



S.A.No.1271 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.06.2023

CORAM

MR.JUSTICE N.SESHASAYEE

S.A.No.1271 of 2019
and C.M.P.No.27548 of 2019

Selvambal

... Appellant

Vs.

Kandasamy

... Respondent

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, seeking to set aside the judgement and decree dated 20.08.2019 made in A.S.No.1 of 2016 on the file of the Principal Subordinate Judge, Virudhachalam by confirming the Judgment and decree dated 29.09.2015 made in O.S.No.45 of 2010 on the file of the Court of II Additional District Munsif, Virudhachalam.

For Appellant : Mr.S.Senthil

For Respondent : M/s.Elizabeth Rani
for Mr.P.Raja



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JUDGMENT

The defendant who lost her defence in a suit for declaration of title and injunction successively before the Courts below in O.S.No.45 of 2010, and followed by A.S.No.1 of 2016 is the appellant herein.

2.The brief facts of the case are as follows:

- A certain Pitchaimuthu Padayachi was entitled to a piece of land measuring 33 cents in Survey No.73/10. On his demise, the property devolved on his son, Gurusamy Padayachi. Apart from the property in Survey No.73/10, the said Gurusamy Padayachi possessed properties in several other Survey fields. While so, on 15.06.1974, under Ex.B2, Gurusamy Padayachi sold a total extent of 84 cents to one Semba Konar. One of the items so sold was the Southern 15 cents in Survey No.73/10. On 17.06.1974, vide Ex.B1, Gurusamy Padayachi had sold the Northern 18 cents in Survey No.73/10 to one Ganesa Padayachi. This case is concerned only with the Southern 15 cents covered under Ex.B2.



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- On Semba Konar's demise, the property covered under Ex.B2 devolved on his widow, Selvambal, the defendant herein and their five children.

One of their children is one Valliammai. On 20.01.2010, under Ex.A1, the said Valliammai had sold the southern 15 cents referred to above to the plaintiff. Her contention is that there was an oral partition among the heirs of Semba Konar, in which this property was allotted to her. The defendant who is the mother of the plaintiff's vendor resists the suit on the ground that there was no such partition as pleaded.

- The dispute went to trial, before which both sides produced oral and documentary evidence. For the plaintiff, he examined himself as P.W.1 and marked Ex.A1 to Ex.A4. For the defendant, she examined herself as D.W.1 and also examined an independent witness as D.W.2 and she marked Ex.B1 to Ex.B5. On appreciating the evidence, the trial Court came to a conclusion that there was no oral partition as pleaded by the plaintiff, and accordingly dismissed the suit. Aggrieved by the same, the plaintiff moved the First Appellate Court in A.S.No.1 of 2016, wherein the plaintiff tasted success, hence the second appeal, at the instance of



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the defendant.

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3.This Second Appeal is admitted for considering the following Substantial Questions of Law:

"a) Whether the First Appellate Court was right in treating Patta as a document of title and granting declaration of title in favour of the respondent ?

b) Whether the First Appellate Court was right in ignoring the Exhibits B1 to B4, Sale deeds pertaining to the suit property while granting declaration of title in favour of the respondent ?"

4. Heard the learned counsel on either side.

5. It is an indisputable fact that on the demise of Semba Konar, his six heirs including plaintiff's vendor were entitled to 1/6th share in the property. It is an admitted fact that Semba Konar had executed non testamentary instrument as concerning his properties. This would imply that each of Semba Konar's heirs would be entitled to 1/6th share. Now, even if the oral partition as alleged by the plaintiff's vendor is believed as true, yet the fact remains that she has every right



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to sell her share of the property. Ordinarily, when a co-sharer sells the property on her share, such purchaser cannot take physical possession of the property.

But in this case, it appears not to be so. If Semba Konar possessed only the 84 cents covered under Ex.B2, and in the absence of any oral partition, Valiammai might have sold couple of cents more than her share in the property. But, at the end of the day, it can only amount to some excess sale and cannot affect the right to sell the share of Valliammal. Here, the defendant has misconceived her line of defence. In fitness of things, she should have sought alternate remedy for partition, but that was not done.

6.In conclusion, this Court does not find any merit in the Second Appeal. This Second Appeal stands dismissed accordingly. No Costs. Consequently, the connected miscellaneous petition is closed.

19.06.2023

Anu

Index : yes / no

Internet : yes / no

Speaking / Non Speaking order



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N.SESHASAYEE, J.

Anu

To.

- 1.The Principal Subordinate Judge, Virudhachalam
2. The II Additional District Munsif, Virudhachalam

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