A4 to Ex.A6, it can be seen that the grandfather of the plaintiff viz., Subburaya Gounder was owning



properties and it stood in his name and thereafter, it was inherited by the 1st defendant and he became the exclusive owner of the property. Therefore, even the additional evidence that was sought to be brought in by the plaintiff did not really help the stand taken by the plaintiff. Even in the absence of taking evidence under Order 41 Rule 28 after the additional documents were marked, it does not really matter and if at all any evidence had to be taken, the plaintiff should have taken steps, since he was attempting to rely upon the additional documents. The substantial question of law framed by this Court is answered accordingly.

13. In the considered view of this Court, the findings of both the Courts below that the partition suit initiated and the decree obtained in the said suit, is collusive, is backed by sufficient reasons. This is more so, since the 1st defendant conveniently stayed away from the proceedings. The present suit has been instituted only with a view to defeat the interest of the 2nd defendant who had obtained a decree for specific performance after contest against the father of the plaintiff. There are absolutely no merits in this Second Appeal and the Judgment and Decree of both the Courts below does not warrant any interference.

14. In the result, the Second Appeal is dismissed with costs through out. Consequently, connected miscellaneous petition is closed.

SD/-

ASSISTANT REGISTRAR

// TRUE COPY //

SUB ASSISTANT REGISTRAR

ssr

To

1. The Third Additional District Court,
Dharapuram.

2. The Subordinate Court,
Dharapuram.

+1cc to Mr. N. Manokaran, Advocate Sr. 22894

+1cc to Mr. S. Saravanan, Advocate Sr. 22633

S.A.No.738 of 2015
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