

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02 - 07 - 2015

CORAM

THE HON'BLE SMT. JUSTICE PUSHPA SATHYANARAYANA

SECOND APPEAL NO. 279 OF 2009

AND

M.P. NO. 1 OF 2009

Devanathan

.. Appellant/Plaintiff

vs.

1. Venkatesan
2. Ranganathan  
S/o Venkatesa Gounder
3. Mathiyazhagan
4. Arumugam
5. Jayamoorthy
6. Mangalakshmi
7. Ranganathan  
S/o Kannanidhi Gounder
8. Kannanidhi Gounder

.. Respondents/Defendants

Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 04.12.2008 in A.S. No.1 of 2008 on the file of the Court of Principal Subordinate Judge, Tindivanam, reversing the judgment and decree dated 26.11.2007 made in O.S. No.120 of 2003 on the file of the Principal District Munsif, Tindivanam.

For Appellant : Mr. P. Mani

For Respondents : Mr. A.K. Kumarasamy

JUDGMENT

This second appeal is filed by the plaintiff inveighing the judgement and decree dated 04.12.2008 passed by the Principal Subordinate Judge, Tindivanam, in A.S. No. 1 of 2008 wherein and by which the judgment and decree dated 26.11.2007 recorded in O.S. No. 120 of 2003 on the file of the Principal District Munsif, Tindivanam,

were reversed allowing the First Appeal at the instance of the defendants.

2. The plaintiff and the defendants 2 to 5 are the sons of the first defendant, who constituted a joint Hindu family. The suit property an extent of 1.80 Acres originally belonged to one Narayana Gounder, who had three sons, viz., Ellappa Gounder, Mottaiya Gounder and Jagannatha Gounder and the property was enjoyed in common by the above said persons. The said Narayana Gounder and his three sons died intestate. The three sons of Narayana Gounder had  $\frac{1}{3}$ <sup>rd</sup> share each in the suit property. The first defendant is the only son of Ellappa Gounder. According to the plaintiff, after the death of Ellappa Gounder,  $\frac{1}{3}$ <sup>rd</sup> share that devolved on him, had been enjoyed by the first defendant and his sons along with other co-owners. The  $\frac{1}{3}$ <sup>rd</sup> share fell to the share of Mottaiya Gounder was exchanged by him with the lands belonging to the 8<sup>th</sup> defendant 25 years ago. The  $\frac{1}{3}$ <sup>rd</sup> share of Jagannatha Gounder was sold in favour of Mangalakshmi, who is the sixth defendant in the suit. The main allegation of the plaintiff is that the first defendant also sold the  $\frac{1}{3}$ <sup>rd</sup> share that fell to the share of Ellappa Gounder in favour of the said Mangalakshmi, who is the sixth defendant herein. According to the plaintiff, as the properties were not divided, the suit for partition had been filed demanding his  $\frac{1}{18}$ <sup>th</sup> share.

3. Resisting the suit, the first defendant filed written statement adopted by the defendants 2 to 6. It is stated that already there was a partition in the family based on which Mottaiya Gounder had alienated his share on 16.6.1973 in favour of the eighth defendant. As the first defendant had sold the property in favour of the 6<sup>th</sup> defendant, according to him, the plaintiff cannot claim partition and sought for dismissal of the suit.

4. Before the trial Court, the plaintiff besides examining himself as P.W.1, examined one Marimuthu as P.W.2 and marked Exs. A.1 to A.5. On the side of the defendants, the defendants 1, 7, 6 and 8 examined themselves as D.W.1 to D.W.4 respectively and marked Exs. B.1 and B.7.

5. The trial Court / learned Principal District Munsif, Tindivanam, on consideration of the evidence adduced and the materials available thereon, decreed the suit as prayed for. Challenging the same, the defendants preferred appeal in A.S. No. 1 of 2008. The Lower Appellate Court, after appreciating the facts, reversed the judgment of the trial Court and allowed the appeal dismissing the suit. Feeling aggrieved, the plaintiff has come up with this Appeal.

6. When the Second Appeal was posted for admission, only notice was ordered on 31.3.2009.

7. The only question that has to be considered in this appeal is whether there was a partition between the father of the first defendant and his brothers.

8. Heard Mr. P. Mani, learned counsel appearing for the appellant / plaintiff and Mr. A.K. Kumarasamy, learned counsel for the respondents / defendants and perused the records.

9. From the materials available on record, it is seen that the appellant / plaintiff was married 20 years ago and as there was no money for the marriage expenses, the first respondent / first defendant had to sell his movables and thereafter, for the marriage of the last son of the first defendant, he sold his share of the property that devolved on him in the partition. The first respondent / first defendant also had stated that there was a partition between Ellappa Gounder, Jagannatha Gounder and Mottaiya Gounder based on which, the parties also had acted upon by selling their respective shares to third parties. It is also admitted by the respondents / defendants that Mottaiya Gounder's legal heirs had exchanged their  $1/3^{\text{rd}}$  share with the lands of the eighth respondent / eighth defendant. The first respondent himself had sold the property in favour of the 6<sup>th</sup> respondent on 13.3.2003 under Ex. B.4 and the said sale is not disputed by the appellant / plaintiff. From the act of the first respondent by selling the property in favour of the sixth respondent and also by selling the share of Mottaiya Gounder under Ex. B.7 on 16.6.1973, it is amply evident that there was a partition between the sons of Narayana Gounder and the same was acted upon by the sharers.

10. The appellant / plaintiff as P.W.1 has also deposed that of the total 1.80 acres extent of lands, each of the branch had taken 60 cents being the  $1/3^{\text{rd}}$  of the same. The plaintiff, who is claiming  $1/18^{\text{th}}$  share in the suit property, is not able to substantiate his claim that his father did not have the right to sell  $1/3^{\text{rd}}$  share in favour of the sixth defendant. The first respondent who is the father of the plaintiff / appellant, has also categorically stated that the suit property was sold by him to meet the expenses of the last son's marriage.

11. It was contended by the learned counsel for the appellant that the marriage of the last son Jayamoorthy was on 26.01.1999 whereas the sale was on 27.3.2000 under Ex. B.3 and, therefore, according to him, the contention of the first respondent that the property was sold for the family necessity should not be accepted.

12. The said contention was assailed by the learned counsel for the respondents pointing out that the recitals in Ex. B.3 sale deed itself, are very clear that the property was conveyed for the loan borrowed on account of the marriage of Jayamoorthy. It is true that though the sale was three months after the said marriage, the recitals in the sale deed clearly indicate that the sale was in discharge of the loan borrowed for the purpose of marriage and the sixth respondent who had purchased the property had, thereafter, sold it in favour of the seventh respondent / defendant.

13. Furthermore, a mere perusal of the records would also show that the appellant / plaintiff, being the eldest son of the first respondent was aware of these transactions and had not raised any objection at the time of the sale. As the sale has been done by the first respondent / defendant as kartha of the family for the family necessity, the appellant / plaintiff cannot object to the same unless he proves the contrary. In such circumstances, when the partition between the first respondent's father and his brothers was proved and in view of the established fact that the sale in favour of the sixth defendant was for the family necessity, the appellant / plaintiff cannot get the relief of partition as claimed. The Lower Appellate Court also has categorically found that there was a partition and that the appellant / plaintiff is not entitled to any relief. In such circumstances, this court finds no material illegality or infirmity with the finding of the Lower Appellate Court, fact finding authority, warranting interference. The point is answered accordingly.

In the result, the Second Appeal fails and the same stands dismissed confirming the judgment and decree dated 04.12.2008 passed by the learned Principal Subordinate Judge, Tindivanam, in A.S. No. 1 of 2008. However, in the circumstances of the case, there shall be no order as to cost. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Asst.Registrar (CS II )

/true copy/

Sub Asst. Registrar

To

1. The Principal Subordinate Judge  
Tindivanam

2. The Principal District Munsif  
Tindivanam

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

+1cc to M/s P.Mani, Advocate sr.32744

S.A. No. 279 of 2009

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srg 07.08.2015



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