

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 01.10.2015

CORAM:

THE HON'BLE MR. JUSTICE P.R.SHIVAKUMAR

Second Appeal No.836 of 2000

1. V.Mariappan (died) ...Appellant/2nd Defendant

2. Dhanam

3. Shanthi

4. Tamilvannan

5. Selvam

6. Thiruvengadam

7. Murthy

8. Kathiravan

9. Tamilselvi

10.Nagaboopathy

[Appellants 2 to 10 are brought on record as LRs the deceased sold appellant vide order dated : 15.10.2013 made in CMP No.13819 of 2002]

...Appellants

Vs

1. V.Uthirapathy (deceased)

2. V.Nagarajan

Rep.by his Power of Attorney
Pakkirisamy

3. V.Jayaraman

4. Punithavalli

5. Sakku @ Govindammal

6. V.Jayalakshmi

...Respondents 1 to 6/
Plaintiffs & D1, 3 to 6

7. Nagalakshmi

8. Mathivanan

9. Kalaivanan

10.Tamilvanan

11.Minor Karthikeyan

represented by mother & guardian
7th respondent Nagalakshmi

[RR7 to 11 are brought on record as LRS of the deceased 1st Respondent vide under dated 15.10.2013 made in CMPs No. 10189 to 10192 of 2002]

...Respondents

Prayer:

Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree of the Additional District Judge, Nagapattinam dated 17.11.1999 made in A.S.No.39 of 1998 confirming the Judgment and decree of the Additional Subordinate Judge, Mayiladuthurai dated 31.07.1996 made in O.S.No.166 of 1993.

For Appellants : Ms.K.M.Nalinishree

For Respondents : Mr.S.Sounthar for R7 to R11

For Respondents 2, 3
5 and 6 : No appearance

For Respondent 4 : Died

JUDGMENT

For the sake of convenience, the parties are referred to in accordance with their ranks in the original suit and in appropriate places, their ranks in the second appeal shall also be referred to.

2. The second appeal has arisen from the judgment of the lower appellate court dated 17.11.1999 made in A.S.No.39 of 1998 confirming the preliminary decree dated 31.07.1996 for partition granted by the trial court in O.S.No.166 of 1993 on the file of the Court of the Additional Subordinate Judge, Mayiladuthurai. The above said suit was filed by Uthirapathy, the deceased plaintiff (first respondent herein) for partition claiming 1/7th share in the suit properties. According to his contention, the suit properties were the self-acquisitions made by his father Vaithialingam Padayachi; that on his death, his property devolved upon his widow and children; that on the death of the widow of Uthirapathy, her share also equally devolved upon their children and that thus he became entitled to 1/7th share in the properties left by Vaithialingam, namely the suit properties. The relationship between the parties is not disputed. The first plaintiff Uthirapathy and defendants 1 to 3, namely Nagarajan, Mariappan and Jayaraman are the sons of Vaithialingam, whereas the defendants 4 to 6 are the daughters of Vaithialingam. Based on his contention that the suit properties were the self-acquisitions of Vaithialingam, the plaintiff Uthirapathy claimed 1/7th share and sought the relief of partition and separate possession.

3. The suit was resisted by Nagarajan and Mariappan, the first and second defendants alone. The fourth defendant conceded the prayer made by the plaintiff, whereas the other defendants remained ex-parte. It was the contention made by the defendants 1 and 2 that they were also earning while they were along with their father in Singapore and that the earnings made by all of them were used for the acquisition of the properties in question. Thus they claim that the suit properties were the properties of the Hindu Undivided Family consisting Vaithialingam and his four sons; that Vaithialingam had got only 1/5th share and that the 1/5th share, on his death alone devolved on the legal heirs of Vaithialingam. Besides the above said plea, the defendants 1 and 2 also contended that the defendants 4 to 6, namely the daughters of Vaithialingam were totally excluded from having a share in the property either as member of the joint family or as legal heirs of Vaithialingam.

4. Necessary issues were framed and a trial was conducted in which one witness was examined as PW1 and six documents were marked as Ex.A1 to A6 on the side of the plaintiff. The first defendant Mariappan was examined as DW1 and only one document was marked as Ex.B1 on the side of the defendants 1 and 2.

5. The learned trial Judge, upon considering the pleadings and evidence, accepted the case of the plaintiff that the suit properties were the self-acquisitions of Vaithialingam and such acquisitions were made after the Hindu Succession Act, 1956 coming into force. Accordingly, the learned trial Judge accepted the case of the plaintiff in toto and rejected the claim of the first and second defendants that the properties were the joint family properties of Vaithialingam and his sons and their further contention that the daughters were excluded from having a share in the suit properties. As a result of the said findings, the learned trial Judge held the plaintiff to be entitled to an undivided 1/7th share in the suit properties and granted a preliminary decree, directing division of the suit properties into seven equal shares and allotment of one such share to the plaintiff.

6. Aggrieved by the same, the second defendant Mariappan alone preferred an appeal in A.S.No.39/1998 on the file of the Additional District Judge, Nagapattinam against the preliminary decree passed by the trial court. The learned lower appellate judge after hearing, concurred with the findings of the trial court in all respects and dismissed the

appeal by a judgment and decree dated 17.11.1999 and thereby confirmed the preliminary decree passed by the trial court. As against the said decree of the lower appellate court confirming the preliminary decree passed by the trial court, the present second appeal came to be filed by the second defendant in the original suit.

7. The second appeal was admitted on 20.09.2000 noticing the following to be the substantial question of law that has arisen for consideration in the second appeal:

"Whether the courts below erred in holding that the properties are not joint family properties of Vaithilinga Padayachi, plaintiff and defendants 1 to 3, when the daughters, viz., defendants 4 to 6 have not chosen to file any statement claiming that the properties are self-acquired properties of Vaithilinga Padayachi?"

8. The arguments advanced by Ms.K.M.Nalinishree, learned counsel for the appellants and by Mr.S.Sounthar, learned counsel for the contesting respondents are heard. The materials available on record are also perused.

9. It is the clear case of the plaintiff that there was no joint family nucleus yielding income, which could have been used for the purchase of the properties in question. Admittedly, Vaithialingam had gone to Singapore and was employed there. None of the suit properties came to be purchased during the period he was employed in Singapore. Admittedly, Vaithialingam came down to India in 1952. Either with the funds he brought from Singapore or with the earnings made by him after having come down to India, Vaithialingam purchased the suit properties by various sale deeds from 1958 to 1965. It is not the case of the contesting defendants that there was any joint family nucleus yielding income with the help of which the properties in question came to be purchased. On the other hand, it is their contention that they had also gone to Singapore and they had given their earnings made through their employment at Singapore to their father Vaithialingam; that with the corpus thus constituted by the contribution of Vaithialingam and the defendants 1 and 2, the properties in question came to be purchased and that hence the suit properties were the properties of the Hindu Undivided Family consisting of Vaithialingam and his four sons as co-parceners. After traversing the pleadings and the evidence adduced on both sides and especially referring to the fact that there was no proof of any contribution having been made by the contesting defendants for the purchase of the

properties in question, the learned trial Judge rendered a finding of fact that the suit properties were purchased solely with the self-earned funds of Vaithialingam and that hence they were the self-acquisitions of Vaithialingam made after the Hindu Succession Act, 1956 came into force. Accordingly, the learned trial Judge held that on the death of Vaithialingam in the year 1980, his properties devolved equally upon his widow and seven children; that on the death of his widow in the year 1990, her share equally devolved upon her seven children and that thus the plaintiff and the defendants 1 to 6 became entitled to 1/7th share each. In line with the above said findings, the learned trial Judge decreed the suit and granted a preliminary decree for partition declaring the plaintiff's share to be 1/7th and directing separation of the same from the rest. On appeal also, the learned lower appellate court, the final court of appeal on facts, has rendered a factual finding concurring with the finding rendered by the trial court, regarding the source of funds for the acquisition of the properties in question in the name of Vaithialingam. Accordingly, the learned lower appellate Judge concurred with the other findings of the trial court and dismissed the appeal preferred by the second defendant. The present second appeal is directed against the said concurrent findings of the courts below.

10. It is pertinent to note that the 4th defendant, one of the daughters of Vaithialingam, supported the case of the plaintiff and conceded the prayer made by the plaintiff. The defendants 3, 5 and 6 remained ex-parte. The fact that they remained ex-parte and they did not file any written statement denying the plaint averments will amount to an admission of the plaint averments on their part. On the other hand, in the second appeal, the non-filing of the written statement by the defendants 4 to 6 is sought to be projected as a ground for contending that they were not supporting the case of the plaintiff that the suit properties were the self-acquired properties of Vaithialingam. Such a contention is far fetched and is not a tenable one. When a party defendant does not file a written statement denying the plaint averments, the inference shall be that he does not dispute the correctness of the plaint averments. The mere failure to file written statement by those persons will not amount to a contention supporting the contention of the contesting defendants. When the plaintiff had taken a clear plea that the suit properties were not the joint family properties of Vaithialingam and his sons and it was also conceded by the 4th defendant, besides the failure of the defendants 3, 5 and 6 to dispute and deny the plaint averments, the contesting defendants cannot be

permitted to contend that the other defendants including defendant No.4, who conceded the claim of the plaintiff, were taking a stand that the suit properties were not the self-acquired properties of Vaithialingam. Hence the question formulated as the substantial question of law itself has been drafted on a misconception and by an intelligent device it is sought to be projected as a substantial question of law involved in the second appeal. In fact, there is no such substantial question of law involved in the second appeal. On the other hand, a finding of fact rendered by the courts below concurrently is challenged in the second appeal. Unless such finding of fact is proved to be perverse, the factual issue cannot be elevated to the level of a substantial question of law. As this court is of the considered view that the finding rendered by the courts below to the effect that the suit properties were the self-acquired properties of Vaithialingam cannot be termed either defective or infirm, much less perverse, there is no scope for interference with the same in the second appeal and the second appeal deserves to be dismissed.

In the result, the second appeal is dismissed. However, considering the relationship of the parties, there shall be no order as to cost.

Sd/-
Assistant Registrar(CS-VII)

//True Copy//

Sub Assistant Registrar

asr

To

1. Additional District Judge,
Nagapattinam.
2. Additional Subordinate Judge,
Mayiladuthurai.

1 CC to S.Viswanathan, Advocate SR.No. 53458

Second Appeal No.836 of 2000

RSI (CO)

PSI (17.11.2015)