

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.01.2018

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

S.A.No.1260 of 2000

P.Sundarraaj

... Appellant/Plaintiff

Vs.

1.Baby Ammal
2.Chandrasekaran
3.Aravamudhu
4.Arivazhagan
5.Raju Mudaliar
6.Jayalakshmi
7.R.Sankar

... Respondents/Defendants

Second Appeal filed under Section 100 of C.P.C. against the judgment and decree of the Subordinate Judge's Court, Nagapattinam, dated 25.06.1999 made in A.S.No.17 of 1999 modifying the judgment and decree of the District Munsif Court, Nannilam dated 23.04.1997 made in O.S.No.137 of 1996.

For Appellant : Mrs.P.Srividhya

For Respondents: Mrs.R.T.Shyamala for R4 and R6
R1 to R3 and R5 set exparte

J U D G M E N T

The appellant/plaintiff filed a suit for partition of his 1/4th share in the 'A' and 'B' schedule properties. The Court below dismissed the suit. Aggrieved against the same, the appellant/plaintiff filed an Appeal in A.S.No.17 of 1999 before the lower appellate Court. The lower appellate Court, by its Judgment dated 25.06.1999, partly allowed the appeal filed by the appellant/plaintiff and granted preliminary decree for partition with regard to the 1/4th share in the 'A' schedule property and Item No.4 of 'B' schedule property. Insofar as other item in 'B' schedule property, the lower appellate Court confirmed the sale deed executed by the 2nd defendant in favour of the subsequent purchaser who is the 5th respondent before this Court. Aggrieved by the said Judgment, the present second appeal is filed before this Court.

2. The case of the plaintiff is as follows:-

The appellant/plaintiff, who is none other than the son of the defendants 1 and 2 and brother of the 3rd and 4th defendants and the defendants 5 to 8 are subsequent purchaser who have purchased the property from 2nd and 4th defendants. Aggrieved by the alienation as well as non-parting of some of the properties in favour of the plaintiff, the plaintiff filed a suit for partition before the lower Court. However, the lower Court dismissed the suit on the ground that the plaintiff/appellant did not establish that the properties purchased by the first defendant from the joint family fund of the property and to prove the same, no documents were filed.

3. However, on appeal, the plaintiff/appellant filed a petition in I.A.No.7 of 1999 under Order 41 Rule 27 CPC for marking additional documents. Accordingly, the lower appellate Court allowed the said application and permitted the appellant/plaintiff to mark the documents as Exs.A21, A22 and A23. Ex.A21 is the notice dated 05.08.1952 issued through lawyer by the first defendant's brother to manage the family properties. Ex.A22 is the copy of the partition suit register in O.S.No.90 of 1954 and Ex.A23 is the sale deed executed by the first defendant in favour of one Dhanalakshmi Ammal. On perusal of the above said documents, the lower appellate Court arrived the conclusion that the plaintiff/appellant is entitled for 1/4th share in the suit 'A' schedule property. Pending suit, the first defendant died leaving behind the plaintiff and other persons as legal heirs. On perusal of the Documents, namely, Ex.A21 Lawyer's Notice sent by the plaintiff's father's brother who managed the family properties and Ex.A22 suit register in O.S.No.90 of 1954, the lower appellate Court arrived the conclusion that the first defendant is none other than the plaintiff's father, the first defendant's brother managed the family properties as per Ex.A22 partition suit register, and Ex.A23, the sale deed executed by the first defendant in favour of third parties for the sale of his ancestral property. Accordingly, based on the sale proceeds, the suit 'A' schedule property was purchased. Accordingly, the lower appellate Court held that the 'A' schedule property is joint family property and hence the plaintiff is entitled for the share of the suit property. Accordingly, the lower appellate Court arrived the conclusion that the plaintiff is entitled 5/16 share in the suit 'A' schedule property. With regard to the 'B' schedule property, it was purchased by the second defendant with her own funds and subsequently the same was purchased by the defendants 5 to 8 and hence the plaintiff is not entitled to any share in the suit 'B' schedule property. Accordingly, the lower appellate Court rejected the claim of the appellant with regard to the suit 'B' schedule property.

4. The substantial questions of law that were framed at the time of admission of the second appeal is as follows:

1. Whether the learned Subordinate Judge erred in law in not granting the 5/16 share to the plaintiff taking note of the subsequent event viz., the death of the father, namely, the first defendant?

2. Whether the plaintiff is debarred from claiming 5/16 share solely because in the plaint he has asked for 1/4 share in the suit properties?

3. In view of the purchases with joint family funds plaint 'B' schedule items 1 and 2 in the name of the second defendant, is not the plaintiff entitled to 5/16 share in the said items also?

5. I have heard the learned counsel for the appellant and the learned counsel for the 5th respondent and perused the materials available on record.

6. The learned counsel for the appellant would submit that the lower court granted decree in favour of the plaintiff in respect of 'A' Schedule property and allotted 5/16 share to the appellant/plaintiff. However, the relief is not granted in favour of the plaintiff and debarred from claiming 5/16 share solely because in the plaint he has asked for 1/4th share. The learned counsel for the appellant further submitted that the said relief, he can very well file a petition before the competent Court claiming the above said shares in respect of the property. However, he mainly argued the other issue with regard to the 'B' schedule property. The lower appellate Court arrived the conclusion that the suit 'B' schedule property was purchased by the second defendant through Ex.A10 sale deed on her own funds. Ex.A10 shows that the suit 'B' schedule property purchased by Babi Ammal from one Chinnusamy Muthaliar. On perusal of Ex.A10, the lower Court as well as the lower appellate Court arrived the conclusion that the second defendant purchased the suit 'B' schedule property on her own fund from one Chinnu Mudhaliar. Thereafter, Babi Ammal(2nd defendant) executed the sale deed in favour of respondents 5 to 8, which is absolutely incorrect. Since the first defendant in his evidence has not categorically stated that the 5th defendant is the subsequent purchaser from the second defendant. Further, he has not categorically stated that whether the land was purchased from her own funds or fund from the first defendant. On the above, the order of the lower appellate Court is liable to be set aside.

7. The learned counsel appearing for the 5th respondent/5th defendant submitted that the 5th respondent has purchased the property from the second defendant after paying the entire sale consideration and after purchase, Patta and encumbrance certificate transferred in the name of the 5th defendant. The learned counsel appearing for the 5th respondent further submitted that the 5th respondent examined himself as D.W.1 and since the other defendants not appeared before the Court they are set exparte. In order to prove his case, D.W.1 deposed that he went to Singapore and earned much amount from Singapore and out of the said earnings, he purchased the said property. However, the 5th defendant purchased the said property from the second defendant, who is the absolute owner of the property. A perusal of Ex.P10 shows that the second defendant purchased the property on her own funds provided from her father. Since the well considered judgment has been passed by the lower appellate Court with regard to the 'B' schedule property that it has been purchased by the 5th defendant from the second defendant, no interference is required.

8. I have considered the rival submissions.

9. As rightly submitted by the learned counsel appearing for the appellant, insofar as substantial questions of law 1 and 2 are concerned, the appellant had to work out his remedy by filing appropriate petition before the competent court and hence the substantial questions of law 1 and 2 are answered accordingly. However, the question of law raised by the appellant in respect of suit 'B' schedule property which was purchased by the 5th respondent from the second respondent, admittedly, the said property was purchased by the 5th respondent from the second respondent through Ex.A10 Sale deed. On perusal of Ex.A10 sale deed, the lower appellate Court arrived the conclusion that the 'B' schedule property was purchased by the second respondent on her own funds. Per contra, no document was produced by the appellant/plaintiff in order to prove that the said suit 'B' schedule property was purchased from the nucleus of the joint family property. In the absence of any evidence to prove that the suit 'B' schedule property was purchased by the second respondent from out of the joint family property funds, the substantial question of law No.3 has to be answered against the appellant and accordingly, it is answered.

10. In the result, the second appeal is dismissed. No costs.

Sd/-
Assistant Registrar (CS-)

//True Copy//

Sub Assistant Registrar

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To

1. The Sub Judge,
The Additional Sub Court,
Nagapattinam.

2. The District Munsif,
The District Munsif Court,
Nannilam.

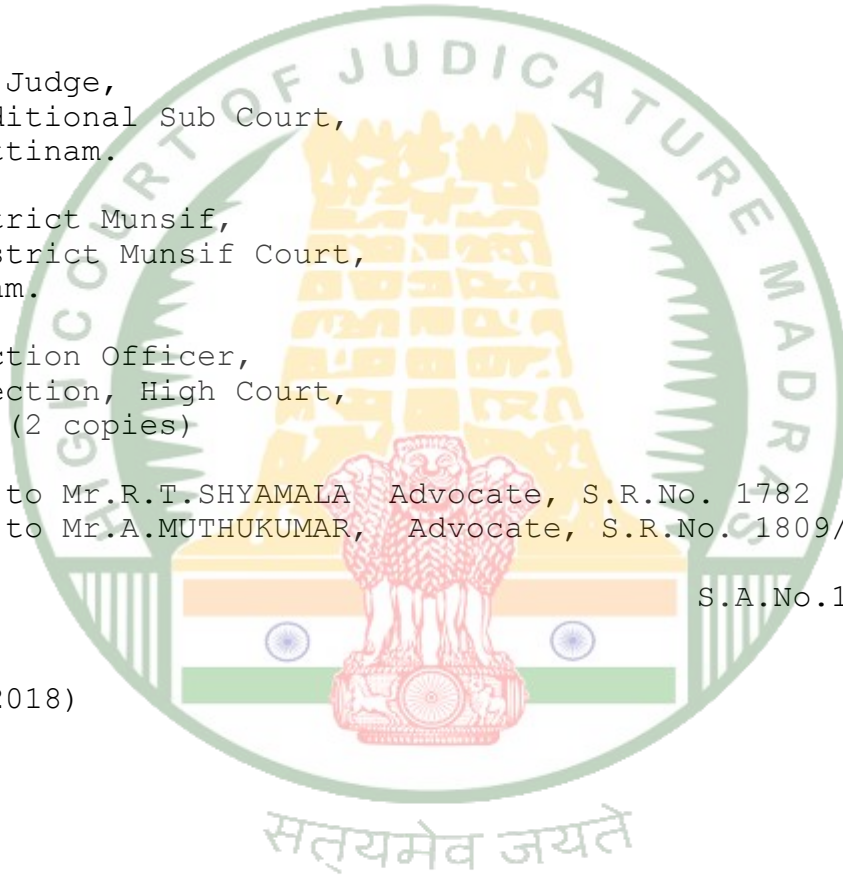
3. The Section Officer,
V.R. Section, High Court,
Madras. (2 copies)

+1cc to Mr. R.T. SHYAMALA Advocate, S.R.No. 1782

+1cc to Mr. A. MUTHUKUMAR, Advocate, S.R.No. 1809/18

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VG II (CO)
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