



S.A(MD)No.731 of 2016

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 22.02.2023

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A(MD)No.731 of 2016

and

C.M.P(MD) Nos.11654 and 11688 of 2016

Mr.Gopalsamy

...Appellant

-Vs-

1.Nachiyar @ Nacharammal

2.Indurani

3.Chandra

4.Mahalakshmi

... Respondents

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree passed in A.S.No.18 of 2011 on the file of Sub Court, Periyakulam, dated 15.07.2013 confirming the judgment and decree passed in O.S.No.13 of 2009 on the file of District Munsif Court, Periyakulam, dated 29.04.2011.



S.A(MD)No.731 of 2016

WEB COPY

For Appellant : Mr.R.Shankar Ganesh

For Respondents : No appearance

JUDGMENT

The unsuccessful defendant in the suit is the appellant. The respondents herein filed a suit for partition claiming 5/6th share in the suit property. They also prayed for mandatory injunction seeking removal of cattle shed put up by the appellant in the suit property without the consent of other co-owners. The suit was decreed by the trial Court and the finding of the trial Court was affirmed by the first appellate Court. Aggrieved by the concurrent findings against him, the appellant/defendant is before this Court.

2. According to the respondents/plaintiffs, the suit property was purchased by the father of the appellant and respondents, namely, Sangamanaicker and after his death, his wife, namely, first respondent and his children, namely, appellant and respondents 2 to 4 succeed to the suit property. It was further pleaded that yet another son of Sangamanaicker, namely, Radhakrishnan died issueless. Therefore, the first respondent is entitled to the share of Radhakrishnan also as his Class-I heir. Accordingly, the first respondent is entitled to 2/6th share and the



S.A(MD)No.731 of 2016

WEB COPY

respondents 2 to 4 are entitled to 1/6 share each. Therefore, the suit was laid by the respondents claiming 5/6th share in the suit property.

3. The appellant herein filed a written statement admitting the purchase of the suit property by the father Sangamanaicker. However, the appellant claimed in his written statement that earlier the respondents filed a suit along with his deceased brother Ramakrishnan seeking recovery of possession in O.S.No.641 of 2004 and the said suit was dismissed holding that after the death of Sangamanaicker, his wife and all the children are entitled to equal share as Class-I heirs. Therefore, it was the case of the appellant that the present suit for partition was barred under Order 2 and Rule 2 of CPC. It was further pleaded that the appellant had put up a cattle shed in the suit property by spending about Rs.60,000/- and he redeemed the suit property by clearing the mortgage debt and therefore, the respondents are not entitled to get their share.

4. The trial Court, on appreciation of evidence available on record, granted a decree for partition of 5/6th share in favour of the respondents as prayed for. The trial Court also directed the respondents to pay a sum of Rs.12,000/- to the appellant towards the mortgage debt cleared by him and granted a decree for



S.A(MD)No.731 of 2016

WEB COPY

mandatory injunction directing the appellant to remove the cattle shed put up by him in the suit property. Aggrieved by the said judgment and decree, the appellant herein preferred the first appeal in A.S.No.18 of 2011 on the file of the Sub Court, Periyakulam. The first appellate Court confirmed the findings of the trial Court. Aggrieved by the concurrent judgments, the appellant is before this Court.

5. The learned counsel for the appellant assailed the judgments passed by the Courts below on the ground that the Courts below failed to consider that the suit was barred under Order 2 Rule 2 of CPC. According to the learned counsel for the appellant, when the earlier suit was filed by the respondents seeking recovery of possession, they could have prayed for the relief of partition. Having failed to pray for relief of partition which was very much available to the respondents even at the time presentation of the earlier plaint, the present suit for partition is clearly barred under Order 2 Rule 2 of CPC. The learned counsel further submitted that the Courts below failed to show that the appellant put up a cattle shed in the suit property by spending huge amount and therefore, the respondents are not entitled to get their share without paying the proportionate share of expenses incurred by appellant.



S.A(MD)No.731 of 2016

WEB COPY

6. It is an admitted case of both parties that the suit property was self-earned property of Sangamanaicker. The first respondent is the wife of Sangamanaicker. The appellant herein and the respondents 2 to 4 are the children of Sangamanaicker. The earlier suit was filed by the respondents seeking recovery possession claiming absolute right over the suit property. The said suit was dismissed on a specific finding that all the parties are entitled to equal share in the suit property. Therefore, based on the findings rendered in the earlier suit, the present suit for partition has been filed by the respondents. Hence, the present suit is not based on the same cause of action on which the earlier suit in O.S.No. 64 of 2004 was filed. The main cause of action for the present suit is the finding rendered in the earlier suit that the parties are co-owners. Therefore, the first contention made by the learned counsel for the appellant that the present suit is barred under Order 2 Rule 2 of CPC, is not acceptable to this Court.

7. Though in the pleadings, the appellant pleaded that he had put up a cattle shed in the suit property by spending about Rs.60,000/-, both the Courts below found that he failed to lead any evidence to substantiate the same. The case of the respondents is that the cattle-shed is a temporary structure which was put up by



S.A(MD)No.731 of 2016

WEB COPY

the appellant without getting consent from the other co-owners. In the absence of any evidence available on record to show that the appellant spent a sum of Rs.60,000/- in putting up cattle shed, he is not entitled to claim proportionate share of the expenses incurred by him, from the respondents, that too, in a case, where he put up superstructure without getting consent from all the co-owners. Therefore, the Courts below rightly rejected the contention of the appellant claiming proportionate share in respect of the expenses incurred by him and granted a decree for mandatory injunction as prayed for.

8. In view of the discussions made earlier, I do not find any question of law muchless substantial question of law involved in this case. Accordingly, the second Appeal is dismissed by confirming the concurrent judgments and decrees passed by the Courts below. However, there will be no order as to costs. Consequently, connected miscellaneous petitions are closed.

22.02.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes / No
cp



S.A(MD)No.731 of 2016

WEB COPY

To

- 1.The Subordinate Judge, Periyakulam.
2. The District Munsif, Periyakulam,
- 3.The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.



WEB COPY



S.A(MD)No.731 of 2016

S.SOUNTHAR, J.

cp

S.A(MD)No.731 of 2016

22.02.2023