

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 15.12.2017
Judgment pronounced on: 18.04.2018

CORAM

THE HONOURABLE MR.JUSTICE P. RAJAMANICKAM

S.A.No.1656 of 2000
and
CMP.No.15530 of 2000

Senniappa Gounder ... Appellant/Appellant/
1st Defendant

Vs.

1.Gandhimathi
2.Selva Kumar ...Respondents 1 & 2/Plaintiffs/Appellants
3.Lakshmi
4.Rajammal
5.Valli Ammal (Deceased) ...Respondents 3to5/Respondents/
Defendants 2 to 4

(R5 died; memo filed seeking exemption to
bring LR.s of R5 is recorded as per order of
Court dated 11.12.2017 in S.A.No.1656/2000).

Prayer : Second Appeal is filed under Section 100 of the Civil
Procedure Code, against the Judgments and Decrees dated
10.02.1999 in A.S.Nos.89 of 1998 on the file of the Court of
Subordinate Judge, Bhavani, dismissing the Appeal and
confirming the Judgment and Decree passed in O.S.No.556/1995
dated 17.04.1998 on the file of the Additional District Munsif,
Bhavani.

For Appellants : Mr.S.Saravanan
for M/s.V.P. Sengottuvel

For Respondent No.1 : M/s.S.J. Mohamed Sathik
for Mr.N.Manokaran

JUDGMENT

This second appeal has been filed by the first defendant
against the Judgment and Decree passed in A.S.Nos.89 of 1998
dated 10.02.1999 on the file of the Sub-Judge, Bhavani,
confirming the Judgment and Decree passed in O.S.No.556/1995
dated 17.04.1998 on the file of the Additional District Munsif,
Bhavani.

2. The respondents 1 and 2 herein have filed a suit in O.S.No.556/1995 on the file of the Additional District Munsif, Bhavani, for the relief of partition and separate possession and for permanent injunction. The learned Additional District Munsif has decreed the suit as prayed for. Aggrieved by the same, the first defendant had filed an appeal in A.S.No.89/1998 on the file of the Sub Judge, Bhavani. The learned Sub- Judge, Bhavani, has dismissed the said appeal confirming the Judgment and Decree passed by the Trial Court. As against the same, 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 plaintiffs 1 and 2 are the wife and son of one Late Samiyappa Gounder. The said Samiyappa Gounder and the first defendant are the sons of one late Subbaroya Gounder. The defendants 2 and 3 are the daughters and fourth defendant is the wife of the said Subbaroya Gounder. The said Samiyappa Gounder died on 12.07.1983 leaving behind the plaintiffs 1 and 2 and fourth defendant as his legal heirs. Thereafter on 04.03.1986, the said Subbaroya Gounder died leaving behind the plaintiffs and the defendants as his legal heirs.

4. The first Item of the suit properties is a residential house property and the same was purchased as a vacant site by Subbaroya Gounder by a registered sale deed dated 02.05.1960. The second Item of the suit properties is a lease hold property of Subbaroya Gounder which belongs to Ariya Vaishya Mutt. Since the said Subbaroya Gounder died intestate, the plaintiffs are entitled to get 2/15 shares jointly, the defendants 1 to 3 are entitled to 3/15 share each and the fourth defendant is entitled to 4/15 share in the suit properties. The plaintiffs and the defendants have been enjoying the suit properties jointly and due to the recent misunderstanding, the plaintiffs are unable to continue in joint possession. Hence, the plaintiffs issued a lawyer's notice to the first defendant calling upon him for amicable partition. The first defendant refused to receive the said notice and evaded partition.

5. The defendants are attempting to alienate and encumber the suit properties including the shares of the plaintiffs. Hence, the plaintiffs have filed a suit to divide the suit properties into 15 equal shares and allot two such shares to them and also for permanent injunction restraining the defendants from alienating or encumbering the first Item of the suit properties including their shares.

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

Item No.1 of the suit properties was purchased by the said Subbaroya Gounder as a vacant site. The said Subbaroya Gounder, due to his old age, relinquished all his rights in the said property in lieu of maintenance. Thereafter, the first defendant constructed the house and he has been in possession and enjoyment of the same. The first defendant is cultivating the second item of the suit properties as a tenant and he is paying rent to the Mutt and as such, the plaintiffs and the defendants 2 to 4 are not entitled to ask for partition in the suit properties. Therefore, he prayed to dismiss the suit.

7. Based on the aforesaid pleadings, the learned Additional District Munsif, Bhavani, framed necessary issues and tried the suit. During trial, on the side of the plaintiffs, the first plaintiff examined herself as PW1 and marked Ex.A1 to Ex.A4 as exhibits. On the side of the first defendant, the first defendant examined himself as DW1 and also examined one more witness as DW2. He has marked Ex.B1 to Ex.B39 as exhibits. Other defendants remained ex parte.

8. The learned Additional District Munsif, Bhavani, after considering the materials placed before him had passed a preliminary decree to divide the suit properties in to 15 equal shares and allot two such shares to the plaintiffs. He also granted permanent injunction restraining the defendants from alienating or encumbering Item No.1 of the suit properties till the shares of the plaintiffs are allotted to them. Aggrieved by the same, the first defendant had preferred an appeal in A.S.No.89/1998 on the file of the Sub- Judge, Bhavani. The learned Sub-Judge, Bhavani has dismissed the said appeal confirming the Judgment and Decree passed by the trial court. As against the same, the first defendant has preferred the present second appeal.

9. At the time of admitting the second appeal, this Court has formulated the following substantial question of law:

"Whether the finding of the Courts below that the suit property is joint family property is vitiated by perversity and whether the above finding is contrary to the settled principles of law?"

10. Subsequently on 15.12.2017, after hearing both sides, the following additional substantial question of law was framed as follows:

" Is whether the Courts below are right without considering the settled law that the burden of proof is on the party who asserts that any of the items is joint family property, if in the absence of any

proof, the Courts below came to the conclusion that suit properties are joint family properties is contrary to law."

11. Heard Mr.S.Saravanan, for M/s.V.P.Sengottuvel, learned counsel for the appellant and Mr.S.J.Mohamed Sathik for Mr.N.Manokaran, learned counsel for the first respondent.

12. Learned counsel for the appellant/first defendant has submitted that the courts below failed to consider that Ex.B1 (blue print) would show that the first defendant alone constructed the house which is situated in Item No.1 of the suit properties. He further submitted that Ex.B2 to Ex.B19 would clearly show that the house tax was assessed only in the name of the first defendant and the electricity service connection also stands in the name of the first defendant. He also submitted that the patta for the first item of the suit property also stands only in the name of the first defendant and he only paid kist to the said property. He further submit that there is no evidence that neither the said Samiyappa Gounder nor the plaintiffs have contributed for construction of the house which is situated in Item No.1 of the suit properties. He further submitted that the courts below failed to consider that the burden of proof is on the plaintiffs that the Item No.1 of the suit properties is a joint family property. He further submitted that Ex.B20 to Ex.B39 would clearly establish that after the death of the Subbaroya Gounder, first defendant alone cultivating Item No.2 of the suit properties as a tenant. He further submitted that without considering all the aforesaid facts, the trial court has erroneously decreed the suit as prayed for and the same was confirmed by the First Appellate Court and hence he prayed to allow the second appeal and set aside the Judgments and Decrees passed by the courts below.

13. The learned counsel for the respondents 1 and 2 has submitted that merely because the blue print has been obtained by the first defendant, it cannot be said that he only constructed the house. He further submitted that the alleged house tax receipt, electricity charge receipts and kist receipts were obtained only after the death of the said Subbaroya Gounder and therefore based on those documents, it cannot be said that the first respondent alone constructed the house. He further submitted that after the death of the said Subbaroya Gounder, the plaintiffs and the first defendant have jointly cultivated Item No.2 of the suit properties as tenants and therefore, the plaintiffs are entitled to get share in both the Items of the suit properties. He further submitted that the trial court as well as the first appellate court, taking into consideration of all the aforesaid facts, have rightly decreed the suit as prayed for and hence, he prayed to dismiss the second appeal.

14. The undisputed facts are as follows:

The plaintiffs 1 and 2 are the wife and son of one Samiyappa Gounder. The said Samiyappa Gounder and the first defendant are the sons of one Subbaroya Gounder. The defendants 2 and 3 are the daughters and fourth defendant is the wife of the said Subbaroya Gounder. The said Samiyappa Gounder died intestate on 12.07.1983 and subsequently, the said Subbaroya Gounder died intestate on 04.03.1986.

15. It is seen from Ex.A1 (a registration copy of the sale deed dated 02.05.1960) that the said Subbaroya Gounder had purchased Item No.1 of the suit properties as a vacant site. Though the first defendant, while examining himself as DW1 had stated that Item No.1 of the suit properties was purchased jointly by his father and himself, to prove the said fact, he has not produced any material. In fact, in his written statement, he has specifically admitted that the said property was purchased by his father Subbaroya Gounder. Therefore, it is clear that Item No.1 of the suit property was purchased by the said Subbaroya Gounder as a vacant site vide Ex.A1.

16. The first defendant claimed that his father Subbaroya Gounder had orally relinquished his right over Item No.1 of the suit property in favour of him in lieu of maintenance. For this also, except the ipse dixit of the first defendant, no other evidence is available. Admittedly, the said Subbaroya Gounder died on 04.03.1986. The house tax receipts (Ex.B2 to Ex.B6), Electricity charge receipts (Ex.B7 to Ex.B14), patta (Ex.B15) and kist receipts (Ex.B16 to Ex.B19) would show that they were obtained after the death of the said Subbaroya Gounder. The first defendant has not produced any document to show that he was in exclusive possession and enjoyment of the Item No.1 of the suit properties, even during the life time of the said Subbaroya Gounder. The first defendant has not stated in his written statement that when he has constructed the house, how much amount he spent for constructing the house and what was the source for such construction. During cross examination of PW1, it was suggested that the first defendant has spent Rs.5 lakhs for constructing the house, whereas the first defendant has stated in his evidence that he has spent Rs.1.75 lakhs for constructing the house. But he has not produced any evidence to show that what was the source of income for constructing the said house. So, merely because, the first defendant has got Blue Print (Ex.B1) in his name, it cannot be presumed that he only constructed the house. As rightly observed by the courts below, since the first defendant is the eldest son, he would have obtained Blue Print in his name. So, based on the Blue Print alone, it cannot be said that the first defendant alone constructed the house. The evidence on record would show that the said Subbaroya Gounder had cultivated Item No.2 of the suit

properties as a tenant till his death. Therefore, he only would have constructed the house which is situated in Item No.1 of the suit properties. Admittedly, the said Subbaroya Gounder died intestate leaving behind the plaintiffs and the defendants as his legal heirs and therefore, the plaintiffs are entitled to get 2/15 shares in Item No.1 of the suit properties. During pendency of the second appeal, the 4th defendant died. The Item No.1 of the suit properties to be divided only among the plaintiffs and the defendants 1 to 3. Therefore, the plaintiffs are entitled to get 1/4 share and the defendants 1 to 3 are entitled to get 1/4 share each in Item No.1 of the suit properties.

17. It is an admitted fact that the said Subbaroya Gounder was cultivating the Item No.2 of the suit properties as a tenant till his death. DW2, who is Supervisor of the Ariya Vaishya Mutt, Nerunjipettai, stated in his cross examination that Subbaroya Gounder was a tenant of the Item No.2 of the suit properties till his death and after his death, the first defendant is cultivating the said lands as a tenant. Ex.B20 to Ex.B39 are the receipts issued by the said Mutt for payment of rent. Those receipts would show that the first defendant alone cultivating the said lands as a tenant. The plaintiffs have not produced any documentary evidence to show that they also jointly cultivated the Item No.2 of the suit properties as a tenant. PW1 has admitted in her cross examination that her father-in-law viz., Subbaroya Gounder was cultivating the said lands as a tenant and after his death, she was not permitted to cultivate the said lands.

18. As per Section 2 (aa) of the Tamil Nadu Cultivating Tenants Protection Act, 1955, "cultivating tenant"

(i) means a person who contributes his own physical labour or that of any member of his family in the cultivation of any land belonging to another, under a tenancy agreement, expressed or implied; and

(ii) includes

(a) any such person who continues in possession of the land after the determination of the tenancy agreement;

(b) the heir of such person, if the heir contributes his own physical labour or that of any member of his family in the cultivation of such land;"

19. In this case, admittedly after the death of the original tenant viz., Subbaroya Gounder, the plaintiffs have not cultivated Item No.2 of the suit properties. It is only the first defendant, who is cultivating the said lands. Therefore, he only can be treated as cultivating tenant under the Tamil

Nadu Cultivating Tenants Protection Act, 1955. So, the plaintiffs and the defendants 2 and 3 cannot claim any share in Item No.2 of the suit properties. Therefore, the Judgment and Decrees passed by the courts below have to be modified to that effect. Accordingly, the substantial questions of law are answered.

20. In the result, the second appeal is partly allowed. The Judgments and Decrees passed by the courts below are modified to the effect that the Item No.1 of the suit properties be divided into four equal shares and one such share be allotted to the plaintiffs. The plaintiffs are entitled for the relief of permanent injunction restraining the defendants from alienating or encumbering Item No.1 of the suit properties till their share is separately allotted to them. In so far as Item No.2 is concerned, the suit is dismissed. Considering the relationship, the parties are directed to bear their own costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

To

1. The Subordinate Judge,
Bhavani.

2.The Additional District Munsif,
Bhavani.

Copy to:

The Section Officer,
V.R.Section,

High Court, Madras. (2 copies)

+1cc to Mr.S.Saravanan, Advocate Sr.No.28715

+1cc to Mr.N.Manokaran, Advocate Sr.No.28967

KGK(CO)

sm:16.5.2018

S.A.No.1656 of 2000
and

CMP.No.15530 of 2000