

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.07.2015

CORAM

THE HONOURABLE MS. JUSTICE R. MALA

A.S.No.541 of 2003

and

C.M.P.No.1383/2006

Judgment reserved on 25.06.2015	Judgment pronounced on 02.07.2015
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M.Murugan

....Appellant/Plaintiff

Vs

1.M.Venkatesh

2.Rajammal

3.Gowri

....Respondents/Defendants

Prayer: First Appeal filed under Section 96 of the C.P.C., against the judgment and decree dated 22.10.2002 made in O.S.No.8 of 2001 on the file of the Additional District Court cum Fast Track Court No.I, Erode.

For Appellant : Mr.T.Murugamanickam

For Respondents
R1 : Mr.V.S.Kesavan

R2 & R3 : No appearance

JUDGMENT

The First Appeal arises out of the judgment and decree against the judgment and decree dated 22.10.2002 of the Additional District Court cum Fast Track Court No.I, Erode.

2.The averments made in the plaint are as follows:

The first defendant is the younger brother, second defendant is

the mother and the third defendant is the sister of the plaintiff. Item Nos.1 and 2, namely, immovable properties and Item No.3, namely, movable properties are belonging to the joint family property of the plaintiff, first defendant and their late Manickam. Those properties were purchased out of the income from the joint family business and they are doing old newspaper business. During his lifetime, as a kartha of the family, the said late Manickam has purchased the properties in his name and in the name of defendants 1 and 2 and subsequently construction has been made. So, it was treated as a joint family property. The property in item No.1 has been purchased in the name of plaintiff's father and his mother, who is the second defendant under a registered sale deed dated 19.01.1985 and the property in item No.2 has been purchased in the in the name of the defendants 1 and 2 on 22.01.1990. They are also doing old newspaper business. Since, the said Manickam died intestate, the plaintiff and the first defendant were entitled to 5/12 share each, and the defendants are entitled to 1/12 share each. Hence, he pray for partition and separate possession of his 5/12 share in the suit properties.

3.The gist and essence of the written statement filed by the first defendant are as follows:

The first defendant has admitted the relationship as stated in the plaint. There was no joint family property. His father, namely, the said late Manickam was doing old newspaper business and he died on 16.08.1995 leaving behind the plaintiff and defendants. It is submitted that item No.1 is the house where they are residing and in item No.2, there are eight houses and it was rented out and income has been received by the joint family is false. In the year 1988, there was a partition in respect of business and out of the income from the separate business from the year 1988 to 1990, he had purchased the portion of item No.2 of the property. On 21.04.1980, a property has been purchased in the name of the plaintiff and house has been constructed and the other portion has been purchased in the name of the second defendant, Rajammal and in the year 1987 building has been constructed. In the year 1988, only the business has been divided and Rs.25,000/- each has been given to the plaintiff and the first defendant. From that date onwards, the plaintiff was doing his old newspaper business at Door No.58-A, R.K.V.Road (Kaveri Road) and the first defendant was doing his old newspaper business at No.1, East Kongalamman Kovil Street. Out of the income from the separate business, the first defendant has purchased the immovable property as mentioned in item No.2 and so, the plaintiff has no right over the property. The suit is bad for partial partition since the property stands in the name of the plaintiff was not included. Door No.42A alone was the joint family property and he had no objection for

partition and at the time of death, the said late Manickam has indebted Rs.2,91,800/- and so, the plaintiff and others are also liable to repay the same. Hence, he pray for dismissal of the suit.

4.The trial Court, after considering the averments both in the plaint and the written statement and arguments of both the counsel, framed four issues and considering the oral evidence P.W.1 and D.W.1 and documentary evidence of Exs.A1 to A5 and Exs.B1 to B14 has passed a preliminary decree for partition in respect of item Nos.1 and 2 except the property purchased by the first defendant under the sale deed dated 22.01.1990 and dismissed the suit in respect of item No.3. Against which, the present first appeal has been preferred by the appellant/plaintiff.

5.The learned counsel appearing for the appellant would submit that under Ex.B6, sale deed dated 22.01.1990, the property has been purchased only from the income from the joint family business. But the Trial Court has failed to consider the same. He would also submit that even though the first respondent has pleaded that there is a partition in the year 1988 in respect of the business, but partition has not been proved and no mutation of revenue records and the license in respect of two shops stands in the name of late Manickam till his lifetime and no document has been filed to show that for the year 1988 to 1990, he had Rs.35,000/- to purchase the property under Ex.B6. He further submitted that even though the property has been purchased in the name of the appellant in the year 1980, the same has been sold to one Kathoon Beevi under Ex.B2 on 13.12.1995 and P.W.1 has deposed that the amount has been distributed to all the members and in his evidence, he has fairly conceded that it is a joint family property. That factum was not considered by the Trial Court. Hence, he pray for 5/12 share in the property purchased under Ex.B6 and also in item No.3 of the property.

6.Resisting the same, the learned counsel appearing for the first respondent would submit that in the year 1980 business has been divided and out of the income from his separate business, he had purchased the property and on the date of death of their father, late Manickam, the property purchased in the name of the plaintiff/appellant in the year 1980 has been available and admittedly, it is a joint family property. Under Ex.B2, the plaintiff/appellant sold the same on 13.12.1995 by himself and that has not been pleaded. So, the suit is hit by partial partition and the cross examination of P.W.1 itself shows that he has not included that immovable properties which stands in his name and also the movable properties. So, the Trial Court has correctly held that the property purchased by the first respondent/first defendant under

Ex.B6 is his separate property and decreed the suit only in respect of item Nos.1 and 2 except the sale deed under Ex.B6 and dismissed the suit in respect of item No.3 on perusal of documents Exs.B3 to B6. Hence, he pray for dismissal of the appeal.

7.After hearing the arguments of both sides counsel, the following points for determination are framed:

1. Whether the property purchased under Ex.B6 is the separate property of the first respondent?
2. Whether there is partition in the year 1988 in respect of business?
3. Whether the judgment and decree passed by the Trial Court is sustainable?

Point Nos.1 and 2 :

8.It is an admitted fact that the second defendant/second respondent is the wife of late Manickam and they are having two sons, namely, Murugan, plaintiff/appellant and Venkatesh, first defendant/first respondent and one daughter, namely, Gowri, third defendant/third respondent. Admittedly the mother and daughter, namely, the defendants 2 and 3/respondents 2 and 3 are not contesting the suit and only the first defendant/first respondent has been contesting the suit. It is true that even though the suit has been filed in respect of item Nos.1 to 3. Item No.3 is only movable properties. The Trial Court has rightly held that it is the duty of the plaintiff/appellant to prove that this movable properties have been purchased out of the income from the joint family business. In the cross examination, P.W.1 has admitted that the business is the joint family business and he has not included in the suit, which shows his mala fide intention to grab the property which stands in the name of the first respondent.

9.It is also appropriate to consider the evidence of D.W.1. In his chief examination, D.W.1 has stated that in the year 1988, when the plaintiff/appellant demanded for partition, joint family business alone has been partitioned and he was paid Rs.25,000/- for his business. In this aspect, there is no cross examination. In his cross examination, his candid admission is that in the year 1988 business has been partitioned during the lifetime of his father, late Manickam. So, the evidence of D.W.1 has falsify the evidence of P.W.1. Considering the evidence of P.W.1, it is seen that the plaintiff/appellant has not come to the Court with clean hands because in his evidence, he himself admitted that there are joint family properties and he has not included the same, which shows that he has filed the suit claiming for partition only in the property purchased in the name of his brother and his mother, namely, the

defendants 1 and 2/respondents 1 and 2 and not the property in his name. In respect of the movable properties are concerned, Exs.B3 to B5 shows that the property has been purchased by the first respondent. P.W.1, in his cross examination, has fairly conceded that he has possessed separate gas connection, T.V. and also other movable properties which was purchased out of the joint family income. But he has not shown the same in the suit. Further, he has stated that he purchased a lorry on the basis of the Hire Purchase agreement and since he was unable to pay the installment, he sold the property and the sale proceeds was with him. But the same has not been shown in the suit.

10.Considering the evidence of P.W.1 itself shows that the appellant is not entitled to any share in item No.3 since the movable properties in item No.3 are the separate properties of the first respondent. So, the Trial Court has rightly held that properties in item No.3 have been owned by the first respondent and the appellant is not entitled to any share in respect of item No.3.

11.As per the evidence of P.W.1, in his cross examination, he has admitted that from the year 1988 onwards, he was doing old newspaper business at No.58A, R.K.V. Road, Erode, which shows that from 1988 onwards he was doing business independently. So, I am of the view that the joint family business has been partitioned between the plaintiff/appellant and the first defendant/first respondent during the lifetime of their father, late Manickam.

12.In the earlier paragraph, this Court has held that there was a partition in respect of the joint family business in the year 1988 and after that only, the first respondent herein has purchased the movable properties and immovable properties in his name, which was evidenced by Exs.B3 to B6 from his independent income. So, the property purchased under Ex.B6 is his separate property. The Trial Court has considered all the aspects and came to the conclusion that the property purchased under Ex.B6 is the separate property of the first respondent even though on the same day another portion of the property has been purchased in the name of the second respondent. It is pertinent to note that the property has been purchased by his father in the name of the appellant/plaintiff on 21.04.1980 wherein house has been constructed and after the death of the plaintiff's father, the appellant/plaintiff alone has sold the same to one Kathoon Beevi under Ex.B2. But that factum was not mentioned in the plaint. In such circumstances, merely because on the same day i.e. on 22.01.1990 item No.2 has been purchased in the name of the defendants 1 and 2/respondents 1 and 2 will not confer that the sale proceeds has been paid by the father of the plaintiff and the

defendants 1 and 3, namely, late Manickam. Further, on perusal of Ex.B1 it is seen that 574 sq.ft. Vacant site has been purchased, but there is no evidence to show that the sale proceeds has been paid by the late Manickam and he is neither an attester nor the identifying witness. In such circumstances, I am of the view that the Trial Court has considered all the aspects in proper perspective and came to the correct conclusion that the property under Ex.B6 has been purchased after the joint family business has been partitioned in the year 1988 and so, it is the separate property of the first defendant/first respondent. So, I am of the view that the property purchased under Ex.B6 is the separate property of the first respondent. Thus, Point Nos.1 and 2 were answered against the appellant/plaintiff.

Point No.3 :

13.In view of the father Point Nos.1 and 2 were answered against the appellant/plaintiff, the judgment and decree passed by the Trial Court is sustainable. Thus, Point No.3 is answered accordingly.

14.Considering the facts and circumstances of the case, I am of the view that the Trial Court has considered both the oral and documentary evidence and came to the correct conclusion. Hence, I do not find any reason to interfere with the finding of the Trial Court and it is hereby confirmed. Consequently, the First Appeal is dismissed.

15.In fine,

- First Appeal is dismissed.
- The decree and judgment passed by the trial Court is hereby confirmed.
- Consequently, connected civil miscellaneous petition is closed.
- There is no order as to costs.

Sd/-

Assistant Registrar (CS-II)

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Sub Assistant Registrar

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To

1.The Additional District Court cum Fast Track Court No.I,
Erode.

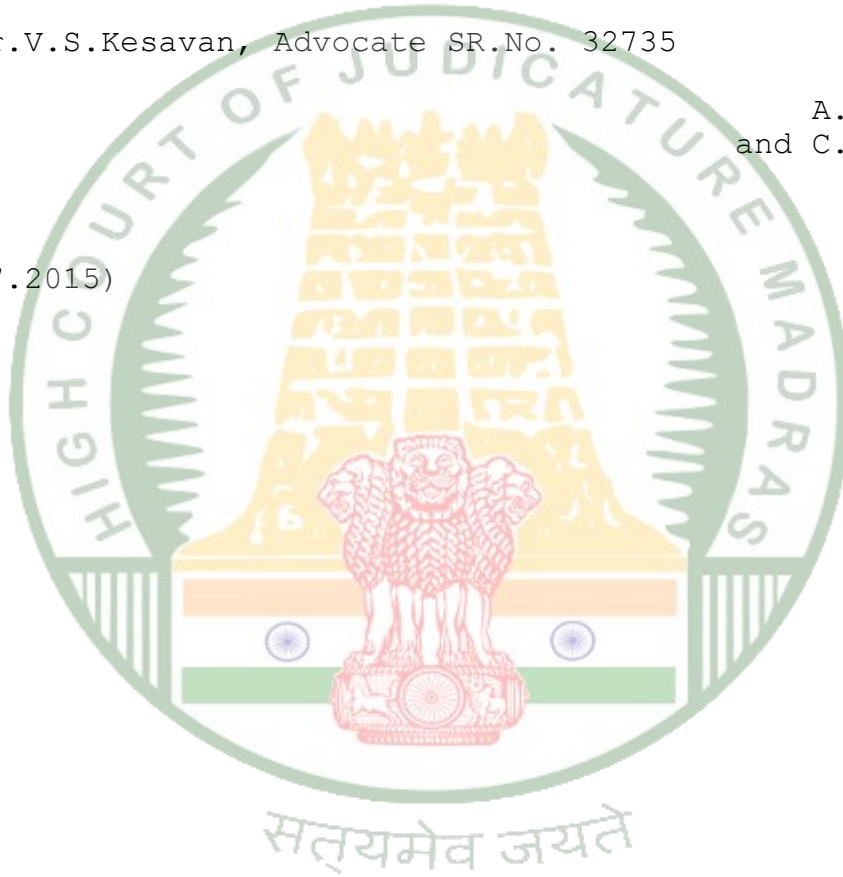
2.The Record Keeper,
V.R.Section, High Court,
Chennai.

1 CC to Mr.T.Murugamanickam, Advocate SR.No. 32895

1 CC to Mr.V.S.Kesavan, Advocate SR.No. 32735

A.S.No.541 of 2003
and C.M.P.No.1383/2006

SAI (CO)
PSI (22.07.2015)



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