

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.03.2017

PRONOUNCED ON : 13.03.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.534 of 2013

and

M.P.No.1 of 2013

M.Balasubramani ...Appellant/3rd Defendant

Vs.

1. Rajendiran
2. Vanitha
3. Ganesan
4. Saraswathi
5. Thenmozhi
6. Minnalkodi
7. Silambarasan (Mentally Disordereed Person)
(By guardian apointed I.A.No.296 of 2009
dated 21.04.2009) ...Respondents/Plaintiff/
Defendant 4 to 9

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree of the Learned Principal District Judge, Namakkal dated 28.09.2012 made in A.S.No.103/2011 confirming that of the learned Subordinate Judge, Namakkal dated 20.06.2011 made in O.S.No.504 of 2000.

For Appellant : Mr.T.V.Krishnamachari
Senior Counsel
M/s. C.Jagadish

For Respondent : Mr.G.Murugendran
Nos.1 & 2

For respondent : Mr.R.Karthikeyan
Nos.3 to 5

For respondent : No appearance
Nos.6 & 7.

JUDGMENT

In this second appeal, the 3rd defendant has challenged the judgment and decree dated 28.09.2012 made in A.S.No.103/2011 on the file of the Principal District Court, Namakkal, confirming the judgment and decree dated 20.06.2011 made in O.S.No.504 of 2000 on the file of the Sub Court, Namakkal.

2. The second appeal has been admitted and the following substantial question of law is formulated for consideration in this second appeal:-

" Whether the judgments and decrees of the Courts below in accepting the case of the plaintiff are based upon the perverse findings and misdirected against the evidence on record?"

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

4. As per the case of the respective parties and the evidence adduced in the matter, it is found that the plaintiff and the 2nd defendant are the sons, born to the first defendant through his first wife Pachaiaammal. Further, it is also noted that the first defendant, after the death of Pachaiaammal, had married the 6th defendant namely Saraswathi and through her, begot the defendants 3 and 4. Pending the suit, it is found that the first defendant had died and the 2nd defendant had also died and accordingly, their legal representatives had been brought on record as the defendants 7 to 9. As regards the relationship between the above parties, there is no dispute.

5. As seen from the contest made by the parties, it is found that according to the plaintiff, the suit properties are the joint family properties of the deceased first defendant and his children and thus, according to the plaintiff, he is entitled to 1/5th share in the suit properties and inasmuch as his request to amicably divide the suit properties and allot his share, did not find acceptance by the defendants, he has been necessitated to lay the suit for partition. Per contra, the plaintiff's case being mainly resisted by the 3rd defendant, the 3rd defendant has taken a plea that the suit properties are the self acquired properties of the 1st defendant and in such view of the matter, it is contended that the plaintiff is not entitled to obtain the share in the suit properties and further, according to the 3rd defendant, the first defendant, during his lifetime, had bequeathed the suit properties in favour of the 3rd defendant by way of a Will dated 23.11.2000 and thus, according to the 3rd defendant, he had obtained absolute interest over suit

properties under the said Will and therefore, the plaintiff is not entitled to obtain the relief fought for. Further, according to the 3rd defendant, the first defendant had laid a suit against the plaintiff and another person in OS No.157/81 on the file of the District Munsif Court, Namakkal, as regards the suit properties and in such view of the matter, the present suit laid by the plaintiff is barred by Resjudicata.

6. Therefore, the main issue that is involved in this case is whether the suit properties are the joint family properties of the deceased first defendant as put forth by the plaintiff or the self acquired properties of the deceased first defendant as claimed by the 3rd defendant. It is admitted that the suit properties and other properties had been derived by the first defendant towards his share under the partition deed dated 07.07.1968, which has been marked as Ex.A1. It is found, on a perusal of Ex.A1, that the suit properties and the other properties had been allotted to the share of the first defendant. Further, a perusal of Ex.A1 would go to show that the said partition deed had been effected amongst the first defendant, his brother Thavasiappa Udayar and their sister. That apart, a further reading of Ex.A1 would also go to show that even though the first defendant and his brother Thavasiappa Udayar had partitioned even the properties acquired by them separately, it is found that the first defendant, his brother Thavasiappa Udayar and their sister had been living jointly and accordingly, it is also noted that they owned certain ancestral properties and since they had been living jointly both the brothers had also blended their separate properties into the hotchpot of the joint family properties i.e. ancestral properties and accordingly, there are clear recitals found in Ex.A1 that the suit properties and the other properties had been blended with the ancestral properties and accordingly, the two brothers and their sister had treated the suit properties and the other properties as joint family properties and enjoying the same as such. Accordingly, it is found that under Ex.A1, they had chosen to divide the properties belonging to them, namely, the joint family properties and under the said partition, it is found that the suit properties and the other properties had been allotted to the first defendant.

7. In the light of the above position, the contention of the appellant's counsel that the plaintiff has not established the inclination of the coparceners to treat their self acquired properties as joint family properties and further, the plaintiff has also not established the existence of the ancestral nucleus and further, the plaintiff has not established that the self acquired properties of the deceased first defendant and his brother Thavasiappa Udayar had been treated and enjoyed as joint

family properties, as such, cannot be accepted. In this connection, reliance is placed upon the decisions reported in (1992) 2 Supreme Court Cases 717 (Madanlal Phulchand Jain V. State of Maharashtra and others), 2003-1-L.W.58 (S.Sathappan (died) & 3 others V. P.S.S.Somasundaram Chettiar & 24 others) and 48 L.W.628 (C.V.Vythianatha Iyer V. C.V.Varadaraja Iyer and others) and the counsel for the respondent also placed reliance upon the decision reported in AIR 1991 KERALA 148 (Smt.Meenakshy and others V.Smt.Vellakutty alias Kamala and others). The principles of law outlined in the above said decisions are taken into consideration and followed as applicable to the facts and circumstances of the case at hand. As rightly put forth by the plaintiff's counsel, a reading of the recitals found in Ex.A1 alone would go to show that the joint family consisting of the deceased first defendant, his brother Thavasiappa Udayar and their sister had owned ancestral properties and accordingly, they had chosen to remain joint and further, the brothers had also, with the inclination to treat their self acquired properties as joint family properties, thrown them into hotchpot of the joint family properties and accordingly, blended their self acquired properties with the ancestral properties and accordingly, enjoyed all the properties in unison as their joint family properties as such. If there had been no inclination to treat their self acquired properties as joint family properties and had there been no ancestral properties and no inclination to remain as the joint family recitals with reference to the same would not have been incorporated in Ex.A1. On the other hand, as adverted supra, it is noted that the existence of the ancestral properties is mentioned in Ex.A1, the inclination of the parties of the joint family to treat their self acquired properties as joint family properties is also mentioned in Ex.A1 and accordingly, it is noted that the joint family consisting of the above mentioned persons had treated all the properties as the joint family properties and enjoying the same as such.

8. Till this point of time, it is found that no challenge has been made to Ex.A1. It has also not been pleaded or established that the first defendant during his life time had thrown any challenge to Ex.A1. Therefore, it could be seen that inasmuch as the suit properties had been treated and enjoyed as the joint family properties along with the other properties of the joint family, it is found that the first defendant had also without any demur accepted the partition effected under Ex.A1 and in such view of the matter, the 3rd defendant, being the son of the first defendant, does not have any right to contend the suit properties are the separate properties of the deceased first defendant.

9. The 3rd defendant has mainly resisted the case of the plaintiff, on the basis of the Will alleged to have been executed by his father on 23.11.2000 marked as Ex.B2. As seen supra, when it has been noted that the suit properties are the joint family properties of the first defendant and his sons, as such, it is found that the first defendant would not be entitled to bequeath the whole of the suit properties in favour of the 3rd defendant, even assuming that the Will projected by the 3rd defendant is a true one. It is also found that the Will marked as Ex.B2, had come into the existence, after the institution of the suit. That apart, it is also noted as rightly found by the Courts below, the Will has not been established to be a genuine document in the manner known to law by the 3rd defendant. The 3rd defendant, in order to prove the authenticity of the Will, has examined the attestors of the same as DWs 2 and 3. As rightly found by the Courts below, a perusal of the evidence of DWs 2 and 3 would go to show that they are not personally aware of the execution of the Will in question. During the cross-examination, they have clearly admitted that at the time of preparation of the Will, they were not present. Further, they have also admitted that they had come to know about the Will and the contents thereof, only after going through the same. In addition, it is also found that the Will had not been registered on the date of the execution and came to be registered belatedly. Accordingly, it is found that the Courts below have disbelieved the evidence of DWs 2 and 3 as to whether at all they would have been present at the time of execution of the Will Ex.B2. No infirmity is noted in the findings and conclusions of the Courts below for not placing reliance upon the evidence of DWs 2 & 3 and rejecting the Will projected by the 3rd defendant. That apart, it is also found that as noted by the trial Court, the 3rd defendant has admitted that the Will had been executed in his favour only as regards the share, to which, his father is entitled to in the suit properties. Be that as it may, when it has been held by the Courts below, which does not call for any interference, that the Will had not been established as required under law, it could be seen that the 3rd defendant is not entitled to claim absolute right over the suit properties under the said Will.

10. The other defence projected by the 3rd defendant to resist the plaintiff's case is the institution of O.S.No.157/81 by the deceased first defendant. As rightly found by the Courts below, the said suit has been laid by the first defendant as Kartha of the joint family mainly seeking the relief of permanent injunction and also possession whereas the present suit has been laid for partition. Therefore, it could be seen that when O.S.No.157/81 has been laid by Kartha of the joint family i.e., the first defendant to protect his possession in

respect of the joint family properties and when the issue of title or the share of the respective co-sharers in the suit properties are not involved in the said suit and when the cause of action for the present suit and the suit in O.S.No.157/81 are completely found to be different, as rightly determined by the Courts below, the suit in O.S.No.157/81 would not operate as resjudicata to the present suit.

11. As seen from the evidence adduced by the respective parties in the matter, it is found that in certain items of the suit properties, some portions had been acquired by the Government. However, as rightly determined by the trial Court in order to claim the compensation with reference to the same, it is seen that the shares of the co-sharers to the respective properties have to be determined and accordingly, the Courts below have proceeded to hold that the acquisition of the certain portions of the said items would not be a bar for the plaintiff to claim the relief for partition.

12. In the light of the above discussions, it is found that the Courts below, on the proper appreciation of the evidence on record and giving acceptable, convincing reasonings and conclusions, have rejected the defence version and decreed the suit as prayed by the plaintiff. No reason is made out to interfere with the judgment and decree of the Courts below. The substantial question of law formulated for consideration in this second appeal is answered in favour of the plaintiff and against the appellant/3rd defendant.

In conclusion, the second appeal fails and the same is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

sms

To

1. The Principal District Judge,
Namakkal.

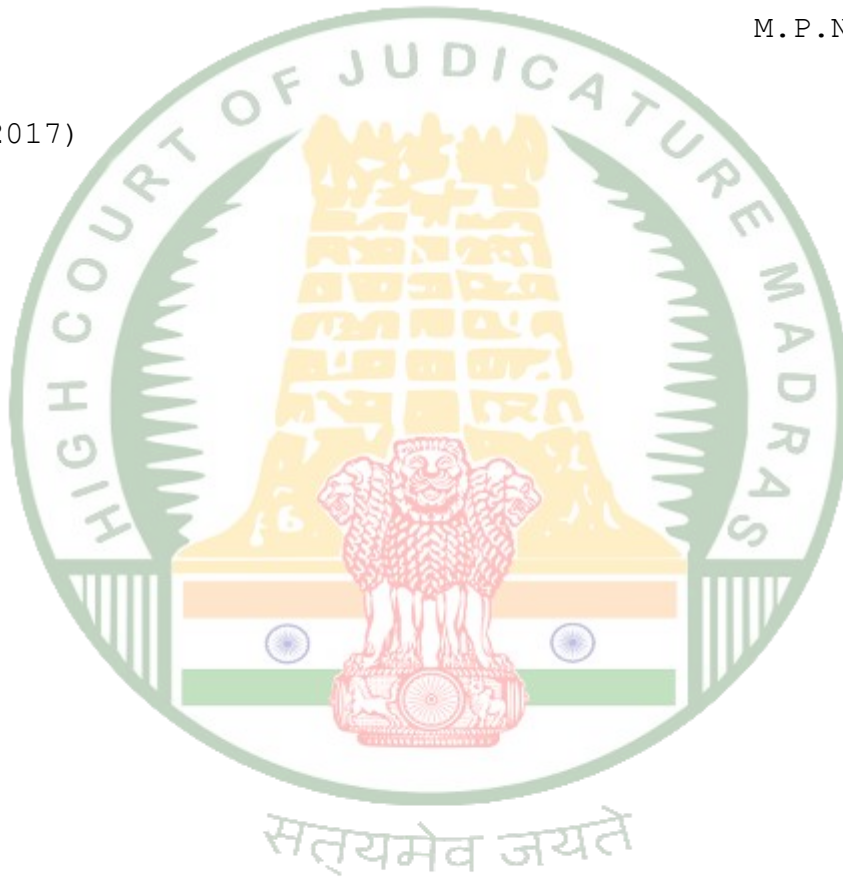
2. The Sub Judge,
Namakkal.

+1cc to Mr.Jagadesh, Advocate, S.R.No.15684

+2cc to Mr.Murugendran, Advocate, S.R.No.15857

S. A.No.534 of 2013
and
M.P.No.1 of 2013

NM(CO)
RS(03/04/2017)



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