



S.A.No.800 of 2007

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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RESERVED ON : 01.07.2024

PRONOUNCED ON : 31.07.2024

CORAM

THE HONOURABLE MR.JUSTICE V.SIVAGNANAM

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1. Pappammal (died)

2. Saravanan

(A2 is brought on record as LR of the
deceased A1 vide Court order dated 06.06.2023
made in CMP No.8390 of 2023)

...

Appellant

Vs.

1. Samikannu (died)

2. Mallika

3. Devika

4. Dhamayanthi

5. Radhika

(R2 to R5 are brought on record as Lrs
of the deceased R1 vide Court order
dated 19.07.2021 made in CMP
Nos.6528 & 6536 of 2020)

...

Respondents



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Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 30.03.2007 in A.S.No.232 of 2006 on the file of the Sub Court, Mannargudi reversing the judgment and decree dated 30.01.2004 in O,S.No.75 of 2001 on the file of the District Munsif's Court, Mannargudi.

For Appellants : Mrs.R. Meenal

For Respondents : Mr.P.Dinesh Kumar,
& Mrs. P.T.Ramadevi,
for R2 & R3

: R4 &R5 set exparte

JUDGMENT

Challenge in this second appeal is made to the Judgement and Decree dated 30.03.2007 passed by the Sub Judge, Sub Court, Mannargudi, in A.S.No.232 of 2006, reversing the Judgment and Decree dated 30.01.2004 passed by the District Munsiff, District Munsiff Court, Mannargudi in O.S.No.75 of 2001.

2. For the sake of convenience, the parties are referred to as per their rankings in the Trial Court.



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3. The defendant in the suit in O.S.No.75 of 2001 on the file of District Munsiff Court, Mannargudi, is the appellant in this second appeal.

4. The fact of the case is that the suit property was originally owned by Rathinam Kandiar. He died 20 years prior to the filing of the suit. Through his first wife, namely, Ponnammal, he had female child, namely, pappa and after the death of his first wife, he married one Pushpavalli and through her, he had female child, namely, Sasikala. The plaintiffs, who are the legal heirs of deceased Pappa, claiming 1/3rd share in the suit property. The relationship between the plaintiffs, Pushpavalli and Sasikala were cordial. Thereafter, due to some mis-understanding, the said Pushpavalli and Sasikala had conveyed the suit property to the defendant. The plaintiffs have issued an legal notice,dated 27.02.2001 to the defendant and her husband to allot 1/3rd share to the plaintiffs, but, the defendant has not agreed for the same. Hence, the present suit for partition.

5. The defendant filed her written statement and contested the suit. In the written statement, she admits that the suit property was owned by Rathinam Kandiar. The plaintiffs have to prove that they are legal heirs of the deceased Rathinam Kandiar. The defendant's vendor alone the legal heirs of deceased



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Rathinam Kandiari. Rathinam Kandiari died on 29.10.1979. After his death, his wife Pushpavalli and her daughter Sasikala were residing in the suit property and they conveyed the suit property to the defendant on 30.01.2001. The defendant's vendor had got title by adverse possession. Patta is in the name of the defendant and she has been paying House tax. The defendant is bonafide purchaser. The suit is not properly valued. The suit is barred by limitation. The plaintiffs are not entitled to 1/3rd share in the suit property. In the additional written statement, the defendant has stated that the plaintiffs have filed the suit to allot their 1/3rd share in the suit schedule properties and the value of the 1/3rd share is Rs.43,333/- . Hence, this Court has no jurisdiction to entertain this suit.

6. On the basis of the abovesaid pleas set out by the respective parties, the following issues were framed by the Trial Court for consideration:

1. Whether Pushpavalli , Sasikala are necessary party ?
2. Whether the alleged sale deed dated 30.01.2001 is true and valid one?
3. Whether the suit property was in possession of the Rathinam Kandiari till the date of execution of sale deed dated 30.01.2001 by the Rathinam Kandiari to the name of the defendant ?
4. Whether the plaintiffs are the legal heirs of the Rathinam Kandiari ?



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5. Whether the Pushpavakki and Sasikala got adverse possession ?

6. Whether the suit is barred by limitation ?

7. Whether valuation of the suit property is correct ?

8. Whether court fee is paid correctly ?

9. Whether the plaintiffs are entitled for 1/3 share in the suit property as legal heirs ?

10. Whether the name of the father in law of Samikannu and husband of the Pushpavalli is Rathinam Kandiyar or Rathinavel Kandiyar ?

11. Whether trial is necessary, the defendant after accepting with regard to 1/3 share as claimed by the plaintiffs in the written statement?

12. To what other reliefs ?

7. Thereafter the Trial Court struck out the issues except the issue Nos. 2 and 4 as per Order 14 Rule 5(2) of CPC.

8. Before the Trial Court, in support of the plaintiffs' case first plaintiff examined himself as P.W.1 and two independent witnesses were examined as P.W.2 and P.W.3, and 13 documents have been marked as Ex.A1 to Ex.A13 . On the side of defendant, her husband was examined as DW1 and one of the defendant's vendors was examined as DW2 and 7 documents have been marked as Ex.B1 to Ex.B.7.



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9. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the Trial Court dismissed the suit by a judgment and decree dated 30.01.2004. Aggrieved over the same, the plaintiffs had preferred an appeal in A.S.No.232 of 2006 before the Sub Court, Mannarkudi. The First Appellate Court, after considering the entire materials, vide judgment and decree dated 30.03.2007, allowed the appeal and passed a preliminary decree granting 1/3 share in the suit property to the plaintiffs. Now, challenging the same, the present Second Appeal has been filed by the defendant.

10. The second appeal has been admitted on the following substantial question of law :

1. Whether in law the Lower Appellate Court was right in overlooking that a suit for partition could not be maintained in the absence of all the sharers ?
2. Whether in law the lower appellate Court was right in failing to see that the respondents had been ousted from making any claim and also since they had admitted to being out of possession by paying Court fee under Section 37(1) of the Tamil Nadu Court Fees and Suit Valuation Act?



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3. Whether in law the lower appellate court did not err grievously in allowing the petition for additional evidence and also relying on Ex.A.14 birth certificate, when under Sections 35 and 14 of the Evidence Act there could be no presumption drawn about parentage from the birth certificate of a child ?

11. The learned counsel for the appellant/defendant submitted that without impleading the necessary parties, the suit for partition against the purchaser is not maintainable and on that ground, the First Appellate Court ought to have dismissed the suit. Further the First Appellate Court failed to consider the fact that the plaintiffs have failed to prove that they are entitled to claim share in Rathina Kandiar property as his legal heirs. The First Appellate Court erred in receiving additional document in I.A.No.139 of 2006 without examining the witnesses and giving an opportunity to the defendant. The additional documents filed in the First Appellate Court , i.e.Ex.A14 and Ex.A15 were not proved, which are totally inadmissible. The finding of the First Appellate Court upon Ex.A.14 & Ex.A.15 without any proof is erroneous one and the learned counsel further reiterated other grounds raised in the grounds of appeal and pleaded to set aside the judgment and decree of the First Appellate Court and allow the Second Appeal.



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12. The learned counsel appearing for the plaintiffs supported the judgment of the First Appellate Court and contended that the additional documents Ex.A.14 & Ex.A15 are relevant to the case and proved the fact that the plaintiffs are the legal heirs of the deceased Pappa. The Plaintiffs filed the Birth Certificate of Pappa and the marriage invitation and proved the fact that Pappa is a daughter of Rathina Kandiar and Ponnammal. P.W.2 Ramadoss, and P.W.3 Veeramani are also known persons to the plaintiffs and defendant. Therefore, the finding of the First Appellate Court is based upon the evidences. There is no ground to interfere with the findings of the First Appellate Court and no substantial question of law involved in this second appeal and thus pleaded to dismiss the second appeal as it has no merit.

13. I have considered the matter in the light of the submissions made by the learned counsel on both sides and perused the materials available on records carefully.

14. On perusal of records, it is seen that the suit is for partition of 1/3 share of the plaintiffs in respect of the plaint schedule property. According to the plaintiffs, the suit property was originally owned by Rathina Kandiyar. His



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first wife is Ponnammal. Through her, a daughter, namely Pappa, was born.

After the death of Ponnammal, the said Rathina Kandiyar married Pushpavalli as his second wife. Through her, he had one daughter, namely, Sasikala. Rathina Kandiyar died 20 years back prior to the filing of the suit. Therefore, Rathina Kandiyar's legal heirs are second wife Pushpavalli and her daughter Sasikala and another daughter through his first wife Pappa. Hence, they are entitled to equal 1/3 share. Since Pappa died, her 1/3 share devolved upon her husband, first plaintiff and daughters 2nd and 3rd plaintiffs. Therefore, the plaintiffs are entitled for 1/3 share in the suit property. The second wife Pushpavalli and her daughter Sasikala sold the property to the defendant vide sale deed Ex.B.1 dated 31.01.2001, which is also marked on the side of the plaintiffs as Ex.A.12. However, in the suit, the said Pushpavalli and her daughter Sasikala were not impleaded as a party to the suit.

15. The argument of the learned counsel for the appellant that without impleading the legal heirs of Rathina Kandiar, viz., his second wife PushpaValli and Sasikala, filing the suit against the defendant, who is the purchaser, is not maintainable and is unsustainable and on the ground of non joinder of necessary party, the suit is unsustainable for the reason that the defendant purchased the entire property of Rathina Kandiyar from his second



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wife Pushpavalli and her daughter Sasikala. Therefore there is no question of non joinder of necessary parties in the partition suit. The defendant is representing the case as a purchaser. Therefore, the argument of the learned counsel for the appellants/plaintiffs is rejected as unsustainable.

16. The Trial Court dismissed the suit on the ground that the plaintiffs failed to prove the fact that Pappa is born through the first wife(Ponnammal) of Rathina Kandiyar and before the Trial Court, no document was filed to prove that Pappa is legal heir of Rathna Kandiyar. Aggrieved by this, the plaintiffs filed an appeal. Pending appeal, they filed I.A.No.139 of 2006 under Order 41 Rule 27 CPC to receive Additional documents before the First Appellate Court. The First Appellate Court marked the documents as Ex.A.14 & Ex.A.15 without being proved through witnesses.

17. On perusal of records, it is noticed that the First Appellate Court took into consideration additional piece of evidence while deciding the appeal on merits.

18. Further it is noticed that no opportunity was afforded to the appellant to file rebuttal evidence, this caused prejudice to the appellant



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because he suffered adverse order from Appellate Court on the basis of additional evidence adduced by the respondent/plaintniff (Ex.A.14 & Ex.A.15).

19. The settled legal position is that when the Appellate Court dealing with an application under Order 41 Rule 27 of the Code of Civil Procedure 1908, should hear the application along with the appeal on merits and consider the evidence to find out the applicability of any one of the clauses of Rule 27, under Order 41 of the Code of Civil Procedure, 1908, in none of the judgments it has been stated that the Order, either dismissing or allowing such application, should be passed simultaneously with the judgment to be pronounced in the appeal or that such an order should be incorporated in the judgement itself. The arrangement of the Rules will make it clear that the normal procedure to be adopted by the Appellate Court, after coming to a conclusion that a party to the proceedings can be permitted to adduce additional evidence is to pass a separate order, thereafter, proceed with the recording of the additional evidence following the procedure contemplated in Rule 28 of Order 41 of the Code of Civil Procedure, 1908 and then pronounce a judgement, taking into account the entire materials, including the additional evidence recorded under Rule 28 of Order 41 of the Code of Civil Procedure,



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1908. Only in exceptional cases, wherein the opposite party states no objection for allowing the application under Rule 27 of Order 41 of the Code of Civil Procedure, 1908 and at the same time expresses consent for making the additional documentary evidence without the necessity of examining any witness in formal proof of such document and comes forward to advance arguments based on such additional documentary evidence also, there cannot be an objection for incorporating the order allowing the application under Rule 27 of Order 41 of the Code of Civil Procedure, 1908 in the judgment in the appeal itself.

20. Therefore, the First Appellate Court had two options, first it could have either set aside the entire judgment/decree of the Trial Court by taking recourse to the provisions of Order 41 Rule 23-A of the Code and remanded the case to the Trial Court for re-trial in the suits so as to enable the parties to adduce oral evidence to prove the additional evidence in accordance with law or second, it had an option to invoke powers under Order 41 Rule 25 of the Code by retaining the appeals to itself and remitting the case to the Trial Court for limited trial on particular issues arising in the case in the light of additional evidence which was taken on record and invite findings of the Trial Court on such limited issues to enable the first appellate court to decide the appeal on



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merits. The First Appellate Court failed to take note of both the above mentioned provisions and proceeded to allow it wrongly. Due to these two jurisdictional errors committed by the First Appellate Court causing prejudice to the appellants herein while opposing the first appeal, the judgment rendered by the First Appellate Court, in my opinion, cannot be sustained legally on merits.

21. Therefore, having regard to the totality of the facts of the case and to enable the parties to have full and fair trial, I considered it proper to take recourse to the powers under Order 41 Rule 23-A of the Court and accordingly, set aside the judgment and decree of the First Appellate Court, but confirmed the order passed in I.A.No.139 of 2006 for adducing additional evidence.

22. In the result, the judgment and decree of the First Appellate Court is hereby set aside and remanded the case to the Trial Court for retrial. The Trial Court, if considered appropriate, can also frame additional issues. The parties will be allowed to adduce additional oral and documentary evidence in addition to one already adduced. The Trial Court will then decide the suit afresh on merits on the basis of entire evidence without being influenced by any of the previous Orders/judgments rendered in this case including this order



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because having formed an opinion to remand the case for re-trial and Trial Court is directed to complete the Trial within 6 months from the date of receipt of a copy of this order, on merits and in accordance with law.

23. With the above directions, this Second Appeal is disposed of. No costs. Consequently, connected miscellaneous petition, if any, is closed.

Index : Yes / No
Internet : Yes / No
mrp

31.07.2024

To

1.The Sub Court,
Mannargudi.

2. The District Munsif Court,
Mannargudi.



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V.SIVAGNANAM, J.

mrp

Pre-Delivery Judgment made
in S.A.No.800 of 2007

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