

IN THE HIGH COURT OF JUDICATURE OF MADRAS

Judgment Reserved on : 26.07.2017

Judgment Pronounced on : 12.06.2018

CORAM:

THE HONOURABLE MR. JUSTICE S.BASKARAN

S.A.No.860 of 2012
and M.P.No.1 of 2012.

1.Ponnuvel
2.Palanisamy

...Appellants/Defendants

Vs.

Jothi

...Respondent/Plaintiff

This second appeal has been filed under Section 100 of CPC, against the judgment and decree dated 20.09.2011 passed by the learned Subordinate Judge, Harur, in A.S.No.37 of 2009, confirming the Judgment and decree dated 26.10.2009 passed by the learned District Munsif, Harur, in O.S.No.70 of 2007.

For Appellants : M/s.S.Kannaih

For Respondents : Notice served
No appearance

JUDGMENT

This second appeal arises out of the Judgment and Decree dated 20.09.2011 passed by the learned Subordinate Judge, Harur, in A.S.No.37 of 2009, confirming the Judgment and decree dated 26.10.2009 passed by the learned District Munsif, Harur, in O.S.No.70 of 2007.

2. Brief facts of the case is as follows:-

The plaintiff is the daughter of first defendant. The second defendant is the son of the first defendant. According to the plaintiff, the suit property was purchased from and out of sale proceeds of the ancestral property of the plaintiff and defendants 1 and 2. Even after the marriage of the plaintiff, she is in possession and enjoyment of the suit property along with the defendants 1 and 2. During the agricultural operation, the plaintiff used to assist the defendants 1 and 2. Being the

Kartha of the family, the property tax receipts stands in the name of the first defendant, Even after the defendants 1 and 2 used to give 1/3rd share in the agricultural proceeds to the plaintiff after deducting to the expenses. The second defendant married the sister in law of the plaintiff. As there was some dispute between them, the defendants 1 and 2 refused to give any share in the agricultural proceeds to the plaintiff. Hence, the plaintiff has filed the suit demanding partition of 1/3rd share in the suit property.

3. The same is disputed by the defendant by filing counter and stated that the defendants denied the allegations of the plaintiff and claimed that the property is the self acquired property of the first defendant. Further more, after the marriage of the plaintiff, enough seervarisai was done to the plaintiff. Hence, the defendant contended that the suit is liable to be dismissed. Before the trial Court, on the side of the plaintiff, P.W.1 and P.W.2 were examined and Documents Ex.A1 to Ex.A5 were marked and on side of the defendant D.W.1 and D.W.2 were examined and Documents Ex.D1 to Ex.D8 were marked. The trial Court on the basis of available evidence decreed the suit as prayed for and allotted 1/3rd share to the plaintiff. Aggrieved upon that the defendants preferred the first appeal before the first appellate Court. After contest, the first appellate Court dismissed the appeal and confirmed the decree and judgment of the trial Court. Hence, the second appeal.

4. In this appeal, the following substantial questions of law are raised by the appellants.

(1) Whether the Courts below have committed an error in interpreting the document dated 09.03.1994 marked under Exhibit A4 for coming to the conclusion that those properties enumerated there in are ancestral properties?

(2) Whether the Courts below have erred in holding that the suit properties are the joint family properties and therefore the respondent is entitled to have 1/3rd share over the same.

(3) Whether the Courts below were justified in permitting the respondent to lead evidence, without any proper pleadings in the plaint?

(4) Whether the Courts below are correct in putting the burden on the appellants to prove that suit properties are not the joint family properties and therefore the respondent has not right to claim any share?

(5) Whether the Courts below are

justified in completely negating the claim of the appellants regarding the expenses incurred in performing the marriage of the respondent?

(6) Whether the Courts below have committed an error in ignoring the document dated 24.01.2007 under Ex.B1 and documents dated 16.03.1954 under Ex.B4 produced by the appellants while considering their claim?

5. The learned counsel appearing for the appellants would submit that the trial Court permitted the plaintiff to lead evidence without pleadings. Further, the trial Court shifted the burden to the appellants to prove that the suit properties are not the joint family property. Further more, the trial Court failed to consider Ex.B1 and Ex.B4. The first appellate Court has also not considered the above question of law properly. Hence, the appellant contended that interference of this Court is warranted.

6. In spite of notice served on the respondent, there is no representation on behalf of the respondent either by counsel or by the party in person.

7. Heard the learned counsel appearing for the appellant and perused the materials available on record.

8. On perusal, it appears that this is a simple suit for partition as per the amended Hindu Succession Act 39 of 2005. According to the plaintiff, the suit property is the joint family property, but contrary to the same, the first defendant produced Ex.B6 and Ex.B7 sale deeds in his name to show that the suit properties are self acquired property. However, the plaintiff produced Ex.A4 and Ex.A5 to show that the ancestral joint family property of the plaintiff and the defendants 1 and 2 was sold by the defendants 1 and 2 through Ex.A4 and thereafter the suit property was purchased in the name of the first defendant. The specific defence on the side of the defendants 1 and 2 is that Ex.A4 and Ex.A5 is inadmissible, since there is no pleadings to that effect. According to the plaintiff, herself and the defendants 1 and 2 originally belongs to Kavapatti Village. They have sold the lands in Survey No.50/3-B and 51/3-B to one Annapoorani wife of Doctor Shanmugasundaram and from and out of the sale proceeds, they have purchased the suit property. However to that effect no pleadings is in favour in the plaint. As such the partition suit is concerned, both the plaintiff and the defendants are in the same category. Both the plaintiff and the defendants are bound to give true facts to the Court. The plaintiff has produced sale deeds Ex.A4 and Ex.A5. It is clear that Ex.A4 is the document executed by the first defendant. Against the pleadings

of the defendants 1 and 2, the plaintiff produced Ex.A4. Since the first defendant failed to disclose the real facts about the origin of the suit property and the source of income for the purchase of the suit property, the plaintiff was constrained to file Ex.A4 and Ex.A5. Ex.A4 is the document of the first defendant and he is the author of the document. Further, it is not the document of the plaintiff. If the plaintiff produced any document, without the knowledge of the defendants 1 and 2, then the pleadings is mandatory for the said amount and without pleadings it cannot be looked into. However, as far as Ex.A4 is concerned, it is the document of the first defendant. He cleverly failed to disclose the real facts and suppressed the best evidence available with him. In such circumstances, to find out the truth production of Ex.A4 by the plaintiff is to be entertained to ascertain the real facts of the case. Hence, the objections put forth by the defendants that without pleadings Ex.A4 is not admissible in evidence is not sustainable. As such both the Courts below have rightly rejected the said contention of the defendants. Thus, as far as the facts of the case is concerned, the substantial question of law raised by the defendants 1 and 2 that without any proper pleadings, no evidence can be let in is not applicable to the facts of this case and the same is answered accordingly.

9. The next substantial question of law raised by the defendants 1 and 2 is that the trial Court as well as the first appellate Court shifted the burden wrongly on him to prove with regard to the suit properties are not joint family property. Admittedly, the plaintiff who seeks to get relief must prove the case. The plaintiff sought for a relief of partition by claiming that the suit properties are the joint family property. To substantiate her claim, she has produced Ex.A4 and Ex.A5. The said Ex.A4 is the sale deed relating to ancestral property sold any by the first defendant. The above said particulars found place in Ex.A5 Encumbrance Certificate that the plaintiff has initially discharged the burden of proving that the suit properties are the ancestral property, as the same was purchased from and out of the sale proceeds of the joint family property. Therefore, the burden automatically shifted to the defendants to contradict and disprove the same. The only defence with regard to the ancestral property, on the side of the defendants is that Ex.A4 and Ex.A5 are not properly appreciated by the Courts below. Further, Ex.B1 is the Will executed by the first defendant in favour of the second defendant. The said Will come in to operation only after the demise of the first defendant and till then, it has no value at all. Therefore, Ex.B1 need not be looked into at all at present. Ex.B4 is the Muchalikka and in that document also there is no recitals to the effect that the suit properties are self acquired property of the first defendant. Ex.B1 and Ex.B4 are no way helpful to prove the

defence of the defendants 1 and 2. Thus, to substantiate the defence put forth by the defendants 1 and 2 and to negative the claim of the plaintiff for 1/3rd share in the suit property, no documentary evidence is available on record.

10. On the side of the defendants 1 and 2 who are denying the claim of the plaintiff for partition, it is stated that on 11.03.1991, the plaintiff got married and for the same, the defendant had spent more than two lakhs and that amount is equal to the share of the plaintiffs in the suit property. The contention of the defendant is that the marriage expenses is incurred by the family is to be construed towards share due to the plaintiff. The Hindu Succession (Amendment) Act 2005 says as follows:-

"In a joint Hindu family governed by the mitakshara law, the daughter of a co-parcener shall,

(a) by birth become a co-parcener in her own right in the same manner as the son;

(b) have the same rights in the co-parcenary property as she would have had if she had been a son;

(c) by subject to the same liabilities in respect of the said co-parcenary property as that of a son, and any reference to a Hindu Mitakshara co-parcener shall be deemed to include a reference to a daughter of a co-parcener;

Provided that nothing contained in this sub section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004."

11. In the above said provision, nothing is found with regard to the marriage expenses and the same will act as restriction to claim partition by a female as a co-parcener. Further as per the proviso, the plaintiff is not entitled to question Ex.A.4 sale deed, since it was a sale deed dated 09.03.1994. Further, if any partition has taken place in the joint family before 20.12.2004 certainly, the plaintiff is not entitled to maintain the same. However, in this case, no such partition has taken place between the defendants 1 and 2. On the date of commencement of the Hindu Succession Amendment Act 39 of 2005, the plaintiff becomes a co-parcener. Even though, she got married in the year 1991, in view of the above said Amendment, by birth, she is entitled to get share in the family properties. Thus, the date of marriage of the plaintiff was no way restrict the right of the plaintiff to such part. Therefore, this Court comes to the conclusion that the marriage

expenses incurred by the Defendant for the plaintiff will not bar the rights of the plaintiff for claiming partition. Furthermore, it is the duty of the parents of the family to celebrate the marriage of the daughter. Hence, the defence of marriage expenses raised by the Defendant is also not sustainable, to deny the claim of the plaintiff. Therefore, this Court comes to the conclusion that the plaintiff is absolutely entitled for partition by birth in the co-parcenera property. Thus, both the Courts below have rightly upheld the claim of the plaintiff for partition of 1/3rd share. Hence, there is no infirmity in the findings of the Courts below and the same does not warrant any interference. The Substantial questions of law is already considered by the court below and answered properly. Thus, the court finds that no substantial question of law arises for consideration. Hence, the second appeal is to fail and the Point is answered accordingly.

12. In the result, the second appeal is dismissed with costs. The Judgment and Decree dated 20.09.2011 in A.S.No.37 of 2009 passed by the learned Subordinate Judge, Harur is confirmed. Consequently, connected MP.No.1 of 2012 is closed.

Sd/-

Assistant Registrar(CCC)

//True copy//

Sub Assistant Registrar

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To

1.The Subordinate Judge, Harur

2.The District Munsif, Harur.

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

+lcc to Mr.S.Kanniah, Advocate SR.No.36550

S.A.No.860 of 2012

GJ II(CO)

GMV(02/01/2019)