



S.A.(MD)No.1273 of 2006

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 15.07.2024

CORAM

THE HONOURABLE MR.JUSTICE **S.SOUNTHAR**

S.A.(MD)No.1273 of 2006

Otchayee @ Thangammal

...Appellant

-Vs-

1.The Divisional Excise Officer,
Excise Department, Divisional Excise Office,
O/o.The District Collector Office,
Theni Town.

2.Jamindhar

... Respondents

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree made in A.S.No.5 of 2006 on the file of the Subordinate Court, Uthamapalayam, dated 22.03.2006 confirming the judgment and decree made in O.S.No.21 of 2004 on the file of the District Munsif Court, Uthamapalayam, dated 05.09.2005.



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For Appellant :Mr.A.Arumugam
for M/s.Ajmal Associates

For R1 :Mr.SRA.Ramachandran
Additional Government Pleader

R2 :No Appearance

JUDGMENT

The plaintiff in the suit is the appellant. The suit is for bare injunction restraining the first defendant from bringing the suit property for auction sale in order to recover the amounts due from the second defendant to the first defendant. The suit was decreed by the trial Court and the appeal filed by the plaintiff was dismissed. Hence, challenging the concurrent findings of the Courts below, the plaintiff has come by way of this Second Appeal.

2.According to the appellant/plaintiff, the suit property belonged to her under a partition deed, dated 09.10.1997 and she had been in possession and enjoyment of the suit property, as an owner from the date partition by paying tax to the Government. It was also claimed by the



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plaintiff that the second defendant had no right or possession over the suit property. The second defendant, who participated in an auction of liquor shop conducted by the first defendant, failed to pay the amounts, as per the terms and conditions of the auction and as a consequence, the first defendant suffered a loss and in order to recover the amounts due from the second defendant, the first defendant proceeded against the suit property, which belonged to the plaintiff. Hence, the plaintiff was constrained to file a suit for bare injunction restraining the first defendant from proceeding against the suit property in order to recover the amounts due from the second defendant, who has no right over the suit property.

3.The contesting first defendant had filed a written statement denying the title of the plaintiff over the suit property. It was stated by the first defendant that a sum of Rs.4,42,600/- was due to the first defendant from the second defendant and the partition deed, dated 09.10.1997 was entered into in order to defraud the amounts due to the first defendant. It was also claimed that the the property was worth about several lakhs and the partition deed was under valued and concocted for the purpose of



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present case. It was the claim of the first defendant that the Writ Petition filed by the second defendant challenging the recovery proceedings was suppressed by the plaintiff. It was also claimed by the first defendant that suit for bare injunction was not maintainable without a prayer for title for declaration, when there was a cloud over the title. On these pleadings, the first defendant sought for dismissal of the suit.

4.The second defendant, who is none other the son of the plaintiff, remained *ex parte*.

5.Before the trial Court, the plaintiff was examined as PW-1 and three other witnesses were examined on her side as PW-2 to PW-4 and on the side of the plaintiff, seven documents were marked as Ex-A1 to Ex-A7. On behalf of the defendants, one witness was examined as DW-1 and six documents were marked as Ex-B1 to Ex-B6. The trial Court, on appreciation of oral and documentary evidence available on record, came to the conclusion that the suit property belonged to the second defendant and the plaintiff failed to prove her title over the suit property and



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dismissed the suit. Aggrieved by the same, the plaintiff preferred an appeal in A.S.No.5 of 2006 on the file of the he Subordinate Court, Uthamapalayam. The first appellate Court affirmed the findings of the trial Court and dismissed the appeal. Aggrieved by the same, the plaintiff has come by way of this Second Appeal.

6.The learned Counsel appearing for the appellant submitted that the suit property was originally belonged to Aanga Thevar, father of the plaintiff and after his death in the year 1997, there was a partition among his legal heirs. The suit property was allotted to the share of the plaintiff under the partition deed marked as Ex-A1, dated 09.10.1997. The learned Counsel for the appellant further submitted that the title of the plaintiff's father Aanga Thevar has been proved by producing Ex-A3, sale deed, dated 25.09.1944. The gift deed executed by the plaintiff's mother in favour of the second defendant would not convey absolute title to the second defendant. In nutshell, the learned Counsel for the appellant submitted that the second defendant is not the absolute owner of the suit property and the suit property belonged to the plaintiff absolutely under



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Ex-A1 and hence, the proceedings initiated by the first defendant against the suit property for recovery of the amounts due from the second defendant is not at all sustainable and hence, the plaintiff was entitled to the injunction, as prayed for.

7. Based on the arguments of the learned Counsel for the appellant, the following substantial question of law is taken up for consideration in this Second Appeal:

“Whether the first defendant is entitled to proceed against the entire suit property for the amounts due from the second defendant, when there is no evidence available on record to suggest that the second defendant was the owner of the entire suit property?”

8. The learned Additional Government Pleader appearing for the first respondent was heard on this substantial question of law and the learned Additional Government Pleader for the first respondent submitted



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that the second defendant is none other than the son of plaintiff and at the time of participating in the auction for liquor shop, the second defendant produced the solvency certificate in respect of the suit property, as he was the full owner of the suit property. Therefore, the first defendant is entitled to proceed against the suit property. The learned Counsel further submitted that Ex-A1, partition deed, entered into among the plaintiff and others is only a concocted document just to defeat the rights of the first defendant.

9.In the plaint averments, the plaintiff claims title over the suit property under Ex-A1, dated 09.10.1997, which is a partition deed among the plaintiff, her mother and her sister, where-under, the suit property was allotted to the share of plaintiff under “C” schedule to the partition deed. While tracing the title of the plaintiff, she relied on the sale deed in favour of her father, Aanga Thevar under Ex-A3. The trial Court observed that the survey number of the property covered by Ex-A3 is not relating to the suit property and the plaintiff failed to produce any correlation register to prove before the Courts below that Ex-A3 is relating to the present suit



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property. But however, the first appellate Court on perusal of the boundaries found in Ex-A3 along with the boundaries of the property mentioned in Ex-A1, partition deed, came to the conclusion that originally the property belonged to the father of the plaintiff.

10.Once it is found that the suit property was purchased by the father of the plaintiff, his wife Pappathiammal was not entitled to execute a settlement deed settling the entire property in favour of the second defendant. The Courts below observed that the cancellation of gift deed executed by Pappathiammal cancelling the gift deed in favour of the second defendant was invalid. It is settled law that there cannot be an unilateral cancellation of settlement deed and therefore, the said finding of the Courts below is sustainable. However, Pappathiammal had no right to execute the gift deed in favour of the second defendant in respect of the entire suit property. As one of heir of Aanga Thevar, she was entitled to execute a gift deed only in respect of 1/3 share. The remaining 2/3 share belong to the plaintiff and her sister. In such circumstances, the entire suit property cannot be treated as absolute property of the second defendant.



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The first defendant neither filed the gift deed in favour of the second defendant nor the solvency certificate produced by him. However, from Ex-A5, cancellation of gift deed, dated 23.12.1996, which was marked by the plaintiff, it is clear that the plaintiff's mother, Pappathiammal executed a gift deed in favour of the second defendant.

11.In the absence of any material evidence to show that the entire suit property belong to the second defendant, the first defendant is not entitled to proceed against the entire suit property. As per the evidence available on record, namely, Ex-A3 and Ex-A5, the second defendant could claim only 1/3 of the suit property. The partition deed relied on by the plaintiff is not valid to the extent of 1/3rd share of plaintiff's mother, who settled the property in favour of the second defendant. Hence, it is clarified that the first defendant is entitled to proceed against the 1/3 share of the second defendant's share in the suit property. However, they are not entitled to proceed against the entire suit property.



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12. Accordingly, the substantial question of law is answered in favour of the appellant and against the respondents and the Second Appeal is partly allowed. The appellant/plaintiff is entitled to the limited injunction restraining the first defendant from proceeding against the suit property other than 1/3rd share of the second defendant. It is clarified that the first respondent is entitled to proceed against the suit property only to the extent of 1/3 share of the second respondent and the judgments and decrees passed by the Courts below are modified accordingly. No costs.

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

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To

- 1.The Subordinate Judge, Uthamapalayam.
- 2.The District Munsif, Uthamapalyam.
- 3.The Divisional Excise Officer,
Excise Department, Divisional Excise Office,
The District Collector Office,
Theni Town.
- 4.The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SOUNTHAR, J.

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