

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :30.03.2015

Delivered on :09.06.2015

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

S.A.No.1393 of 2007

and

M.P.No.1 of 2007

Maragadham

... Appellant

-Vs-

1.Periyaraja
2.Muniammal
3.Vijayakumar
4.Kuttiyappa Gounder
5.Nandimalai

... Respondents

Prayer:- Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree of the Sub Court, Tirupattur, Vellore dated 16.04.2007 made in A.S.No.77 of 2006 reversing the judgment and decree of the District Munsif Court, Tirupattur dated 13.04.2006 made in O.S.No.697 of 1996.

For Appellant : Mr.V.Raghavachari

For Respondents : Mr.Jeevagiridharan for R1 to R3
No Appearance for R4 and R5

JUDGMENT

The plaintiff in the original suit is the appellant in the second appeal. The original suit was filed by the appellant against the respondents for declaration of title, recovery of possession and permanent injunction not to alienate or encumber the suit properties, for rendition of accounts and for cost. The learned trial judge decreed the suit as prayed for by a judgment and decree dated 13.04.2006.

2. Aggrieved by the decree of the trial court, the respondents 1 to 3 herein, who were the defendants 2 to 4 in the original suit, preferred an appeal in A.S.No.73 of 2006 on the file of the lower

appellate court, namely Sub Court, Tiruppattur, Vellore District. By a judgment and decree dated 16.04.2007, the learned lower appellate judge, allowed the appeal, set aside the decree passed by the trial court and dismissed the suit filed by the appellant herein/plaintiff, without prejudice to the right of the 4th respondent/1st defendant to file a suit in respect of his half share in the suit properties.

3. As against the said decree of the lower appellate court dated 16.04.2007 made in A.S.No.73 of 2006, the present second appeal has been filed on various grounds set out in the memorandum of grounds of second appeal.

4. Since the ranks of the parties in the suit came to be changed in the first appeal and the said change is also reflected in the second appeal, for clarity and sake of convenience, the parties are referred to in accordance with their ranks in the plaint and at appropriate places their ranks in the second appeal shall also be indicated.

5. The second appeal was admitted on 06.12.2007 formulating the following questions as substantial questions of law involved in the second appeal:

"1. Whether the lower appellate court is right in drawing adverse inference by reason of the fact that the first defendant had been examined as PW2?

2. Whether the courts below ought to have appreciated that in a suit for declaration a lesser relief of partition could be granted as per the provisions of Order VII Rule 7 CPC?"

6. The arguments advanced by Mr.V.Raghavachari, learned counsel for the appellant and by Mr.Jeevagiridharan, learned counsel for the respondents 1 to 3 were heard. The materials available on record were also perused and taken into consideration.

7. The plaintiff Maragadham filed the suit for the reliefs indicated supra on the basis of the plaint averments that are as follows:

i) The suit properties originally belonged to Kuttiyappa Gounder, the first defendant and he was in possession and enjoyment of the same. The plaintiff is his grand daughter. By virtue of a registered Settlement Deed dated 13.12.1990, Kuttiyappa Gounder gifted the same to the plaintiff Maragadham and delivered possession. The gift was accepted and acted upon. From the date of the settlement deed, the plaintiff has been in possession and enjoyment of the suit properties. Since the plaintiff and the defendants were residing in one and the same house, she was having

the documents relating to the suit property in the said house. She was cultivating the suit property with the help of her father by engaging agriculture labourers.

ii) While so, with a view to cause loss and hardship to the plaintiff, the defendants removed all the title deeds from the plaintiff and intimidated the plaintiff to leave the house. When she questioned the propriety of such act on the part of the defendants, the defendants 1 to 4, in the month of Chithirai 1995, trespassed into the suit lands and illegally took possession. When the plaintiff demanded possession, the defendants proclaimed that the settlement deed was cancelled and there was no need for giving possession to the plaintiff.

8. The first defendant Kuttiyappa Gounder and the 5th defendant Nandi Malai remained absent and they were set ex-parte. The defendants 2 to 4, namely Periya Raja, Muniammal and Vijayakumar alone contested the suit. The 4th defendant filed a written statement and the defendants 2 and 3 adopted the same. In the written statement they had contended as follows:

The first defendant had no right or title to the suit properties and he had no authority to give the same as gift to the plaintiff. The gift made by the first defendant in favour of the plaintiff shall not be binding upon the defendants 2 to 4. The plaintiff was not in possession of the suit property from 13.12.1990 as claimed by her. The suit properties were in the possession and enjoyment of the defendants 2 to 4 prior to the execution of the settlement deed and after the settlement. In fact, the suit properties were the properties belonging to Muniyammal, the wife of the first defendant. She was the mother of the third defendant Muniammal. The mother of the third defendant died 20 years prior to the filing of the suit. On her death, the third defendant became the absolute owner of the suit properties and she is in enjoyment of the suit properties along with her husband, namely the second defendant. The other contrary averments made in the plaint are false.

9. The plaintiff deposed as PW1 and one Gaundappan was examined as PW3. The 4th respondent herein/first defendant Kuttiyappa Gounder was examined as PW2 on the side of the plaintiff. In support of her contention, the plaintiff produced two documents. In fact they are one and the same. Ex.A2 is the original gift settlement deed dated 13.12.1990 and Ex.A1 is its copy. Apart from the said documents, no other document has been produced on the side of the plaintiff to show that the property was in the possession and enjoyment of the plaintiff at any point of time. Except a bald allegation that the suit property originally belonged to the first defendant, no details as to how the first defendant got the property has been furnished by the plaintiff. During the course of trial, the plaintiff, who figured as PW1, gave evidence to the effect that the suit properties were the self-acquired

properties of her grandfather, namely the first defendant Kuttiyappa Gounder. However, during cross examination, she admitted that the name of the wife of the first defendant was Muniyammal and the third defendant Muniammal was her only legal heir. Though PW1 would state that the first defendant Kuttiyappa Gounder purchased the suit properties in the year 1939, she has not produced the sale deed. During cross examination she admitted that she had no evidence to show how the suit properties belonged to the first defendant Kuttiyappa Gounder. A clinching admission made by her is to the effect that she did not know how the suit properties belonged to Kuttiyappa Gounder. The further admission made by her is that the suit properties had been purchased from the first defendant by one Ammakara Gounder on 05.01.1949 and the said Ammakara Gounder settled the properties under a gift settlement deed dated 06.01.1949 on his daughter Muniyammal, who was the wife of Kuttiyappa gounder. It has also been admitted by her that Kuttiyappa Gounder's enjoyment of the property was only in his capacity as the husband of Muniyammal. There is also a clear admission that patta had been issued in the name of Muniyammal and revenue assessment also had been made in the name of Muniyammal.

10. The first defendant, who figured as PW2 made an attempt to show that he, on his own volition, came to the court to depose as a witness on the side of the plaintiff. He gave an answer to the effect that he joined with the plaintiff and filed the suit. The relevant part of his evidence in vernacular is extracted hereunder:

"நானும் வாதியும் சேர்ந்து தான் இந்த வழக்கை
கொடுத்தோம் என்றால் சரி தான்."

There is also a clear admission made by PW2 that the suit property belonged to his wife. The first defendant, who deposed as PW2, admits that the second defendant is his daughter Muniammal's husband. But he stated that he did not know the name of the second defendant. From the evidence of PWs.1 and 2, it is obvious that, after the death of his wife Muniyammal, the first defendant married one Muthammal. But it is doubtful as to how far the marriage was valid. Both of them pleaded absence of knowledge as to whether Muthammal had been married to another person earlier and she had children through her former husband. Above all, PW1 would say that she did not know whether PW2 married Muthammal or simply kept her.

11. There is a clear admission made by PW2 that his father-in-law Ammakara Gounder settled the property in favour of his daughter Muniyammal. PW3 has been examined to prove the execution of Ex.A2-Settlement deed. However, he ventured to state that the suit properties were in the possession and enjoyment of the plaintiff Maragadham for one or two years after the execution of the settlement deed. The averment made in the plaint is that it was in 1995 she was dispossessed. Hence there is a clear contradiction

between the pleading, the evidence of PW2 and the evidence of PW3. On the other hand, the contesting defendants have led clear evidence through DW1 and DW2 to the effect that the suit properties were the properties given by Ammakara Gounder to his daughter Muniyammal under two settlement deeds dated 03.01.1949 and 06.01.1949 and also a sale deed dated 05.02.1949. The said settlement deeds and the sale deed have been produced as Exs.B1 to B3. It has also been clearly established that the third defendant Muniammal is the only daughter of Muniyammal, wife of Kuttiyappa Gounder and that after the death of Muniyammal, the revenue assessments in respect of the suit properties were made in the name of the third defendant. Ex.B4-Patta Pass Book and Exs.B5 to B10-Kist receipts also establish the same. As such, the contesting defendants have made it clear through oral and documentary evidence that the suit properties were the absolute properties of Muniyammal, wife of Kuttiyappa Gounder, the first defendant.

12. It is also an admitted fact that the said Muniyammal, wife of Kuttiyappa Gounder died intestate after the advent of the Hindu Succession Act, 1956. Admittedly, she died leaving a daughter, namely the third defendant. Hence as per Section 15 of the Hindu Succession Act, 1956, her daughter, namely the third defendant and her husband, namely the first defendant Kuttiyappa Gounder would have become entitled to equal shares. Therefore, the defendants 2 to 4 were not correct in their contention that the property became the absolute property of the third defendant on the death of Muniyammal wife of Kuttiyappa Gounder. The first defendant Kuttiyappa Gounder, being a legal heir as per Section 15(1)(a) of the Hindu Succession Act, 1956 along with her daughter Muniammal (3rd defendant), the first defendant Kuttiyappa Gounder became entitled to half share and the third defendant became entitled to half share.

13. The learned trial judge has committed a blunder in making an observation that when the wife dies intestate, her property would go to her husband alone and that her daughter would not get any share. On the basis of the said reasoning alone, the learned trial judge held that the first defendant became entitled to the suit properties to the exclusion of the third defendant and that hence the settlement deed executed by him in favour of the plaintiff under Ex.A2 was perfectly valid. The above said observation shows the absence of knowledge regarding the rudimentary principles of succession to the estate of a Hindu female under the Hindu Succession Act, 1956. Section 15 is to the effect that in the presence of children, the children and the husband will take simultaneously. In the absence of children alone, the property will go to the husband as per clause (a) of sub section (1) to Section 15 of the Hindu Succession Act, 1956. In the case on hand, admittedly, the third defendant is the daughter of the first defendant through Muniyammal. Hence both Muniammal (3rd

defendant) and the first defendant Kuttiyappa Gounder have become entitled to half share each. Ignorant of the said legal position, the learned trial judge has rendered a perverse finding that on the death of Muniyammal, her husband Kuttiyappa Gounder, namely the first defendant got her property in entirety.

14. The first defendant who was entitled to an undivided half share has chosen to execute a gift settlement deed in respect of the entire suit properties without even restricting the gift to his half share held by him in the suit properties. Even in respect his half share, the same being undivided, without seeking partition and without getting the concurrence of the other co-sharers, he could not have validly made a gift in favour of the plaintiff. Hence the trial court ought to have arrived at a conclusion that the gift settlement deed dated 13.12.1990 was not effective and it would not confer any title on the plaintiff in respect of the suit property. In fact there is no proof to show that the plaintiff was put in possession pursuant to Ex.A1-settlement deed. Without the consent of the other co-sharers, third parties could not have been inducted into possession. Such a third party getting transfer of title from a co-owner, has to work out his/her remedy by seeking partition. Therefore, it is quite clear that possession was not delivered on the date of Ex.A2.

15. The learned trial judge, without appreciating the evidence adduced on both sides in proper perspective, and without applying the correct principles of law, chose to render a perverse finding to the effect that the suit properties were proved to be that of Kuttiyappa Gounder and that the same were validly gifted to the plaintiff under Ex.A2-Settlement deed dated 13.12.1990; that the said gift was accepted and acted upon and that the plaintiff was in possession and enjoyment of the suit properties from 1990 in her own right. The learned trial judge also rendered an erroneous finding that the contesting defendants trespassed into the suit properties and hence the plaintiff was entitled to the relief of declaration, recovery of possession and rendition of accounts regarding the income derived from the suit properties as prayed for by the plaintiff. The above said finding of the trial court can, without any hesitation, be termed discrepant and erroneous, if not perverse.

16. On appeal, the learned lower appellate judge, on proper appreciation of evidence and application of proper principles of law came to the conclusion that the first defendant Kuttiyappa Gounder was not the absolute owner of the suit property and that on the other hand his wife Muniyammal was the absolute owner of the suit property. The learned lower appellate judge further held that on the death of Muniyammal, her husband Kuttiyappa Gounder (1st defendant) and daughter Muniyammal (3rd defendant) became entitled to half share each and that the first defendant, being a co-owner

having an undivided interest, could not have validly executed a gift settlement deed in favour of the plaintiff. The learned lower appellate judge has also rightly held that the plaintiff could not have obtained possession and could not have derived valid title under Ex.A2-settlement deed. The learned lower appellate judge, with a clear vision, negatived the plea of the plaintiff holding that she did not derive any title under Ex.A2-Settlement Deed and that hence the suit was liable to be dismissed. However, the learned lower appellate judge made it clear that the dismissal of the suit would be without prejudice to the right of the first defendant to file a suit in respect of his half share. The said finding of the lower appellate court cannot be found fault with, capable of being interfered with by this court in exercise of its power of appeal in the second appeal. There is no defect or infirmity, much less any perversity in the above said findings of the lower appellate court. Hence this court is of the considered view that the lower appellate judge was right in setting aside the decree of the trial court and dismissing the suit filed by the appellant without prejudice to the right of the first defendant Kuttiyappa Gounder to work out his remedy in a separate suit.

17. It shall be apt to point out here that though the first defendant figured as a witness on the side of the plaintiff and deposed as PW2 supporting the case of the plaintiff, he did not file any written statement seeking declaration of his title to half share in the suit properties; Nor did he seek a relief of partition. He also failed to get him transposed as a co-plaintiff to contend that declaration of his title to the undivided half share at least would have been granted, as the same would amount to granting a lesser relief than the relief sought for in the plaint. In fact, the fact that the first defendant deposed as PW2 supporting the case of the plaintiff has given rise to an adverse inference that Ex.A2-settlement deed came to be executed to defeat the claim of the third defendant and that there was collusion between the plaintiff and the first defendant in filing the suit. The same has been brought to light in the admission made by PW2 (first defendant himself) to the effect that he, along with the plaintiff, filed the suit. Therefore, the lower appellate court has not committed any mistake or error in drawing an adverse inference as indicated supra. The first substantial question of law is answered accordingly against the appellant and in favour of the contesting respondents.

18. It has been pointed out supra that the plaintiff has not proved her title or any lesser right in respect of the suit property. The first defendant, who is having half share in the suit property has not come forward with a prayer for declaration of his half share or for partition. Hence there will be no question of considering the grant of a lesser relief of partition in the suit filed by the plaintiff for declaration of title, recovery of

possession, etc. Hence the second substantial question of law is also answered against the appellant and in favour of the contesting respondents.

19. For the reasons stated above, this court finds no merit in the second appeal and holds that the second appeal deserves to be dismissed.

In the result, the second appeal is dismissed confirming the decree of the lower appellate court dated 16.04.2007 made in A.S.No.77 of 2006 reversing the decree of the District Munsif Court, Tirupattur dated 13.04.2006 made in O.S.No.697 of 1996. However, there shall be no order as to cost. Consequently connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

asr/-

To

- 1) The Sub Judge,
Tiruppattur, Vellore
- 2) The District Munsif,
Tirupattur, Vellore

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The Section Officer,
V.R Section,
High Court, Madras

+1cc to M/s.V.JeevaGiridharan, Advocate, S.R.No.27503

VSN(CO)
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