

THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.11.2016

PRONOUNCED ON : 02.01.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.56 of 2011

and

M.P.No.1 of 2011

1. Vasantha
2. Mallika
3. Selvi

..
Vs.

Appellants

1. Pushpa
2. Thangamani
3. Venkatesan
4. Bhavanai
5. Rani
6. Manimegalai
7. Kavitha
8. Rajendran
9. Natesan

..

Respondents

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 30.04.2010 in A.S.No.8 of 2009 on the file of the Additional District Judge, Fast Track Court No.2, Chennai, confirming the judgment in O.S.No.7995 of 2006 dated 22.07.2008 on the file of XVIII Assistant Judge, City Civil Court, Chennai.

For Appellants : Mr.K.Chandrasekaran

For Respondents : Mr.P.Seshadri
Nos.1, 2, 5,8 & 9

Respondents : No appearance
Nos.3,4,6 & 7

JUDGMENT

Challenge in this second appeal is made to the Judgment and decree dated 30.04.2010 passed in A.S.No.8 of 2009 on the file of the Additional District Court, FTC II, Chennai, confirming the judgment and decree dated 22.07.2008 passed in O.S.No.7995 of 2006 on the file of the XVIII Assistant City Civil Court, Chennai.

2. The suit has been laid by the plaintiffs for partition and permanent injunction.

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

The plaintiffs are the daughters of late Thiruvengada Naicker and Varadhammal. Thiruvengada Naicker died leaving behind his wife Varadhammal and sons Kannan, Natesan, Elumalai and Rajendran and daughters viz., the three plaintiffs. Varadhammal also died. Kannan died leaving behind the defendants 1 to 4 as his legal heirs. Another son Elumalai also died leaving his legal heirs as defendants 5 to 7. As such, Thiruvengada Naicker died leaving behind 7 branches of legal heirs. The suit property is the absolute property of Thiruvengada

Naicker. The plaintiffs are also having portions in the suit property. After the death of Thiruvengada Naicker, the plaintiffs and the defendants are residing in the suit property and the same has not been divided by metes and bounds. As such, the plaintiffs are each entitled to 1/7th share in the suit property. The plaintiffs demanded partition by making several requests and also, issued notice to the defendants on 06.10.2003, even thereafter, the defendants did not come forward for amicable partition. Hence, the suit.

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

The suit is not maintainable either in law or on facts. The suit property was originally purchased by Thiruvengada Naicker under the registered sale deed dated 17.05.1965. The property was purchased as a vacant site and later on, Thiruvengada Naicker along with his four sons had mortgaged the property as the Kartha of joint family constituting an undivided Hindu Joint family consisting of himself and his four sons and out of the said amount borrowed, the superstructure was built. Thus, the suit property is the joint family property belonging to Thiruvengada Naicker and his four sons. The plaintiffs are the daughters. Therefore, all the sons including the father are

each entitled to $\frac{1}{5}^{\text{th}}$ share in the suit property. After the death of the father, the sons are residing in the suit property. The suit property has not been divided amongst the sons. The daughters viz., the plaintiffs, are not entitled to seek partition, when the sons have not chosen to divide the suit property, the suit is thus premature and not maintainable. It is only the defendants, who had paid the entire mortgage debt and got back the mortgage deed. It is false to state that the suit property is the absolute property of Thiruvengada Naicker. The plaintiffs never demanded any partition as put forth in the plaint. It is false to state that the plaintiffs are each entitled to $\frac{1}{7}^{\text{th}}$ share in the suit property. At the most, the plaintiffs would be entitled to claim only $\frac{1}{3}^{\text{rd}}$ share out of the $\frac{1}{5}^{\text{th}}$ share to which Thiruvengada Naicker was entitled to. The mother had left the Will bequeathing her share in the suit property in favour of the sons. There is no cause of action and hence, the suit is liable to be dismissed.

5. In support of the plaintiffs' case, PW1 has been examined and Exs.A1 and 2 were marked. On the side of the defendants, DW1 was examined and Exs.B1 to 4 were marked.

6. On a consideration of the oral and documentary evidence adduced by the respective parties, the trial court was pleased to hold that the plaintiffs are not entitled to obtain 3/7 share in the suit property and they would be entitled to obtain only 3/35 share in the suit property and accordingly, granted the preliminary decree in favour of the plaintiffs. The plaintiffs preferred the first appeal. The first appellate court also confirmed the judgment and decree of the trial court. Challenging the same, the second appeal has been preferred by the plaintiffs.

7. The second appeal has been admitted and the following substantial questions of law are formulated for consideration in this second appeal.

(a)Has the lower Court erred in coming to the conclusion that Thiruvengada Naicker, the father has treated his self-acquired property as joint family property when there is no evidence at all to this effect, on the other hand the recital in Ex.B1 against such a theory?

(b)Has the lower Court erred to coming to the conclusion that the discharge of mortgage by some co-owners would divest the title of other co-owners?

8. The relationship between the parties is not in dispute. Now, according to the plaintiffs, the suit property is the absolute property of their father Thiruvengada Naicker and therefore, it is contended that the plaintiffs being class-I heirs, after the death of Thiruvengada Naicker, they are entitled to obtain 3/7 share in the suit property. Further, according to the plaintiffs, as the request for amicable partition was not considered by the defendants even after the legal notice, they were constrained to file the suit.

9. Per contra, it is the case of the defendants that though the suit property was purchased in the name of Thiruvengada Naicker under the sale deed dated 17.05.1965, the suit property was all along treated as the joint family property of Thiruvengada Naicker and his four sons and the same would be evidenced by the mortgage of the property by Thiruvengada Naicker as the Kartha of the joint family

along with his four sons and it is only the four sons, who had discharged the mortgage debt and therefore, according to the defendants, the plaintiffs would not be entitled to obtain $3/7^{\text{th}}$ share in the suit property and at the most, the plaintiffs would be entitled to obtain only $3/35^{\text{th}}$ share in the suit property.

10. It is the admitted case of the parties that the suit property was purchased by Thiruvengada Naicker under the sale deed dated 17.05.1965. Therefore, it could be seen that the suit property is the absolute property of Thiruvengada Naicker. Admittedly, at the time of purchase of the suit property, it could be seen that all the sons of Thiruvengada Naicker were only minors. There is no proof that the sons had contributed any amount for the purchase of the suit property under the above said sale deed. In such circumstances, as rightly argued by the plaintiffs' counsel, the onus is squarely upon the defendants to show that though the property was purchased in the name of Thiruvengada Naicker still, the same has been only treated and enjoyed as the joint family property consisting of Thiruvengada Naicker and his four sons as pleaded by them. In this connection, the plaintiffs' counsel relied on the decisions reported in **2005 (5) CTC 264 (Savithiri Ammal V.Ilayaperumal and another) and**

2013(1) MLJ 513 (G.Kumar V.Samuthiradevi and another).

11. Even the courts below have noted that the burden of proof is upon the defendants to show that the suit property has been treated and enjoyed as the Joint Hindu Family property consisting of Thiruvengada Naicker and his four sons. To establish the same, on the side of the defendants, only one witness, namely, Natesan, who had been arrayed as 9th defendant has been examined as DW1. DW1, during the cross examination, has admitted that the suit property was purchased by his father in his own name under the sale deed dated 17.05.1965 and at that time, he was aged about 10 and 11 years and his brothers and sisters were also minors. The said sale deed or the copy of the same, has not been produced in the court.

12. However, as adverted to earlier, the purchase of the suit property by Thiruvengada Naicker under the above said sale deed is not controverted. Further, DW1, during the cross examination, has admitted that immediately after the purchase, Thiruvengada Naicker had mortgaged the suit property and obtained a loan of Rs.1500/- in order to reconstruct the house thereon. He has also further admitted that all the four sons have separately put up huts and residing in the

suit property and that the father and his four sons had not maintained any joint account in the bank and also, not paid any income tax jointly and they were maintaining the families separately out of the income earned by them separately. Further, he has also admitted that the sons had not contributed any amount in the purchase of the suit property by their father and there is no proof or material to show that the four sons had remained as the joint family. However, he would state that they were living jointly. Further, he has also admitted that there is no proof to show that the sons had performed the marriage of the sisters viz. the plaintiffs. It is admitted that barring Rajendran, the marriage of the other sons was performed only by the father and that his father had celebrated the marriage of his sister Malliga. Therefore, from the above evidence of DW1, it could be seen that there is absolutely no material to hold that the suit property has been ever treated as the joint family property consisting of Thiruvengada Naicker and his four sons. In such circumstances, it has not been explained by the defendants as to how without any material on record, could it be presumed or held that the suit property is the joint family property of Thiruvengada Naicker and his four sons.

13. With reference to the same, it is argued by the defendants'

counsel that Thiruvengada Naicker and his four sons had mortgaged the property and based on the said fact, it is contended that the courts below had held that the suit property is the joint family property of Thiruvengada Naicker and his four sons. Further, according to him, inasmuch as the mortgage debt has been discharged only by the sons, on that basis also, the courts below had concluded that the suit property is the joint family property of Thiruvengada Naicker and his four sons.

14. Countering the said argument, it is contended by the plaintiffs counsel that the very execution of the mortgage deed in respect of the suit property by Thiruvengada Naicker along with four sons by itself would not lead to the conclusion that the suit property has been treated and enjoyed as the joint Hindu family property of Thiruvengada Naicker and his four sons. In this connection, the copy of the mortgage deed dated 24.07.1992 has been exhibited as Ex.B1 and the discharge endorsement has been marked as Ex.B2.

15. Therefore, the only point that arises for consideration in this case is whether the mortgage of the suit property by Thiruvengada Naicker along with his sons would be sufficient to hold that the suit

property has been treated and enjoyed as the Joint family property of Thiruvengada Naicker and his four sons. A perusal of Ex.B1 would go to show that prior to Ex.B1, the suit property had been earlier mortgaged on 12.06.1965. Therefore, it could be seen that at the time of the first mortgage, the sons of Thiruvengada Naicker were only minors. No material to hold otherwise has been placed by the defendants. The second mortgage under Ex.B1 has been executed to discharge the earlier mortgage debt and also, for meeting the family expenses. Therefore it could be seen that as rightly argued by the plaintiffs counsel, inasmuch as the earlier mortgage deed was executed by Thiruvengada Naicker along with minor sons, the second mortgage had also been executed on the same lines perhaps at the instance of the mortgagee. However, with reference to same, there is no proof on the side of the plaintiffs. Be that as it may, as rightly put forth by the plaintiffs' counsel, on the sole ground that Thiruvengada Naicker had jointly executed the mortgage deed along with four sons, that by itself, would not lead to the conclusion that the suit property had been treated as the joint family property of Thiruvengada Naicker and his four sons. Barring the said isolated incident, as seen from the evidence of DW1, there is no material whatsoever to show or evidence that the suit property had been ever treated as the Joint family

property of Thiruvengada Naicker and his four sons. Such being the position, it could be seen that the courts below have erred in holding that the execution of the mortgage deed by Thiruvengada Naicker and his four sons would be sufficient to hold that the suit property is the joint family property.

16. The mere fact that the sons had discharged the mortgage debt, as rightly argued plaintiffs' counsel could not be taken as a factor for holding that the suit property has been treated as the Joint Hindu Family property of Thiruvengada Naicker and his four sons. As rightly argued, it could be seen that, at the most, having regard to the case of the defendants, by the discharge of the mortgage debt, equities have to be worked out and adjusted while passing final orders in the final decree proceedings. Therefore, the above factor on its own, would not be sufficient to sustain the defendants case.

17. In the light of the above discussions, I hold that in the absence of any evidence adduced on the side of the defendants that the suit property has been ever treated as the joint family property of Thiruvengada Naicker and his four sons and also the fact, as admitted by DW1, that all the sons had been living separately and maintaining

their respective families out their own income and when the sons had not contributed any sum for the purchase of the suit property, in the year 1965, when at the time of the first mortgage, the sons were minors and when the second mortgage has been made only to discharge the earlier mortgage debt and for meeting the family expenses and when there is no material to hold that there was contribution of the sons in any manner other than the execution of the mortgage deed along with their father and when the discharge of the mortgage debt by itself would not lead to the inference that Thiruvengada Naicker and his four sons had treated the suit property as the joint family property, in my considered opinion, the above act of the execution of the mortgage deed by Thiruvengada Naicker and his sons could not be the determining factor to hold that the suit property is the joint family property consisting of Thiruvengada Naicker and his four sons.

18. On the other hand, as rightly argued by the plaintiffs' counsel, it could be seen that all along, till his death, the suit property has been treated as the self acquired property of Thiruvengada Naicker and not as the joint family property and accordingly, it could be seen that the defendants are unable to place any material to hold otherwise,

other than projecting Ex.B1 mortgage deed and Ex.B2, discharge endorsement.

19. In conclusion, I hold that the courts below have, on a wrong appreciation of the evidence adduced by the parties concerned, erred in holding that the suit property is the joint family property of Thiruvengada Naicker and his four sons. As the above finding of the courts below is sans any acceptable evidence and material, as rightly argued, the same is held to be perverse.

20. Therefore, I hold that the suit property is the separate property of Thiruvengada Naicker and after his demise, the plaintiffs, being the class I heirs of Thiruvengada Naicker, are each entitled to obtain one-seventh share in the suit property.

At the end, the second appeal is allowed and the Judgment and decree of the first appellate Court as well as the trial Court are set aside and I hold that the plaintiffs are each entitled to obtain 1/7th share in the suit property as prayed for and accordingly, the preliminary decree is granted in favour of the plaintiffs. No costs. Consequently, connected miscellaneous petition is closed.

Index : Yes/No
Internet: Yes/No
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02.01.2017

To

- 1.The Additional District Court,
Fast Track Court No.2,
Chennai.
2. The XVIII Assistant Judge,
City Civil Court, Chennai.

T.RAVINDRAN,J.

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Pre-delivery order in
S. A.No.56 of 2011
and
M.P.No.1 of 2011

02.01.2017

