

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.10.2016

PRONOUNCED ON : 07.11.2016

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.283 of 2011

and

M.P.No.1 of 2011

Jeevarathinam ... Appellant

Vs.

Rasambal ... Respondent

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree of the Principal District Judge at Puducherry in A.S.No.3 of 2008 dated 23.10.2008 in confirming the judgement and decree of the Additional Sub-judge, Puducherry in O.S.No.13 of 1990 dated 19.11.2007.

For Appellant : Mr.D.Bharatha Chakaravarthy

For Respondent : Mr.G.Karthikeyan

JUDGMENT

Challenge in this second appeal is made by the defendant against the judgement and decree dated 23.10.2008 made in A.S.No.3 of 2008 on the file of the Principal District Court, Puducherry confirming the judgement and decree dated 19.11.2007 made in O.S.No.13 of 1990 on the file of the Additional Subordinate Court, Puducherry.

2. The suit has been laid by the plaintiff for partition.

3.The averments contained in the plaint in brief are as follows:

The suit property originally belonged to the plaintiff's grandfather Narayana Gounder S/o. Ramu Gounder as per the registered sale deed dated 15.03.1906. The above said Narayana Gounder died leaving behind two sons viz., Gangamuthu Gounder and Velu Gounder. Gangamuthu Gounder died leaving behind two sons, viz., Samikannu and Krishnan. Samikannu died issueless and the defendant is the son of Krishnan. The plaintiff is the daughter of Velu Gounder. Thus, the plaintiff, being the daughter of Velu Gounder, is entitled to half share in the suit

property and the defendant, being the heir of Gangamuthu Gounder, is entitled to half share in the suit property. Velu Gounder died on 03.04.1966 leaving behind the plaintiff as his sole legal heir to inherit his share. Velu Gounder was employed at Ahmedabad and also, was in possession and enjoyment of the suit property, jointly with his brother Gangamuthu Gounder and after the death of Velu Gounder, on the demand made by the plaintiff to get half share in the suit property, a panchayat was convened. As the defendant took a definite stand not allotting her due share, the plaintiff caused a legal notice calling upon the defendant to effect partition in the suit property and to the same, the defendant had sent a reply containing false averments and hence, the suit.

4. The averments contained in the written statement in brief are as follows:

The suit is not maintainable either in law or on facts. It is true that the suit property originally belonged to Narayana Gounder. It is false to state that the plaintiff is the grand daughter of Narayana Gounder and the said Narayana Gounder S/o. Rama Gounder died leaving behind two sons viz., Gangamuthu Gounder and Velu Gounder. Narayana Gounder had only one son, viz., Gangamuthu Gounder and he never had any other son by name Velu Gounder. Gangamuthu Gounder died leaving behind two sons viz., Samikannu Gounder and Krishna Gounder and they were in possession and enjoyment of the suit property. Krishna Gounder died leaving behind his only son, viz., the defendant and the defendant and Samikannu Gounder had effected a partition deed dated 19.12.1970 and subsequently, Samikannu Gounder sold his half share in the suit property to the defendant by the sale deed dated 19.09.1971 and thus, the defendant is the absolute owner of the suit property and he is in possession and enjoyment of the same and the plaintiff has no right whatsoever over the same. The plaintiff is not entitled to claim any share in the suit property. She is not the legal heir of Narayana Gounder through his alleged son Velu Gounder. It is false to state that a Panchayat was convened to effect partition between the plaintiff and the defendant. The defendant gave a suitable reply repudiating the claim of the plaintiff, to the notice issued by the plaintiff claiming partition and hence, the suit is liable to be dismissed.

5. In support of the plaintiff's case, as found in the Judgement of the trial Court, PW1 has been examined and Exs.A1 to 8 were marked. On the side of the defendant, DWS1 and 2 were examined and Exs.B1 to 10 were marked and Exs.X1 and 2 were marked.

6. On a consideration of the oral and documentary evidence adduced by the respective parties, the trial Court was pleased to decree the suit as prayed for. Aggrieved over the same, the defendant preferred the first appeal and the first appellate

court was also pleased to confirm the judgement and decree of the trial court, as against which, the present second appeal has been instituted.

7. The second appeal was admitted on the following substantial question of law;

(i) Whether or not the trial court and the lower appellate court erred in finding the plaintiff's claim are proved by virtue of Ex.A1 to A8, while the same was held to be sufficient in A.S.No.110 of 2006?

8. That the suit property originally belonged to Narayana Gounder under the registered sale deed dated 15.03.1906 is not controverted. According to the plaintiff, Narayana Gounder had two sons, viz., Gangamuthu Gounder and Velu Gounder. Per contra, according to the defendant, Narayana Gounder had only one son by name Gangamuthu Gounder. The plaintiff claims to be the daughter of Velu Gounder and thus, she has made the claim of partition in the suit property as the heir of Velu Gounder. According to the defendant, Narayana Gounder had only one son, viz., Gangamuthu Gounder and the said Gangamuthu Gounder had two sons, viz., Samikannu Gounder and Krishna Gounder and the said Krishna Gounder died leaving behind his only son, viz. the defendant and on 19.12.1970, the defendant and Samikannu Gounder had effected a partition and subsequently, Samikannu Gounder sold his half share in the suit property to the defendant under the sale deed dated 19.09.1971. Thus, the defendant is the absolute owner of the suit property and therefore, according to the defendant, the plaintiff is not entitled to claim any title or share in the suit property.

9. Therefore, the only issue that has to be decided in this lis is whether Narayana Gounder had a son by name Velu Gounder as projected by the plaintiff and whether the plaintiff is the daughter of Velu Gounder or whether Narayana Gounder had only one son by name Gangamuthu Gounder, as put forth by the defendant.

10. This is the second round of litigation in this matter. Originally, the suit laid by the plaintiff was decreed by the trial Court by Judgement and decree dated 11.01.1995, as against which, the defendant preferred the first appeal in A.S.No.110 of 2006 and the first appellate Court, by judgement and decree dated 21.03.2007, finding that the evidence adduced by the parties was shortcoming with reference to decide the paternity of Velu Gounder, remitted the matter back to the trial Court, granting permission and affording opportunity to both parties to adduce further evidence on the said aspect.

11. Again, the trial Court, by Judgement and decree dated 19.11.2007, decreed the suit as prayed for by the plaintiff and the first appeal preferred by the defendant in A.S.No.3 of 2008

was dismissed by the first appellate Court on 23.10.2008 and as against which, the present second appeal has been preferred.

12. The parties are referred to in this second appeal as per their ranking in the trial Court.

13. It is argued by the defendant's counsel that pursuant to the order of remand made by the first appellate court by judgment and decree dated 21.03.2007, the parties had not chosen to adduce any further evidence with reference to the issue of the paternity of Velu Gounder. Per contra, it is contended by the plaintiff's counsel that after the remand, the plaintiff has chosen to examine PWS2 and 3 in support of her case and she did not adduce any documentary evidence and therefore, according to him, it is incorrect to state that the parties have not adduced any further evidence on the issue of paternity of Velu Gounder. It is admitted by both parties that the defendant did not adduce any further evidence on that issue pursuant to the order of remand. That the plaintiff has adduced further evidence through PWS 2 and 3, after the remand in support of her case, could be seen from para -14 of the impugned judgement of the first appellate Court. No doubt, the trial Court in its judgement, has not mentioned about the examination of PWS 2 and 3 in the list of plaintiff's witness and it could be seen that on that aspect, the trial Court has committed an error. Further, it could also be seen that the trial Court has also mentioned in its judgment that both parties had not chosen to adduce any further evidence, after the remand. That apart, in the ground No.2 of the appeal memorandum, the defendant has mentioned about the evidence of PW3. Therefore, it could be seen that pursuant to the order of remand on the side of the plaintiff, two further witnesses have been examined as PWS 2 and 3.

14. Be that as it may, the only issue that has to be decided in this matter is with reference to the paternity of Velu Gounder. To establish that Narayana Gounder is the father of Velu Gounder, the plaintiff has produced Ex.A2, marriage certificate of Velu Gounder. A perusal of Ex.A2 would go to show that, as found by the Courts below, Velu Gounder has been described as the son of late Narayana Gounder and late Canniammalle. Further, the plaintiff has also produced her marriage certificate as Ex.A3 and a reading of Ex.A3 would go to disclose that the plaintiff has been described as the daughter of Velu Gounder and of late Zegadamballe. From Ex.A3, it could be seen that the plaintiff is the daughter of Velu Gounder and Zegadamballe. The plaintiff has further produced Ex.A4 certificate dated 19.12.1989 issued by Sri Ambiga Mills Limited, in which, according to the case of the plaintiff, her father Velu Gounder was employed in the above said Mills. However, as rightly found by the Courts below, inasmuch as none had been examined to establish the authenticity of Ex.A4, no, safe credence could not be attached to the same. To buttress her case, the plaintiff has produced her birth certificate, which

has been marked as Ex.A5. Under Ex.A5 also, the plaintiff has been described as the daughter of Velu Gounder and Zegadamballe. Therefore, from Ex.A3 and A5, it could be safely concluded that the plaintiff is the daughter of Velu Gounder and Zegadamballe.

15. As found earlier, in the marriage certificate of Velu Gounder, which has been marked as Ex.A2, Velu Gounder has been described as the son of Narayana Gounder and Canniammalle. In support of her case, the plaintiff has also marked the death certificate of her father Velu Gounder, which has been exhibited as Ex.A6 and on an analysis of Ex.A6 would go to show that in the same, the plaintiff's father Velu Gounder has been described as the son of Narayana Gounder. Even the corrections found therein had been found to be authenticated by the authorities concerned as found by the Courts below. That apart, in the aforesaid documents the place of Velu Gounder has also been mentioned as Pillai Thottam, where, the suit property is situated. Therefore, it could be seen that prima facie and also by preponderance of probabilities, as found by the Courts below, the plaintiff has clearly established that Narayana Gounder had a son by name Velu Gounder and that, the plaintiff is the daughter of Velu Gounder.

16. However, controverting the above said documents put forth by the plaintiff, the defendant mainly relied upon the birth extract of the plaintiff marked as Ex.B1 on his side. No doubt, a perusal of Ex.B1 would go to show that the plaintiff has been described as the daughter of Velu Gounder and Zegadamballe. However, while describing Velu Gounder, he has been mentioned that he is the son of Manicka Gounder. That apart, it is also seen that Zegadamballe is described as the daughter of Rethinam Gounder. On the basis of the same, it is argued by the defendant's counsel that inasmuch as Velu Gounder has been described as the son of Manicka Gounder, the document relied on by the defendant should not be accepted and on the above said ground alone, the plaintiff should be non suited.

17. According to the defendant's counsel, in view of the above position only, the first appellate Court had earlier remitted the matter back to the trial Court giving opportunity to the parties concerned to adduce further evidence. However, inasmuch as the plaintiff has not cared to adduce any further evidence in support of her case, it is argued that the plaintiff's case should be rejected. However, as found earlier, after the order of remand, the plaintiff has chosen to examine PWs 2 & 3. Further, as seen earlier, after the remand, the trial Court has once again decreed the suit as prayed for and the first appellate Court also confirmed the judgement and decree of the trial Court.

18. Therefore, it has to be seen whether the plaintiff's claim should be discountenanced merely on the basis of Ex.B1. The first appellate Court has also found that even though the

father's name of Velu Gounder has been mentioned as Manika Gounder in Ex.B1, however, correlating the father's name of Zegadamballe found in Ex.B1 as Rethinam Gounder and also comparing the same with the marriage certificate of the plaintiff marked as Ex.A2, wherein also, it has been mentioned that Zegadamballe is the daughter of Rethinam Gounder and further also noting that in the death extract of Velu Gounder marked as Ex.A6 and the marriage certificate marked as Ex.A2, the father's name of Velu Gounder having been mentioned as Narayana Gounder and also, noting that in the above mentioned certificates, the residence of Velu Gounder has been mentioned as Pillai Thottam, wherein, the disputed property is situated and also finding that the corrections found in Ex.A6 having been duly authenticated, upheld the plaintiff's case on the basis of the preponderance of probabilities. The above reasonings of the first appellate court, as also made by the trial Court on two occasions are convincing and no plausible ground has been projected by the defendant to warrant any interference.

19. In the above said findings of the Courts below, on two occasions, it could be seen that the Courts below have rightly found that the plaintiff has established her case that Narayana Gounder had a son viz., Velu Gounder also and that, she is the daughter of Velu Gounder and thus, she is entitled to get half share in the suit property.

20. The Lower appellate Court has also gone into the other aspects and found that the falsity case of the defendant and held that he and his paternal uncle Samikannu could not effect a partition in respect of the suit property under EX.B2 ignoring the other legal heir viz., Velu Gounder. It has also been found by the lower appellate Court that the case of the defendant that he and his paternal uncle had put up terraced house in the suit property is also belied by the recitals found in Ex.B2 partition deed and Ex.B3 sale deed vis-a-vis Ex.A1 sale deed dated 15.03.1906. It could be seen that the defendant has set up a false case claiming to be the sole heir of Narayana Gounder and thereby, attempted to dis-entitle the plaintiff to obtain her half share in the suit property.

21. Further, the lower appellate Court has also considered and negated the case of the defendant that he has been in exclusive possession of the suit property to the knowledge of the plaintiff and thereby, he has perfected his title to the suit property by way of adverse possession and on the principle of ouster. Even on that aspect, the lower appellate court has gone into the evidence adduced by the parties concerned and found that the defendant would not be entitled to claim ownership to the suit property on the principle of ouster. Such being the position, the argument now put forth by the defendant's counsel that the plaintiff should be non suited on the question of limitation, on the footing that the defendant has excluded the plaintiff from enjoying the suit property

openly and uninterruptedly asserting his title over the suit property beyond the statutory period on the principle of ouster cannot be accepted. Therefore, it could be seen that the authority relied on by the defendant's counsel reported in (2013) 10 Supreme Court Cases 472 (Gothamchand Jain Vs. Arumugam Alias Tamilarasan) as rightly argued by the plaintiff's counsel, would not be applicable to the facts and circumstances of the present case.

22. The contention of the defendant's counsel is that the Courts below had not correctly understood the import of the order of remand made by the First appellate Court, at the first instance and wrongly upheld the case of the plaintiff and in this connection, he has relied upon the decision reported in 1998 (II) CTC 218 (R.Maria Siluvai Vs. B.Sreekumari Amma and three others), 1995 supp (4) Supreme Court Cases 286 (Most Rev.P.M.A.Metropolitan and others Vs. Moran Mar Marthoma and another), & (2000) 6 Supreme Court Cases 359 (Kunhayammed And others Vs. State of Kerala And Another) & (2013) 10 Supreme Court Cases 472 (Gothamchand Jain Vs. Arumugam Alias Tamilarasan). However, considering the facts stated supra, it could be seen that after the remand, the plaintiff alone has adduced additional evidence through Pws 2 & 3 and that apart, no further documentary evidence has been adduced either by the plaintiff or by the defendant. In such circumstances, it could be seen that the Courts below have again gone into the aspect of the paternity of Velu Gounder and accordingly, based upon the evidence available on record has proceeded to deal with the issue concerned and accordingly, found that the plaintiff's father Velu Gounder is one of the heirs of Narayana Gounder and thus, the plaintiff is entitled to half share in the suit property. Such being the position, as rightly argued by the plaintiff's counsel, the above said authorities would not be applicable to the facts and circumstances of the case at hand.

In the light of the above discussion, I hold that the appellant/defendant has failed to establish that any substantial question of law is involved in this second appeal and hence, the second appeal is found to be devoid of merits and the same is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Asst.Registrar (CS VII)

/true copy/

Sub Asst. Registrar

sms

To

1. The Principal District Judge,
Puducherry.

2. The Additional Sub-Judge,
Puducherry.

1 cc to M/s. Sai Bharath and Ilan, Advocate, Sr. 63487

1 cc to M/s. G. Karthikeyan, Advocate, Sr. 63876

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