

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 04.11.2016

PRONOUNCED ON : 18.11.2016

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.260 of 2011

1.Senthamizhselvi
2.Senthamaraikannan
3.Kanchana
4.Rathi
5.Rajesh Kannan ... Appellants/ Appellants/ Plaintiffs

Vs.

1.Padmavathi
2.Chitra
3.Jeevalakshmi
4.Dhanasekaran
rep by his power Agent Padmavathi
5.Hemalatha
6.The Tahsildar,
Gingee.
7.The District Collector,
Villupuram District,
Villupuram. ... Respondents/ Respondents/ Defendants

Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and decree dated 20.04.2009 made in A.S.No.40 of 2008 on the file of Principal District Judge, Villupuram confirming the Judgment and Decree dated 31.03.2008 made in O.S.No.18 of 2006 on the file of Principal Subordinate Judge, Gingee.

For Appellants : Mr.D.Bharatha Chakravarthy

For Respondents : Mr.P.Dinesh Kumar

JUDGMENT

Challenge in this Second Appeal is made by the plaintiffs to the Judgment and Decree dated 20.04.2009 passed in A.S.No.40 of 2008 on the file of Principal District Judge, Villupuram, confirming the Judgment and Decree dated 31.03.2008 made in O.S.No.18 of 2006 on the file of the Principal Subordinate Judge, Gingee.

2.Suit for partition and mandatory injunction.

3.In as much as the Second Appeal pertains only to the third item of the suit properties, the case of the parties are confined only with reference to the said item.

4.The case of the plaintiffs in brief is as follows:

The first plaintiff is the wife and the plaintiffs 2 to 5 are the children of Rajendran. The first defendant is the wife and the defendants 2 to 5 are the children of Kulasekaran. Both Rajendran and Kulasekaran are brothers. The item Nos.1 & 2 of the suit properties were purchased by Rajendran and Kulasekaran jointly out of their joint income and funds under the Sale Deeds dated 12.12.1974 and 15.12.1974. Further, Rajendran and Kulasekaran also purchased the third item of the suit properties out of the joint income and funds under the sale deed dated 19.03.1984. As such, according to the plaintiffs the suit properties are the joint family properties of Rajendran and Kulasekaran. Kulasekaran had settled at Chennai. Rajendran has been in exclusive possession and enjoyment of item Nos.1 and 2 of the suit properties and in joint possession of third item of the suit properties alongwith the defendants and the other joint family properties. In respect of the properties situated in Natham R.S.No.104/13, Kulasekaran had relinquished his right of share in the year 1993. After the demise of Kulasekaran on 28.04.1999, leaving behind his legal heirs namely the defendants 1 to 5, the properties were in possession and enjoyment of Rajendran as above mentioned. Subsequently, the defendants developed animosity and demanded partition barring the third item of the suit properties. Further, the defendants had denied the right and title of Rajendran in the suit item No.3 of the suit properties and claimed exclusive possession and enjoyment of the same. In this connection, Rajendran filed a suit in OS.No.29 of 2003 for declaration and permanent injunction in respect of the property situated in R.S.No.104/13- 0.06 cents. The sisters of Rajendran and Kulasekaran have filed a suit for partition in O.S.No.62 of 2004 in respect of the joint family properties barring the suit properties and the same is also pending. While so, the defendants 6 and 7 without authority and unlawfully had also muted the revenue records in respect of the suit properties. Hence, the plaintiffs are constrained to file the suit for necessary reliefs.

5.The case of the defendants 1 to 5 in brief is as follows:

The purchase of the suit item Nos.1 & 2 of the suit properties under the Sale Deeds dated 12.12.1974 & 15.12.1974 by Rajendran and Kulasekaran jointly, is admitted. The institution of the suits in O.S.Nos.29 of 2003 & 62 of 2004 is also admitted. The item No.3 of the suit properties absolutely belonged to Kulasekaran and the same has been purchased out of his own income and been in possession and enjoyment of Kulasekaran only. The construction put up on item No.3 of the

suit properties was made by the defendants. Rajendran has no right or title over the item No.2 of the suit properties. The item Nos.1 & 2 of the suit properties had already been divided. Therefore, the plaintiffs have no right to claim partition in respect of item Nos.1 & 2 of the suit properties again. As the plaintiffs have no right or title over the third item of the suit properties, they are not entitled to claim the partition in respect of the third item of the suit property. Hence, the suit is liable to be dismissed.

6. In support of the plaintiffs case PWs 1 to 5 were examined. Ex.A2 to A31 were marked. On the side of the defendants, DW1 has been examined. Ex.B1 to 5 were marked. On a consideration of the oral and documentary evidence adduced by the respective parties, the trial Court was pleased to grant the relief of partition and the mandatory injunction only in respect of item Nos.1 & 2 of the suit properties and dismissed the suit in respect of the third item of the suit properties. Against the judgment and decree of the trial Court in respect of the third item of the suit properties, the plaintiffs preferred the first Appeal. The first Appellate Court was also pleased to confirm the judgment and decree of the trial Court in respect of the third item of the suit properties and dismissed the first Appeal. Challenging the same, the present Second Appeal has been laid.

7. In this litigation before the High Court, only the third item of the suit property is involved. According to the plaintiffs, the third item of the suit properties had been purchased by Rajendran and Kulasekaran under the Sale Deed dated 19.03.1984 out of their joint income and funds and therefore, it is stated that the third item of the suit properties is also the joint family property of the brothers Rajendran and Kulasekaran and as such the plaintiffs are entitled to claim $\frac{1}{2}$ share in the same.

8. Per contra, it is the case of the defendants 1 to 5 that the third item of the suit properties is the self acquired property of Kulasekaran and his brother Rajendran does not have any right or title over the same and the third item of the suit properties has been in possession and enjoyment of Kulasekaran and thereafter the defendants 1 to 5 had put up construction on the third item of the suit properties and it is not the joint family property of Rajendran and Kulasekaran and therefore according to the defendants 1 to 5 there is no warrant to interfere with the judgement and decree of the Courts below. Ex.A3 is the copy of the sale deed dated 19.03.1984. A perusal of the same would go to show that as contended by the defendants 1 to 5, the said property had been purchased only in the name of Kulasekaran. Further, a perusal of Ex.A3 would also go to show that as rightly argued by the learned counsel for the defendants that it only Kulasekaran, who had parted with the sale consideration for the purchase of the property comprised

there in. Further, it could also be seen that prior to the execution of the sale deed, a sale agreement had also entered into between the parties concerned to the sale transaction and thereafter Ex.A3 had come to existence. Therefore, it could be seen that as rightly found by the Courts below, on the face of it, Ex.A3 does not indicate that Rajendran had contributed any sum towards the purchase of the property comprised therein.

9. In this connection, PW1 examined on the side of the plaintiffs would admit that his father had been maintaining accounts in respect of the joint family properties and he has not placed the same before the court and has also not placed the income particulars derived from the joint family properties, his paternal uncle Kulasekaran was earning separately by joining as Mechanic in Simson Company and the Sale Deed, Ex.A3 was taken only in the name of Kulasekaran and he does not know the sale consideration and also does not know who parted the sale consideration for the same and the patta in respect of the suit property stands in the name of his paternal uncle and the house tax also stands in the name of his paternal uncle and he does not know how much amount was incurred for the construction put up on the third item of the suit property and in the earlier proceedings there was no mentioning that the third item of the suit properties was purchased out of the joint family income funds and during the lifetime of his father he had not claimed partition in respect of the third item of the suit properties and therefore from the evidence of PW1 and also the recitals found in Ex.A3, as correctly noted by the trial Court as well as the first Appellate Court, it could be seen that it is only Kulasekaran, who had acquired the third item of the suit properties out of his own funds. Though item Nos.1 and 2 of the suit properties had been admitted to be acquired out of the joint income and funds of Rajendran and Kulasekaran, on that basis, alone, we cannot infer without any material that the third item of the suit properties though purchased in the name of Kulasekaran under Ex.A3 had also been acquired only out of the joint income of Rajendran and Kulasekaran. As adverted to earlier with reference to the above said case of the plaintiffs, no acceptable and reliable evidence is forthcoming. That apart from Ex.B4 & 5, it could be seen that certain other properties were also acquired separately in the name of Rajendran and it could therefore be seen that the brothers though had been having joint properties were also acquiring separate properties in their names out of their own income and funds. In such circumstances without any basis to contend that the third item of the properties also belonged to Rajendran and Kulasekaran jointly, cannot be accepted in any manner.

10. The only point that was argued by the learned counsel for the plaintiffs is that the plaintiffs have not produced the sale agreement which came into being before the execution of Ex.A3, Sale Deed. According to him, if that had been produced, more light would have been thrown on the source of consideration for the purchase made under Ex.A3, Sale Deed.

11. However, as rightly argued by the learned counsel for the defendants the non marking of the sale agreement would not in any manner disprove the defendants' case. The burden is entirely upon the plaintiffs to establish that the third item of the properties though stands in the name of Kulasekaran is the joint family properties of Rajendran and Kulasekaran. In such circumstances, when there is no proof with reference to the same on the side of the plaintiffs and as rightly found by the Courts below when the plaintiffs have miserably failed to establish that Rajendran had contributed any sum for the purchase of the third item of the suit properties, it could be seen that it is only Kulasekaran, who had purchased the same under Ex.A3. As rightly found by the Courts below the evidence of PWs.2 to 5 examined on the side of the plaintiffs are not useful to sustain the case of the plaintiffs. In such view of the matter, the decisions relied upon by the learned counsel for the plaintiffs reported in (2014) 4 SCC 707(Kesharbai Vs. Tarabai Prabhakar Rao Nalawade) & AIR 68 SC 1413(Gopal Krishnaji Ketkar Vs. Mohamed Haji Latif & Others), as rightly argued by the learned counsel for the defendants, would not be applicable to the facts and circumstances of the present case.

12. The learned counsel for the defendants in support of his case has submitted the decisions reported in (1960) 2 SCR 253: AIR 1960 SC 335(MST Rukhmabai Vs. Lala Laxminarayan and Others, (1955) 1 SCR 1(Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others), 2010(11) SCC 777(Sameer Kumar Pal and Another Vs. Sheikh Akbar and Others), (2011) 9 SCC 451 (Marabasappa Vs. Ningappa), (2003) 10 SCC 310(D.S. Lakshmaiah and Another Vs. L. Balasubramanyam and Another). The principles of law adumbrated in the above decisions are taken into consideration and followed as applicable to the facts and circumstances of the present case.

13. In the light of the above discussions, the plaintiffs having come forward with a specific case that the third item of the suit properties is also the joint family property of Rajendran and Kulasekaran and when they have failed to discharge the onus of proof pertaining to the said issue and on the other hand when the materials placed only indicate that the third item of the properties had been purchased by Kulasekaran in his name out of his own income and funds, it could be seen that no interference is called for in the findings of the Courts below, as regards the nature and character of the third item of the suit properties and the owner thereof. Therefore, I hold that the Courts below have rightly rejected the claim of the plaintiffs in respect of the third item of the suit properties.

14.The upshot of the above discussions is that the Second Appeal is devoid of merits and no substantial question of law is involved in the same. Hence, the Second Appeal is dismissed. No costs.

Sd/-
Asst.Registrar (CS IV)

/true copy/

Sub Asst. Registrar

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To

1.The Principal District Judge,
Villupuram

2.The Subordinate Judge,
Gingee.

3. The Section Officer
VR Section,
High Court, Madras

1 cc to Mr.D. Ravichander, Advocate, Sr. 66999

1 cc to M/s. Sai Bharath and Ilan, advocate, Sr. 66958

S. A.No. 260 of 2011

NMI (CO)
kk 26/12

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