

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 04.10.2018
PRONOUNCED ON : 29.10.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.328 of 2015

1. Papanna (deceased)
2. Venkatamma (deceased)
3. Pasavaraj
4.Nandesh
(Appellants 3 and 4 respondents
2 to 4 Lrs of the Deceased 1 & 2nd appellants
vide order dt:14/09/2018 in SA.No.328/15 by TRNJ)
...Appellants/Defendants

Vs.

1. Venkatesh ...1st Respondents/Plaintiff
2. Shoba
3. Uma
4. Bharathi
5. Narayanappa
6. Jayaram
7. Madesh
8. Jayamma
9. Yeshoda
10.Chinnamma
11. Magadevamma
12. Lakshmanan
13. Ashwathamma
14. Rajamma
15.Rajamma
...2&15 Respondents/Defendants

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 05.02.2015 passed in A.S.No.40 of 2011 on the file of the Additional District Judge, Hosur, confirming the judgment and decree dated 17.06.2011 in O.S.No.129 of 2007 passed by the Subordinate Judge, Hosur.

For Appellants
For Respondents

: Mrs.V.Srimathi
: Mr.S.Sivashanmugam

JUDGMENT

In this second appeal challenge is made to the judgment and decree dated 05.02.2015 passed in A.S.No.40 of 2011 on the file of the Additional District Court, Hosur, confirming the judgment and decree dated 17.06.2011 passed in O.S.No.129 of 2007 on the file of the Subordinate court, Hosur.

2. The second appeal has been admitted on the following substantial questions of law.

"a) Whether the courts below are right in shifting the burden of proof on the first defendant to establish the properties standing in his name are his self acquisitions, especially when they were purchased during the life time of this father, as senior member of the coparcenary?

b. Whether the courts below have not failed to appreciate that the acquisition in the name of the plaintiffs father had not been included in the suit for division?

c. Whether the Stridhana of the second defendant could be included for division in the suit for partition?

3. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

4. Materials placed on record go to show that as per the admitted case of both the parties, most of the properties described in the plaint schedule belonged to Chinnappa ancestrally and it is found that Chinnappa had three sons, namely, Papanna, the first defendant, Vengadappa, the eighth defendant and Sonnappa, the plaintiffs' father. The plaintiff and the defendants 16 to 18 are the legal representatives of the deceased Sonappa. The defendants 1 to 8 form part of the branch of the first defendant papanna and the defendants 8 to 15 form part of the branch of the eighth defendant Vengadappa. Claiming that the suit properties are the ancestral joint family properties belonging to the deceased Chinnappa and accordingly by way of the income derived from the ancestral properties, a few properties had been acquired in the name of the sons of Chinnappa and all the properties had been put in the common

hotchpot and enjoyed as the joint family properties by the sons of Chinnappa and accordingly on that footing putting forth the case that though the parties had been enjoying the joint family properties in specific extents without any partition for the sake of convenience and inasmuch as there has been no division of the suit properties by metes and bounds allotting the shares of the various parties to whom the suit properties are entitled to, accordingly seeking his share in the suit properties, the plaintiff has come forward with the suit for partition.

5. The defendants 1 to 4 resisted the plaintiff's case by contending that all the suit properties are not the joint family properties of the deceased Chinnappa and it is stated that some of the properties described in the plaint schedule and as detailed in the written statement belong to the first defendant Pappanna independently, he having acquired the same on his own and further putting forth the case that the three branches of Pappanna had divided the joint family properties in the year 1980 itself and accordingly, the parties are enjoying their separate properties and also contending that the plaintiff has not impleaded all the necessary parties to the suit as detailed in the written statement, particularly, the plaintiff having failed to implead Uma Devi and her husband Sivanna who had purchased certain joint family properties from the power agent Muralidharan based on the power deed dated 05.09.2001 executed by the three sons of Chinnappa, accordingly, prayed for the dismissal of the plaintiff's suit.

6. The trial court had granted the preliminary decree in favour of the plaintiff as prayed for barring items 41 to 43 of the plaint schedule properties. The first appellate court had granted the preliminary decree in favour of the plaintiff declaring his 1/12 share in the suit properties in respect of entire plaint schedule properties and accordingly modified the judgment and decree of the trial court. Impugning the same, the present second appeal has been laid by the contesting defendants.

7. From the evidence adduced in the matter, both oral and documentary, it is found that most of the plaint schedule properties are the joint family properties belonging to the family of the deceased Chinnappa. The relationship between the parties is not in dispute. That apart, it is found that the main avocation of the deceased Chinnappa is only agriculture and it is also seen that the three sons were also engaged in agricultural operation. There is no proof placed to show that the three sons of Chinnappa had been having other source of income other than by way of agriculture. Thus, it is found that when the father Chinnappa had been in the possession of vast joint family properties and acquiring income there from, it is

found that accordingly, as rightly determined by the courts below, the joint family properties in the hands of the deceased Chinnappa were income yielding properties, and as rightly put forth by the plaintiff, when the three sons of Chinnappa had been only engaged in agricultural work, accordingly, as also found by the courts below, the contesting defendants having taken the plea that the properties standing in the name of the first defendant belong to him independently, the burden is upon them to establish that the first defendant, in particular, had acquired the suit properties on his own without the aid and assistance of the ancestral nucleus. However, with reference to the abovesaid position, there is no material worth acceptance on the part of the contesting defendants to establish that the first defendant had acquired the properties standing in his name out of his own source of income without the aid and assistance of the ancestral nucleus and in such view of the matter, the courts below are found to be justified in holding that the three sons of Chinnappa had been acquiring certain properties in their names only from and out of the aid of the ancestral nucleus and the contesting defendants having failed to establish their independent entitlement to the properties standing in the name of the first defendant as such, no interference is called for in the determination of the courts below that the plaint schedule properties are only the joint family properties of the parties concerned. Accordingly, it is seen that though certain plaint schedule properties had been acquired in the names of the sons of the deceased Chinnappa, all the properties had been put in the common hotchpotch and been enjoyed by all the joint family members as the joint family properties and accordingly it is found that all the plaint schedule properties had been treated and enjoyed only as the joint family properties. The findings of the courts below with reference to the abovesaid aspects, based on the correct and proper appreciation of the materials placed on record, do not warrant any interference.

8. The plaintiff has now come forward with the suit seeking partition of his share in the suit properties and the abovesaid case of the plaintiffs is being resisted by the contesting defendants by raising the defence that the joint family properties had already been divided orally in the year 1980 itself. However, considering the materials placed on record, particularly, the power of attorney deed executed by the three sons in favour of Muralidharan dated 05.09.2001 projected in the matter, would go to show that all the three sons had executed the abovesaid power of attorney in favour of Muralidharan in respect of the ancestral properties belonging to them by asserting that they had been in their common enjoyment and following the same, it is seen that the power agent had alienated the joint family properties comprised in the power deed in favour of Uma Devi and her husband Sivanna. Therefore, when from the power of attorney deed projected in the matter,

even in the year 2001, the three sons had asserted that the ancestral properties had been remaining in their common enjoyment, the defence projected by the contesting defendants that even in the year 1980 itself the joint family properties had been orally divided amongst the three sons, as such, cannot be accepted. That apart, though the defendants would claim that there had been an oral partition in the year 1980 of the joint family properties, they had not come forward with the clear case as to what are the properties allotted to each branch by way of the abovesaid oral partition. Other than putting forth the plea that the joint family properties had been orally divided in the year 1980, the defendants had not placed any other material worth acceptance to evidence as to the shares allotted to each branch in the joint family properties, etc. On the other hand, when from the power of attorney deed projected in the matter, the three sons had asserted that the ancestral properties had remained joint in their possession, to say that the properties belonging to the joint family had been orally divided in 1980 falls to the ground and therefore the plea of oral partition projected by the defendants rightly did not find acceptance by the courts below.

9. Furthermore, by way of Ex.B1, it is seen that the first defendant and the eight defendant had jointly settled certain properties belonging to them in favour of the second defendant, wherein the plaintiff's father, Sonappa has attested. The abovesaid document also would falsify the defence version of the oral partition having taken place in the year 1980.

10. The materials placed on record would go to show that an endeavour had been made by the parties concerned to divide the joint family properties in the year 1983. Accordingly it is found that the evidence adduced in the matter would go to show that the three sons had endeavoured to divide the joint family properties by way of a panchayat intervention and accordingly the muchalika had come to be executed amongst them. However, as the dispute arose between the parties as regards the same, particularly, with reference to the allotment of shares, it is seen that the said document had not attained the finality in the manner known to law and it is seen that the said document evidencing the separation had been left in the custody of the first defendant, he being the eldest son. The said document has not seen the light of the day and in particular, the contesting defendants had not produced the said document for the consideration of the court. Be that as it may, when the endeavour had been made by the parties to effect division of the properties belonging to the joint family in the year 1983, as rightly found by the courts below, the defence version that the parties had divided the joint family properties in the year 1980 itself, merits rejection and accordingly it is seen that the

defendants have failed to establish the claim of oral partition said to have been effected in the year 1980.

11. Merely because the joint family members, for the sake of their convenience and adjustment, had been enjoying the properties separately, that by itself, would not, lead to the conclusion that the parties had divided the joint family properties belonging to them by metes and bounds and enjoying the same separately. Accordingly, it is found that even the defendants have not come out with the clear case as to what the properties allotted to each branch in the alleged oral partition effected during 1980. However, as above discussed, during 1983, some endeavour had been made to divide the joint family properties into three shares, but the same did not fructify as the parties did not further proceed in the matter by signing the muchalika written with reference to the same and in such view of the matter, as rightly found by the courts below, the plaint schedule properties continued to remain joint with the family members.

12. Merely because, the revenue documents, namely, patta, kists receipts, etc., are standing in the name of the certain family members, that by itself, would not be adequate and sufficient for holding that the joint family properties had already been divided amongst the members. As above noted, when the parties are enjoying the joint family properties separately for the sake of convenience and adjustment, on an understanding effected between them and on that ground, the revenue records have also come to be issued in their names separately, that by itself, would not be the sufficient cause for accepting the partition plea projected by the contesting defendants.

13. As regards the defence version that the plaintiff's suit is bad for non joinder of proper and necessary parties, as rightly determined by the courts below, when the alienations of the joint family properties made in favour of Uma Devi and her husband Sivanna had been done based on the power of attorney deed executed by the three sons long back, in such view of the matter, it is seen that the non impleadment of the abovesaid alienees, would not, in any manner, affect the plaintiff's case and the determination of the same by the courts below is found to be proper and not warranting any interference. As above discussed, when the contesting defendants, in particular, had failed to establish that the properties standing in the name of the first defendant or in the name of the other sons of the deceased Chinnappa, had been acquired on their own source of income and on the other hand, when the existence of ancestral nucleus, more particularly, income yielding ancestral nucleus, has been accepted and when the parties main avocation is found to be only agriculture, in such view of the matter, it is

seen that all the properties described in the plaint schedule are only the joint family properties. The defendants 1 and 8, as such, would not be entitled to settle certain properties in favour of the second defendant by way of Ex.B1 settlement deed and even though the deceased Sonappa, the plaintiff's father had attested the said document, that by itself, would not lend any legal credibility to the settlement deed as sought to be projected by the contesting defendants. Inasmuch as the deceased Sonappa had not joined the execution of the abovesaid settlement deed and when considering the nature of the properties comprised therein being the joint family properties, the settlement effected by the defendants 1 and 8 in favour of the second defendant by way of Ex.B1, would not be legally valid and binding upon the plaintiff and the other defendants and the attestation of the said document by the deceased Sonappa, by itself, would not lend credence to the said document. As rightly determined by the first appellate court, when there is no material placed on record that the deceased Sonappa had attested the said settlement deed knowing the contents thereof, on his mere attestation, it cannot be construed that he had attested the said document knowing the nature and contents of the same and in such view of the matter, in the light of the principles of law formulated with reference to the abovesaid aspect in the decision reported in 2003(1) CTC 745 (K.A.Selvanachi and another v. Dr.S.R.Sekar and another) as attestation would not imply that the attestor had knowledge of the contents of the document or the attestor had accepted the correctness of the contents of the document in question and without there being some evidence intrinsic in the document itself or extrinsic to show that the attestor had knowledge of such contents, it is found that the contesting defendants cannot take advantage of the attestation of Ex.B1 by the deceased Sonappa as if the said document is binding upon his legal heirs. When admittedly, the deceased Sonappa had not joined the execution of Ex.B1 settlement deed and as above noted, the contesting defendants had not placed any material to evidence that the deceased Sonappa had attested the said document knowing the nature of the contents of the said document, in such view of the matter, the first appellate court is right in holding that the deceased Sonappa is not a willing member to the abovesaid execution of the settlement deed in favour of the second defendant and thereby it is noted that the same would not be binding upon the legal heirs of the deceased Sonappa and in such view of the matter, there is no need on the part of the plaintiff to challenge the said document on his attaining majority as the said document being the settlement deed in respect of the joint family properties and the same having been not found to be executed with the consent and approval of all the joint family members, it is found that the said document is null and void and not binding upon the

plaintiff and therefore despite the execution of Ex.B1 settlement deed, the properties comprised therein continue to remain only as the joint family properties. Accordingly, it is found that as rightly determined by the courts below, there is no material placed on the part of the second defendant to establish that she has been in the exclusive possession and enjoyment of the said properties in her own right and therefore, the first appellate court is found to be justified in granting the partition in favour of the plaintiff even in respect of the abovesaid items of the suit properties namely, items 41 to 43 of the plaint schedule properties.

14. The counsel for the plaintiff in support of his contentions placed reliance upon the decision report in (2018) 7 Supreme Court Cases 646 (Shyam Narayan Prasad v. Krishna prasad and others). The principles of law outlined in the abovesaid decision are taken into consideration and followed as applicable to the case at the hand.

15. In the light of the above discussions, the courts below had properly appreciated the materials placed on record in the proper perspective and not shifted the burden of proof on the contesting defendants as sought to be made out and considering the existence of income yielding ancestral nucleus and the avocation of the parties being only agriculture and not having any independent source of income and when the contesting defendants have failed to establish that the properties standing in their name belong to them in their own right and when the plaintiff has established the income yielding ancestral nucleus out of which aid the other members of the family are found to have acquired the properties in their own names and accordingly all the properties acquire the character of ancestral joint family properties and when by way of Ex.B1 settlement deed, the second defendant would not be entitled to acquire the legal right in respect of the properties comprised thereunder, in such view of the matter, the substantial questions of law formulated in this second appeal are accordingly answered against the defendants/appellants and in favour of the plaintiff.

16. In conclusion, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

bga

To

1.Additional District Judge, Hosur,

2.Subordinate Judge, Hosur.

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

+1cc to Mr.V.Raghavachari, Advocate, S.R.No.73952

+1cc to Mr.S.Siva Shanmugam, Advocate, S.R.No.73867

S. A.No.328 of 2015

KJI (CO)
GSP (04/12/2018)