

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 21.12.2016

Coram:

The Honourable Mr.Justice M.M.SUNDRESH

S.A.No.1043 of 2015

- 1.Govindaraj @ Balaji
- 2.Murali
- 3.Prabavathi
- 4.Vanaja

All are residing at
Bazaar Street, Perambur,
Puthur Post, Sirkali Taluk & Munsif.

... Appellants/Defendants

Vs.

- 1.Anusuya
- 2.Minor Elakumidevi @ Iswarya (aged 7)
represented by her mother and guardian
Anusuya

Both are residing at
6/13, North Street, Nachiarkoil,
Kumbakonam Taluk & Munsif.

... Respondents/Plaintiffs

Second Appeal is filed under Section 100 C.P.C., to set aside the judgment and decree dated 30.08.2012 made in A.S.No.11 of 2012 on the file of District Court, Nagapattinam, confirming the judgment and decree dated 18.07.2011 made in O.S.No.63 of 2009 on the file of Principal Subordinate Court, Mayiladuthurai.

For Appellants :Mr.T.S.Baskaran

For respondents :Mr.S.Sounthar for R1
R2-Minor represented by R1

JUDGMENT

The plaintiffs, who suffered by a decree in both the Courts except the "C" schedule property, over which the proceedings become final, are the appellants before this Court.

2. At the time of admission, the following substantial questions of law have been framed.

(1) Whether the Courts below were right in granting the relief of partition pertaining to the "A" schedule property when the plaintiffs claimed only the relief of recovery of possession?

2. Whether the Courts below committed any error in granting 1/5th share in the "A" schedule property when the plaintiffs had claimed that already a partition had taken place and the 1st plaintiff's husband was allotted with 3.43 acres in R.S.No.305 and the same did not exist in the "A" schedule of the plaint?

However the appellants have raised two more substantial questions of law which are as under:

(3) Whether the Courts below right in holding that the "A" schedule property on the whole was the joint family property, when item 2 of the said 'A' schedule was allotted to the 1st defendant by way of the registered partition deed dated 03.03.1977 and the said partition deed was not challenged by the plaintiffs?

(4) Whether the lower appellate Court can say that the plaintiffs are entitled to mesne profits in the 'B' schedule properties, when he himself gave a finding that the income from the said properties can be utilised to pay for the liabilities of the family?

(5) Whether the judgment and decree of the Courts below have travelled beyond the relief and pleadings in the plaint to grant relief in favour of the plaintiff?

3. Heard the learned counsel for the parties on all the substantial questions of law.

4. Before going into the substantial questions of law, the back ground facts of the case require a narration.

5. The appellants and the respondents are claiming title to the common ancestral property. The respondents/plaintiffs, who are the wife and minor daughter of the deceased Giriraj, have filed the suit against defendants 1 to 4, who are the brothers, sister and mother of the deceased Giriraj. It is their case,

the suit "A" schedule properties, in view of the partition of the year 1974 made between the plaintiffs' predecessor the said Giriraj and his father the deceased Ramakrishna Naidu and the defendants absolutely belong to the plaintiffs on the death of the said Giriraj on 13.01.2004 as his legal heirs. The first plaintiff examined herself as P.W.1 and produced Exs. A1 to A3 viz., patta, order for transfer of patta and kist receipt dated 21.3.2005 respectively for the claim of ownership in the suit "A" schedule properties. The trial Court, on a perusal of evidence and documents, came to the conclusion that the plaintiffs have not produced any acceptable evidence for the plea of partition of the year 1974 and accepted the defendants' plea that the suit item No.4 in the suit "A" schedule properties belong to Ramakrishna Naidu. On accepting the plea that the suit "A" schedule properties are the properties of the predecessor Padmavathi Ammal and her son Ramakrishna Naidu, the trial Court passed a decree for partition of 1/5 share in favour of the plaintiffs in the suit "A" schedule properties as the legal heirs of deceased Giriraj and rejected the plaintiffs' claim of absolute ownership of their predecessor viz., the deceased Giriraj over the suit "A" schedule properties on the ground that though the said properties were mentioned in the abovesaid Exs.A1 to A3, the same was originally recorded in the name of the deceased Ramakrishna Naidu, who is the father of the deceased Giriraj. As against the said decision, no appeal has been preferred by the plaintiffs.

6.Insofar as "B" schedule properties are concerned, the trial Court, considering the plea of the defendants as partiabile properties, decreed the suit for partition of the plaintiffs' 1/5 share in items 2, 4, 5 and 7 to 11.

7.Insofar as the "C" schedule property is concerned, the suit was dismissed holding that it did not belong to the first plaintiff as Sreedhana property. These properties are movable properties. Suffice it to state that as against the dismissal of the suit qua the "C" schedule properties also there is no appeal and hence, the judgment and decree of the Courts below have become final.

8.Insofar as the above mentioned immovable properties are concerned, they admittedly stand in the names of grandmother Padmavathy Ammal and the father of the first appellant Ramakrishna Naidu. However, both the Courts, placing reliance upon the mortgage created over the "B" schedule properties, rejected the case of the defendants even for an extent of 1.34 covered under Ex.B1. The contention sought to be raised by the

first appellant with respect to the discharge of the mortgage was also rejected on the premise that such a discharge must have been through the income derived from the joint family properties.

9.The learned counsel appearing for the appellants submits that when the suit itself has been filed as one for possession based upon absolute title, it ought not to have decreed for partition. The plaintiffs, for the reasons known, have not included that portion of the property, which has been allotted in favour of the deceased Giriraj under Ex.B1. The registered partition deed having been not questioned, it is not open to the plaintiffs to contend to the contrary. Without any material and pleading to the contrary, the Courts below have merely on presumption and assumption, declined to accept the plea of the appellants for discharge of mortgage. The construction put up by the appellants also have not been taken into consideration. To buttress his submissions, the learned counsel has relied upon the following decisions.

- 1.SINGARAVEL V. MURUGESA UDAYAR (Died) AND OTHERS (2014 (1) CTC 797) ; and
2. ARUNACHALAM PILLAI V. RAMU MUDALIAR (DIED) AND THREE OTHERS (1998 (II) CTC 146)

10.The learned counsel appearing for the respondents submits that when a larger relief is sought for, it is always open to the Courts to grant a lesser one. Admittedly, the suit was filed, claiming absolute title, which has been modified into that of a co-owner. The decree has been granted based upon the documents filed by the appellants and therefore, there cannot be any dispute over the same. The respondents/plaintiffs have explained the reason for not including the property of the Giriraj. The Courts below have taken into consideration the mortgage deed signed by all the parties and therefore, such a finding need not be interfered. There is no material to substantiate that a construction was put up by the appellants. In support of his contentions, the learned counsel has relied on the following decisions.

1. HINDALCO INDUSTRIES LTD., V. UNION OF INDIA AND OTHERS ((1994) 2 Supreme Court Cases 594); and
2. SRINIVAS RAM KUMAR V. MAHABIR PRASAD AND OTHERS ((AIR 1951 Supreme Court 177)).

11.Coming to the questions of law with respect to the prayer as sought for in the plaint and the one granted by the Courts below, this Court is of the view that sufficient power is available under Order VII Rule 7 of the Code of Civil Procedure

to a Civil Court to use its plenary powers. When a suit has been filed on the premise of absolute title and if a Court, based upon the pleadings and documents relied upon by the defendants, is of the view a lesser relief can be granted then it is always open to such a Court to mold it in the interest of justice. In the case on hand, the relief of declaration of title has been modified into one of co-ownership. This has been done based upon the pleadings of the defendants in the written statement coupled with the documents filed by them.

In the written statement filed, the defendants have stated that there was a partition deed under Ex.B1 and except the specific shares allotted to Giriraj through whom the plaintiffs were claiming absolute title, all other properties are owned by grandmother and the father as the case may be. Thus, based upon the said factual premise, which has also been accepted by the plaintiffs, the Courts below have granted a decree. It has been held by the Apex Court in SRINIVAS RAM KUMAR V. MAHABIR PRASAD AND OTHERS ((AIR 1951 Supreme Court 177) in paragraph 7 in the following manner.

"But it was certainly open to the plaintiff to make an alternative case to that effect and make a prayer in the alternative for a decree for money even if the allegations of the money being paid in pursuance of a contract of sale could not be established by evidence. The fact that such a prayer would have been inconsistent with the other prayer is not really material. A plaintiff may rely upon different rights alternatively and there is nothing in the Civil Procedure Code to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative. The question, however, arises whether, in the absence of any such alternative case in the plaint it is open to the court to give him relief on that basis. The rule undoubtedly is that the court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's

own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings. In such circumstances, when no injustice can possibly result to the defendant, it may not be proper to drive the plaintiff to a separate suit."

12.The decisions relied upon by the learned counsel for the appellants/defendants do not help their case. In ARUNACHALAM PILLAI V. RAMU MUDALIAR (DIED) AND THREE OTHERS (1998 (II) CTC 146), this Court has held that the jurisdiction of the Court to grant a relief must be based on pleadings or at least the opposite party must have admitted the right of the plaintiff in respect of the portion of the same. Therefore, the said decision only helps the case of the respondents/plaintiffs.

13.The decision in SINGARAVEL V. MURUGESA UDAYAR (Died) AND OTHERS (2014 (1) CTC 797) is also distinguishable on facts. In the said case, there is no admission on the part of the defendants. Hence, this Court is of the view that the decisions as sought to be relied upon by the learned counsel for the appellants/defendants do not support their case. Accordingly, the substantial questions of law Nos.1, 2 and 5 are answered in favour of the plaintiffs.

14.There is one more issue to be considered. The execution of Ex.B1- settlement deed is not in dispute. The plaintiffs have also accepted the findings of the Courts below on the genuinity of Ex.B1. In fact, their own specific case is that the properties allotted to Giriraj through whom they are claiming title is not included for the reason that there has been a separate dispute between the said Giriraj and one Vijaya. Even the said averment would be fatal to the case of the plaintiffs. The said averments would clearly show that Giriraj and the plaintiffs have asserted their right over the properties allotted under Ex.B1 by filing the suit against the third party by name Vijaya. The rigour of Sections 91 and 92 of the Indian Evidence Act, 1872, would come into play. The title of the first appellant/first defendant over 3.74 acres in the "B" schedule as granted under Ex.B1 can never be questioned. A mere factum of signing the mortgage deed itself would not create a presumption of jointness based on a partition deed followed by a joint family hotchpotch. Accordingly, the substantial question of law No.3 is answered in favour of the defendants/appellants.

15.Coming to the substantial question of law No.4, there is absolutely no finding rendered. The finding rendered by the

Courts below on the discharge are perverse. Admittedly, the appellants have purchased Exs.B4 and B5. They have not been disputed or denied by the plaintiffs. It is nobody's case that the discharge has been effected from the income derived from the joint family properties. Such a presumption has got no basis in law especially, the teeth of the documents filed on behalf of the appellants, which are not disputed. Accordingly, the findings to the said effect are hereby set aside and thus, this Court holds that equities will have to be worked out by treating the discharge made by the appellants under Exs.B4 and B5 over the "B" schedule properties. It is clarified that in such a case, the liability of the plaintiffs would come only to the extent of share allotted viz., 1/5. Incidentally, the question with respect to the equities qua the construction said to have been put up by the appellants can also be decided at the time of final hearing proceedings.

16.The judgment and decree of the Courts below are hereby set aside as against the extent of 1.34 acres in Item No.2 of "A" schedule property out of 1.34.5 hectares. The substantial questions of law are answered accordingly. The second appeal stands allowed in part. No costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

raa
To

1.The District Court,
Nagapattinam.

2.The Principal Subordinate Court,
Mayiladuthurai.

+1cc to Mr.S.Sounthar, Advocate SR.74621

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srg 24/01/2017