

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.03.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

S.A.No.1433 of 2011
and
M.P.No.1 of 2011

1. K.V.Subramanian
2. Mrs.N.Kokilam .. Appellants/Defendants 2 & 3
Vs.
1. K.Vijaya
2. K.Deepa
3. K.Gokula Krishnan
4. Mrs.Radha Rajagopalan .. Respondents/Plaintiffs 1 to 3
of 1st Defendant

Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 30.11.2010 in A.S.No.501 of 2009 on the file of the VII Additional City Civil Court, Chennai, against the judgment and decree dated 05.03.2009 in O.S.No.7602 of 2007 on the file of the III Assistant City Civil Court, Chennai.

For appellants : Mr.A.Muthukumar

For respondents : Mr.L.J.Krishnamurty for RR-1 to 3

Mr.D.Gopinathan for Mr.P.B.Sampathkumar for R-4

JUDGMENT

The defendants 2 and 3 are the appellants before this Court. The Second Appeal is filed against the judgment and decree dated 30.11.2010 in A.S.No.501 of 2009 on the file of the VII Additional City Civil Court, Chennai, confirming the judgment and decree dated 05.03.2009 in O.S.No.7602 of 2007 on the file of the III Assistant City Civil Court, Chennai.

2. The first plaintiff is the wife of one late K.V.Krishnamoorthy and the plaintiffs 2 and 3 are their children. According to the plaintiffs, the father of the plaintiffs 2 and 3, namely K.V.Krishnamoorthy died intestate on 06.06.2001. The father of late Krishnamoorthy, namely K.Venkatraman, pre-deceased him and he died intestate on 04.04.1985. During the lifetime of K.Venkatraman, he acquired the properties mentioned in Schedule A and B of the suit properties along with the mother and others. Late

Krishnamoorthy's mother Mangalam Venkatraman also passed away on 27.02.2000. Since both the parents of late Krishnamoorthy died intestate and that late Krishnamoorthy also died on 06.06.2001, being self-acquired properties of late K.Venkatraman, the plaintiffs requested the second defendant to partition the properties among the heirs of late Venkatraman. The plaintiffs submitted that they are entitled to inherit 1/4 share in the properties of late Venkatraman and inspite of legal notice, no steps have been taken by the defendants. The plaintiffs are entitled to 1/4 share and each of the plaintiffs would get 1/12 share and each of the defendants would be getting 3/12 share. Hence, the plaintiffs have filed the suit for partition of the suit schedule properties by metes and bounds by allotting 1/12 share to each of the plaintiffs. The plaintiffs are also claim mesne profits from 27.02.2000, as the properties have been enjoyed by the second defendant solely after the death of the mother. The plaintiffs have also sought for permanent injunction restraining the defendants from alienating the suit properties mentioned in the schedule to third parties. The plaintiffs have also prayed for appointment of a Receiver to collect the rents and profits from the suit properties and to appoint Commissioner to determine the mesne profits payable to the plaintiffs by way of 1/12 share each, in the rental income after deducting public dues.

3. The defendants 2 and 3 have filed written statement stating that the relief sought for by the first plaintiff is no longer available, in view of the fact that divorce proceedings have been initiated by the first plaintiff against her husband, who is the brother of the defendants, and hence, she cannot claim any share in the suit properties as heir of the deceased husband. It is also stated that the plaintiffs have suppressed the said fact in the suit. It is also stated by the defendants 2 and 3 that the second defendant was employed abroad till 2001 and that he has contributed for purchase of B-Schedule properties and late Krishnamoorthy, the husband of the first plaintiff was in possession of A-schedule properties till his death and one of his friends was permitted to occupy the first floor portion of A-schedule property and that friend vacated the premises in 2005 / 2006. The paternal aunt's children of the defendants 2 and 3 are in occupation of the ground floor of A-schedule property. The defendants 2 and 3 further stated that their father permitted them to reside therein only under leave and licence. Hence, there is no income from A-schedule property. It is further stated that B-schedule property is only a vacant site and it is not yielding any income. Hence, the share in profits with regard to B-schedule property is not maintainable. The contention of the plaintiffs that the defendants are trying to alienate the suit properties without the consent of the plaintiffs, is not correct and that the plaint is lacking

particulars and the address of the second defendant given in the plaint is not correct. Hence, the defendants 2 and 3 pray for dismissal of the suit.

4. On a consideration of the above pleadings and oral and documentary evidence, the trial Court held that the issue with regard to the partition of the share for the first plaintiff alone is in dispute and with regard to the entitlement of 1/4 share to the other legal heirs is not in dispute. The trial Court further proceeded on the basis that the parties have agreed that there was a family dispute, but the factum that the first plaintiff and her husband, i.e. the brother of the appellants herein, obtained divorce, has not been established by the defendants. Even there is no averment in the written statement to the effect that the divorce had been granted. The trial Court also rendered a finding that the first plaintiff was the wife of late Krishnamoorthy till his demise and that as his wife, she is entitled to a share in the suit properties. Merely because of pendency of the divorce proceedings, it cannot be put against the first plaintiff to deprive her share in the suit properties. The trial Court further held that the plaintiffs are entitled to 1/4 share in the suit properties. Thus, the trial Court granted preliminary decree of partition of 1/4 share to the plaintiffs and the first defendant, and as far as the relief of permanent injunction is concerned, the suit was dismissed by the trial Court.

5. Aggrieved by the judgment and decree of the trial Court, the defendants 2 and 3 preferred appeal, and the first appellate Court confirmed the findings of the trial Court and held that the contention of the defendants 2 and 3 before the lower appellate Court that the first respondent/first plaintiff initiated proceedings for divorce against the first plaintiff's husband and she cannot claim any share in the suit properties as legal heir of the deceased husband, was stoutly denied by the first respondent/first plaintiff before the lower appellate Court. Moreover, there is no proof before the first appellate Court to show that the first plaintiff has initiated divorce proceedings against her husband and the marriage was dissolved between them by Court, and hence, the first appellate Court observed that the Court cannot come to the conclusion that the first plaintiff has lost her right to claim a share in the suit properties in the capacity of wife. The contention that the second defendant has contributed for purchase of B-schedule property, has not been proved, as there is no iota of evidence with regard to the purchase of B-schedule property. Hence, the lower appellate Court held that B-schedule property is also a joint family property. Finally, the lower appellate Court has confirmed the findings of the trial Court and held that the plaintiffs are entitled to 1/4 share in the suit properties

along with the defendants. Aggrieved by the above findings of the first appellate Court, the defendants 2 and 3 have filed the present Second Appeal.

6. At the time of admission of the Second Appeal on 22.12.2011, this Court framed the following substantial questions of law:

(i) Whether the lower appellate Court erred in law in holding that there is no proof that the first plaintiff had initiated proceedings for divorce against her husband, when the first plaintiff has categorically admitted in her evidence about the proceedings for divorce initiated by her ?

(ii) Whether the Courts below erred in law in placing burden of proof on the appellants/defendants 2 and 3, when the first plaintiff admits the proceedings for divorce initiated by her ?

(iii) Whether the suit for partition is maintainable at the instance of the divorced wife for partition of the estate of her husband ?

(iv) In the absence of any evidence to suggest that the father of the second defendant, Venkatraman, had sufficient income after meeting out family expenses and admittedly, the second defendant was employed gainfully abroad, whether the Courts below erred in law in holding that B-schedule property is available for partition ? and

(v) Whether the Courts below have misconstrued and mis-appreciated the evidence on record ?

7. Heard both sides and perused the materials available on record.

8. The facts mentioned *supra* are not in dispute. The deceased Venkatraman, the father of late Krishnamoorthy, died on 04.04.1985 and the mother of late Krishnamoorthy also died on 27.02.2000 and the late Krishnamoorthy died on 06.06.2001. The first plaintiff is the wife and the plaintiffs 2 and 3 are the children of the first plaintiff, born to her through late Krishnamoorthy. The other parties to the suit, namely the defendants are brother and sisters of late Krishnamoorthy.

9. Whether there is any partition with regard to the self-acquired properties of Venkatraman, has to be considered. Admittedly, all the four children born to Venkatraman and Mangalam, are entitled to equal share in the self-acquired properties. The only stand taken by the defendants 2 and 3 who

are the appellants herein, is that initiation of divorce proceedings would dis-entitle the first plaintiff from getting a share in the suit properties. It is contended by the appellants/D2 and D3 that the Courts below are wrong in shifting the burden on the defendants to establish that there was divorce proceedings and the same is only an observation and not a finding. Even assuming for the sake of argument that the said contention is going to be accepted, there is no iota of evidence to show that the defendants have proved the initiation of divorce proceedings.

10. Learned counsel for the appellants produced certified copy of the decree of the Principal Family Court, Chennai in F.C.O.P.No.93 of 1991, dated 10.12.1997, wherein it has been categorically stated that the said F.C.O.P. had been filed by Vijaya, the first plaintiff herein, for judicial separation and the said Court had granted the decree of judicial separation between the first plaintiff and her husband, i.e. Krishnamoorthy.

11. Learned counsel appearing for the appellants/D2 and D3 submitted that the said decree of the Court below granting judicial separation, was not placed before the Courts below. Even without reference to the decree of the Court below granting judicial separation, no divorce had been granted and it is only an allegation that divorce proceedings have been initiated. Even assuming that such divorce proceedings have been initiated, it cannot be a ground to deprive the first plaintiff her share in the suit properties, unless and until the divorce proceedings culminated into a decree of divorce. Moreover, the decree of judicial separation has not been placed before the Courts below and at this Second Appeal stage, the same cannot be taken as a document under Order 41 Rule 27 CPC, on the facts and circumstances of this case, because the same was very much available to be marked as an exhibit, as the document is only pre-dated to the date of filing of the suit and it could have very well been marked as an exhibit before the trial Court itself. Hence, this Court cannot allow the production of the said document of granting decree of judicial separation between the first plaintiff and her husband Krishnamoorthy, as evidence to prove the stance of the defendants, coupled with the fact that the ingredients of Order 41 Rule 27 CPC have not been satisfied to mark it as an additional evidence.

12. Hence, the first, second and third substantial questions of law are answered in favour of the plaintiffs and against the defendants. Thus, the plaintiffs are entitled to preliminary decree of partition.

13. With regard to the fourth substantial question of law,

there is no evidence to prove that the second defendant had contributed for purchase of B-schedule property and hence, B-schedule property is also available for partition, the same being a joint family property. Hence, the fourth substantial question of law is also answered against the defendants.

14. With regard to the fifth question of law, this Court holds that the Courts below have properly appreciated the evidence available on record and they had not misconstrued the same. The concurrent findings of the Courts below do not warrant any interference by this Court under Section 100 CPC. The findings of fact concurrently recorded by the trial court, as also by the lower appellate court, could not be legally upset by this Court, sitting in Second Appeal under Section 100 CPC, unless it is shown that the findings are perverse, being based on no evidence or that on the evidence on record, no reasonable person could come to that conclusion. Further, the scope for interference with the concurrent findings of fact, while exercising jurisdiction under Section 100 CPC, is very limited, and re-appreciation of evidence is not permissible, and if the trial court and the first appellate court misdirected themselves in appreciating the question of law or placed the onus on the wrong party, certainly, there is a scope for interference under Section 100 CPC.

15. Hence, for the foregoing reasonings and in view of the discussion made above on the substantial questions of law, and there being no perversity, illegality or infirmity in the impugned concurrent judgments of the Courts below, the Second Appeal is dismissed. No costs. The Miscellaneous Petition is closed.

Sd/-

Assistant Registrar

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Sub Assistant Registrar

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Copy to

1. The VII Additional Judge, City Civil Court, Chennai.
2. The III Assistant Judge, City Civil Court, Chennai.

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3. The Section Officer, V.R. Section, High Court, Madras.

+1cc to Mr.A. Muthukumar, Advocate, S.R.No.19240
+1cc to Mr.L.J. Krishnamurthy, Advocate, S.R.No.19236
+1cc to Mr. P.B. SampathKumar, Advocate SR.No.19704

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md(21/04/2017)

S.A.No.1433 of 2011



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