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THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 20.03.2024

CORAM:

THE HONOURABLE MRS.JUSTICE S.SRIMATHY

S.A.(MD).No.406 of 2023

and

C.M.P.(MD)Nos.8830 of 2023

Jeeva

... Appellant

/Vs./

Thangamayan

... Respondent

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, to allow the second appeal and set aside the judgment and decree dated 27.09.2022 made in A.S.No.27 of 2022 on the file of the I Additional District Court, Madurai confirming the Judgment and Decree, dated 08.04.2022 made in O.S.No.136 of 2019 on the file of the Subordinate Court, Thirumangalam.

For Appellant : Mr.P.T.Narendravasan

For Respondent : Mr.J.Gunaseelan Muthiah

JUDGMENT

This Second Appeal is filed to set aside the Judgment and Decree, dated 27.09.2022 passed in A.S.No.27 of 2022 on the file of the I Additional District Court, Madurai confirming the Judgment and Decree,



dated 08.04.2022 passed in O.S.No.136 of 2019 on the file of the Subordinate Court, Thirumangalam.

2. The Plaintiff is the Appellant herein and the Defendant is the Respondent herein. For the sake of convenience, the contesting parties shall be referred to as Plaintiff and Defendant.

3. The plaintiff has filed a suit in O.S.No.136 of 2019 for declaration and injunction. The facts of the case as stated by the plaintiff is that the suit property and other properties originally belongs to her father, namely Ponniah Thevar, who is having two wives, namely Petchi (1st wife) and Chinnathai (2nd wife). The Petchi has one son namely Raju Thevar and the said Raju was married to Muthumani and they have one son Jeeva (plaintiff) one daughter Valli and the said Raju Thevar died on 15.01.2011. The defendant Thangamayan is the son of the 2nd wife. The family tree is given below:



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injunction is not maintainable. Thereafter, the plaintiff has filed the present suit in O.S.No.136 of 2019 seeking for declaration and injunction. The said suit was allowed. Aggrieved over the same the defendant had preferred first appeal A.S.No.27 of 2022 and the same was allowed. Aggrieved over the same the plaintiff has preferred the present second appeal in S.A.No.406 of 2023.

5. The contention of the defendant is that the plaintiff is claiming right over the property based on the patta issued to the plaintiff's father Raju Thevar. The said Raju Thevar and the defendant Thangamayan are brothers. But originally the patta was issued in the name of the father Ponniah Thevar and the plaintiff's father had changed and entered his name Raju Thevar in the patta. When the patta was changed the defendant Thangamayan was young and there is huge age difference between the said Raju Thevar and the defendant Thangamayan. Further the defendant is illiterate. Taking advantage of his age and illiteracy, the plaintiff's father Raju Thevar had removed the name of the father and had entered Raju Thevar's name in the patta. Moreover, the said Raju Thevar and the defendant Thangamayan had



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entered into oral partitioned of the suit property and the suit property was allotted to the defendant. The said Raju Thevar was allotted some other property and he has sold the said property which was allotted to the said Raju Thevar. Having sold his share, now the plaintiff is taking advantage of the situation is claiming right over the suit property. Further the defendant is taking steps to change Patta of the suit property and the same is stated in the written statement also. The further contention of the defendant is that the plaintiff has relied on the document which was marked before the Trial below as Ex.A4 in the present suit and the same was created for the present suit since Ex.A4 was not stated or produced in the previous litigation. When the plaintiff has filed the suit for bare injunction, the defendant further has taken steps to file a suit in O.S.No. 278 of 2023 for partition and the same is pending before the Subordinate Court, Thirumangalam. Hence the defendant prayed to dismiss the suit.

6. The present Second Appeal is admitted on the following substantial questions of Law:

1. Whether the lower appellate Court is right in holding that the release deed executed under Ex.A4 has been executed during the pendency of A.S.No.69 of 2018 and



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hence the said document is invalid, particularly when the earlier suit in O.S.No.513/16 and the Appeal in A.S.No.69 of 2018 is only for a bare injunction and the same was dismissed as not maintainable and any how liberty given to the parties to the fresh suit?

2.Whether the lower appellate Court is right in dismissing the suit filed by the plaintiff by discussing the earlier suit particularly the earlier suit is a suit for bare injunction and the present suit is a comprehensive suit for declaration and injunction which is not barred by law and it can be decided independently based on the records and evidence before the Court?

3.Whether the lower appellate Court right in holding that the plaintiff has failed to prove the oral partition taken place during the life time of Ponniah Thevar and dismissed, particularly the defendant who is one of the sons of Ponniah Thevar has categorically admitted in his evidence that there was an oral partition during the lifetime of Ponniah Thevar and Ponniah Thevar settled all his properties among the family members?

4.Whether the lower appellate Court right in holding that the plaintiff has failed to prove that the plaintiff's father Raju Thevar is the owner of the suit property and not as a Karta for joint family particularly after the death of the plaintiff's father i.e., from the year 2011 the defendant has not taken any steps to claim any right over the suit property along with other co-owners and



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more particularly even a liberty was given in the earlier suit, file partition suit till date the defendant has not filed the same to obtain his share in the suit property?

7. As far as the first substantial question of law is concerned, the plaintiff claimed that the suit property belongs to his father Raju Thevar and after his demise the suit property devolves around the plaintiff's mother, sister and the plaintiff himself. Thereafter through Ex.A.4 the plaintiff's mother and sister had executed release deed dated 25.02.2016 and hence the property belongs to the plaintiff. But the contention of the defendant is that the said release deed was created for the purpose of the suit, moreover the release deed was not pleaded when the plaintiff had filed the suit for bare injunction in O.S.No.502 of 2014, hence the veracity of the Ex.A.4 cannot be accepted. After hearing the arguments this Court had given its anxious consideration. It is seen even according to the plaintiff and the defendant the suit property was originally belonged to Ponniah Thevar (grandfather to plaintiff and father to the defendant) and after his demise his two wives had partitioned the suit property orally. But it is seen after the said oral partition, both the wives have not changed the name in the revenue



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records and the same was in the name of the Ponniah Thevar. Suddenly, the revenue records were changed in the name of the plaintiff's father alone. When the patta still stands in the name of Ponniah Thevar, then the claim of the plaintiff that the suit property was allotted to the plaintiff's father is unbelievable. Consequently the Ex.A.4 is not believable and hence the Lower Appellate Court is correct in holding that the release deed executed under Ex.A4, has been executed during the pendency of O.S.No.513 of 2016 and the said fact was not disclosed when the A.S.No.69 of 2018 was pending before the Appellate Court. Further it is seen the patta was changed in the name of the plaintiff in Patta No.462, but the defendant had paid kist receipts on 01.05.2001, 15.04.2006, 21.03.2007 and 12.03.2008 marked as Ex.B1. Therefore, this Court is of the considered opinion that the suit property was in joint possession and enjoyment of the plaintiff's father and the defendant. Hence the Release Deed executed in favour of plaintiff by his mother and sister cannot be sustained. The first substantial question of law is held in favour of the defendant.



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8. As far as the second substantial question of law is concerned, this Court has discussed the same lastly but proceed to discuss the third and fourth substantial question of law.

9. On facts it is seen that the defendant Thangamayan had filed another suit in O.S.No.583 of 2014 to declare him as legal heir of the deceased Ponniah Thevar and the same was allowed. Based on the same the said Thangamayan had submitted application before Revenue authorities for changing Patta in his name. The plaintiff sensing that the defendant would claim right over the property had hurriedly made plaintiff's mother and sister to execute the released deed in the plaintiff's name, pending the other suit in O.S.No.513 of 2016. Based on these facts, it would indicate that the property was not partitioned at all. Furthermore, the plaintiff while filing the suit for bare injunction in O.S.No.513 of 2016 had stated that the suit property was orally partitioned between the plaintiff's father Raju Thevar and his grandfather Ponniah Thevar and the suit property was allotted to the share of the plaintiff's father. But in the present suit in O.S.No.136 of 2016 filed for declaration and injunction the plaintiff had stated in the plaint that while



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the plaintiff's grandfather was alive the suit property was partitioned among the two wives namely Petichi and Chinnathayee. On perusing this it is seen that the plaintiff had taken two different stands, that too inconsistency stand in both the suit suits. Also, it is seen that the revenue document Patta still stands in the name of the Ponniah Thevar until the demise of his two wives and the plaintiff's father Raju Thevar taking advantage of the age difference with his step brother Thangamayan had changed patta in his name. It is also noted that the plaintiff and the defendant had stated that "the suit property and other properties are partitioned among the said Petchi and Chinnathayee", but both the plaintiff and the defendant had not stated the list of other such properties, had not stated which property was allotted to whom, whether the said property was retained or sold etc. Based on the aforesaid factual matrix, this Court is of the considered opinion that the suit property is the only property allotted to the said Petchi and Chinnathayee after the life time of the Ponniah Thevar.

10. Thereafter the son of Petchi namely Raju Thevar and the son of the Chinnathayee namely Thangamayan are entitled to equal share



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in the suit property. Therefore, the prayer of declaration and injunction cannot be granted to the plaintiff. Hence for the third substantial question of law is answered by holding that both the plaintiff and the defendant are entitled to equal share in the suit property.

11. As far as the fourth substantial question of law is concerned, since this Court had held that both the plaintiff and the defendant are equally entitled to the suit property as stated supra, the fourth substantial question of law is held against the plaintiff, that is the plaintiff has failed to prove that the plaintiff's father Raju Thevar is the owner of the suit property. Further the defendant had filed suit for partition in O.S.No.278 of 2023, which is pending and the rights of the plaintiff and the defendant would be determined in the partition suit.

12. As far as the second substantial question of law is concerned, the contention of the plaintiff is that in the earlier suit the plaintiff had filed the suit for bare injunction and when the defendant had rival claim for the title over the suit property, then it is appropriate to file a suit for declaration and injunction, hence the plaintiff had filed a suit



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for declaration and injunction. But the Appellate Court has held that the present suit is not maintainable and hence the second substantial question of law was raised. The defendant submitted that as on date the suit for partition pending and the present suit for declaration and injunction cannot be entertained. It is seen that the Appellate Court had held that the suit property ought to be partitioned among the legal heirs and hence the suit for declaration and injunction is not maintainable. Based on the pleadings, evidence and based on the aforesaid facts discussed in earlier paragraphs this Court is of the considered opinion that when there are inconsistencies regarding the plea of oral partition, then the suit for partition would be that appropriate remedy. Therefore, the Appellate Court is right in holding that the suit is not maintainable and the second substantial question of law is held against the plaintiff.

13. Accordingly, this Second Appeal stands dismissed. The Judgment and Decree, dated 27.09.2022 passed in A.S.No.27 of 2022 on the file of the I Additional District Court, Madurai, setting aside the Judgment and Decree, dated 08.04.2022 passed in O.S.No.136 of 2019 on the file of the Subordinate Court, Thirumangalam, is hereby



confirmed. No Costs. Consequently, connected miscellaneous petition is closed.

20.03.2024

Index : Yes / No
NCC : Yes / No
KSA

TO:

1. The I Additional District Court,
Madeira.
2. The Subordinate Court,
Thirumangalam.
3. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SRIMATHY, J.

KSA

Judgment made in
S.A.(MD)No.406 of 2023

Dated:
20.03.2024