



S.A.(MD)No.155 of 2018

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 01.08.2024

PRONOUNCED ON: 20.12.2024

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

S.A.(MD)No.155 of 2018

and

C.M.P.(MD)Nos.4072 and 4073 of 2018

Rajeswaran : Appellant/2nd Respondent/2nd Defendant

Vs.

1.Saifulla : 1st Respondent/Appellant/1st Plaintiff

2.Narayanan : 2nd Respondent/3rd Respondent/
2nd Plaintiff

3.M.M.Jamal Mohaideen : 3rd Respondent/1st Respondent/
1st Defendant

PRAYER:- Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree made in A.S.No.137 of 2017, dated 14.02.2018, on the file of the Sub Court, Tiruchendur, reversing the judgment and decree passed by the District Munsif Court, Tiruchendur in O.S.No.13 of 2009, dated 28.02.2013.



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For Appellant : Mr.S.Kumar

For Respondents :Mr.R.Subramanian
for R.1
:Mr.R.Pon Karthikeyan
for R.2
:No Appearance
for R.3

JUDGMENT

The Second Appeal is directed against the judgment and decree passed in A.S.No.137 of 2017 dated 14.02.2018, on the file of the Subordinate Court, Tiruchendur, reversing the judgment and decree made in O.S.No.13 of of 2009, dated 28.02.2013, on the file of the District Munsif Court, Tiruchendur.

2. The suit is for declarations and injunction.

3. The appellant is the second defendant and the respondents 1 and 2 as plaintiffs have filed the above suit to declare that the fourth schedule of suit property absolutely belongs to the first plaintiff and for consequential permanent injunction restraining the defendants and their men from in any manner interfering with the plaintiffs' peaceful



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possession and enjoyment of the said property and to declare that the sale deed dated 19.12.2005 executed by the first defendant in favour of the second defendant in respect of fourth schedule of property and registered on 21.12.2005, on the file of the Tiruchendur SRO is null and void.

4. For the sake of convenience and brevity, the parties will hereinafter be referred as per their status/ranking in their original suit.

5. The case of the plaintiffs is that originally, the suit properties and other properties belonged to one Mohammed Mohideen Maraikayar, that he had three sons namely Noohu Maraikayar, Ibrahim Maraikayar and Mahadoom Meera Sahibu, that Mohammed Mohideen Maraikayar, after giving his properties to his legal heirs through gift deeds, died in the year 1969, that he partitioned his properties at Columbu and gave it to his sons Noohu Maraikayar, Mahadoom Meera Sahibu and that the said Mohammed Mohideen Maraikayar executed a registered Will dated 07.08.1973 bequeathing 1st and 2nd schedule of properties to Noohu Maraikayar and Mahadoom Meera Sahibu and all the remaining properties to his sons Noohu Maraikayar, Mahadoom Meera Sahib and the first plaintiff , son of Ibrahim Maraikayar and directed them to



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partition the suit properties equally after his death, that subsequently there arose some disputes, that Mahadoom Meera Sahibu has filed a suit in O.S.No.97 of 1977 claiming partition in respect of the gifted properties on the file of the Subordinate Court, Tuticorin, that the first plaintiff has also filed a suit in O.S.No.149 of 1978 claiming partition in respect of the Will properties on the file of the Subordinate Court, Tuticorin, that after joint trial, the suit in O.S.No.97 of 1977 was decreed and whereas the suit in O.S.No.149 of 1978 was ordered to be dismissed on 22.02.1985, that two appeals came to be filed in A.S.Nos.34 of 1985 and 35 of 1985 and the first appellate Court has passed a judgment dated 15.09.1989 reversing the judgment of the trial Court and thereby decreed the suit in O.S.No.149 of 1978 and dismissed the suit in O.S.No.97 of 1979, that the second appeals came to be filed before this Court in S.A.Nos.1610 of 1989 and 1611 of 1989, that since Noohu Maraikayar had died, his LR's came to be impleaded in the appeal, that this Court has passed a compromise judgment on 09.07.2002, wherein the properties containing 30 items admeasuring 83.96 Acres were shown as 16(A) item of properties and out of which, 20 Acres were allotted to Mahadoom Meera Sahibu – first defendant and Ahammed Meera Nachi each and the remaining extent of 23.86 Acres were allotted to the first plaintiff, that



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the father of the first defendant Mahadom Meera Sahibu had sold away 20 Acres of his properties in 16(A) item of properties in favour of Sivasubramania Nadar, Sivanesan Nadar, Saraswathi Ammal and Muthulakshmi through various sale deeds, that the properties belonging to the first plaintiff in 16(A) item of properties were shown as third schedule, out of which the first plaintiff had already sold the 11th item of properties to third parties through various sale deeds, that the said property was shown as 4th schedule property in the suit schedule, that the 4th schedule property belongs to the first plaintiff found in the 16(A) item properties and that the first defendant had no right to execute any sale deed in respect of the 4th schedule property and that therefore, the plaintiffs were constrained to file the above suit.

6. The defence of the defendants is that the suit properties and other properties originally belonged to Mohammed Mohideen Maraikayar and subsequent to his death, the first defendant's father had filed the suit in O.S.No.97 of 1997, on the file of the Subordinate Court, Tuticorin for partition, that the first plaintiff had also filed a suit in O.S.No.149 of 1978, that two second appeals were preferred before the High Court in S.A.Nos.1610 and 1611 of 1989, challenging the judgment



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and decree passed by the first appellate Court, that the High Court has passed a compromise decree dated 09.07.2002 allotting the properties, that the properties admeasuring 83.86 Acres were shown as 16(A) item properties and the same was divided into 4 shares in which each 20 Acres were allotted to Mohadoom Meera Sahibu, Noohu Maraikayar and Ahammedu Meera Nachi and the property having extent of 23.86 Acres in 16(A) item properties was allotted to the first plaintiff, that subsequently Mahadoom Meera Sahibu had sold away the first schedule properties, whereas the second schedule properties were shown as security for the same, that the first defendant had sold away the self acquired properties in favour of one Sulaika Beegi and Jamrath Nisha through various sale deeds in respect of the properties left by Mahadoom Meera Sahibu, that the properties sold in favour of Muthu Lakshmi and Saraswathi Ammal are not the part of 16(A) item properties and that therefore, the suit is liable to be dismissed.

7. The learned trial Judge, upon considering the pleadings of both parties, has framed the following issues:

1. Whether the 4th schedule property belongs to the plaintiffs?



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2. Whether the plaintiffs are having right possession over the 4th schedule property?

3. Whether the plaintiffs are entitled to get the decree of declaration as prayed for?

4. Whether the plaintiffs are entitled to get the decree of permanent injunction as prayed for?

5. Whether the plaintiffs are entitled to get the decree of declaration as the Will dated 11.12.2005 is null and void?

6. Whether the suit is bad for non joinder of necessary parties?

7. Whether the Court fee paid is correct?

8. What about the suit cost?

9. To what other relief?

8. During trial, the first plaintiff has examined his son Ibrahim as P.W.1 and exhibited 3 documents Exs.A.1 to A.3. The defendants have examined the second defendant as D.W.1 and exhibited 7 documents as Exs.B.1 to B.7. The learned trial Judge, upon considering the pleadings and the evidence both oral and documentary and on hearing the arguments of both sides, has passed a judgment dated 28.02.2013 dismissing the suit. Aggrieved by the dismissal of the suit, the plaintiff



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has preferred an appeal in A.S.No.137 of 2017 and the learned Subordinate Judge, upon considering the materials available on record and on hearing the arguments of both sides, has passed the impugned judgment and decree dated 14.02.2018 reversing the judgment and decree of the trial Court and granted the declarations and injunction as sought for. Aggrieved by the impugned judgment and decree, the present Second Appeal came to be filed.

9. It is evident from the records that two Substantial Questions of Law came to be formulated as if the Courts below have decreed the suit, but the first appellate Court has reversed the judgment and decree passed by the trial Court and hence, the following Substantial Questions of Law are formulated.

(1) Whether the first appellate Court is right in decreeing the suit by shifting the burden of proof on the defendants without deciding the case of the plaintiffs?

(2) Whether the first appellate Court is right in not drawing adverse inference against the first plaintiff who did not enter into witness box to prove his case, when the plaintiffs did not prove their case?



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(3) Whether the judgment and decree of the first appellate Court is made in A.S.No.137 of 2017 dated 14.02.2018, is liable to be interfered with?

10. It is pertinent to mention that the learned Subordinate Judge, after conducting joint trial, passed a common judgment dated 22.02.1985 decreeing the suit in O.S.No.97 of 1997 and dismissing the suit in O.S.No.149 of 1978, that challenging the above common judgment, the first plaintiff Saifulla and 12 others has preferred two appeals in A.S.Nos. 34 and 35 of 1995, on the file of the District Court, Tirunelveli and the learned District Judge has allowed both the appeals and thereby setting aside the common judgment passed by the trial Court and wherein the suit in O.S.No.97 of 1997 was ordered to be dismissed and the suit in O.S.No.149 of 1978 was ordered to be decreed. Aggrieved by the judgment of the first appellate court, Noogu Maraikayar and Makdoom Meera Sahib filed two Second Appeals in S.A.Nos.1610 and 1611 of 1989 before this Court and pending appeal, since Noogu Maraikayar had died, his LRs., were brought on record as appellants 3 to 12 in S.A.No. 1610 of 1989 and respondents 15 to 24 in S.A.No.1611 of 1989.



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11. It is pertinent to mention that pending second appeals, the parties have entered into an amicable settlement and on that basis, the second appeals were disposed of in terms of settlement, vide judgment dated 09.07.2002. It is admitted by both parties that this Court in the Second Appeals, has passed a common judgment and on that basis, decree came to be passed allotting the properties to the plaintiffs and the defendants 1 to 3 in O.S.No.97 of 1977 separately. As rightly contended by the learned Counsel on either side, in the present second appeals, we are concerned with the properties shown in item 16(A) of first schedule situated in Paramankurichi village and that the plaintiffs in O.S.No.97 of 1977 were allotted with 20 Acres. The defendants 1 and 3 were allotted with 20 Acres each and the second defendant (first plaintiff herein) was allotted with 23.86 Acres in item 16(A) of the first schedule of the properties therein.

12. It is pertinent to note that the parties to the present proceedings would also admit categorically that the first defendant's father was allotted with 20 Acres, Noogu Maraikayar was allotted with 20 Acres and whereas the first plaintiff was allotted with 23.86 Acres in item 16(A).



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The case of the plaintiffs is that the first defendant's father Mohammed Mohideen Maraikayar sold some of the properties in favour of one Sivasubramania Nadar and one Sivanesan Nadar, vide sale deed dated 29.04.1977, that the first defendant himself had sold away some properties in favour of one Saraswathi Ammal and Muthulakshmi Ammal vide sale deed dated 16.03.1994, that the first defendant and his father had sold away total extent of 25.96 Acres in item 16(A) of the properties found in compromise decree, but they had right over the property only to the extent of 20 Acres, that the third schedule property admeasuring 23.86 acres were allotted to the first plaintiff in which, the fourth schedule property was shown as part and parcel of the properties which were allotted to the first plaintiff and that therefore, the sale deed executed by the first defendant in favour of the second defendant in respect of item 4 of the suit property is null and void.

13. It is not in dispute that this Court while passing the compromise judgment and decree directed the plaintiffs and the defendants 1 to 3 in O.S.No.97 of 1977 to file a memo in terms of the above allotment taking possession of their respective shares within 30



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days from the date of receipt of a copy of the said order before the Subordinate Court, Tuticorin. But admittedly no party has filed such a memo before the Subordinate Court, Tuticorin in pursuance of the directions of this Court.

14. The learned Counsel for the appellant would submit that there is no final decree passed based on the judgment in S.A.Nos.1610 and 1611 of 1989 and they did not take any steps for passing of final decree. But as rightly pointed out by the learned Counsel appearing for the respondents, this Court, after recording the settlement between the parties, while passing the judgment, has also passed a decree allotting the properties to the parties concerned separately.

15. The first plaintiff by alleging that the fourth item of the suit property is belonging to him, has claimed declaration of his title to the said property and for consequential permanent injunction and also claimed declaration that the sale deed executed by the first defendant in favour of the second defendant dated 19.12.2005 is null and void. It is settled law that in a suit for declaration of title, the burden is on the plaintiff to establish his title to the suit property and that in such a suit,



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the plaintiff could succeed only on the strength of his own title and not on the weakness of the case of the defendant.

16. The Hon'ble Supreme Court in the case of ***Union of India and others Vs. Vasavi Co-operative Housing Society Ltd., and others*** reported in 2014(2) SCC 269 has specifically observed that it is trite law that, in a suit for declaration of title, burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff.

17. It is not in dispute that the suit properties and other properties originally belonged to Mohammed Mohideen Maraikayar and he had three sons namely Noohu Maraikayar, Ibrahim Maraikayar and Mahadoom Meera Sahibu, that the said Ibrahim Maraikayar died in the year 1969 leaving behind his son Saifulla, first plaintiff and daughter Ahamed Meera Nachi, that the said Mohammed Mohideen Maraikayar had given properties to his sons and the children of the deceased son vide gift deeds and also executed a registered Will dated 07.08.1973, whereunder he settled suit 1 and 2 item of the suit properties in favour of



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Noohu Maraikayar and Mahadoom Meera Sahibu and bequeathed his remaining properties to Noohu Maraikayar, Mahadoom Meera Sahibu and his grand son Saifulla (first plaintiff).

18. It is also not in dispute that Mahadoom Meera Sahibu, after the death of his father Mohammed Mohideen Maraikayar, has filed a suit for partition in O.S.No.97 of 1997, on the file of the Subordinate Court, Tuticorin against the first plaintiff and 28 others. It is also not in dispute that the first plaintiff has filed a suit in O.S.No.149 of 1978 claiming partition in respect of the properties bequeathed under a Will against his father's brothers Noohu Maraikayar and Mahadoom Meera Sahibu.

19. At the outset, it is pertinent to note that the first plaintiff who filed the suit and claimed the reliefs, has not chosen to enter into the witness box, whereas he has chosen to examine his son as P.W.1 and P.W.1 would admit that he is not aware of anything with regard to the properties prior to 2002. Similarly the first defendant who is also claiming title to the fourth item of the suit property has not chosen to enter into the witness box whereas his purchaser – second defendant has entered into the witness box. Though the plaintiffs' side has alleged that



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the first plaintiff was aged and not well, both parties have not offered any acceptable reason or explanation for not deposing before the concerned Court. Though both parties have alleged that there were two suit proceedings and the consequent first and second appeal proceedings, the plaintiffs' side have produced only the copies of the judgment and decree passed in S.A.Nos.1610 and 1611 of 1989 and not the original as well as the first appellate Court records.

20. It is pertinent to note that in the judgment and decree passed by this Court in the Second Appeals, the details about the properties in item 16(A) are not all shown. As rightly contended by the learned Counsel for the defendants, though the plaintiffs had alleged that the first defendant and his father had sold away the first and second schedule of properties to the third parties, which were form part of 16(A) item of the properties, has miserably failed to prove the same. The plaintiffs have only produced the copies of the sale deed executed by the first defendant in favour of one Subaitha Beevi dated 07.11.2002 and the copy of the sale deed executed by the first defendant in favour of the second defendant dated 19.12.2006 now under challenge, whereas the defendants have produced the copy of the sale deed executed by the first



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plaintiff – Saifulla in favour of one Senthur Selvi and except the above sale deeds, they have not produced any other sale deeds allegedly made by the first defendant and his father and also by the first plaintiff.

21. As rightly contended by the learned Counsel for the defendants, though the plaintiffs have alleged that though the first defendant and his father were allotted only 20 Acres, they have sold 25.96 Acres, they have not chosen to produce the sale deeds alleged to have been executed by the first defendant's father in favour of Sivasubramanian Nadar and Sivanesan Nadar and the sale deed executed by the first defendant in favour of Saraswathy Ammal and Muthulakshmi Ammal and the extent sold therein. Though the first plaintiff has alleged that he sold items 1 to 11 of the third schedule properties and that he is having remaining extent, he has not chosen to produce the sale deeds executed by him and the extent therein.

22. It is pertinent to note that neither the plaintiff nor the defendants have chosen to produce the documents to identify 16(A) properties. Though both of them have alleged about 16(A) properties in their pleadings, they have neither produced any materials nor evidence to



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show the properties covered under item 16(A) properties. As rightly contended by the learned Counsel for the plaintiffs, the defendants have also not produced any iota of materials to show which properties came to be allotted to them in 16(A) of the properties and that they have sold only 20 Acres which came to be allotted to the first defendant's father by the High Court and that there was no excess sale.

23. The learned Counsel for the plaintiffs would rely on the sale deed executed by the first defendant in favour of the second defendant under Ex.B.2 (Ex.A.1) that the recitals in the said document are false and fraudulent. No doubt, as rightly pointed out by the learned Counsel for the plaintiffs, in Ex.A.2, the first defendant has traced out the title from his grandfather Mohammed Mohideen Maraikayar, the gift deed and the Will executed by him and after his death, there was a oral partition between Noohu Maraikayar, Mahadoom Meera Sahibu and the first plaintiff. Admittedly, there is no reference to the compromise judgment and decree passed by this Court in the Second Appeals.

24. The learned Counsel for the plaintiffs would contend that the defendants in the written statement has disputed the genuineness of the



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Will dated 07.08.1973 alleged to have been executed by Mohammed Mohideen Maraikayar, but he has sold the property tracing out the title from the said Will and not through the common judgment. But at the same time, as rightly contended by the learned Counsel for the defendants, the first plaintiff has also executed a sale deed in favour of one Senthur Selvi on 30.08.2004 under Ex.A.2. He has also traced out the title in the same manner as in Ex.A.2 and he has also not referred about the compromise judgment and decree passed in the Second Appeal. It is necessary to refer the similar portion in Exs.A.2 and B.2 hereunder:

“..... 07.08.1973 - ல் எனது தகப்பனாரைப் பெற்ற ம.முகமது முகைதீன் மரைக்காயர் திருச்சேந்தூர் சார்பதிவு அலுவலகம் 3.32.93 - 95.14 / 1973 - நீராக பிறப்புவித்து வைத்துள்ள உயில் துதாவஜம்பு தேன் தபசிலில் என் பெயருக்கும் எனது தகப்பனாரின் சுகாதாரர்கள் நூகமரைக்காயர் (1)இ மகுதூம் மீரா சாகிபு மரைக்காயர் (2) ஆகிய எங்கள் மூவர் பெயருக்கும் எழுதி வைத்து இம்மற்படியார் காலங்சென்றபின் :ரத்தில் சொல்லியபடி எங்கள் மூவருக்கும் ஜாயிண்டாய் கிடைத்து அனுபவித்து வந்து பின் வாய்மொழி பாகம் செய்துகொண்டதில் “

25. But the learned first appellate Judge has observed that the



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defendants have not given any particulars about the oral partition alleged in Ex.A.2 and that they have not even furnished the date on which the oral partition was held and the properties which came to be allotted to the parties. But as already pointed out, the plaintiffs have also executed a sale deed tracing out the title through Will and oral partition and he has also not furnished any particulars about the alleged oral partition. As rightly observed by the learned trial Judge, the plaintiffs have not produced any iota of materials to show that the first plaintiff has taken possession of the fourth item of the suit property and has been in possession and enjoyment of the same. Though the plaintiffs have alleged that one Sivakumar was in possession of the suit property as cultivating tenant and subsequently the second plaintiff has been in possession and enjoyment of the property as cultivating tenant, admittedly, the first plaintiff has not produced any lease agreement or any other document to show that the said Sivakumar or the second plaintiff remained as cultivating tenant in respect of the suit property under the first plaintiff.

26. As already pointed out, since the plaintiffs alone have filed the



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suit and claimed declaration of title, it is for him to establish his case and he cannot take advantage of the loopholes or the defects in the defence. As rightly contended by the learned Counsel for the plaintiffs, the first appellate Court has put the entire burden on the first defendant to disprove the case of the plaintiffs and the way in which the onus was shifted cannot be sustained.

27. Considering the above, the learned trial Judge has rightly come to a decision that the plaintiffs have miserably failed to prove their case and as such, they are not entitled to get any of the reliefs. Hence, the Substantial Questions of Law are decided in favour of the defendants and against the plaintiffs. This concludes that the the judgment and decree passed by the first appellate Coure are liable to be interfered with and as such, the Second Appeal is liable to be allowed. Considering the other facts and circumstances, this Court is of the view that the parties are to be directed to bear their own costs.

28. In the result, the Second Appeal is allowed, by setting aside



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the judgment and decree made in A.S.No.137 of 2017, dated 14.02.2018, on the file of the Sub Court, Tiruchendur, and by restoring the judgment and decree passed by the District Munsif Court, Tiruchendur in O.S.No. 13 of 2009, dated 28.02.2013. The parties are directed to bear their own costs.

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

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To

1. The Subordinate Court, Tiruchendur.
2. The District Munsif Court, Tiruchendur.
3. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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K.MURALI SHANKAR,J.

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PRE-DELIVERY JUDGMENT MADE IN

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