



S.A.No.537 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on 16.02.2024	Judgment Pronounced on 08.03.2024
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THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No.537 of 2018
and C.M.P.No.15136 of 2018

V.Muniyappan

..Appellant

Vs.

1.T.Settu @ Salappan

2.S.Palani

3.Muniyammal @ Muthulakshmi

4.M.Sakkaravarthi

..Respondents

PRAYER: The Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 19.02.2018 passed in A.S.No.46 of 2017 on the file of the Principal District Judge, Krishnagiri, partly allowing the judgment and decree dated 05.04.2017 passed in O.S.No.195 of 2014 on the file of the Subordinate Judge, Uthangarai.



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For Appellant : Ms.N.Nathami
for Mr.T.S.Baskaran

For Respondents
For R1 : Mrs.AL.Gandhimathi
Senior Counsel
for Mr.A.R.Karthik Lakshmanan

For RR2 to 4 : No appearance

JUDGMENT

This Second Appeal has been filed against the judgment and decree dated 19.02.2018 passed in A.S.No.46 of 2017 on the file of the Principal District Judge, Krishnagiri, partly allowing the judgment and decree dated 05.04.2017 passed in O.S.No.195 of 2014 on the file of the Subordinate Judge, Uthangarai.

2.The 1st defendant in a suit for declaration and permanent injunction is the appellant herein, aggrieved by the reversal findings rendered by the First Appellate Court.

3.The parties are described as per their litigating status before the Trial Court.



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4.The plaintiff's case is that the suit schedule property is a self acquired property, in his possession and enjoyment. The said property consists of two items comprised in S.No.638. The 1st item of the property originally belonged to the 1st defendant, being his ancestral property, which was inherited by the plaintiff. So far as the 2nd item of the suit property is concerned, it belonged to 3rd defendant's mother Jadachiyammal, who sold it to the 4th defendant, from whom, the plaintiff purchased the said two items of the suit property in and by a Sale Deed dated 26.05.2010. The plaintiff has mutated revenue records in his favour and while he was in peaceful possession and enjoyment, the defendants tried to interfere with his possession by attempting trespass. The plaintiff has therefore filed the suit for declaration.

5.The 1st defendant filed a written statement stating that though the 1st item of the suit property belonged to the 1st defendant, the 2nd item of the suit property did not belong to the 3rd defendant. The Gift Deed was denied by the 1st defendant, on the ground that the settlor was not the mother of the 3rd defendant and further, she was also not entitled to item 2 of the suit property.



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According to the 1st defendant, the Settlement Deed was created only to grab the property of the 1st defendant and the entire lands in S.No.638 measuring 2.80 acres was purchased by the paternal grandfather of the 1st defendant on 20.07.1957 and the 1st defendant became entitled to half share at birth and after the demise of his father, the 1st defendant's share increased to 2/3rd. The 1st defendant therefore questioned that the plaintiff's entitlement as not being valid. The 1st defendant, in order to meet the marriage expenses of the 3rd defendant, had spent a sum of Rs.6,00,000/- and in order to celebrate the marriage, he was forced to avail loan and in order to settle the same, the item 1 of the suit property alone was sold to the 4th defendant.

6.The 3rd defendant filed a written statement, which was adopted by the 2nd defendant. According to these defendants, the plaintiff was not in possession and enjoyment of the suit property. The 1st item of the property, being ancestral property, the 1st and 3rd defendants were also entitled to a share in the property and therefore, the sale executed by the 1st defendant, without the consent of the 3rd defendant would not bind the 3rd defendant. According to the 3rd defendant, the Gift Deed in her favour, by her mother Jadachiammal was true and the sale in favour of the 4th defendant was for consideration and also valid.



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7.The Trial Court dismissed the suit, as against which, the plaintiff preferred a First Appeal in A.S.No.46 of 2017. The First Appellate Court partly reversed the judgment and decree of the Trial Court, holding that the defendants were entitled to 93 cents in the 1st item of the suit property and 1 acre in the 2nd item of the suit property and therefore, the plaintiff's entitlement in respect of 1.93 acres was held to be valid. The First Appellate Court also found that the plaintiff was in possession and granted relief of a permanent injunction also. Aggrieved by the said findings of the First Appellate Court, the present Second Appeal has been preferred by the 1st defendant.

8.The above Second Appeal was admitted by this Court on 15.11.2018 on the following two substantial questions of law:

1.Is the lower Appellate Court correct and justified in decreeing the suit especially when the plaintiff has not established his right?

2.Is the decision of the Lower Appellate Court correct in holding that the defendants are entitled to 93 cents in item No.1 and 1.00 acre in item No.2 instead of deciding the plaintiff's right and title?



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9.I have heard Ms.N.Nathami, learned counsel for Mr.T.S.Baskaran, learned counsel for the appellant and Mrs.AL.Gandhimathi, learned Senior Counsel for Mr.A.R.Karthik Lakshmanan, learned counsel for the 1st respondent. The respondents 2 to 4 have chosen to remain exparte.

10.Ms.N.Nathami, learned counsel for the appellant would state that the Trial Court has treated the suit for declaration and injunction, as if it is a suit for partition and proceeded to declare the shares of the defendants, which was totally irrelevant for the purposes of the suit for declaration filed by the plaintiff. The learned counsel for the appellant would further state that the plaintiff was not entitled to any share and on a total non application of mind and misappreciation of the evidence, especially, the character of the suit properties, the First Appellate Court proceeded to partly decree the suit in respect of 93 cents in the 1st item of the suit property and 1 acre in the 2nd item of the suit property.

11.The learned counsel for the appellant would also place reliance on the decision of the Hon'ble Supreme Court in ***Gajara Vishnu Gosavi Vs.***



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Prakash Nanasaheb Kamble and Others reported in ***(2009) 10 SCC 654***,

where the Hon'ble Supreme Court has held that when there was no partition, specific share in the property cannot be claimed and consequently the question of possession also would not arise and at best, the purchaser would become an owner along with the other co-sharers. The Hon'ble Supreme Court also held that a purchaser of a coparcener's undivided interest in the joint family property is not entitled to possession of what he had purchased and his remedy was only to sue for partition and seek for separate allotment of his share.

12.Per contra, Mrs.AL.Gandhimathi, learned Senior Counsel for the 1st respondent would support the findings of the First Appellate Court stating that the 1st defendant cannot be aggrieved in so far as the 1st item of the suit property is concerned, as admittedly, the 1st defendant, even in the written statement, has conceded that the Sale Deed has been executed by the 1st defendant in favour of the plaintiff and has affirmed the validity of the said Sale Deed also. The 1st defendant has also categorically admitted that the possession of the 1st item was handed over to the plaintiff and the objection of the 1st defendant was only pertaining to the 2nd item of the suit property.



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13.The 3rd defendant has not chosen to challenge the decree passed by the First Appellate Court and surprisingly, when the plaintiff approached the Court for declaration and permanent injunction, the First Appellate Court, reversing the judgment and decree of the Trial Court dismissing the suit, passed a decree entitling the defendants to 93 cents in the 1st item of the suit property and 1 acre in the 2nd item of the suit property. As rightly contended by the learned counsel for the appellant, the suit is not for a partition. However, at the same time, the 1st defendant cannot have any grievance in so far as the sale of 1st item of the suit property in favour of the plaintiff which has been specifically admitted by the 1st defendant even in the written statement. Thus, the issue only pertains to 2nd item of the suit property. Unfortunately, the First Appellate Court, while reversing the findings of the Trial Court, granted a decree in favour of the defendants, which is totally unwarranted, illegal and perverse.

14.The learned Senior Counsel for the 1st respondent would bring to my notice that a suit for partition is pending and the shares of the parties can be decided only in the said suit for partition and not in the suit for declaration



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and permanent injunction, at the instance of the plaintiff, only a purchaser of item 2 of the suit property, that too from two different co-owners. A suit in O.S.No.190 of 2020 filed for partition by the appellant herein is pending on the file of the Sub Court, Uthangarai. While so, admittedly, when there has been no partition, at best, the plaintiff would step into the shoes of his vendors, the co-owners and would become entitled to their respective shares as may be declared in the suit for partition. The First Appellate Court has exceeded its jurisdiction in converting the suit for declaration and permanent injunction into a suit for partition. As rightly contended by the learned counsel for the appellant, the plaintiff would not be entitled to the relief of declaration and permanent injunction, without there being a partition decree, declaring the respective shares of the parties.

15.However, at the same time, it has to be made clear that the appellant, having admittedly sold the 1st item of the suit property, cannot have any grievance in so far as the claim of the plaintiff in respect of item 1 of the suit property. As already discussed, none of the other defendants have challenged the sale in favour of the plaintiff. Moreover, even the suit for partition has been filed only by the 1st defendant/appellant herein and not by the other defendants.



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16.At the same time, I find from the written statement filed by the 3rd defendant and adopted by the 2nd defendant in an earlier partition suit in O.S.No.135 of 2010 that the defendants have also categorically admitted the sale of item 1 of the suit property to the plaintiff and they have not questioned the same. Therefore, the issue pertains only to item 2 of the suit property. In any event, the decree passed by the First Appellate Court has to necessarily be set aside since the First Appellate Court has granted a decree for partition in favour of the defendants in a suit filed by the plaintiff, seeking declaration and permanent injunction.

17.However, it is seen that even though the Trial Court had originally dismissed the suit in entirety, it was only the 5th defendant who preferred the appeal before the First Appellate Court. The decree for permanent injunction was not granted and as against the same, the plaintiff has not preferred any appeal and the same has become final. Thus, the plaintiff would not be entitled to the relief of permanent injunction. It is also brought to my notice that a suit in O.S.No.135/2010 which had been filed for partition was dismissed for default and subsequently, another partition suit has been filed in O.S.No.190 of 2020 and same is pending on the file of the Sub Court, Uthangarai. The defendants cannot take any contradictory stand than what



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they have taken in O.S.No.135 of 2010, the earlier suit for partition, where all the parties have admitted the sale in favour of the plaintiff, having been executed by the 1st defendant herein. Therefore, the 1st respondent would be entitled to declaration in so far as item 1 of the suit property alone. In fine, the substantial questions of law are answered accordingly.

18.In the result, the Second Appeal is partly allowed in the following manner:

- (i) The judgment and decree of the First Appellate Court is set aside.
- (ii) The plaintiff is declared to be the absolute owner of the item 1 of the suit property.
- (iii) In so far as the item 2 of the suit property is concerned, the parties shall workout their respective rights with regard to their shares in the said item 2 of the suit property in the pending suit for partition in O.S.No.190 of 2020 on the file of the Sub Court, Uthangarai, and the suit is dismissed in so far as the item 2 of the suit property is concerned.
- (iv) There shall be no order as to costs. Consequently, connected Civil Miscellaneous Petition is closed.

08.03.2024

Index : Yes/No
Speaking Order/Non-Speaking Order
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P.B.BALAJI., J.

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To

- 1.The Principal District Judge, Krishnagiri.
- 2.The Subordinate Judge, Uthangarai.
- 3.The Section Officer, V.R.Section, High Court, Madras.

Pre-delivery judgment made in

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