



S.A.No.917 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.11.2022

CORAM

THE HONOURABLE Ms.JUSTICE P.T.ASHA

S.A.No.917 of 2019

and

C.M.P.No.9424 of 2022

R. Vilvanathan

... Appellant

-Vs-

1.R. Velusamy

2.Kalavathi

3.Jayalakshmi

... Respondents

Prayer : This Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree passed in A.S.No.95 of 2018 dated 14.03.2019 on the file of the Court of Principal Subordinate Judge, Mayiladuthurai in confirming the judgment and decree passed in O.S.No.29 of 2012 dated 07.06.2016 on the file of the Court of Principal District Munsif, Mayiladuthurai.

For Appellant : Ms.P. Srividhya

For Respondents : No Appearance



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J U D G M E N T

The plaintiff is the appellant before this Court, challenging the concurrent judgment and decree against him in a suit filed for partition of his $\frac{1}{4}^{\text{th}}$ share in the suit schedule property.

2. The facts in brief which is necessary for disposing of the above second appeal is herein below narrated and the parties are referred to in the same rank as before the trial Court.

3. The plaintiff had filed the suit in O.S.No.29/2012 on the file of the Principal District Munsif, Mayiladuthurai, for a partition of his $\frac{1}{4}^{\text{th}}$ share in the suit schedule property and for mesne profits. It is the case of the plaintiff that the 1st item of the suit property is the ancestral property of the plaintiff. In the year 1958, his father had constructed a double storeyed house. On 02.12.1964 his father had sold an extent of 2 cents in the 1st item of the suit property. The 2nd item belongs to the Vaitheeswaran Temple. In



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the year 1974, the plaintiff's mother, Radha passed away, followed by his father in the year 1975. Being the eldest, the plaintiff had discontinued his studies to take care of his family. During the life time of his father, the family had around 16MA (67 grounds) of land which roughly works out to about 4 acres of land. After the various alienations, what now remains in the hands of the plaintiff and his family is only the suit property. The 1st item of suit property has been described as an extent of 11 cents in S.No.411, bearing Door No.7 of Palakudi Village, Mayiladuthurai bounded on the East by the street, on the North by the common lane, South by Thillaivijayan's house site and on the West by mangrove road, it consist of a storeyed house measuring 56 feet in length and 21 feet in breadth, together with the electricity connections. The 2nd item was an extent of 10 cents in S.No.410 of the same Village bounded on the South by Kuttai, on the West by Renganathan's vacant site, on the East by AVC Dharmabhagan's Punja land, on the North by Vaidyanatha Swami's Punja lands.

3(i). It is the plaintiff's further contention that in the year 1978, he had got married and the 2nd defendant had married against the wishes of the



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family. Thereafter, the 3rd defendant was given off in marriage, by the plaintiff and the 1st defendant. In the year 1998, the first defendant had also got married. The plaintiff had borrowed money for conducting the wedding of the sisters and for the 1st defendant's education abroad. All of this was cleared by the plaintiff. By reason of the second defendant's love marriage, the plaintiff had cut his ties with the second defendant and on account of his work, the plaintiff is residing at Perambur. The suit property is in the joint possession of the plaintiff and the defendants. On 08.02.2012, the first defendant had made attempts to cut and sell the trees in the 1st item, on coming to learn about the same, the plaintiff had warned the 1st defendant. Thereafter, on 09.02.2012, the plaintiff had requested for a partition which was denied by the defendants. Therefore, the plaintiff has been constrained to file the suit, in question.

4. The first defendant had filed a written statement, *inter alia* denying the various allegations in the plaint and contending that the plaintiff had no right over the property. It was the further case of the 1st defendant



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that the plaintiff had completely removed himself from the family, 5 years ago. On 23.01.2012, the plaintiff had issued a notice stating that there was an understanding between the plaintiff and the first defendant which assigned by both of them. The plaintiff had thereafter filed O.P.No.90 of 2003 against the first defendant and Chinnathambi, which was dismissed. From the year 1997, there is a strained relationship between the plaintiff and the first defendant. The first defendant had accordingly responded to the notice dated 23.01.2012. Once again, the plaintiff had moved the legal services authority by filing an application, which was dismissed. The 1st defendant would further submit that since he is employed abroad, he has been sending money to the plaintiff, nearly a sum of Rs.8 lakhs was sent by him. When the 1st defendant returned to India and sought accounts from the plaintiff, the plaintiff refused to account for the same. In the reply dated 23.01.2012, the defendant stated that the agreement on 09.06.2000 was that the plaintiff had released his half share in the property, after receiving a sum of Rs.75,000/-. Rs.5,000/- was given on the very same day and thereafter, on 30.06.2000, a further sum of Rs.9,500/- was paid. The plaintiff has



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permanently left the suit village and he is now residing at Perambur. The 1st item of the suit property belongs only to the defendants and in the said property, it is the defendants who had constructed a storeyed house and the electricity service connection, water connection etc., in respect of the property stands in the name of the 1st defendant. The 1st defendant had further contended that the suit has not been properly valued. Since the plaintiff is out of possession, the same had to be valued and Court fee paid under Section 37(1) of the Tamilnadu Court Fees and Suit Valuation Act and not under Section 37(2) of the Tamilnadu Court Fees and Suit Valuation Act.

5. The trial Court, on considering the pleadings had framed the following issues which translated from the vernacular would read as follows:-

1. Whether the plaintiff is entitled to the preliminary decree as prayed for?
2. Whether the plaintiff is entitled to mesne profits?
3. What other relief the parties are entitled to?



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6. The plaintiff had examined himself as P.W.1 and one Murugasen, as P.W.2 and marked Exs.A1 to A5. On the side of the defendants, the first defendant had examined himself as D.W.1 and marked Exs.B1 to B6. The 2nd defendant had remained ex parte and the 3rd defendant who had entered appearance, had thereafter, not filed his counter or participated in the proceedings. The learned Judge, on considering the evidence, dismissed the suit by stating that in the 1st item of suit property, the plaintiff's father had owned only 2 cents and not the entirety and that apart no document had been filed to show that the property, in question, is an ancestral one. The learned Judge, had also taken note of the partition, in the year 2000 between the parties which had been projected by the plaintiff and accepted by the first defendant and that the plaintiff has not been in possession and enjoyment of the property since the year 2004. The 1st defendant had produced the chitta, the house tax receipts, from the year 2002-2016 (B1 Series) then the kist receipt (B3 Series) etc., to come to the conclusion that the defendants are in possession of the suit schedule properties. The learned Judge, had also taken note of the admission of



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P.W.1 regarding the filing of an earlier petition in O.P.No.90 of 2003 before the Sub Court, Mayiladuthurai, which had ended in a compromise. The plaintiff who admits that the terms of compromise was in possession has not filed the same into the Court. Therefore, the suit was dismissed.

7. Challenging the said order, the plaintiff had filed A.S.No.95 of 2018 on the file of Principal Sub Court, Mayiladuthurai. The learned Subordinate Judge also concurred with the judgment and decree of the trial Court and consequently, dismissed the suit. Aggrieved by the same, the plaintiff is before this Court.

8. Ms.Srividya, the learned counsel who appeared on behalf of the plaintiff would vehemently contend that the suit property is the ancestral property which is evident from the fact that the first defendant had also admitted the agreement dated 09.06.2000. She would contend that even as per the version given in the written statement, a sum of Rs.5,000/- was paid on the date of the signing of the agreement and thereafter, a further sum of



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Rs.9,500/- was paid on 30.06.2000 and thereafter, the written statement does not contain any detail to show that the balance sum of Rs.75,000/- has been paid. Therefore, considering the fact that the agreement had not been acted upon, the same is no longer valid. Therefore, both the Courts below ought to have granted the decree for partition.

9. The defendants though served have not entered appearance. The Second appeal was admitted on the following substantial questions of law on 10.09.2019:

i) Whether the Courts below erred in law in dismissing the suit for partition in the absence of any valid prior partition?

ii) Whether the Courts below erred in law in holding that only 2 cents out of 11 cents in Item No.1 of the suit property belonged to the father of the parties more so, when the title of the predecessor was not disputed?



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10. The plaintiff who has come to Court with a contention that the suit properties are the ancestral properties, has not filed any document whatsoever, to show that the property is a joint family property. The plaintiff has filed Ex.A1 which is a sale deed in favour of his father, under which, his father has purchased 2 cents of land in S.No.411/1A, the suit property is an extent of 11 cents, the plaintiff has not been able to establish the right to the said extent of 11 cents. That apart, the plaintiff has himself stated that there was an arrangement on 09.06.2000 in and by which, he had released the share in the suit schedule property for a sum of Rs.75,000/-. The learned counsel for the appellant would submit that since the entire amount has not been paid, the agreement dated 09.06.2000 has not been acted upon. However, this is not the contention of the plaintiff in his pleadings. The plaint is silent about this. Further, the plaintiff has not taken any steps to enforce that agreement or to declare that agreement as null and void if the amount had not been paid. It is only in the written statement that the said transaction has been mentioned. Therefore, the plaintiff has not



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come to Court with clean hands and a definite case. The plaintiff who comes to Court stating that the suit properties are ancestral in nature, has not produced any document to show how the property is ancestral and the entitlement to 11 cents. Even in Ex.A1 sale deed standing in the name of the plaintiff's father only an extent of 2 cents is the property subject matter of sale.

11. To demand partition, the plaintiff has to establish his right to the suit property and suggest the manner in which, the partition can be effected. However, in the instant case, there is nothing to show the ancestral nature of the suit schedule property and the plaintiff right over the same. Therefore, I see no reason to interfere with the concurrent judgment and decree of the Courts below and consequently, the substantial questions of laws are answered against the plaintiff.



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12. Accordingly, the Second Appeal stands dismissed.

Consequently, connected miscellaneous petition is closed. No costs.

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AT

Index : Yes/No

Speaking order/non-speaking order

To

1.The Principal Subordinate Judge, Mayiladuthurai.

2.The Principal District Munsif, Mayiladuthurai.



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P.T.ASHA, J.

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