

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 15.11.2017

PRONOUNCED ON : 24.11.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.1104 of 2001

Radhakrishnan ... Appellant/Plaintiff

Vs.

1. Neelaveni Ammal

2. Venkatesan

... Respondents/Defendants

(R2 declared as Major and R1 discharged from her guardianship vide order of the Court dated 24.06.13 made in CMP Nos. 1020 and 1021 of 2008)

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree of the Subordinate judge of Maduranthagam dated 24.03.2000 in A.S.No.45 of 1999 reversing the judgment and decree of the District Munsif of Maduranthagam dated 28.11.1997 in O.S. No.269 of 1991.

For Appellant : Mr.J.Hariharan for Mr.V.Nicholas

For Respondents: Mr. M.S.Subramanian

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 24.03.2000 passed in A.S.No.45 of 1999 on the file of the Subordinate Court, Maduranthagam reversing the judgment and decree dated 28.11.1997 passed in O.S. No.269 of 1991 on the file of the District Munsif Court, Maduranthagam.

2. Parties are referred to as per their rankings in the trial Court.

3. Suit for declaration and permanent injunction.

4. The case of the plaintiff, in brief, is that he is the son of the deceased Ponnuswamy Naicker and the plaintiff and his

father were living together as joint family members, owning the plaint schedule properties as undivided Hindu joint family properties and the said properties had been acquired by the plaintiff's paternal grandfather Muthuswamy Naicker. Muthuswamy Naicker died about 60 years ago and during his life time, he has divided the joint family properties into three equal shares including the plaintiff's father Ponnuswamy Naicker and Ponnuswamy Naicker died on 26.08.1991, leaving behind the plaintiff as his only son. The plaintiff has also got three sisters and the plaintiff and his father had jointly sold certain properties owned by the joint family, in favour of Dhanalakshmi, wife of the plaintiff, vide registered sale deed dated 6.10.1981 and she in possession and enjoyment of the said properties. Similarly, the plaintiff and his father had jointly executed the sale deed on the same date, in favour of the first defendant with regard to the some other properties. The first defendant being the wife of the plaintiff and the second defendant is the son of the first defendant and the remaining items of the family still continues to be the joint family properties and thus, the plaintiff is in possession and enjoyment of the plaint schedule properties, which are joint family ancestral properties. While so, the first defendant, all of a sudden, gave out on 15.09.91, the plaintiff should vacate the residential house situated in the plaint item no.2 of the schedule properties and on being questioned, it was informed that Ponnuswamy Naicker had executed a registered settlement deed dated 12.12.90, in favour of the second defendant, in respect of the above said residential house, claiming to be his absolute property and on verification of the documents concerned, the plaintiff came to know that such a settlement deed had been executed and however, the settlement deed dated 12.12.90 is void abinitio and hence, there is no need to set-aside the same, since, the plaintiff is not a party to the document. The plaintiff's father had been inimical to the plaintiff from the beginning of 1990 and accordingly, taking advantage of the same, the first defendant got the settlement deed falsely executed in favour of the second defendant and without knowing the purport of the document, Ponnuswamy Naicker had signed the same and the settlement deed will not in any manner bind the plaintiff as such. The plaintiff is entitled to be in possession and enjoyment of the plaint schedule properties and inasmuch as the defendants are attempting to interfere with the possession and enjoyment, according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

5. The case of the defendants, in brief, is that the suit is not maintainable either in law or on facts. The allegation that the plaintiff and his father had lived together as joint family members, owning the plaint schedule properties as undivided Hindu joint family properties are denied and not

correct. The first defendant is the legally wedded wife of the plaintiff and out of the wed lock, the second defendant was born. The plaintiff has taken one Dhanalakshmi as concubine and living with her and abandoned the defendants and seeing the attitude of the plaintiff, the plaintiff's father made family arrangements and divided the properties between himself and his son, the plaintiff and the share of the plaintiff was equally sold to the first defendant and Dhanalakshmi through a registered sale deeds and accordingly, the plaintiff is estopped from questioning any right over the properties conveyed to the first defendant and after the family arrangement, inasmuch as the plaintiff and his father attempted to go behind the same, the first defendant preferred O.S. No.31 of 1986 and got the decree against them with regard to the properties obtained by her, by way of sale deed dated 06.10.1981. Later, the first defendant alone had been maintaining Ponnuswamy Naicker and he was living with the defendants during his last days and on account of love and affection, he had settled the properties in favour of the second defendant, who is his grand son, by a registered settlement deed dated 12.12.90 and pursuant to the sale, the defendants are in possession and enjoyment of the properties covered under the settlement deed and patta had also been granted in the name of the defendants and the settlement deed is a valid document and there was no joint family existing at the time of the settlement deed. The alleged joint ownership of the above properties covered under the settlement deed is denied and hence, the suit is liable to be dismissed.

6. In support of the plaintiff's case PWs 1 and 2 were examined and Exs. A1 to A7 were marked and on the side of the defendants DWS1 and 2 were examined and Exs.B1 to B6 were marked.

7. On a consideration of the materials placed and the submissions made, the trial Court was pleased to decree and grant the relief of declaration sought for by the plaintiff, however, declining the relief of permanent injunction prayed for by the plaintiff and accordingly disposed of the suit. Aggrieved over the same, the plaintiff preferred the appeal and the first appellate Court, on an appreciation of the materials placed, set-aside the judgment and decree of the trial Court, as regards the relief of declaration granted in favour of the plaintiff and resultantly, dismissed the suit laid by the plaintiff in its entirety and aggrieved over the same, the present second appeal has come to be preferred by the plaintiff.

8. At the time of the admission of the second appeal, the following substantial questions of law were formulated for consideration:

1. Whether the lower appellate Court is

correct in upholding the claim of partition which is not based on any record and that too contrary to the documentary evidence?

2. When the documents filed both by the plaintiff and defendants show the character of the suit properties as on the date of the alleged settlement that they are the ancestral properties and they have been treated and enjoyed as such by the plaintiff and his father whether the lower appellate Court is correct in holding that the suit properties were divided and enjoyed by the father of the plaintiff as his separate properties?

9. It is not in dispute that the plaintiff is the son of the Ponnuswamy Naicker and it is also not in dispute that the first defendant is the wife of the plaintiff and the second defendant is the son of the plaintiff and the first defendant. From the materials placed, it is found that the suit properties are the joint family ancestral properties belonging to Ponnuswamy Naicker and his son, the plaintiff. The case of the plaintiff that the suit properties are the joint family ancestral properties consisting of his father and himself is not, as such, controverted by the defendants. The Courts below have also given a specific finding that the suit properties belonged to Ponnuswamy Naicker and the plaintiff as joint family ancestral properties. It is further found that out of the joint family properties belonging to the above persons, certain properties have come to be alienated by both of them in favour of Dhanalakshmi and the first defendant, by way of the sale deeds dated 06.10.91. The above said fact is also found to be not in issue as such. On a perusal of the above said sale deeds placed in the matter, also would go to show that Ponnuswamy Naicker and his son, the plaintiff, consisting of joint Hindu family had alienated certain properties belonging to them by way of the above said deeds and it is thus found that excluding the properties alienated by them, the remaining properties namely the suit properties continued to be the joint family properties of Ponnuswamy Naicker and his son the plaintiff.

10. Now according to the plaintiff, the suit properties being the joint family properties, as such Ponnuswamy Naicker cannot claim any exclusive title to the same, unless the same had partitioned between the parties concerned and therefore, it is contended that Ponnuswamy Naicker cannot make any valid settlement in respect of the said properties, in favour of the

second defendant and as Ponnuswamy Naicker claiming absolute ownership over certain properties of the plaintiff had settled the same in favour of the second defendant by way of a settlement deed dated 12.12.90 and on the basis of the same, the defendants had attempted to interfere with his possession and enjoyment of the plaint schedule properties, according to the plaintiff, he has been necessitated to institute the suit for appropriate reliefs.

11. The settlement deed 12.12.90, has come to be marked as Ex.A1. A perusal of Ex.A1 also would go to show that Ponnuswamy Naicker had described the properties settled by him, in the said document, as only ancestral properties. Whether Ponnuswamy Naicker is entitled to settle the joint family ancestral properties in favour of the second defendant, claiming to be the absolute owner of the same has to be seen. In this connection, the plaintiff counsel relied upon the decision reported in 1993 II MLJ page 172 (Ramakrishna Naidu Vs. Shanmugasundaram and others) wherein, it has been held that the co-parcener even if he is the Manager of the joint family cannot alienate any property owned by the joint family for any purpose other than pious, charitable or religious purpose and the gift, if executed, would be invalid even in respect of his own share also. In this connection, it is found that the decisions reported in I.L.R. 16 Mad 84, (Rayakkal Vs. Subbanna) and S.V. Sundaresan Vs. Assistant Controller of Estate Duty, Coimbatore, 1983 Tax L.R. 1438, were taken into consideration. On the basis of the above said decisions, when admittedly the plaint schedule properties are found to be the Hindu joint family ancestral properties of Ponnuswamy Naicker and his son, the plaintiff, it is seen that Ponnuswamy Naicker as such would not be entitled to execute a gift deed in respect of the said properties and such a gift would be void ab initio and wholly invalid and therefore, it is found that the case of the plaintiff that the settlement deed dated 12.12.90, is not binding upon him, as such, is found to be acceptable.

12. However, a defence has been taken by the defendants that the seeing the evil ways of the plaintiff, according to them, Ponnuswamy Naicker made a family arrangement and divided the properties between himself and his son, the plaintiff and thus, according to the defendants, the properties settled by him by way of the settlement dated 12.12.90 were allotted to Ponnuswamy Naicker under the above said family arrangement/partition. However, the above plea of the defendant is stoutly repudiated by the plaintiff. In such view of the matter, it is for the defendant to establish that a valid partition had been effected between Ponnuswamy Naicker and his son the plaintiff, in respect of the family properties belonging to them, as put forth by them. However, it is found that as

rightly argued by the plaintiff's counsel, the above plea of partition projected by the plaintiff has not been established by them in any manner. It is found that even in the written statement, the defendants have not clearly made out, as to, when the so called family arrangement/partition had been effected between Ponnuswamy Naicker and his son, the plaintiff and it is not further pleaded by them, as to, in whose presence the properties got divided amongst them and what were the properties allotted to the plaintiff and Ponnuswamy Naicker under the family arrangement and the so called partition have not been clearly mentioned in the written statement. Very vaguely, it has been averred that Ponnuswamy Naicker divided the properties between himself and his son, the plaintiff.

13. It is not even stated whether the so called family arrangement had been effected orally or by way of written document. It is further found that the defendants have also not placed any material as such, to hold that subsequent to the so called family arrangement/partition, Ponnuswamy Naicker had enjoyed the properties allotted to him under the above said partition, absolutely as full owner thereof, at least, till 12.12.90. It has not been established by the defendant, by way of acceptable materials that Ponnuswamy Naicker had enjoyed the properties covered under the settlement deed above mentioned absolutely as full owner thereof. In such view of the matter, it is seen that the plea of family arrangement/partition made by the defendant cannot at all be believed and accepted.

14. The trial Court has rightly disbelieved the above defence put forth by the defendant. However, the first appellate Court, based on the evidence of Dws. 1 and 2 had accepted the above plea of partition projected by the defendants. However, it is seen that the First Appellate Court has not properly appreciated the evidences of DWs 1 and 2 in the right perspective, for upholding the defence version. In this connection, it is found that DW2 has come to be examined by the defendant, only to prove the settlement deed dated 12.12.90, on the footing that he is the attester to the said document. During the course of cross examination, DW2 has admitted that the settlement deed had been written by one Kuppusamy and he did not hear the contents of the documents when the same was read out and as he was directed to sign the document as attester, he had attested the document and when the source of the title to the properties was questioned, according to DW2, it was informed to him by Ponnuswamy Naicker that the same had been allotted to him under partition, but he does not know the contents of the settlement deed and when he was questioned about the plaintiff's entitlement, he has deposed that he was informed by Ponnuswamy Naicker that he had written the settlement deed voluntarily and he had not seen any partition deed and does not know enjoyment

of the properties. Such being the evidence of DW2, it is found that other than attesting the settlement deed, he does not know as to how Ponnuswamy Naicker had acquired the title to the properties covered under the settlement deed. All that DW2 would state is that he was informed that the same had been allotted to Ponnuswamy Naicker. However, when the partition/family arrangement effected between Ponnuswamy Naicker and the plaintiff has not been clearly made out in the written statement and also not substantiated by any acceptable document and when DW2 does not have any personal knowledge about the same and his evidence with reference to the same seems to be only hearsay evidence, it is seen that DW2 is not a competent person to speak about the so called family arrangement/partition. Hence, the reliance of the first appellate Court, on his testimony for up holding the plea of partition, projected by the defendants, cannot at all be accepted and the above approach of the first appellate Court and the determination of the case in favour of the defendants thereby is found to be wholly perverse and erroneous.

15. The first defendant examined as DW1, during the course of cross examination has admitted that the properties described in the settlement deed are the ancestral properties. During the chief examination, she has deposed that the partition took place orally in the year 1981. Therefore, according to DW1, during the course of evidence, partition had been made orally during the year 1981. If that be so, she would have averred about the said fact in the written statement. That apart, though she would have claim that more properties had been allotted to the plaintiff, as to what are the properties allotted to the plaintiff, there is no material. Further, as adverted above, there is no material to hold that after the so called oral partition effected during 1981, Ponnuswamy Naicker had been enjoying the properties allotted to him absolutely as full owner thereof and in such view of the matter, it is found that on the unreliable and uncorroborated testimony of DW1, she being the party interested, her evidence cannot be solely accepted for accepting the defence version. In such view of the matter, it is found that the first appellate Court has also erred in placing reliance upon the evidence of the DW1 for believing the partition said to have been effected between Ponnuswamy Naicker and the plaintiff and by relying upon the evidence of DW1 and the determination of the case in favour of the defendant based upon the same by the first appellate Court is found to be unacceptable and erroneous and against the principles of law.

16. In the light of the above position, it is found that there is no material at all to hold that till the death of the Ponnuswamy Naicker, there had been a family arrangement/partition effected between Ponnuswamy Naicker and

his son, plaintiff. Therefore, it is seen that till the death of Ponnuswamy Naicker, the properties had remained jointly with the joint family consisting of Ponnuswamy Naicker and the plaintiff and in such view of the matter, the claim of the defendants that Ponnuswamy Naicker had settled certain properties of the plaintiff schedule on the second defendant, as if the same belonged to him absolutely cannot be accepted in any manner. In such view of the matter, it is found that the settlement deed dated 12.12.90 projected by the defendants, is found to be a void document and not binding upon the plaintiff as such.

17. As rightly put forth by the plaintiff's counsel, taking advantage of the misunderstanding between the plaintiff and his father Ponnuswamy Naicker, it is found that the settlement deed dated 12.12.90 had come to be executed only one or the other. By way of the same, it is found that the defendant cannot claim any exclusive right to the properties covered under the settlement deed legally.

18. In the light of the above discussions, it is found that the first appellate Court had erred in upholding the claim of the partition without any basis and particularly, without any record to substantiate the same and without any evidence what so ever to buttress the same. It is further found that the first appellate court has erred in holding that the suit properties had been divided between Ponnuswamy Naicker and his son, the plaintiff and that the properties covered under the settlement deed were allotted to Ponnuswamy Naicker and enjoyed by him as his separate properties. In the light of the above said determination, the substantial questions of law formulated are accordingly answered in favour of the plaintiff and against the defendants.

19. In conclusion, the judgment and decree dated 24.03.2000 passed in A.S.No.45 of 1999 on the file of the Subordinate judge of Maduranthagam are set aside and the judgment and decree dated 28.11.1997 passed in O.S. No.269 of 1991 on the file of the District Munsif of Maduranthagam are confirmed. Accordingly the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any is closed.

sd/-

Assistant Registrar(CS VI)

//True copy//

Sub Assistant Registrar

sli

To

1.The Subordinate Judge,
Maduranthagam.

2.The District Munsif,
Maduranthagam.

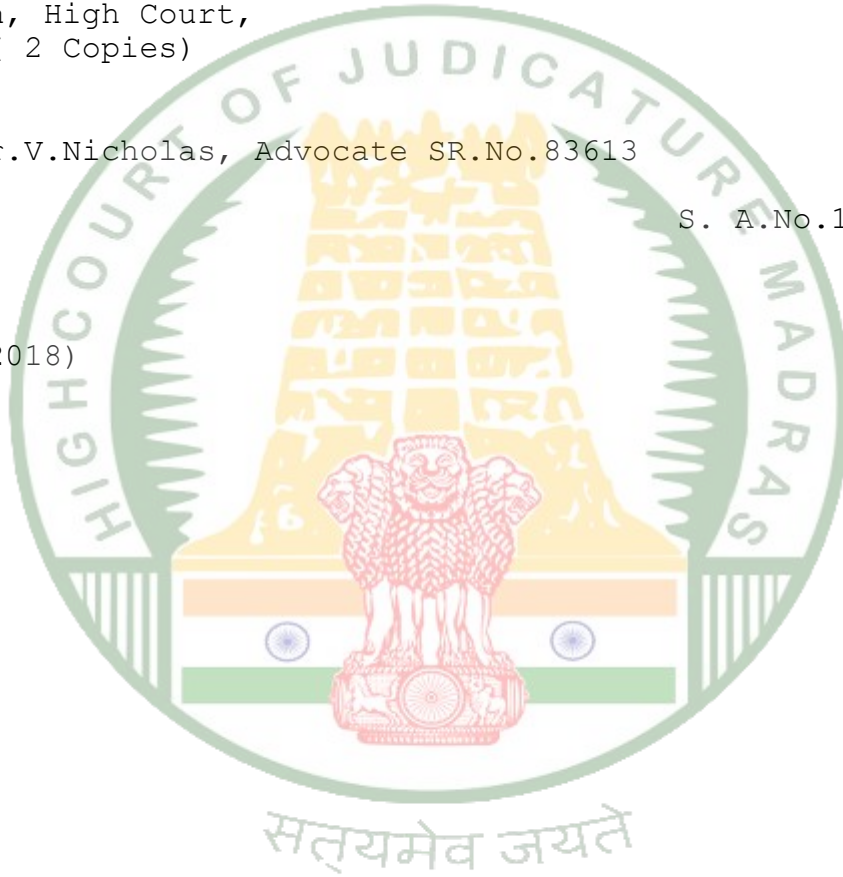
Copy TO

The Section Officer,
VR Section, High Court,
Madras. (2 Copies)

+lcc to Mr.V.Nicholas, Advocate SR.No.83613

S. A.No.1104 of 2001

PA(CO)
GN(28/03/2018)



WEB COPY