

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

JUDGMENT RESERVED ON : 12.12.2017

JUDGMENT PRONOUNED ON : 18.12.2017

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THE HONOURABLE **MR. JUSTICE S. BASKARAN**

S.A. (MD) .No.10 of 2017

&

CMP (MD) Nos.307/17 & 8575/17

1.Nisli Motha

...1st Appellant/1st Appellant/
13th Defendant

2.Michael Motha

...2nd Appellant/2nd Appellant/Nil

Vs.

1.Sangarammal

2.Krishnammal

3.Lakshmi

...Respondents 1 to 3/Plaintiffs

4.S.Kaasi

5.S.Sudalaimuthu

6.C.Iyammal

7.R.Thangakani (died)

8.R.Periyaraasi

9.R.Raasi

10.S.Nirmala

11.K.Pooranam

12.P.Pechiyammal

13.P.Muthulakshmi (minor)

14.P.Anitha (minor)

15.P.Ulaganathan (minor)

(minors R13 to R-15 represented through R-12)

...Respondents 4 to 15/
Defendants 1 to 12

(R-7 died. RR-8 & 9 are the LRs of the deceased R7, who are already on record is recorded vide memo in USR.No.4550 of 2017, dated 06.10.2017 vide court order dated 10.10.2017 made in S.A. (MD).No.10/2017 & CMP (MD).No.307/17)

Prayer: This Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and Decree dated 06.10.2016 passed by the II Additional District and Sessions Court, Thoothukudi, in A.S.No.3 of 2009, confirming the judgment and decree passed in O.S.No.122 of 2006 on the file of the District Munsif Court, Srivaigundam, dated 15.04.2008.



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For Appellants	: Mr.Ajmal Khan Sr. Counsel for M/s.Ajmal Associates
For Respondents 1 to 3 & 11	: Mr.S.Meenakshi Sundaram Sr. Counsel for Mr.N.GA.Nataraj
RR 4 to 10	: No appearance

JUDGMENT

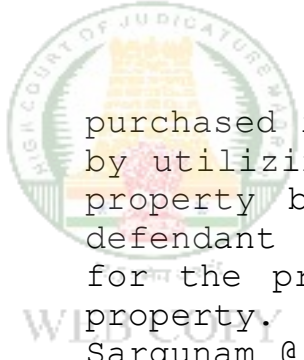
Challenging the judgment and decree dated 06.10.2016 passed by the learned II Additional District and Sessions Judge, Thoothukudi, in A.S.No.3 of 2009, confirming the judgment and decree passed in O.S.No.122 of 2006, by the learned District Munsif, Srivaigundam, dated 15.04.2008., the present second appeal has been filed. The unsuccessful defendant No.13, is the appellant before this court.

2.At the stage of admission itself, this second appeal is taken up for final disposal. Both sides counsel are present.

3.For the sake of convenience, both parties are hereinafter referred to as they were arrayed in the trial court.

4.The plaintiffs contend that the suit property was purchased by their father Sargunam alias Velayutham, as per Ex.A.4 to A.7/sale deeds and he was in enjoyment of the property for more than 20 years and died intestate. All the three plaintiffs along with first, third and eighth defendants as well as husband of the 4th defendant and father of the defendants 5 to 7 one Ramasamy and husband of 9th defendant and father of 10 to 12 defendants are the legal heirs of the said Sargunam @ Velayutham. The defendants 2, 9, 10, 11, 12 have sold the suit items 1 and 3 to 13th defendant. The suit property was jointly enjoyed by the plaintiffs along with defendants 1 to 12 and till now, the property was not divided among them. Since some difficulties arose between them, the plaintiffs asked the defendants to divide the property, but as they were not prepared to do so, the plaintiffs caused Ex.A.1/legal notice to be issued. The said notice was received by 2 and 13 defendants, but no reply was received from them. The ninth defendant failed to receive notice. Since the defendants are not coming forward to divide the property and delaying the same, the plaintiffs have come forward with the suit, seeking 3/9th share in the suit property.

5.(i)On the other hand, when the plea of the plaintiffs is admitted by 3rd and 8th defendants, the defendants 2, 9 to 13 opposed the suit claim, by filing written statements. According to the contesting defendants, even though the suit property was

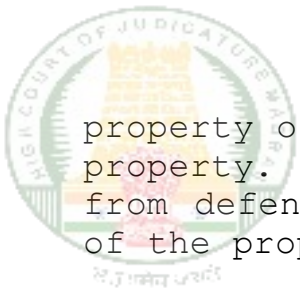


purchased in the name of plaintiffs' father, the same was acquired by utilizing income from family property and therefore, the suit property belongs to joint family. It is stated by the second defendant that himself and his brother Parvathinathan got patta for the property 22 years ago and they are in enjoyment of the property. Further, the defendants along with their father Sargunam @ Velayutham conducted the marriage of the plaintiffs and gave them movable properties as well as cash. Subsequently, in 1980, the plaintiffs' father Sargunam, before his death, with the consent of plaintiffs as well as defendants 1, 3 and 8 gave away the property to the second defendant and his brother Ramasamy and Parvathinathan and also handed over possession to them. Thereby, the suit item Nos.1 and 3 were given to second defendant and Parvathinathan, while Sy.No.632/2 and 633 measuring 4 acre 85 cents in Vallanadu village were given to Ramasamy and they were in possession and enjoyment of the property ever since. After the death of the plaintiffs' father, the second defendant and Parvathinathan obtained patta in their names and they were paying kist. The suit items 1 and 3 were enjoyed by the 2nd defendant and his brother excluding the plaintiffs for more than 25 years and as such, they have got title over the property and the relief sought for by the plaintiffs in respect of item Nos.1 and 3 is not maintainable. Hence, he seeks dismissal of the suit.

(ii) The 4th and 8th defendants filed their written statements, admitting the plaintiffs' claim by stating that they are entitled for 3/9th share and the same was adopted by the third defendant also.

(iii) The defendants 9 to 12, who opposed the suit claim, contend that in respect of suit item Nos.1 and 3, the plaintiff as well defendants 1, 3 and 8 cannot have any right over the same. They have also contended that while Sargunam was alive, he gave away some of his properties to his male children with the consent of daughters and he conducted the marriage of his daughters by selling away some of his properties. It is contended that the suit item Nos.1 and 3 were given to Parvathinathan and after the death of Parvathinathan, the defendants 9 to 12 and the second defendant were in enjoyment of the suit item Nos.1 and 3 and they sold the property to 13th defendant and possession was also given to him. Thus, the defendants 9 to 12 contend that the plaintiffs have no interest in the suit property and the plea of the plaintiffs has to fail.

(iv) Similarly, opposing the said claim, 13th defendant filed his written statement, stating that the father of the plaintiffs Velayutham himself converted into Christian and he was given the name as Sargunam. The 13th defendant contend that the ~~services of Sargunam~~ of Sargunam were not included and the purchasers of his properties are not added as parties to the suit. Therefore, the suit has to fail. Since the suit property is the ancestral



property of Sargunam, his daughters cannot claim any right in the property. The suit items 1 and 3 were purchased by 13th defendant from defendants 2, 9 to 12 and he is in possession and enjoyment of the property ever since his purchase.

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6.The trial court, on the basis of the above pleadings, has framed the following issues:

"1. வாதிக்க கோரியிருக்கும் பாகப் பிரிவினை பரிகாரம் கிடைக்கத்தக்கதா?

2.இதர பரிகாரங்கள் என்ன?"

7.During the course of trial, on the side of the plaintiffs, two witnesses were examined and 7 documents were produced. On the side of the defendants, two witnesses were examined and nine documents were produced. The defendants produced a sale deed dated 28.10.2005 as Ex.B.1 and encumbrance certificate as Ex.B.5 and the 13th defendant also produced the patta in his name as Ex.B.7 and the A Register extract as Ex.B.8. The survey map for Sy.No.704/A and 705/A is produced as Ex.A.9 and the cash receipt given to the 13th defendant by his forefathers is produced as Ex.B.6.

8.The trial court, on consideration of oral and documentary evidence placed before it, decreed the suit as prayed for by granting the relief of partition in favour of the plaintiffs 3/9th shares in the suit property.

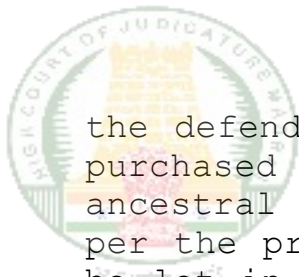
9. Aggrieved over the same, the 13th defendant/subsequent purchaser preferred A.S.No.3 of 2009 on the file of the first appellate court.

10.The lower appellate court, on going through the grounds of appeal, framed the same issues, which were raised by the trial court for determination:

"1. வாதிக்க கோரியிருக்கும் பாகப் பிரிவினை பரிகாரம் கிடைக்கத்தக்கதா?

2.இதர பரிகாரங்கள் என்ன?"

11.The lower appellate court after considering the materials placed before it, dismissed A.S.No.3/2009, holding that there is no pleading on the side of the 13th defendant stating that the suit property was purchased from and out of income meant from the ancestral property of the plaintiff's father. It is also held by the first appellate court that in Ex.B.1/sale deed, it is mentioned that the property therein was obtained by way of sale by the plaintiffs' father and it is apparent from the averments of the defendant that no partition took place in the plaintiffs' vendor's family. Further, the first appellate court held that in contrary to the averments in Ex.B.1/sale deed, it is not open to



the defendants to contend that the property mentioned therein was purchased by the plaintiffs' father by utilizing income from the ancestral property. The first appellate court also held that as per the principle of promissory estoppel and no oral evidence can be let in to contradict the documentary evidence, the plea of the appellant/13th defendant cannot be accepted. On the above said grounds and for the other reasons stated in the judgment, the first appellate court dismissed the appeal by confirming the judgment and decree, dated 15.04.2008, passed by the trial court.

12. Aggrieved over the same, the 13th defendant has come forward with the present second appeal. In the second appeal, the appellant has raised the following substantial questions of law for consideration:

"1. Whether the courts below are wrong in decreeing the suit for partition especially when it failed to apply the legal presumption that the properties standing in the name of the father of the father are the joint family properties especially when he had no independent source of income?

2. Whether when the succession opened in the year 1981, whether the plaintiffs can become a Coparcener under Tamil Nadu Hindu Succession Amendment Act, 1989 or Amendment Act, 39 of 2005

3. Whether the failure of the 1st appellate court in not applying the provision contained in Order 41 Rule 27 of C.P.C in the correct perspective has vitiated the ultimate result of the 1st appeal as against the appellants?

4. When the 2nd item of the suit property was already held to be the property of the 2nd appellant's mother in O.S.No.6 of 1978 on the file of District Munsif Court, Tuticorin as confirmed in A.S.No.154 of 1979 on the file of Sub Court, Tuticorin, whether the prayer for partition in respect of the said property is barred under Section 11 of C.P.C?

5. Whether the failure of the 1st appellate court in not referring to the earlier interim applications in which the right of the parties were considered and decided has resulted in miscarriage of justice?

6. Whether the failure of the courts below to frame proper issues under Order 14 Rule 1 of C.P.C, 1908 has vitiated the judgment of the trial court?

7. Whether the failure of the First Appellate court in framing proper points for consideration under Order 41 Rule 31 of C.P.C has vitiated the judgment of the First Appellate court?"

<https://hcservices.ecourts.gov.in/hcservices/> 13. When the second appeal was listed for hearing, the learned counsel for the appellants contended that he is not going into the merits of the appeal, but sought for remand of the matter



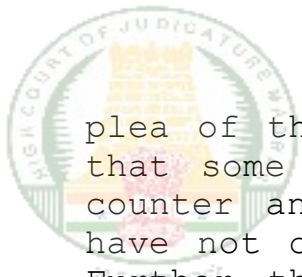
on the ground that the first appellate court, which allowed number of applications filed under Order 41 Rule 27 of C.P.C, has not considered the additional documents and pleadings and disposed of the first appeal, without considering those additional evidence. Hence, he seeks to remand the matter with a direction to the first appellate court to consider the appeal afresh, after taking into consideration the additional documents and evidence, which has been allowed, as per orders passed on various dates by the first appellate court.

14.It is evident from the additional typed set that the following I.As were ordered by the first appellate court:

- i)I.A.No.34 of 2011, dated 26.09.2011
- ii)i)I.A.No.47 of 2009
- iii)I.A.No.257 of 2011 , dated 26.09.2011
- iv)I.A.No.258 of 2011, dated 26.09.2011
- v)I.A.No.293 of 2011, dated 14.10.2011
- vi)I.A.No.335 of 2011, dated 26.09.2011
- vii)I.A.No.336 of 2011, dated 26.09.2011

However, the first appeal has been disposed of on 06.10.2016 only. On going through the judgment of the first appellate court, it is clear that some documents allowed to be produced as additional evidence, as per orders passed in I.A.No.34/2011, I.A.No.47 of 2011 and additional written statement ordered to be filed, as per orders passed in I.A.Nos.335 and 336 of 2011 were not considered by the first appellate court. Similarly, the first appellate court failed to take note of the consequence of allowing I.A.Nos.258 of 2011 and 293 of 2011. It is apparent from the first appellate court's judgment, which was passed on 06.10.2016 that the additional written statements and additional documents, which were allowed to be filed by the said court, as per orders passed on various dates in different I.As, as stated above, have not been considered and looked into. Apparently, it is clear that the first appellate court has failed to consider the additional pleadings and additional evidence permitted to be produced before the said Court. In such circumstances, the plea of the appellant that the appeal should be remanded back for the purpose of considering the additional evidence produced before the first appellate court is just and proper.

15.The learned counsel for the respondents has also stated that in spite of allowing the applications as stated above, the first appellate court has not considered the materials, while disposing of the first appeal. Hence, the learned counsel for the respondents also expressed no objection to remand the matter back to the first appellate court for considering the appeal afresh. The learned counsel for the respondents pleaded to set aside the order passed by the first appellate court in the above said I.As with a direction to dispose of the same afresh. Such



plea of the respondents cannot be accepted for the simple reason that some of the applications were allowed on the ground of no counter and other applications were allowed, as the respondents have not come forward to file counter, as they remained exparte. Further the said I.As were allowed on different dates and not along with the first appeal on 16.10.2016 and the aggrieved party has not preferred any revision or appeal against the orders passed in the above said I.As. The first appellate court has observed in its order paper in the same I.A's to receive the documents, subject to proof and relevancy. Thus, it is open for the respondents to raise their objection as to proof and relevancy of the documents sought to be filed before the courts below. In such circumstances, it is apparent that the plea of the respondents to set aside the orders passed by the first appellate court in allowing the above said I.As cannot be entertained.

16. In view of the above said discussions and on independent application of mind on the entire materials available on record, this court is of the considered opinion that the first appellate court having entertained the various I.As, as stated above to produce the additional evidence, has failed to consider the additional evidence produced before it and the same is error apparent on the face of it. In such circumstances, this court has no other alternative except to interfere with the judgment and decree of the first appellate court and accordingly, the same are set aside and the appeal is remanded back to the first appellate court for fresh disposal, after taking into consideration the additional evidence and pleadings, produced, as per the order passed in the above said I.As and dispose of A.S.No.3/2009 on merits.

17. In the result, the appeal is allowed and A.S.No.3 of 2009 is remanded back with a direction to the first appellate court to dispose of the appeal, after taking into consideration the additional pleadings and evidence produced before it, as per orders passed by the said court in (i) I.A.Nos.34 of 2011, dated 26.09.2011 ii) I.A.No.47 of 2009 iii) I.A.No.257 of 2011, dated 26.09.2011 iv) I.A.No.258 of 2011, dated 26.09.2011 v) I.A.No.293 of 2011, dated 14.10.2011 vi) I.A.No.335 of 2011, dated 26.09.2011 vii) I.A.No.336 of 2011, dated 26.09.2011. The first appellate court is directed to dispose of the appeal within a period of four months from the date of receipt of records. There is no order as to costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(AE)

/True Copy/



To

1. The District Munsif,
Srivaigundam,
Tuticorin District.

2. Do Through The Chief Judicial Magistrate,
Tuticorin.

3. The II Additional District and Sessions Court,
Tuticorin.

Copy to

1. The Record Keeper (Two Copies)
VR Section,
Madurai Bench of Madras High Court,
Madurai.

2. The Section Officer,
Judicial Section,
Madurai Bench of Madras High Court,
Madurai.

+1cc to M/s.Ajmal Associates, Sr.No.93526
+1cc to Mr.N.GA.Nataraj, Advocate Sr.No.93525

VS

VB/SV/MMS/SAR2/30.01.2018/8P/9C

judgment made in
S.A. (MD) .No.10 of 2017
18.12.2017