

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :24.10.2018

Pronounced on :23.11.2018

CORAM:

THE HON'BLE MR.JUSTICE P.RAJAMANICKAM

S.A.No.2048 of 2001

Vedachala Gounder ..Appellant/1st defendant

Vs.

1. Gowri ..1st Respondent / Appellant /
Plaintiff

2.Banu Gounder ..2nd Respondent / 2nd Respondent/
2nd Defendant

Prayer:- Second Appeal filed under Section 100 of C.P.C., to set aside the Judgment and decree dated 23.03.2001 made in A.S.No.8 of 2000 on the file of Sub-Court, Madurantakam reversing the Judgment and Decree dated 16.12.1999 in O.S.No.382 of 1993 on the file of the District Munsif Court, Madurantakam by allowing the second appeal.

For Appellant : M/s.M.S.Subramanian

For Respondents : Mr.V.V.Krishnamurthy for R1
R2 set ex parte

J U D G M E N T

This second appeal has been filed by the first defendant against the judgment and decree passed by the Sub-Judge, Madurantakam, in A.S.No.8 of 2000 dated 23.03.2001 reversing the judgment and decree passed by the District Munsif, Madurantakam in O.S.No.382 of 1993 dated 16.12.1999.

2. The first respondent herein has filed a suit in O.S.No.382 of 1993 on the file of the District Munsif, Madurantakam for partition of the suit properties into two equal shares and to allot one such share to her and also to ascertain the mesne profits from the date of the suit till the date of delivery of separate possession. The learned District Munsif, by the judgment dated 16.12.1999, has dismissed the said suit with costs. Aggrieved by the same, the first respondent

herein/plaintiff has filed an appeal in A.S.No.8 of 2000 on the file of the Sub-Judge, Madurantakam. The appellant herein also filed an appeal in A.S.No.4 of 2001 on the file of the Sub-Judge, Madurantakam against the findings that the Item Nos.2 and 3 of the suit properties are joint family properties. The learned Sub-Judge by the common judgment dated 23.03.2001 has allowed the appeal in A.S.No.8 of 2000 and set aside the judgment and decree passed by the trial court and passed preliminary decree for partition of the suit properties into two equal shares and to allot one such share to the plaintiff and also directed the defendants to pay costs to the plaintiff. However, he dismissed the appeal in A.S.No.4 of 2001 without costs. Feeling aggrieved against the allowing of the appeal in A.S.No.8 of 2000, the first defendant has filed the present second appeal. For the sake of convenience, the parties are referred to as described before the trial court.

3. The averments made in the plaint are, in brief, as follows:

The first defendant is the elder brother of one Kistappa Gounder and the plaintiff is the widow of the said Kistappa Gounder. The plaintiff had a son through Kistappa Gounder by name Selvam. The plaintiff's son died while he was ten years old. The husband of the plaintiff predeceased his son Selvam. The suit properties are the joint family properties of the husband of the plaintiff and the first defendant. The suit properties were purchased out of the joint exertions, savings and income of the joint family. The plaintiff's husband has made contributions and also pooled his physical labour for the improvement of the joint family estate. The plaintiff's father-in-law and mother-in-law viz., Ethiraj Gounder and Rajammal also no more and after the life time of her husband, the plaintiff is also in joint possession of the suit properties. Since the first defendant is the eldest son, the part of the suit properties were purchased in his name and certain properties were also acquired out of the sale proceeds under document dated 25.08.1965 in the name of the first defendant. Since the husband of the plaintiff was so young, in fact all the properties were treated as joint family properties and the plaintiff is entitled to half share in the suit properties. The plaintiff apprehends that the first defendant may execute document in favour of the second defendant and hence, he also has been impleaded as a party. In spite of the several demands, the first defendant did not come forward for amicable partition. Hence the plaintiff has issued a lawyer's notice dated 19.08.1993 calling upon the first defendant for amicable partition. The first defendant after receipt of the notice, has sent a reply with false averments. Hence, the plaintiff was constrained to file the suit for the aforesaid reliefs.

4. The averments made in the written statement filed by the first defendant are, in brief, as follows:

a) The averment made in the plaint with regard to the relationship between the plaintiff and the first defendant is true. It is also true that the plaintiff's husband and her son are no more. But the allegation that the suit properties are the joint family properties of plaintiff's husband and the first defendant are not correct. Further, the averments that the properties were purchased out of joint exertion, savings and income of the joint family and the plaintiff also is in joint possession after her husband's life time are all false. The plaintiff's husband died long back. There was only one joint family property which was enjoyed by the first defendant and his brother in S.No.206 measuring 0.96.09 hectares and the same is mentioned as Item No.1 in the plaint schedule barring that there was no other joint family properties. Immediately after the death of the first defendant's brother, item No.1 of the suit property was divided between the plaintiff and the first defendant orally. In the said partition, a half share i.e, one acre was allotted to the plaintiff. From the date of the said partition, the plaintiff is in exclusive possession and enjoyment of her husband's half share as a divided member. Therefore, there is no question of joint family existing after the said division.

b) The first defendant went to his maternal grandfather's house when he was young and looked after the cultivation of his grandfather's properties. Thereafter, he married his own uncle's daughter. Taking into consideration of his service and also his marriage with his son's daughter, the maternal grandfather gave his properties bearing S.No.134/2B measuring 82 cents (2nd item), in S.No.134/6 measuring 20 cents (3rd item) and in S.No.134/7 measuring about 53 cents. Totally 1 acre and 55 cents were given to the first defendant by his grandfather by executing a sale deed dated 24.08.1955. Therefore the properties acquired under the said document are the self-acquired properties of the first defendant. Infact, the first defendant had sold one of the above three items viz., in S.No.134/7 measuring about 53 cents in the year 1965 in his own exclusive right and title. He also mortgaged a portion of the items 2 and 3 of the suit properties to one Subarraya Mudaliar in the year 1990 in his own right and title. Neither the plaintiff nor her husband ever objected to the said dealings. The allegations that the properties purchased under the document dated 25.08.1965 were out of the joint family income and that they were purchased in the name of the first defendant because the plaintiff's husband was too young are all false. The first defendant had purchased 33 cents in S.No.138 and 1.01 acres in S.No.140 out of own funds and earnings. The plaintiff's husband was aware of the

same and never questioned the above transactions till his death. The patta in respect of the properties also stands in the name of the first defendant and neither the plaintiff nor her husband ever objected the same. The plaintiff has suppressed about the oral division with regard to the only ancestral joint family properties i.e., Item No.1 and about her exclusive possession and enjoyment of the share in the said item. Suppressing the aforesaid facts, the plaintiff had filed the above suit at the instigation of one Mari with whom she is living now in order to grab the self-acquired properties of the first defendant. Therefore, the first defendant prayed to dismiss the above suit.

5. The averments made in the additional written statement filed by the first defendant are, in brief, as follows:

The plaintiff has omitted to include the property which is in her possession and enjoyment. The plaintiff has wantonly included the properties which were already sold out to the second defendant which are in his possession and enjoyment. Therefore, the first defendant prayed to dismiss the above suit for the reason of partial partition.

6. Based on the aforesaid pleadings, the learned District Munsif has framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined herself as PW1 and also marked Exs.A1 and A2 as exhibits. On the side of the first defendant, the first defendant examined himself as DW1. He also examined two more witnesses as DW2 and DW3. The second defendant remained ex parte.

7. The learned District Munsif, after considering the materials placed before her, came to the conclusion that the first defendant failed to prove that the item Nos.2 and 3 are his self-acquired properties. However, she dismissed the suit on the ground of partial partition. Aggrieved by the same, the plaintiff has filed an appeal in A.S.No.8 of 2000 on the file of the Sub-Judge, Madurankam. The first defendant also filed an appeal in A.S.No.4 of 2001 challenging the findings of the trial court that the item Nos.2 and 3 of the suit properties are the joint family properties. The learned Sub-Judge by the common judgment and decree dated 23.03.2001 has allowed the appeal in A.S.No.8 of 2000 and passed preliminary decree to divide the suit properties into two equal shares and allot one such share to the plaintiff. However, he dismissed the appeal filed by the first defendant in A.S.No.4 of 2001. The first defendant has filed the present second appeal against the allowing of the appeal in A.S.No.8 of 2000. He also filed S.A.No.2047 of 2001 against the dismissal of the appeal in A.S.No.4 of 2001. This court by the Judgment dated 17.01.2001 has dismissed the said S.A.No.2047 of 2001 as it was filed against the findings.

8. This court at the time of admitting the present second appeal has formulated the following substantial questions of law:

"1. When items 2 and 3 are purchased under Ex.B1 in 1955 could there have been joint exertions for the purchase when the plaintiff's husband was not even born?

2. In the absence of any evidence regarding the income from admitted joint family property (ancestral nucleus), can the Court draw a legal inference of the purchase under Ex.B1 as being from joint family income?"

9. Heard the arguments of Mr.M.S.Subramanian, the learned counsel for the appellant and Mr.V.V.Krishnamurthy, the learned counsel for the first respondent.

10. Substantial Question of law Nos.1 and 2:

It is an admitted fact that the first defendant is an elder brother of one Kistappa Gounder and the plaintiff is the widow of the said Kistappa Gounder. It is also an admitted fact that the plaintiff and Kistappa Gounder had one child by name Selvam and the said child also died. According to the plaintiff, the suit properties are the joint family properties of her husband and the first defendant. However, the first defendant denied the aforesaid allegation. According to him, the property situated in S.No.206, measuring 0.96.0 hectares which is mentioned in Item No.1 of the suit properties alone joint family property and immediately after the death of the plaintiff's husband, the said property was divided into two shares and one such share was allotted to the plaintiff and she is in exclusive possession and enjoyment of the said share. His further case is that the properties situated in S.No.134/2B measuring 82 cents, in S.No.134/6 measuring 20 cents and in S.No.134/7 measuring 53 cents totally 1 acres 55 cents were given to him by his maternal grandfather under the sale deed dated 02.04.1955 taking into consideration the service rendered by him for cultivating the lands of his maternal grandfather and also his grand daughter was married to the defendant, and therefore, the aforesaid properties are his self-acquired properties. His further case is that he had sold the properties situated in S.No.134/7 measuring 53 cents in the year 1965 in his own exclusive right and title. His further case is that he had mortgaged the properties situated in S.Nos.134/2B and 134/6 in the year 1990 itself and ascertained his exclusive right over the said properties. His further case is that he purchased the properties situated in S.No.138/12 measuring 33 cents and in S.No.140 measuring 1.01 acres out of his own funds and earnings under the sale deed

dated 25.08.1965 and therefore, the aforesaid properties are also his self-acquired properties.

11. The trial court taking into consideration the admission made by the first defendant that their family got joint family properties in S.No.206 measuring 0.96.0 hectares, came to the conclusion that the other items of the suit properties might have been purchased by the first defendant from and out of the income derived from the joint family properties. However, taking into consideration the admission made by the plaintiff (PW1) in her evidence that the house in which she is residing was acquired by her father-in-law, but the said house has not been included in the suit for partition. Accordingly, the trial court has dismissed the suit on the ground that the suit is bad for partial partition.

12. The first appellate court has confirmed the findings of the trial court that the items 2 and 3 of the properties are also joint family properties. The first appellate court has held that the DW1 has stated in his evidence that in the joint family property which is situated in S.No.206 measuring 1.4 acre was given to the mother of the first defendant's sister Gowri and hence, it cannot be said that a portion of the said property was allotted to the plaintiff. The said finding is not correct. There is no evidence that the first defendant is having a sister by name Gowri. Even if it is assumed that the first defendant is having a sister by name Gowri, her mother should be the first defendant's mother also. If really a share was given in item No.1 to the first defendant's mother, that could have been mentioned directly in the judgment. Instead of that the first appellate court observed that a portion of property in Item No.1 was given to the mother of the first defendant's sister Gowri. A perusal of the DW1's evidence shows that he has stated that in the joint family property in S.No.206 measuring 1.4 acre was given to Gowri Ammal. The said Gowri Ammal is none other than the plaintiff. It appears that in the deposition of the DW1, it has been recorded as in the family properties situated in S.No.206 measuring 1.4 acre was given to Gowri Ammal. The first appellate court has misconstrued the sentence and has come to the conclusion that the said Gowri Ammal is the sister of the first defendant and a portion of the aforesaid property was given to the said Gowri's mother. Therefore, the aforesaid findings are against the evidence.

13. The first appellate court has further held that there is no evidence that the house in which the plaintiff is residing also a joint family property and hence, the suit is not bad for non-inclusion of the said property. The plaintiff, while examining herself as PW1 in her cross examination, has categorically admitted that the house in which she is residing

was acquired by her father-in-law and the said house has not been included in the suit. It is well settled that the admitted facts need not be proved. In the additional written statement, the first defendant has specifically pleaded that the plaintiff has omitted to include some other properties which are in her possession. Taking into consideration of the aforesaid facts, the trial court has rightly come to the conclusion that the suit is bad for partial partition, but the first appellate court by overlooking the admission made by the plaintiff in her evidence has held that it cannot be said that the house in which the plaintiff is residing is a joint family property. Therefore, this court is of the view that the suit is liable to be dismissed on the ground of partial partition. Accordingly, the substantial questions of law are answered.

14. In the result, the second appeal is allowed. The judgment and decree passed by the first appellate court are set aside. The judgment and decree passed by the trial court are restored. The suit filed by the plaintiff is dismissed. However, liberty is given to the plaintiff to file a fresh suit including all the properties, if so advised. The parties are directed to bear their costs throughout.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

gv

To

1. The Sub-Court,
Madurantakam.

2. The District Munsif Court,
Madurantakam

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

+1 cc to M/s.M.S.Subramanian, Advocate, S.R.No.80053

+1 cc to Mr.K.Mani, Advocate, S.R.No.80051

S.A.No.2048 of 2001

KJ(CO)
SSM(20/05/2019) .