

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 02.07.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

S.A.No.650 of 2015
and M.P.No.1 of 2015

1.P.Muthukumararaja
2.Deiveega Indiradurai .. Appellants/Plaintiffs

Vs.

Sellappa Udayar (died)
Thailaammal (died)
Panneerselvam (died)

1.Vaithialingam
2.Selvathamil rani
3.Pari
4.Sellappan
5.Oorali
6.Mariayeeammal
7.Dhanalakshmi ... Respondents/Defendants

PRAYER: Second Appeal is filed under Section 100 of C.P.C against the judgment and decree dated 27.01.2015 made in A.S.No.9 of 2013 on the file of the II Additional District Court, Salem, confirming the judgment and decree dated 22.06.2012 made in O.S.No.676 of 2003 on the file of the I Additional Sub Court, Salem.

For Appellants : Mr.S.Kalyanaraman

For RR1, 3 to 5 : Mr.K.Raja

for Mr.N.Kolandaivelu

For R6 : Mr.P.Muthukrishnan

For R7 : Mr.V.Sekar

For R2 : No appearance

J U D G M E N T

Second Appeal is filed against the judgment and decree dated 27.01.2015 made in A.S.No.9 of 2013 on the file of the II Additional District Court, Salem, confirming the judgment and decree dated 22.06.2012 made in O.S.No.676 of 2003 on the file of the I Additional Sub Court, Salem.

2.The appellants are the plaintiffs and respondents are defendants in O.S.No.676 of 2003 on the file of the I Additional Sub Court, Salem. The appellants filed the said suit against the respondents for partition, allotment of 84/768 shares each, declaration of sale deeds and settlement

deeds as null and void and for recovery of possession.

3. For the sake of convenience, the parties are referred to as per their ranks in the suit.

4. According to the plaintiffs, the plaintiffs and defendants 1 to 8 are the members of Hindu joint family. The defendants 1 and 2 are the grand parents of the plaintiffs, defendants 3 and 4 are sons of defendants 1 and 2. Third defendant is father of the plaintiffs and fifth defendant. The defendants 6 to 8 are the sons of the fourth defendant. The suit properties belong to the joint family. First defendant acquired one property by way of partition and other properties purchased from and out of the income derived from the said property. The plaintiffs as co-parceners are entitled to claim share in the said properties. First defendant sold various properties to third parties, which are not binding on the plaintiffs. Fourth defendant taking advantage of the old age of the defendants 1 and 2 got settlement deed in his favour and is alienating the property with a view to grab the joint family property.

5. The defendants 2, 3, 5, 9 and 10 were set exparte before the trial Court. The fourth defendant filed written statement and the same was adopted by the defendants 6 to 8. According to the defendants 4, 6 to 8, the properties are not joint family properties, they are only self acquired properties of defendants 1 and 2. The property allotted to the first defendant by partition was sold and first defendant gave Rs.2,00,000/- to the defendants 2 and 3. The first defendant also spent money for education of the third defendant, who was studying in the medical college. The third defendant got appointment in the year 1967, got married in the year 1968 and thereafter, left the family and was living separately. He did not contribute any amount to the defendants 1 and 2. The defendants 1 and 2 alone toiled and moiled on the land in the suit property and earned meager income. The fourth defendant was running a provision store and from and out of the income derived from the provision store, he contributed amount for purchasing the properties by the first defendant. Fourth defendant resisted the claim of the plaintiffs on the ground that their father did not contribute by way of money or labour and no joint family income was derived by their effort. The defendants 1 and 2 purchased certain properties even before partition and the defendants sold certain properties even before filing of the suit. The defendants 1, 3, 4 and 10 sold the property, which was allotted to the first defendant in the partition deed dated 19.12.1952, to ninth defendant. The plaintiffs did not implead other legal heirs and purchasers as parties to the suit. The suit is bad for non-joinder of necessary parties and prayed for dismissal of the suit.

6. Based on the pleadings, the learned trial Judge framed necessary issues and additional issues. Before the learned

trial Judge, the first plaintiff examined himself as P.W.1, one Angamuthu Pillai was examined as P.W.2 and second plaintiff was examined herself as P.W.3 and marked 23 documents as Exs.A1 to A23. The fourth defendant examined himself as D.W.1 and marked four documents as Exs.B1 to B4.

7.The learned trial Judge considering the pleadings and oral and documentary evidence, dismissed the suit holding that the suit properties are self-acquired properties of defendants 1 & 2 and the plaintiffs are not entitled to any share in the suit properties and the suit is bad for non-joinder of necessary party.

8.Against the said judgment and decree dated 22.06.2012 made in O.S.No.676 of 2003, the plaintiffs have filed A.S.No.9 of 2013 on the file of the II Additional District Court, Salem.

9.The learned First Appellate Judge framed necessary points for consideration. The learned First Appellate Judge independently considering the materials available on record and judgment of the trial Court, dismissed the First Appeal.

10.Against the said judgment and decree dated 27.01.2015 made in A.S.No.9 of 2013, confirming the judgment and decree dated 22.06.2012 made in O.S.No.676 of 2003, the plaintiffs have come out with the present Second Appeal.

11.At the time of admitting the Second Appeal, the following substantial questions of law have been framed:

"a. Whether the Courts below erred in law in holding that the plaintiffs cannot maintain the suit, when they are entitled to seek share in the suit ancestral properties even during the life time of their father being grandsons, being co-parceners as per Section 6 of the Hindu Succession Act? सत्यमेव जयते

b. Whether the Courts below erred in law in dismissing on the ground of non joinder of necessary parties?

c. Whether the Courts below misdirected themselves in dismissing the suit over-looking the plea in the written statement that all the properties were acquired out of the joint family chest, and denying relief to the plaintiffs holding that the suit properties are the self-acquired properties of the first defendant and that they cannot maintain the suit during the lifetime of their father?"

12.The learned counsel for the appellants/plaintiffs contended that the Courts below erred in holding that the

plaintiffs are not entitled to have a share in the suit property, as third defendant, their father was alive. The plaintiffs, as grand sons of the first defendant are co-parceners and also entitled to seek partition as per Section 6 of the Hindu Succession Act. The fourth defendant himself has admitted that the suit properties are purchased from their joint family income. The Courts below erred in holding that the suit is bad for non-joinder of parties. The Courts below having held that the defendants 4, 6 to 8 failed to prove the oral partition, ought to have decreed the suit. The defendants 1, 3, 4 and 10 have sold the portion of the joint family property to ninth defendant and settled the portion of the joint family property on the fourth defendant, which are not binding on the plaintiffs. The respondents have not proved that the third defendant got married second time and two daughters were born to the third defendant through the second wife. The admission of P.W.1 in his cross-examination that regarding the two daughters of third defendant will not amount that they were born from a valid marriage in the absence of any proof. The sale deeds executed in favour of the ninth defendant and one Lalitha as well as the settlement deed executed by first defendant in favour of fourth defendant are not valid in law. Non-impleading said Lalitha is not fatal to the claim of the plaintiffs and he relied on the following judgments:

(i) 2004 (3) CTC 92 (*Shanmugaiah and another v. Thirumalayandi alias Thirumalai Pandaram and 5 others*);

(ii) 2012 (1) CTC 128 (*Malla Naicker @ Singari and others v. Jeeva (Minor) and others*);

13. Per contra, the learned counsel for the respondents 1, 3 to 5/defendants 4, 6 to 8 contended that the suit properties are joint family properties. The defendants 1 and 2 purchased the properties even before the partition deed dated 19.12.1952. The property allotted to the first defendant in the partition deed was only 2.08 Acres, out of which, 1.37 Acre was sold by the defendants 1, 3, 4 and 10 to the ninth defendant. The income derived from the property allotted to the first defendant was very meager. The sale proceeds was spent for the education of the third defendant, who was studying in a medical college. The other properties were purchased by the first defendant by earning money by doing agricultural work along with the fourth defendant and income from the provision store run by the fourth defendant. The third defendant was separated from the family in the year 1968 itself and has not contributed anything to the defendants 1 and 2 for purchasing the suit property. The Courts below have considered various documents marked as exhibits, oral evidence of the parties and rightly concluded that the suit properties are self-acquired properties of the first defendant and dismissed the suit and First Appeal by giving cogent and valid reason. There is no error of law in the judgment and decree passed by both the Courts below.

14.The learned counsel for the sixth respondent/ninth defendant adopted the arguments advanced by the learned counsel for the respondents 1, 3 to 5/defendants 4, 6 to 8. In addition to that, the learned counsel contended that the ninth defendant purchased the property for valid consideration from the defendants 1, 3, 4 and 10. The said purchase is valid and the plaintiffs on erroneous fact are challenging the said sale.

15.Substantial questions of law (a), (b) and (c):

"(a) Whether the Courts below erred in law in holding that the plaintiffs cannot maintain the suit, when they are entitled to seek share in the suit ancestral properties even during the life time of their father being grandsons, being co-parceners as per Section 6 of the Hindu Succession Act?

(b) Whether the Courts below erred in law in dismissing on the ground of non joinder of necessary parties?

(c) Whether the Courts below misdirected themselves in dismissing the suit over-looking the plea in the written statement that all the properties were acquired out of the joint family chest, and denying relief to the plaintiffs holding that the suit properties are the self-acquired properties of the first defendant and that they cannot maintain the suit during the lifetime of their father?"

The claim of the plaintiffs are for partition, recovery of possession and declaration on the ground that the suit properties are joint family properties and they are entitled to have share as co-parceners. According to the plaintiffs, from and out of the income derived from the joint family properties i.e. 2.08 Acres allotted to the first defendant in the partition deed dated 19.12.1952, the other properties were purchased. On the other hand, from the recitals, it is seen that the defendants 1 and 2 owned properties even before partition. Further, the first defendant exchanged certain properties for convenient use. The father of the plaintiffs, third defendant along with the defendants 1, 4 and 10 sold major portion of the property allotted to the first defendant in the partition deed dated 19.12.1952. The third defendant has not entered appearance and has not given any evidence. The Courts below considering these facts have held that the competent witness did not appear before the Court to speak about the nature of the properties standing in the name of the first defendant.

16.From the judgment, it is seen that the Courts below have considered the documents, by which the first defendant has purchased the property, exchanged certain properties and

held that the properties are self-acquired properties of the first defendant. The contention of the learned counsel for the plaintiffs/appellants is that the fourth defendant has admitted that from the income of the joint family properties, other properties were purchased. From the materials available on record, it is seen that the said contention is not correct. The fourth defendant has stated that income from the said property was very meager and defendants 1 and 2 toiled hard to earn income and the fourth defendant contributed amounts from and out of the income of his provision store business.

17. From the documents marked as exhibits, it is seen that it is an admitted fact that the defendants 1 and 2 have owned properties even before partition deed dated 19.12.1952 and the plaintiffs have failed to prove by any acceptable evidence that the properties were purchased by the first defendant only from and out of the property allotted to the first defendant in the partition. The Courts below have considered these facts in proper perspective and rightly held that the properties are not joint family properties and it is only self-acquired properties of the first defendant. There is no error in such findings of the facts of the Courts below. In view of the finding that the properties are self-acquired properties of the first defendant, Section 6 of the Hindu Succession Act is not applicable to the facts of the present case.

18. As far as non-joinder of proper and necessary parties are concerned, the first plaintiff as P.W.1 had admitted that the third defendant had two daughters through one Saraswathi, his second wife and she had given complaint against the fourth defendant and others before Inspector of Police, Veeranam Police Station, which was taken on file as C.C.No.21 of 2007, in which the said Saraswathi has stated that she is the wife of third defendant. Ex.B3 has been filed to prove that the third defendant married Saraswathi for the second time. The contention of the learned counsel for the plaintiffs that the sale deeds executed in favour of the ninth defendant and one Lalitha as well as the settlement deed executed by first defendant in favour of fourth defendant are not valid in law, but non-impleading said Lalitha is not fatal to the claim of the plaintiffs, has no merits. The plaintiffs have stated that they have included ninth defendant in the suit stating that the defendants 1, 3, 4 and 10 have jointly sold a portion of suit property to the ninth defendant.

19. Considering these facts, the Courts below have held that the daughters of third defendant are also necessary parties and as the plaintiffs have not impleaded Lalitha, the purchaser, the suit is not maintainable for non-impleading necessary parties. For the reasons stated above, all the substantial questions of law are answered against the plaintiffs/appellants. There is no error of law warranting interference by this Court with the judgment and decree of both the Courts below.

20.In the result, the Second Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS IV)

// True Copy//

Sub Assistant Registrar

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To

1.I Additional Judge, Sub Court, Salem.

2.II Additional District Judge, Salem.

Copy to:The Section Officer,
VR Section,
High Court, Madras

+1cc to Mr.V.Sekar, Advocate SR.No.42486

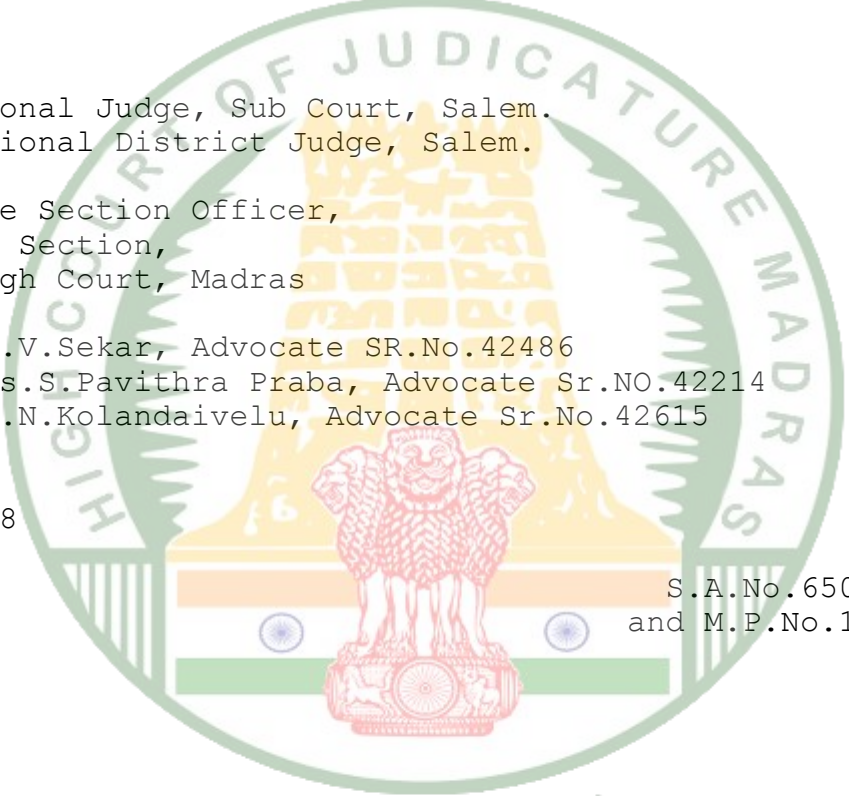
+1cc to M/s.S.Pavithra Praba, Advocate Sr.NO.42214

+1cc to Mr.N.Kolandaivelu, Advocate Sr.No.42615

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