

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.03.2016

CORAM :

THE HONOURABLE MR.JUSTICE T.MATHIVANAN

S.A.No.1274 of 2004

and

C.M.P.Nos.9379 of 2004 & 3533 of 2016

Sanjeevi Moorthy

... Appellant/Plaintiff

Vs.

1.Mani
2.Santha Ammal
3.Kanagavalli Ammal
4.Karpagambal
5.Sagunthala
6.Gandhimathi
7.Mangaiyarkarasi
8.Radhabai
9.Bagiyalakshmi
10.Jayalakshmi

..Respondents/Defendants
2 to 14

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 20.01.2004 and made in the appeal in A.S.No.229 of 2002 on the file of the Principal District Judge, Villupuram, confirming the judgment and decree dated 05.09.2001 and made in the suit in O.S.No.239 of 1991 on the file of the learned Subordinate Judge, Tindivanam.

For Appellant : Mr.V.Raghavachari
For RR1 & 5 : Mr.R.Siddharth for
Mr.T.R.Rajaraman

R2 : NA

J U D G M E N T

This Memorandum of Second Appeal has been directed against the Judgment and decree dated 20.01.2004 and made in the appeal in A.S.No.229 of 2002 on the file of the learned Principal District Judge, Villupuram confirming the judgment and decree dated 05.09.2001 and made in the suit in O.S.No.239 of 1991 on the file of the Principal Subordinate Judge, Tindivanam.

2. The appellant herein is the plaintiff, whereas the respondents are the defendants. Seeking the relief of partition in respect of 1/3rd share in the suit property, the appellant has filed the above suit.

3. Heard Mr.V.Raghavachari, learned counsel appearing for the appellant and Mr.R.Siddharath, learned counsel appearing for Mr.T.R.Rajaraman, who is on record for RR1 & 5.

4. During the pendency of the suit, the first defendant Kannappa Mudaliar had passed away. The defendants 6 to 11 are the legal representatives of the deceased first defendant. This suit was resisted by the respondents and on appreciation of the evidences both oral and documentary, the Trial Court had proceeded to dismiss the suit on 05.09.2001.

5. Having lost the suit before the Trial Court, the appellant being the plaintiff has preferred an appeal in A.S.No.229 of 2002 on the file of the learned Principal District Judge, Villupuram. After hearing both sides that appeal was also dismissed on 20.01.2004 confirming the judgment and decree of the Trial Court. The plaintiff, who has lost his suit before the Courts below stands before this Court with this second appeal.

6. This second appeal came to be admitted on the following substantial questions of law:

(i) Whether the findings of the lower Appellate Court that the appellant had failed to prove the nature of the property is correct, when there is no dispute as regards the character of the property as joint and ancestral in nature?

(ii) Whether the Courts below are right in relying upon Ex.B7, when it's non production at the earliest point of time remains unexplained and particularly, there is no pleadings as regards that document?

(iii) Whether the Courts below are right in dismissing the suit on the basis of the contradictory and inconsistent case projected before the Court as regards the year of partition?

7. The facts which are absolutely necessary for the disposal of the second appeal are as under:

The deceased first defendant Kannappa Mudaliar is the father of the plaintiff, second defendant and the defendants 6 to 10. The said Kannappa Mudaliar had passed away in the year 1993, after the institution of the suit. According to the appellant/plaintiff, some of the properties described in the plaint schedule and other properties were originally belonged to the joint family consisting of one Govindasamy Mudaliar, his sons Kodandapani Mudaliar, Kannappa Mudaliar (deceased first defendant) and Ramanadha Mudaliar. Some of the properties have been acquired out of the joint family nucleus. Since a dispute arose between the brothers around the year 1963, a partition was effected between them. However, Ramanadha Mudaliar, who is one of the sons of Govindasamy did not accept the partition and filed a suit in O.S.No.1 of 1965 on the file of the Principal District Court, Cuddalore. During the pendency of the suit, a compromise was entered into between the parties and the properties were divided by a

Partition Deed dated 27.02.1965, which was registered on 20.03.1965. In the said partition Deed, 'B' schedule properties were allotted to Kannappa Mudaliar(deceased first defendant). He was managing the property, which devolved upon the joint family consisting of plaintiff and the defendants 1 & 2. The deceased first defendant was running a provisional store at No.485, J.N.Street, Tindivanam. Again, there was a partition in respect of the movable properties between the family but the immovables were enjoyed in common.

8. The appellant/plaintiff had subsequently started a business afresh out of the sources of income derived from his wife and brother-in-law and he had been running the said shop. Acknowledging the delivery of shop run by the deceased first defendant to the appellant/plaintiff, he had executed a letter dated 25.08.1986. Though, the joint family alone was divided, the properties set out in the plaint schedule were let within the management of the first defendant. The daughters of the deceased first defendant were given in marriage with reasonable expenses.

9. The deceased first defendant and the second defendant having hand in glove with each other and in order to deprive the rights of the plaintiff's legal heirs had created sham and nominal documents in respect of item Nos.8 and 11 and sold out those properties in favour of the defendants 3, 4 and 5 on 25.05.1987 and 19.02.1990 respectively. The sales effected by the deceased first defendant and the second defendant were not having any legal necessity or for the benefit of the joint family. Therefore, the said alienations are not binding upon the appellant/ plaintiff's share.

10. Since, the appellant/plaintiff had thought that he could not be in any common enjoyment of the properties alongwith other defendants, he was constrained to file the present suit for partition in respect of his 1/3rd share.

11. The defendants 2, 6 to 11 have contended that the appellant/plaintiff being the eldest son of the deceased Kannappa Mudaliar became divided from the family and he was living separately. When the appellant/plaintiff had expressed his desire to separate from the family and living as a divided member, it was agreed between the plaintiff/appellant and the deceased Kanappa Mudaliar and in consequence there of, it was decided that the appellant/plaintiff should take the business concerned in lieu of and in full settlement and his claim for his share in the joint family properties.

12. The appellant/plaintiff was also put in possession of the business with his assets and he had become the sole and exclusive owner of the same. It happened during the year 1982. At that time his share in movable properties was also ascertained and handed over to him since then the plaintiff had become divided and had ceased to be a member of joint

family. This fact is admitted in the plaint itself. The plaintiff/appellant having separated from the family, prior to the death of the deceased Kannappa Mudaliar, is not entitled to claim any such share from the suit properties belonged to the joint family consisting of second defendant and his mother.

13. According to the defendants, the entire suit properties are devolved on the second defendant and the fifth defendant, who are the remaining co-parceners of the said joint family. With the contribution the deceased first defendant/appellant/plaintiff had also constructed his common house in College Road at Tindivanam, after became separated from the family. The plaintiff has not included the said house in the suit for partition as he claims the house as his own property. The deceased first defendant had also executed a Will affirming the fact of separation of the plaintiff from the family. Even as per the said Will, the properties are belonged to the second and fifth defendants.

14. The deceased first defendant had sold some of the properties described in the suit in favour of the defendants 3 to 5 and they being the purchasers are in possession and enjoyment of the properties so purchased by them. They cannot be questioned by the appellant/plaintiff as he was aware of the alienation. Hence, the suit for partition is not sustainable.

15. Based on the pleadings of the parties to the suit, the trial Court had formulated six issues and two additional issues.

(i) Two witnesses including the plaintiff/appellant were examined on behalf of the appellant. During the course of their examination Ex.A1 to A4 were marked. On the other hand, the first respondent herein, who is the second defendant in the suit had examined himself as DW1. Alongwith him two more witnesses were examined as DW2 and 3 respectively. During the course of their examination, seven documents were marked. On appreciation of the evidences, the trial Court had dismissed the suit on 05.09.2001, on the ground that the appellant/plaintiff got already separated from the family and that he got the business of grocery shop and other assets in lieu of his share and therefore he is not entitled to any share from the properties specified in the plaint schedule much less $1/3^{\text{rd}}$ share. The first Appellate Court has also dismissed the appeal filed by the appellant/plaintiff, confirming the judgment of the trial Court. Hence, the appellant/plaintiff stands before this court with this second appeal.

Substantial Question of Law:2:

This substantial question of law seems to be the pivot of this Second Appeal. Ex.B7 is said to be the Will dated

22.09.1987, alleged to have been executed by the deceased first defendant Kanappa Mudaliar. This has been mainly attacked by Mr.V.Raghavachari, learned counsel appearing for the appellant/plaintiff on the ground that this document was not at all produced at the earliest point of time and no such pleadings was also available in the written statement with regard to Ex.B7, Will.

In this connection, it is imperative on the part of this Court to make reference to the written statement filed by the defendants. In part of the written statement, they have stated that the deceased first defendant had executed a Will confirming the fact of separation of plaintiff from the family. They have also stated that even as per the said Will, the properties are belonged to the second and sixth defendants only.

16. On perusal of Ex.B7, Will dated 22.09.1987, the following properties were given to the appellant/plaintiff:

- (i) Towards presentation of jewels to the extent of 10 sovereigns to the daughter-in-law, Deena @ Komalavalli comes to Rs.20,000/-
- (ii) Shopping premises situate at Tindivanam Nehru Street, No.485, under the name and style of Sri Kannika Parameswari Devastanam valued @ Rs.80,000/-
- (iii) The Terraced house situate at Door No.22, College Road, stands in the name of my elder son (appellant/plaintiff) valued @ Rs.1,00,000/-
- (iv) Accessories and goods available in the shopping premises valued at Rs. 45,000/-

Total

Rs.2,45,000/-

17. Besides this, the Testator of the Will viz., the deceased first defendant has stated that after the life time of his wife Shakunthala, his two sons are entitled to share the following properties equivally.

1.பு.ச.எண்.	172/1	0.27	சென்ட்
2. பு.ச.எண்.	172/2	2.80	சென்ட்
3. ந.ச.எண்.	172/5	0.78	சென்ட்
4.ந.ச.எண்.	172/7	0.28	சென்ட்
5.பு.ச.எண்.	175/1	0.72	சென்ட்
6.பு.ச.எண்.	175/2	1.42	சென்ட்
7.பு.ச.எண்.	172/3	2.72ல்	1.10
8.பு.ச.எண்.	172/3	2.06ல்	0.15

18. But the wife of the deceased first defendant, who is none other than the mother of the plaintiff/appellant and the second defendant is still alive. Therefore that cannot be partitioned during the life time of the sixth defendant Sagunthala. The main ground on which the plaintiff's case was attacked by the defendants is that already the appellant/plaintiff had separated from the family and in lieu of his share in family property, he was given shopping premises with the accessories. Therefore, he is not entitled to claim any share. No doubt, the plaintiff/appellant is the eldest son of Kannappa Mudaliar(D1) and the second defendant is his younger son.

19. It is established that during the life time of Kannappa Mudaliar, the appellant/plaintiff had become divided from the family and he was living separately now. It is also established that the appellant/plaintiff has been in possession of the business of the shopping premises alongwith its accessories and as such he had become the sole and absolute owner of the same. The Grocery business which is being run in the Kannika Parameswari Devasthanam shopping premises was already given to the plaintiff/appellant by Kannappa Mudaliar(D1) in the year 1982, which has been ascertained in Ex.B7, Will. In his cross examination, the appellant/plaintiff(D1) has admitted that after his father's death, he had undertaken grocery business and that his father had transferred the lease agreement in respect of the shopping premises in his favour. With regard to the said shop, a suit in O.S.No.53 of 90 was instituted by the deceased first defendant and after his demise that suit was prosecuted by the appellant/plaintiff as against Sri Kannika Parameswari Devasthanam. Ex.B1 is the copy of the plaint relating to the suit in O.S.No.53 of 90. After the demise of his father, the appellant/plaintiff had not impleaded his brother, who is the first respondent herein as a party in the above said suit. But he alone had prosecuted that suit. He himself had admitted in the cross examination that he had been paying and running the business in the shopping premises belonging to Sri Kannika Parameswari Devasthanam since 1986.

20. It is pertinent to note here that the sale effected by the deceased first defendant in favour of the defendants 3 to 5 has not been challenged by the appellant/plaintiff in the present suit. Ex.B7 has been admitted by the plaintiff/appellant in his cross examination.

21. He has admitted that the signature found beneath the contents of Ex.B7 is that of his father. When the execution as well as the existence of Ex.B7 is admitted by the appellant/plaintiff, the non production of this Will(Ex.B7) at the earliest point of time will not in any way affect the case of the appellant/plaintiff. Hence, nothing is found wrong in the act of the Court below in relying upon the document under Ex.B7.

22.The substantial questions of law Nos.1 & 3:

1.Courts below have given a concurrent finding and thereby the suit filed by the appellant was dismissed on the ground that the appellant/plaintiff had miserably failed to substantiate his case of claiming partition of the suit property. Since a partition was effected already and in consequence there of the portion in which the appellant/plaintiff has now been in possession was allotted to him. It cannot be heard to say that the property is joint family property.

23. It is obvious to note here that the appellant/plaintiff, being the eldest son of the deceased Kannappa Mudaliar had become divided from the family and he was also living separately. It is also manifested from the available evidences that the deceased Kannappa Mudaliar had ascertained the separation of the plaintiff from the family in his Will under Ex.B7 dated 22.09.1987. Therefore, it is absurd to claim that the property, which is in possession and enjoyment of the appellant is still within the joint family.

24.Therefore, this Court does not find any wrong with the finding of the lower Appellate Court that the appellant / plaintiff had failed to prove the nature of the property. Further this Court, on perusal of the judgments of the Courts below has found that the Courts below have correctly come to the conclusion that the appellant/plaintiff had failed to substantiate his case and thereby this suit was rightly dismissed by both the Courts below. The concurrent findings of the Courts below have not been shown to be perverse or illegal nor is it based on mis-reading or mis- appreciation of the evidences. On the contrary, the said findings are reasonable which could be arrived at on the basis of the evidences on record. Consequently, this Court is of the considered view that the findings of the Courts below did not warrant any interference.

25. In the result, this Second Appeal is dismissed. The judgments and decree of the Courts below are confirmed. Consequently, connected miscellaneous petitions are closed. Considering the relationship of the parties to the appeal, there shall not be any order as to costs.

Sd/-
Assistant Registrar(CS II)

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Sub Assistant Registrar

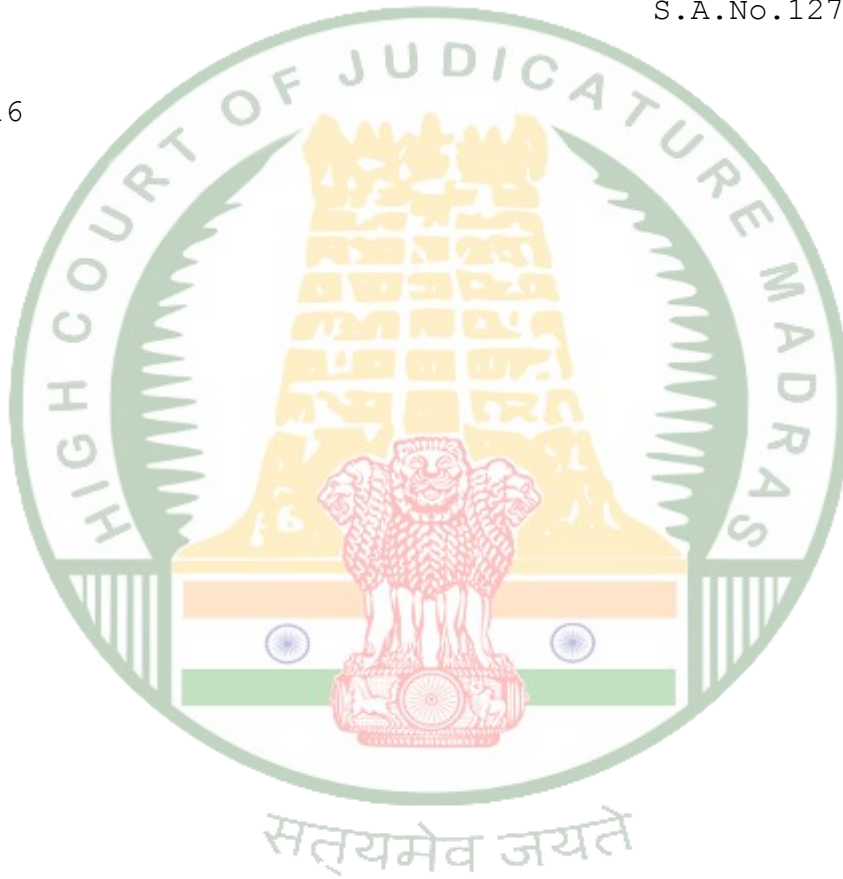
To

1.The Principal District Judge, Villupuram.

2.The learned Subordinate Judge, Tindivanam.

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