

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :07.12.2016

PRONOUNCED ON :12.12.2016

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.1823 of 1998

1.Kadaiammal
2.Minor Ravi
2nd appellant declared Major and
1st appellant discharged from guardianship
vide order of Court dated 25.4.2014 made in
CMP.Nos.687/12 in S.A.No.1823/1998

...Defendants/ Appellants

..Vs..

1.M.Raman(Died)
2.Baby Ammal
3.Prem Sagar
4.Rani
5.Seetha
6.Yasodha
7.Radhakrishnan
8.Ramani Gopal
9.Ravi Kumar
10.Sivasubramanian
RR2 to 10 brought on record
as LR of the deceased sole respondent vide
as per order of Court dated 14.02.2003 made
in CMP.No.14638/2000 by CNJ

... Plaintiff/Respondent

Prayer:- Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree of the learned Subordinate Judge of Nilgiris at Ootacamandalam, dated 16.08.1996 in A.S.No.3 of 1995 confirming the

judgment and decree of the learned District Munsif of Ootacamandalam, dated 29.09.1988 in O.S.No.180 of 1984.

For Appellants : Mr.Kingston Jerold

For R2 to R10 : Mr.B.Ramamoorthy

JUDGMENT

The defendants in the suit are the appellants in this Second Appeal.

2. Before the trial Court, the suit was initially filed for permanent injunction in respect of suit schedule property alleging that, the defendants trying to trespass into the suit property. The same was contested by the defendants on the ground that the property being their ancestral property there cannot be any injunction in favour of one owner against other co-owners. The claim of the defendants that the property is ancestral property of Matha Gowder and it being a joint family property, the first defendant have right over it as the widow of Matha Gowder's son and second defendant being Matha Gowder's predeceased son's son.

3. The trial Court framed the following issues:-

1. Whether the suit properties are the joint family properties of the deceased H.Matha Gowder?
2. Whether the gift deed dated 21.07.1969 in favour of the plaintiff is true and genuine and binding on the defendants?
3. Whether the plaintiff and Nanjan are going cultivation of separate plots?
4. Whether the standing crops were destroyed by the plaintiff?
5. Whether the plaintiff has been in enjoyment of the entire suit property?
6. Whether the defendants have been in enjoyment of items of property which the deceased M.Lingam cultivating?
7. Whether the suit as framed is not maintainable?
8. To what relief is the plaintiff entitled?

4. The trial Court examined four witnesses on the side of plaintiff. 3 witnesses on the side of the defendant and marked Exhibits A1 to A18 for plaintiff; Exhibit B1 for defendant. On appreciating these evidences, the trial Court allowed the suit as prayed.

5. Aggrieved by the judgment, the defendants preferred First Appeal before the District Court, contending that, the deceased Matha Gowder had two acres of land at Katanadu Village, more than 1 acre of land at Thooneri Village and three houses. All inherited by him from his ancestral and from out of the income from those properties, he purchased the suit property on 13.11.1920. On his death, all his three sons namely, Lingam, Nanjan and Raman are entitled to inherit the same equally. Being the co-owner of the suit property, injunction cannot be granted. Further, it was pointed out in the grounds of appeal that a suit for injunction without declaration is not sustainable when the title to the property is disputed.

6. Pending first appeal, the plaintiff/respondent has taken out an application to amend the prayer by including relief of declaration and same was allowed. No appeal was filed against the order permitting the plaintiff to amend the prayer at the appellate stage. The First Appellate Court has framed the following points for determination.

- i) Whether the lost gift deed proved?
- ii) Whether the gift deed valid?
- iii) Whether the suit property is the joint family property?
- iv) Whether the plaintiff is entitled for declaration for injunction as prayed for?

7. The First Appellate Court has held against the appellant after considering the evidence and the law governing the facts of the case.

8. Aggrieved by the concurrent findings, the defendants have filed the present Second Appeal.

9. Based on the pleadings and considering the grounds raised in the memorandum of appeal, this Court has formulated the following substantial questions of law:-

i) Whether on the facts and circumstances of the case, non-production of original gift deed by the plaintiff would estop the plaintiff from making any claim to title over the suit property.

ii) Whether the courts below are right in permitting secondary evidence to be let in by the plaintiff in

the absence of proper and cogent evidence to establish that the gift deed is lost.

iii) Whether the presumption of law for Hindus that the properties are joint family properties have been rebutted in the instant case.

iv) Whether Matha Gowder had exclusive right to execute the gift deed in favour of the plaintiff over the joint family properties belonging to the joint family of late Matha Gowder and his sons.

10. The specific case of the plaintiff is that the property was purchased by their father on 13.01.1920 and was settled in his favour on 21.07.1969 since then he is in possession and enjoyment of the property absolutely. Whereas, the contra claim of the defendant is that the properties were purchased by Matha Gowder from out of the income accrued from the joint family property.

11. Thus, the claim of the plaintiff is attacked on two grounds. Firstly, the nature of the property. Secondly, the truthfulness of the gift allegedly given in favour of the plaintiff on 21.07.1969.

12. To substantiate the plea raised in the written statement, the defendant has relied upon the mortgage by Matha Gowder marked as Exhibit.B1.

13. Both the Courts below have held that the property is self acquired property of Matha Gowder and he has settled the property in favour of the plaintiff under Exhibit A17. The reason for such conclusion is that, Exhibit B1 relied by the defendants does not indicate that the suit property is an ancestral property of Matha Gowder.

14. Contrarily, the recital of Exhibit B1 only say that it is the property owned by Matha Gowder and his sons and insofar as Exhibit A17, gift deed is concerned being a certified copy and having proved that original lost and could not be traced inspite of all endeavours, the Court has accepted this certified copy. Relying upon that document, Courts below have held the suit property was gifted to the plaintiff by Matha Gowder as early as 21.07.1969.

15. It is seen from the records that the plaintiff before marking the certified copy of the gift deed as secondary evidence has taken all necessary steps to retrieve the original document which was marked in C.C.No.2098 of 1970. Only after receiving reply from the Court that the said document could not be retrieved, he has taken an application before the trial Court to mark the

certified copy of the gift deed as secondary evidence and the registers maintained in the Registrar's office pertaining to the gift deed. Initially the trial Court has declined to admit it in evidence. The plaintiff has filed Revision Petition before the Hon'ble High Court in CRP.No.2609 of 1986 and based on the direction of the High Court Ex.A17 was admitted into evidence.

16. The fact in this case establishes that the plaintiff has marked the secondary evidence of certified copy of the gift deed only after establishing before the Court that original deed could not be traced and lost irretrievably. Therefore, non production of original deed by the plaintiff no way estop him from claiming title over the suit property.

17. The learned counsel for the appellant relying upon Exhibit B1 mortgage deed contended that the recital of the mortgage deed clearly indicates suit property is a joint family property. Therefore, the Courts below ought to have relied upon the presumption that the properties are joint family properties which was purchased out of the ancestral nucleus.

18. The learned counsel appearing for the appellant referring the judgment of this High Court reported in 2004(3) CTC page No.92 Shanmugaiah

and another Vs.Thirumalayandi alias Thirumalai Pandaram and 5 others contended that under Hindu law, it is well settled preposition of law that one of the co-parceners in the co-parcenary without the consent of the other co-parceners cannot execute a settlement deed or gift deeds. In the above said case, the Supreme Court has held that the settlement deed executed by husband in favour of his wife in respect of his undivided 1/3 share in co-parcenary property without consent of two other co-parceners is invalid.

19. Further the learned counsel for the appellant contended that in a joint family, it has to be presumed that property purchased in the name of anyone of the family member as property of the joint family, and not the property of the individual in whose name the property stands.

20. Both these preposition of law does not apply to the facts of this case, because as pointed out earlier, when Matha Gowder purchased the suit property in the year 1920. There was no evidence to show that he had inherited property which yielded income sufficient to purchase the suit property. There is no evidence to show that Matha Gowder had ancestral nucleus as a sufficient source to purchase the property in dispute. When these two facts not been proved, there cannot be a presumption that the suit property is co-parcenary property. In fact during the cross examination it is elucidated that though Madha Gowder got some property from his ancestors, it had no yield and

income.

21. Exhibit A1 is the title deed of the suit property. Matha Gowder has purchased the suit property from one Thimmey Gowder on 13.01.1920. Exhibit A1 is the certified copy of the sale deed. The recital of Exhibit B1 reveals that the suit property was earlier mortgaged to the District Co-operative Bank on 20.03.1961 to repay the accrued interest and principle for the said loan. The above said document has been executed with an undertaking that in case of any default, the bank can proceed against them for recovery of the loan amount. This document only mention that the property is owned by the Matha Gowder and his sons. There is no indication that it is their ancestral property. The documents appears to have been executed at the instance of Bank, carefully worded to avoid any minors right or rival claims in future.

22. Particularly, when the title deed stands in the name of Matha Gowder and when there is no evidence to show Matha Gowder had ancestral nucleus to purchase the suit property, it cannot be presumed that it is the ancestral or joint family property of Matha Gowder. When we compared Exhibits A1 and B1, the age of the Matha Gowder in the year 1961 was around 66 years that means when he purchase the suit property in the year 1920, he should have been 26 years old. By that time, there is no possibility for neither the plaintiff nor

defendant to contribute efforts to purchase the property.

23. The last limb of argument by the learned counsel for the appellant that, the plaintiff by amending the prayer at the appellate stage, to fill up the lacunae in their pleading. The Lower Appellate Court erred in allowing the plaintiff to amend the plaint in the appeal filed by the defendant.

24. If the appellant was really aggrieved by the order allowing the amendment, he should have taken it on appeal immediately. That plea is not available for the appellate at this stage, after the appellate court allowed the amendment and let in evidence on that point providing opportunity to cross examined by the party adverse the same.

25. To sum up, as pointed out, Ex.A17 a certified copy of the registered gift deed, non production of original no way prejudice the appellant. The plaintiff/respondent have proved, even after due diligence the original could not be retrieved. The absence of evidence to show that Madha Gowder had no property in the year 1920 worth yielding income to buy the suit property and coupled with the fact that suit property was purchased when the plaintiff was hardly few years old baby and the defendants husband was not even born, the claim made by the appellant that the suit property is joint family property of

Madha Gowder has no legs to stand.

26. In 2002(4) CTC 25 of the Madras High Court has said,

12. The learned counsel has referred to a number of judgments in support of the petition for amendment. The principle relating to amendment is well settled. Object of Courts and rules of procedure are to decide the rights of parties and not to punish them. Merely because the plaintiff has not chosen to seek a prayer for mesne profits all these years, she cannot be denied that, if she is otherwise entitled to it.

13. In Dhani Sahu and others v. Bishun Prasad Singh and others, AIR 1942 Pat. 247 it has been held that even in the absence of prayer, relief can be granted.

14. In Ramakurup Narayana Kurup v. Oomman Eapeu AIR 1953 Travancore-Cochin 237 it has been held as follows:

"An application for amendment can be allowed, however late it may be made. Amendments can be allowed not merely by the trial Court, but also by the Court of appeal or even of the second appeal. Mere delay in making the application is not by itself a ground for rejecting it".

15. In Kartar Singh Hira Singh v. Mal Singh Surjan Singh and others, AIR 1954 Pepsu 39 it has been held that,

"rules of procedure are meant to enable Courts to do

justice between the parties and not to stand in their way.

Thus a party may be allowed to amend the plaint or retract an amendment already allowed to be made even at the stage of second appeal when the Court is satisfied as to its necessity".

16. In *Raminder Singh and another v. Sham Lal and another*, AIR 1981 P &H 45 it has been held that Court can grant relief to the plaintiff even if there is no specific prayer if he is entitled on facts proved upon the evidence in the case.

27. In 2012 (5) CTC 803, the Hon'ble Supreme Court has held that,

14. In *Pankaja & another v. Yellapa (Dead) by LRs.&others*, 2004(4) CTC 231 (SC):AIR 2004 SC 4102:2004 (6) SCC 415, this Court held that if the granting of an amendment really subserves the ultimate cause of justice and avoids further litigation, the same should be allowed. In the same decision, it was further held that an amendment seeking declaration of title shall not introduce a different relief when the necessary factual basis had already been laid down in the Plaint in regard to the title.

15. We reiterate that all amendments which are necessary for the purpose of determining the real questions in

controversy between the parties should be allowed if it does not change the basic nature of the suit. A change in the nature of relief claimed shall not be considered as a change in the nature of suit and the power of amendment should be exercised in the larger interests of doing full and complete justice between the parties.

28. The Courts below had rightly considered this point and had held that the suit property are self acquired property of Matha Gowder and he has executed the gift in favour of the plaintiff. The fact that Matha Gowder gifted it to the plaintiff through the registered deed and the said registered deed got lost and could not been traced also proved. Under the above said circumstances, secondary evidence has been admitted, which is permissible in law.

29. This Court finds that no substantial questions of law to interfere with the findings of the courts below and therefore the Second Appeal is dismissed. No order as to costs.

12.12.2016

To

1. The Subordinate Court of Nilgiris at Ootacamandalam
2. The District Munsif Court of Ootacamandalam

Dr.G.JAYACHANDRAN.J.,

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**Judgment made in
Second Appeal No.1823 of 1998**

12.12.2016

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