

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.04.2017

Coram:

The Hon'ble Mr. Justice S.VAIDYANATHAN

Second Appeal No.1035 of 2013

1. Malarkodi
2. Minor Dharman
3. Minor Gokul ... Appellants/Plaintiffs
(Minors 2 and 3 represented
by their mother, Malarkodi)

vs.

Subbaiyan (died)

1. Lakshmi
2. Radhamani
3. Parvathi
4. Loganathan
5. Thangavel
6. Moorthy
7. Lakshmi
8. Shanmugam
9. Chandrasekaran
10. Venugopal
11. V.S.Duraisamy
12. Rajasulochana ... Respondents/Defendants 2 to 3

Second Appeal filed under Section 100 C.P.C. against the judgment and decree dated 18.03.2013 made in A.S.No.51 of 2012 on the file of the II Additional District Court, Erode, confirming the judgment and decree dated 08.02.2011 made in O.S.No.52 of 2006 on the file of the I Additional Sub Court, Erode.

For Appellants	..	Mr.N.Manokaran
For Respondents 1 to 9, 11 & 12	..	No appearance
For 10th Respondent	..	Dispensed with

J U D G M E N T

Aggrieved by the judgment and decree dated 18.03.2013 made in A.S.No.51 of 2012 on the file of the II Additional District Court, Erode, confirming the judgment and decree dated 08.02.2011 made in O.S.No.52 of 2006 on the file of the I

Additional Sub Court, Erode, the plaintiffs are before this Court by way of the present Second Appeal.

2. It is seen that the 1st respondent/Lakshmi is the wife of the deceased respondent/Subbaiyan and respondents 2 to 6 are their children. The 1st appellant/Malarkodi is the wife of the 4th respondent/Loganathan and appellants 2 and 3 are their children. The 7th respondent is the mother of respondents 8 and 9. Respondents 11 and 12 are husband and wife and the 10th defendant is their son-in-law. The deceased respondent/Subbaiyan and one Karuppanan are the sons of one Ayee Aandi. The said Karuppanan died long before leaving behind his wife, the 7th respondent herein and children, respondents 8 and 9. Ayee Aandi also died long before intestate. His wife Nallammal died intestate. One of the sons of the deceased respondent/Subbaiyan and the 1st respondent, viz. Velliangiri and his wife also died intestate, issueless. The 1st respondent herein, being Class I heir of the said Velliangiri, inherited his share.

3. It is the case of the 1st appellant that the 4th respondent demanded dowry from her and drove the appellants from their house. She has further stated in the plaint that Ayee Andi had ancestral properties at Kanagapuram and Kondavanaickenpalayam Villages and the same are arrayed as 'A' schedule properties. Out of the income derived from the suit 'A' schedule properties, the deceased respondent/Subbaiyan purchased Item 1 of 'B' schedule properties under a registered Sale Deed dated 26.02.1986. Thereafter, constructions were made thereon. Item 2 of 'B' schedule properties was also purchased out of the income derived from suit 'A' schedule properties.

4. Before the Trial Court, the appellants/plaintiffs averred that there is no permanent partition among the plaintiffs and the defendants. Since the 4th respondent/5th defendant is leading a wayward life, the appellants/plaintiffs filed a suit in O.S.No.52 of 2006 before the I Additional Subordinate Court, Erode seeking partition and separate possession and also for permanent injunction, as the respondents/defendants are attempting to alienate the properties including the share of the appellants 2 and 3.

5. Denying the averments of the appellants/plaintiffs that the father of the deceased respondent/Subbaiyan had ancestral properties at Kangapuram and Kondavanaickenpalayam Villages, respondents 11 and 12/defendants 12 and 13, in their Written Statement, stated that deceased respondent/Subbaiyan demanded more money from respondents 11 and 12 and when they refused to part with money, the deceased respondent/Subbaiyan instigated the respondents 4, 5 and 6 to file a suit in O.S.No.401 of 2002 against the respondents 11 and 12 for permanent injunction and

the same got dismissed on 28.01.2004. Aggrieved by the same, respondents 4, 5 and 6 preferred an appeal in A.S.No.27 of 2004 and after enquiry, the said appeal was also dismissed on 24.09.2004. Pending the said suit, respondents 1 and 2 filed a suit in O.S.No.1118 of 2004 against the deceased respondent and respondents 2, 4 to 6, 11 and 12 for partition and separate possession and permanent injunction. The other defendants in the said suit remained exparte and the suit was dismissed on 24.10.2005.

6. According to respondents 11 and 12, item 1 of B schedule properties is the self-acquired property of the deceased respondent/Subbaiyan. On 29.01.1997, the deceased respondent/Subbaiyan entered into a sale agreement with the 11th respondent. On 28.01.2000, he again entered into a agreement extending the period of agreement of sale, dated 29.01.1997 and the 4th respondent/Loganathan attested both the documents. On 28.01.2000 itself, the deceased respondent/Subbaiyan executed a Power of Attorney Deed in favour of one Venugopal and on 26.06.2001, the said Agreement of Sale was cancelled by the deceased respondent as also respondents 1 to 9. On the same date, an agreement was entered into between the deceased respondent and the 12th respondent. Subsequently, on 20.06.2002, a Sale Deed was executed in favour of the 12th respondent by the Power of Attorney agent. It is the case of the 11th respondent that respondents 11 and 12 are in exclusive possession and enjoyment of the suit property and neither the appellants nor the other respondents 1 to 9 have got any right, title or possession over the suit property.

7. The Trial Court, on consideration of the oral and documentary evidence available on record, decreed the suit in part that the suit properties be divided into 42 equal shares by metes and bounds and with reference to good and bad soil and allotted 2 such shares to the appellants 2 and 3/plaintiffs 2 and 3 and dismissed the suit insofar as other reliefs are concerned. Aggrieved by the said judgment, the plaintiffs went on appeal before the II Additional District Court, Erode in A.S.No.51 of 2011 and the First Appellate Court concurred with the findings of the Trial Court and dismissed the appeal. Challenging the same, the plaintiffs are before this Court.

8. The substantial question of law that arises for consideration in this appeal is as follows:

"Whether the Courts below have committed an error in holding the suit in 'B' schedule properties are the separate properties of the 1st defendant when he failed to prove any source of income sufficient to purchase the suit 'B' schedule?"

9. Heard the learned counsel for the appellants. The only issue raised by the learned counsel for the appellants is that when there is a specific plea that the 'B' schedule property is a Joint family property and no evidence has been let in by the appellants and respondents, it is the duty cast upon the kartha to show that it is not a Joint family property, but a separate property.

10. To substantiate his stand, learned counsel for the appellants relied on a decision of this Court in the case of Malla Naicker @ Singari and others vs. Jeeva (minor) and others (2012 (1) CTC 128), wherein, it was held as under:

"22. ... Therefore, having regard to the fact that the joint family possessed of ancestral properties and the appellants failed to prove through satisfactory evidence that they were running a separate business from which they have derived income and the fact that the First Appellant is the Kartha of the joint family and the properties were purchased in his name and in the name of his wife, the legal presumption is that the ancestral properties must have provided the nucleus and the burden is on the Kartha to prove that the properties were not purchased from out of the income derived from the joint family and it was purchased from his own income."

11. It is seen that the Trial Court accepted the case of the respondents insofar as 'B' schedule property is concerned, however, it granted relief to the appellants herein, with regard to 'A' schedule property. The facts mentioned supra are not in dispute. Admittedly, as could be seen from the discussion by the Courts below, no evidence has been let in by defendants 1 to 13 to prove that the deceased respondent/Subbaiyan had separate income to acquire 'B' schedule properties. In the absence of any evidence, the mere proof of existence of joint family nucleus out of which acquisitions should have been made is not sufficient. The moot question is whether the income which the joint family nucleus yields is sufficient to acquire a property.

12. It is also not in dispute that there was a earlier suit for permanent injunction before the file of the District Munsif, Erode with regard to Item No.1 of 'B' schedule property and the suit was dismissed, even though it was contended that the deceased respondent/Subbaiyan had no right to alienate the property. The Courts below have found that earlier it has been pleaded that 'B' schedule property is not a Joint family property, but, it is a self-acquired property in O.S.No.401 of 2002 and O.S.No.1118 of 2004 and the said finding remains unchallenged.

13. Even though the counsel for the appellants has relied on a decision of this Court in the case of Malla Naicker (cited supra) stating that the Kartha of the joint family properties will have to prove that he had source of independent income to acquire the property, as the property in question is a separate property and not a Joint Family property as held in the two suits referred to above, on factual aspects, the decision cited by the counsel for the appellants will not be applicable to the facts of this case.

14. Had the findings rendered in the earlier two suits were not available, certainly the appellants herein will get their relief. Thus, the substantial question of law is answered holding that 'B' schedule property is not a joint family property and it is only a separate property. In view of the judgments rendered in the said two suits, i.e. in O.S.No.401 of 2002 and O.S.No.1118 of 2004, this Court finds no reason to interfere with the findings rendered by the Trial Court and accordingly, the same is upheld in all respects.

In fine, the Second Appeal stands dismissed. No costs. Consequently, connected M.P.No.1 of 2013 is closed.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

aeb

To

1. The II Additional District Court, Erode.
2. The I Additional Sub Court, Erode.
3. The V.R.Section, High Court, Madras.

+1cc to Mr. N. Manokaran, Advocate Sr. 22770

Judgment in
S.A.No.1035 of 2013

SKV(CO)
VR(9/5/2017)