

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 23.09.2015

CORAM:

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

Second Appeal No.933 of 2008

1.Valliammal
2.C.P.Kuppan
3.C.K.Arumugam

.. Appellants/Respondent/
Defendants

Vs

1. Rajammal
2. Muniammal
3. Pothum

.. Respondents/Appellant/
Plaintiffs

SECOND APPEAL filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree, dated 16.02.2008 made in A.S.No.77 of 2006 on the file of the Additional District and Sessions Court/Fast Track Court II Ranipet reversing the Judgment and Decree in O.S.No.64 of 1997 dated 31.10.2005 on the file of District Munsif, Sholingur.

For Appellants : Mr.K.Ramachandran

For Respondents : Mr. R.Shivakumar

J U D G M E N T

This Second Appeal has arisen out of the Judgment and Decree of the Additional District and Sessions Court/Fast Track Court II, Ranipet dated 16.02.2008 made in A.S.No.77 of 2006.

2. The defendants in the original suit are the appellants in the second appeal. The plaintiffs in the original suit are the respondents. They filed O.S.No.64 of 1997 on the file of the learned District Munsif, Sholingur for the relief of partition and separate possession in respect of the suit properties, which are shown in two schedules, namely, Schedule 'A' and Schedule 'B'. Schedule 'A' is eleven cents of land comprised in S.F.No.194/17B within specified boundaries in Rendadi Village, Walajah Taluk, Vellore District. Schedule 'B' is the house site (in gramamatham) measuring 352 Sq.Ft., with a thatched shed put up therein, comprised in Survey No.202/5 of the very same village.

3. According to the plaintiffs, eleven cents of land described in plaint 'A' Schedule fell to the share of Kandappa Reddy in an oral partition that took place between himself and his son Munisamy and on the death of Kandappa Reddy, his son Munisamy and daughters namely, the plaintiffs became entitled to 1/4th share each. So far as the plaint 'B' Schedule is concerned, it is the case of the respondents/plaintiffs that though Kandappa Reddy and his son Munisamy were divided in status, plaint 'B' Schedule property, being a house and residential property, was enjoyed in common without partition and that hence the half share belonging to Kandappa Reddy devolved equally on the plaintiffs and their brother Munisamy on the death of Kandappa Reddy and that thus each one of the plaintiffs became entitled to 1/8th share in the plaint 'B' Schedule property.

4. The claim of the respondents herein/plaintiffs was resisted by the appellants herein/defendants contending that the plaint plea to the effect that there was a partition and the plaint 'A' Schedule property was allotted to the share of Munisamy, the husband of the 1st appellant was not true; that on the other hand, ten cents out of twenty one cents owned by Kandappa Reddy was sold by his son Munisamy during the life time of Kandappa Reddy itself for discharging the loans incurred by Kandappa Reddy and that therefore, the remaining eleven cents shown as 'A' Schedule property remained as coparcenary property of Kandappa Reddy and his son Munisamy without partition. Based on the said contention, the appellants/defendants claimed that the respondents/plaintiffs were entitled to 1/8th share each in respect of the plaint 'A' Schedule property also. They also expressed their willingness for a partition provided the respondents/plaintiffs would contribute for discharging the family debts allegedly incurred by Kandappa Reddy. Based on the above said pleadings, the learned Trial Judge framed necessary issues.

5. The framing of the issue was followed by a trial in which three witnesses were examined as P.Ws.1 to 3 on the side of the respondents herein/plaintiffs and seven documents were marked on their side as Exs.A.1 to A.7. Five witnesses were examined as D.Ws.1 to 5 and thirty documents were marked as Exs.B1 to B30 on the side of the appellants herein/defendants.

6. The learned trial Judge on an appreciation of evidence came to the conclusion that the respondents/plaintiffs were not entitled to the reliefs sought for in the plaint and accordingly dismissed the suit without costs by a Judgment and decree dated 31.10.2005. The said decree of the trial court was challenged by the respondents herein/plaintiffs before the Lower Appellate Court (Additional District Court, FTC No.II, Ranipet) in A.S.No.77 of 2006.

7. The learned Lower Appellate Judge after hearing, allowed the appeal with costs and granted a preliminary decree as prayed for in the plaint, by a Judgment and Preliminary Decree dated 16.02.2008. The present Second Appeal is directed against the said decree of the Lower Appellate Court dated 16.02.2008.

8. The Second Appeal was admitted on 21.07.2008 and the following questions were framed as substantial questions of law involved in the second appeal:-

1. Whether no right accrued to the plaintiffs and whether the Amendment Act will not come to the aid of the plaintiffs and whether the Lower Appellate Court erred in passing decree for partition?

2. Whether the Appellate Court was not in error in failing to hold that the plaintiffs' suit was barred by limitation on the ground that the 1st defendant had perfected title by adverse possession?

9. The argument advanced by Mr.K.Ramachandran, learned counsel for the appellants/defendants and by Mr.R.Shivakumar, learned counsel for the respondents/plaintiffs are heard. Judgments of the Court below and materials available on record are perused and are taken into consideration. For achieving brevity and clarity, the parties shall be henceforth referred to in accordance with their ranks in the suit and at appropriate places, if necessary, their ranks in their appeal will also be indicated.

10. The plaintiffs 1 to 3 and one Munisamy, husband of the 1st defendant are the daughters and son of late Kandappa Reddy. Admittedly, a larger extent viz., 21 cents of land, which comprised the 11 cents of land shown as the suit 'A' Schedule property and also the suit 'B' Schedule property, were the ancestral properties of the said Kandappa Reddy and he along with his son Munisamy constituted a coparcenary. It is also not in dispute that as co-parceners Kandappa Reddy and his son Munisamy were entitled to an un-divided $\frac{1}{2}$ share each in both the properties. Admittedly, Kandappa Reddy died in the year 1977 long before the Tamilnadu Amendment to the Hindu Succession Act, Act 1 of 1990 came into force. Hence, it is crystal clear that the plaintiffs did not become coparceners by virtue of the said Tamilnadu Amendment. Even after the Central Amendment made to Section 6 of the Hindu Succession Act, 1956 by the Hindu Succession Amendment Act, 2005, they did not become coparceners as their father was not alive on the date when the amendment came into force and since succession opened long back, namely in 1977 itself.

11. The learned counsel appearing for the parties in the Second appeal fairly concede the above said legal position. In fact, it is not the case the plaintiffs that they are entitled to any share in the suit properties as coparceners. On the other hand, they have placed their claim on the premise that on the death of one of the coparceners namely, Kandappa Reddy, his undivided interest in the

coparcenary property would devolve upon his legal heirs in accordance with the Rule of Succession provided under Section 8 of the Hindu Succession Act. The said proposition is also not in dispute. However, the plaintiffs claimed that there was a partition in respect of a larger property measuring 21 cents of which the plaint 'A' Schedule formed part; that the said larger property was divided between Kandappa Reddy and his son Munisamy, in which the plaint 'A' Schedule fell to the share of Kandappa Reddy and that on the death of Kandappa Reddy, all the plaintiffs 1 to 3 and the husband of the 1st Defendant became entitled to 1/4th share in it as legal heirs of Kandappa Reddy.

12. This plea of the plaintiffs has been denied to be false by the defendants. They do contend that though larger property measuring 21 cents was with the family, without there being any partition, 10 cents of lands was sold by Munisamy, the husband of the 1st defendant, even during the life time of Kandappa Reddy to discharge the loans incurred by Kandappa Reddy himself and that the sale made by Munisamy would not support the case of the plaintiffs that there was a partition between the Kandappa Reddy and his son Munisamy. In this regard, the learned counsel for the defendants (Appellants herein) would point out the fact that the sale deed dated 04.02.1976, a certified copy of which has been marked as Ex.A.7, does not contain any recital referring to a partition as claimed by the plaintiffs. But the fact remains that the sale came to be effected holding out that Munisamy was the absolute owner of the property conveyed therein. It is also pertinent to note that on the date of execution of the said sale deed, his father Kandappa Reddy was very much alive and Kandappa Reddy alone would have been the kartha if at all the family did not get dis-integrated by partition. Suppose, the said sale was effected by Kandappa Reddy for discharging the debts incurred by him for the expenses of the family, there is scope for contending that the sale was made on behalf of the joint family and for the benefit or for the necessity of the joint family. Junior coparcener could not have been allowed to execute such sale deed holding out the property to be his absolute property. Kandappa Reddy also did not raise his little finger against the right of his son Munisamy to alienate the said property under the original Ex.A.7. The same will probabalise the case of the plaintiffs that there was a division in status in the family and a partition by metes and bounds in respect of larger property measuring 21 cents of which the plaint 'A' Schedule property formed part and that the portion that fell to the share of Munisamy in the said oral partition alone came to be sold under Original of Ex. A.7. If at all there was no partition, the plaintiffs themselves would not have chosen to leave the subject matter of the Original of Ex.A.7 and sue for the remaining portion alone. The said conduct of the plaintiffs will also gives raise to an inference that there should have been a partition in which the plaint 'A' Schedule property was allotted to the share of Kandappa Reddy and the remaining portion in the same survey number was allotted to the share of son Munisamy. The Lower Appellate Court has

committed an error and rendered a perverse finding to the effect that there was no partition between Kandappa Reddy and his son Munisamy in respect of the larger property which comprised plaint 'A' Schedule property and the property sold under the original of Ex.A7. The said perverse finding has led to the finding of the trial court that the plaintiffs were entitled to 1/8th share each, instead of 1/4th share in respect of plaint 'A' Schedule property.

13. So far as the plaint 'B' Schedule property is concerned, there is no serious contest. The parties do admit that the plaintiffs are entitled to 1/8th share each, as it remained the common property of Kandappa Reddy and his son Munisamy and on the death of Kandappa Reddy, his ½ share devolved equally upon the plaintiffs and Munisamy. Insofar as the other objection that the plaintiffs would not be entitled to seek partition unless they contribute to the discharge of family debts is concerned, the Lower Appellate Court itself has negatived the contention of the defendants, as there was want of evidence to prove such a contention. The foregoing discussions will make it clear that the findings of the Lower Appellate Court in respect of the Plaint 'A' Schedule alone is liable to be interfered with and modified as indicated supra.

14. The foregoing discussions themselves provide answer to the First Substantial Question of Law. At the cost of repetition, it is hereby once again pointed out that the position of the plaintiffs did not improve either by the enactment of Tamilnadu Act 1 of 1990 or by the Enactment of Hindu Succession Amendment Act, 2005, since their father died long back. The same will show that the First Substantial Question of Law does not arise for consideration in the Second Appeal and it is also not the case of the plaintiffs that they became coparceners either after the passing of Tamilnadu Act 1 of 1990 or after passing of Hindu Succession Amendment Act 2005. The First Substantial Question of Law is answered accordingly.

15. So far as the Second Substantial Question of Law is concerned, the contention of the defendants is that the plaintiffs were ousted and the defendants perfected title by prescription. They have also taken a plea that the suit is barred by limitation. Though such a plea would have been taken, there is dearth of evidence to prove the presence of the ingredients of ouster and perfection of title and by ouster. Possession by one of the co-shares will tantamount to possession on behalf of all the coparceners, unless by necessary overt act and declaration some of the co-owners are kept out of possession. Here, the necessary ingredients of ouster have not been proved by reliable evidence and the Lower Appellate Court was right in holding that the defendants had not perfected title by prescription by ouster. Accordingly, the said Second Substantial Question of Law is answered against the appellants.

16. In the result, the Second Appeal is allowed in part. The decree of the Lower Appellate Court is modified as follows:-

"There shall be a preliminary decree for partition directing division of 'A' Schedule property into four equal shares and allotment of three such shares to the plaintiffs and division of 'B' Schedule property into eight equal shares and allotment of three such shares to the plaintiffs." There shall be no order as to costs.
Ssd

Sd/-

Assistant Registrar (Judicial)

/True Copy/

Sub-Assistant Registrar

To

1. The Additional District and Sessions Judge/
Fast Track Court II, Ranipet
2. The District Munsif, Sholinghur.

+1 C.C. To MR.K.Ramachandran, Advocate in SR.NO.52139

+1 C.C. To MR.R.Shivakumar, Advocate in SR.NO.52554

Second Appeal No.933 of 2008

EV(CO)

sd : 23/11/2015

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