

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.01.2018

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

S.A.No.825 of 1997

1. Minor Thanigavel
rep. by Father and
next Friend Vedagiri

2. Vedagiri ...Appellants

Vs

Shanmuga Mudaliar

...Respondent

Prayer: The second appeal has been filed under Section 100 of C.P.C. against the judgment and decree dated 24.01.1997 in A.S.No.44 of 1995 on the file of the Court of Principal District Judge, Chengalpattu.

For Appellants : Mr.Muthuraman

For Respondent : No appearance

J U D G M E N T

The appellant's unsuccessful grandson and son have filed a suit for partition against the grand father and the father/first defendant. The second and third defendants intend to purchase the property. The trial Court after the preliminary trial, decreed the suit in favour of the appellants. The respondent / first defendant has preferred an appeal before the Lower Appellate Court and the Lower Appellate Court set aside the preliminary decree passed by the Trial Court as against which the present second appeal filed.

2.The facts of the plaint filed by the appellants / plaintiffs states as follows:

The suit properties originally belonged to two brother namely Velmurugappa Mudaliar and Kailasa Mudaliar. Veerappa Mudaliar and Shanmuga Mudaliar are the sons of Kailasa Mudaliar. Shanmuga Mudaliar is the 1st defendant, the 2nd plaintiff is the son of the 1st defendant and the 1st plaintiff is the son of the 2nd plaintiff. During the life time of Kailasa Mudaliar partition

was effected among father and sons, under Koor Chit dated 15.05.1960, in which 'A' schedule was allotted to Kailasa Mudaliar, 'B' and 'C' were allotted to Veerabadra Mudaliar and Shanmuga Mudaliar. In the entire plaint schedule properties, 102 feet is built up portion abutting the Kandappar Street in length and 42 feet in breadth with a common passage to be enjoyed by all the sharers. To the north of built up portion back, and 50 feet in length and 2 feet in breadth is kept as vacant site to be enjoyed by the respective shareholders. Velmurugappa Mudaliar is entitled to half share in the built up portion and half share in the vacant backyard portion. To the north of Velmurugappa Mudaliar's portion, 42 feet east-west and 51 feet north-south being constructed portion is allotted to Kailasa Mudaliar with corresponding northern vacant open backyard measuring measuring 25 feet in length north-south and 42 feet in breadth east-west. In the partition Koor chit dated 15.05.1960, Kailasa Mudaliar and his two sons namely Veerabadra Mudaliar and Shanmugha Mudaliar effected partition of the constructed portion. 51 x 42 feet and also vacant open backyard portion 25 x 42 feet with with a right in the common passage. The 1st defendant as Manager of joint family with family weaving profession and from its earnings purchased ABCD portion measuring 16 x 42 feet from Velmurugappa Mudaliar with corresponding backyard portion EFGH. Though the sale deeds stand in the name of 1st defendant the said properties were purchased by joint exertion and income from the joint family. Both the 1st defendant and his brother Veerabadra Mudaliar jointly sold half share shown as MNOP to one Murugappa Mudaliar with corresponding backyard portion. After selling the same in the remaining extent 25½ feet x 42 feet the southern side half portion is being enjoyed by the 1st defendant and the northern side half portion is being enjoyed by Veerabadra Mudaliar. In the open vacant backyard portion also northern half is being enjoyed by the 1st defendant and the southern half by Veerabadra Mudaliar. The 1st defendant wanted to sell away ABCD portion and EFGH portion to 2nd defendant. The 1st defendant received advance of Rs.5,000/- on 15.11.1992 from the 2nd defendant. The 1st defendant had no right to sell ancestral property got in the partition. Hence the plaintiff has filed suit for partition and separate possession of property described in 'B' schedule and injunction.

3. The written statement filed by the 1st defendant states as follows:

The 1st defendant denied that he was the manager of the joint family weaving profession and from earnings purchased ABCD portion from Velmurugappa Mudaliar with corresponding vacant site portion. The plaint plan was misleading. There was Koor chit dated 15.05.1960, which was not acted upon. After the death of Kailasa Mudaliar, his sons Veerabadra Mudaliar and the defendants have divided themselves. The built up portion was allotted to his father Kailasa Mudaliar, out of which the 1st

defendant was allotted East to west 37 feet and north to south 16 feet and the rest of the portion of Kailasa Mudaliar was allotted to Veerabadra Mudaliar. To discharge the debts incurred during his early days, the 1st defendant sold his portion by way of sale deeds dated 17.03.1966 and 21.03.1969 to his brother Veerabadra Mudaliar. The above sale deeds were executed in order to discharge mortgage deed debts dated 20.03.1969, 12.05.1968 and 22.08.1967. Except the dwelling house, the family did not possess any land. During 1973, the 1st defendant purchased DCIJ portion from his brother out of his own income along with corresponding backyard portion shown as DCIJ. In the year 1973, the 2nd plaintiff was only 7 years and did not contribute any amount to the purchase of the above property. The property allotted to the 1st defendant which is marked in Rose colour was the self acquired property of the 1st defendant. The 1st defendant was doing his customary weaving operation and he was also doing his electronic repair shop at Iyyampettai village and from that avocation he earned amount and in the year 1984-85, he became a licensee of arrack shop and from all his earnings purchased green marked portion ABCD from Velmurugappa Mudaliar. The 2nd plaintiff did not contribute any fund to the above sale. Therefore, green marked portion is self acquired property of the 2nd defendant. The 1st defendant had spent Rs.50,000/- for the marriage of the 2nd plaintiff. At the time of filing the suit the 2nd plaintiff demanded Rs.25,000/- to discharge his debts. When the same was refused, the 2nd plaintiff had filed this suit, through his minor son. There is no relationship of joint family, status between this defendant and 2nd plaintiff. Apart from the property, the house property was in existence and therefore, the suit for partition is not sustainable. The 1st defendant has perfected title by adverse possession. The plaintiffs are not in joint possession of the suit property along with this defendant.

4. At the time of admission, the following substantial questions of law were framed:

1. When the 1st defendant has sold portion of the joint family properties and re-purchased the same, does the re-purchase of the property not acquire the character of joint family property, especially when the purchase was by the father who is the kartha of the joint family?

2. Whether the Lower appellate court erred in relying on Ex.B3 which is an unregistered xerox copy of the sale deed and should not have completely eschewed the same from evidence?

3. When the other joint family properties which continue to remain with the 1st defendant without any alienation, whether the lower appellate court erred in completely dismissing the suit for partition?

7. Heard the learned counsel for the appellant. The learned counsel for the respondent is absent. The learned counsel for the appellant would submit that the second plaintiff was minor when Ex.B13 was purchased. It is a presumption that only adults can render assistance for the welfare of the joint family and contribute income to the purchase, for the joint family. After considering the above, the Lower Court arrived a conclusion that the appellant had contributed assistance to the joint family, accordingly, granted preliminary decree in favour of the second plaintiff, however, rejected the permanent injunction. Aggrieved by the same, the first defendant's (father) filed an appeal before the Lower Appellate Court. The Lower Appellate Court dismissed the suit and allowed the appeal filed by the first defendant's father, which is not permissible. The Lower Appellate Court failed to consider that the first defendant sold some portion of the joint family properties and re-purchased the property, accordingly the appellants are entitled for partition.

8.A perusal of the entire records, particularly in paragraphs 14, 16 and 17 of the lower Appellate Court judgment, it is clearly admitted that the property covered under Ex.B13 was purchased by the 1st defendant and his brother. Based on that, the partition of the disputed property was sold to the respondent / 1st defendant, but after the original partition, two such properties were sold for the purpose of the well being of the joint family in order to render medical assistance to the second plaintiff who was suffering by tuberculosis and the first property was purchased by the 1st defendant out of his personal income, in the year 1973 which is marked as Ex.B8 and other portion was purchased in the year 1985 which has been marked as Ex.B13.

9. When the first property was purchased in the year 1973, the second plaintiff was only eight years and for the other portion, he was only 20 years of age and the appellant / plaintiff was not married and no documents have been produced to show that he has rendered assistance for the purchase of the property. Taken into the account, the absence of any documents, this Court is not able to accept that the property was purchased from the joint family funds. Since the appellant / plaintiff was a minor at the relevant point of time.

10. In view of the above, I do not find any substantial questions of law arise for consideration in the second appeal. On perusal of the entire judgment of the Lower Appellate Court, this Court did not find any error.

11. Accordingly, the second appeal is dismissed. The judgment of the Lower Appellate Court is confirmed, by dismissing the suit as against the appellants / plaintiffs. No costs.

s/d-
Assistant Registrar (CS-III)

True Copy

Sub-Assistant Registrar

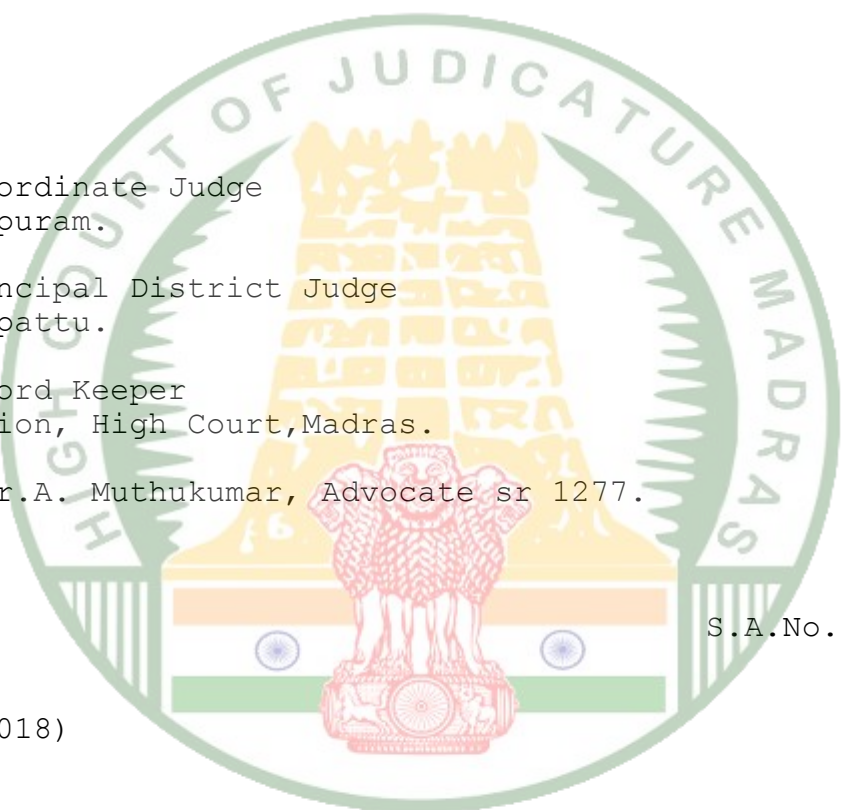
kas

To

1. The Subordinate Judge
Kancheepuram.
 2. The Principal District Judge
Chengalpattu.
 3. The Record Keeper
VR Section, High Court, Madras.
- +1 CC to Mr.A. Muthukumar, Advocate sr 1277.

VGII (CO)
SP (17/02/2018)

S.A.No.825 of 1997

The seal of the High Court of Judicature Madras is a circular emblem. It features a central yellow temple gopuram (tower) with a red lion capital on top. The gopuram is flanked by two green palm trees. The entire emblem is set against a white background with a green border. The words "HIGH COURT OF JUDICATURE MADRAS" are written in a green arc around the top. At the bottom, the Sanskrit motto "सत्यमेव जयते" (Satyameva Jayate) is written in Devanagari script.

WEB COPY