



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:05.03.2018	Pronounced on: .03.2018
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Coram

The Honourable Dr. Justice G.Jayachandran

Second Appeal No.910 of 2015

and

M.P.No.1 of 2015

1.Srinivasan

2.Jaganathan

... Appellants/Appellants/
Plaintiffs

/versus/

1.K.R.Adimoola Naicker

2.U.Sridhar

3.Meera

4.Chitra

5.Anurathan

6.Dinesh

7.Savithri

8.M.Baskar

9.B.Mahalakshmi

10.E.Balaraman

... Respondents/Respondents/
Defendants

Second Appeal is filed under Section 100 of Code of Civil Procedure against the judgment and decree passed in A.S.No.2 of 2013, dated 03.07.2015 on the file of District Court No.II, Kanchipuram, confirming the judgment and decree passed in O.S.No.7 of 2007 dated 16.04.2013 on the file of learned Sub Court, Kanchipuram.

For Appellants :Mr.B.Singaravelu

For Respondents:Mr.Perumbulavil Radhakrishnan

for R1,3 to 7 and 10

Mr.S.Hariharan for R2

Mr.Christoper Vijay for R8 and R9

J U D G M E N T

The plaintiffs, who have lost their suit for partition and consequential permanent injunction before the trial court and the first appellate court are the appellants herein.

2. Background of the litigation:

Adimoolam Naicker is the first defendant in the suit. He had four sons and one daughter. The suit schedule property measuring

to extent of 6.50 acres was purchased by him from one Karunakaran vagaiyara in the year 1983 and 1984. The revenue records are in his name and kist is paid in his name. He had entered into a sale agreement with one U.Shridar and had received advance of Rs.10 lakhs from him. In the said sale agreement his son Srinivasan, one of the plaintiff and his wife Kannammal had signed as witnesses.

3. The suit for partition initially filed by all his sons and daughter claiming 1/6 share each. Later, except two sons Srinivasan and Jaganathan, his all other children and legal heirs of pre-deceased son Venkatesan have transposed themselves as defendants and sail with Adimoolam. On considering the evidence placed by rival parties, both the Courts below had held against the plaintiffs, since they have not proved the suit property was the joint property of the family bequeathed by their great grandfather or property acquired through joint exertion of the family members or acquired through the source of joint family nucleus.

4. Pleadings:

The case of the appellants as found in their plaint is that, the suit schedule property is the ancestral property bequeathed by their great grandfather and in joint possession and enjoyment of their family in which their father Adimoolam, the first respondent is the manager and kartha. The second respondent had prevailed over their father to create a sham and nominal alienation of the entire property for a song with the view to defraud their legitimate right.

5. The first respondent has pleaded that the suit property is his self acquired property. He has purchased the same through his own earning from N.Karunakaran vagayara through two sale deeds dated 07.09.1983 and 26.04.1984. After purchase, the title deed and revenue records are mutated in his name. The property is in his possession and enjoyment. The claim of the plaintiffs that the property is joint ancestral property, is baseless. The family had no ancestral property, he through his cattle business and real estate business, earned money to purchase the property.

6. The second respondent, who is the agreement holder of the property from first respondent, has pleaded that the suit is a collusive suit between the sons and father to defeat his interest. The first respondent has entered into an agreement to sell the suit property and had received advance of Rs.10lakhs. In the sale agreement, the first appellant Srinivasan and his mother Kannammal (wife of Adimoolam) had signed as witnesses. Since the first defendant has failed to come forward to execute the sale deed, notice to complete the contract has been caused and contemplating to file the suit for specific performance.

7. The trial Court after appreciating the respective pleadings and evidence has dismissed the suit and the same has been confirmed by the first appellate Court. In the second appeal before this Court, the appellants has raised the following Substantial Questions of Law:-

A)Whether the Courts below are right in placing the onus on the plaintiffs to prove that the suit properties were purchased with the income from the joint family nucleus without considering the fact that the 1st defendant being the kartha of the joint family and the onus on him prove that the suit properties were purchased without aid or assistance from the ancestral or joint family property?

B)Whether the Courts below are right in holding that the suit properties are purchased by the 1st defendant from his personal income without any evidence, hence it is perverse?

C)Whether the Courts below are right in holding that the pleadings of the appellants/plaintiffs is destructive to the case without considering his fact that the basic claim of the appellants/plaintiffs is that the suit properties are joint family properties?

8. This Court had admitted the second appeal formulating the following Substantial Questions of Law:

a) Whether the Courts below are right in placing the onus on the plaintiffs to prove that the suit properties were purchased with the income from the joint family nucleus without considering the fact that the 1st defendant being the Kartha of the joint family and the onus on him prove that the suit properties were purchased without aid or assistance from the ancestral or joint family property?

b) Whether the Courts below are right in holding that the suit properties are purchased by the 1st defendant from his personal income without any evidence, hence it is perverse?

9. Heard the learned counsel appearing for the appellants and the respondents. Records perused.

10. Before the trial Court the first plaintiff has given evidence as PW-1. His father Adimoolam is examined as DW-1 and the agreement holder Sridhar is examined as DW-2. The plaintiffs have exhibited 7 documents and the defendants have exhibited 8 documents. The sale deeds of the suit property are marked as Exs.A-4 and A- 5. The same document is also relied on by the defendants and the certified copies of the sale deeds are marked as Exs.B-1 and B-2. The other documents relied on by the parties are the revenue documents like patta (Ex.B-4) in the name of Adimoolam, Kist receipts (Ex.B-5) in the name of Adimoolam, encumbrance certificate (Ex.A-6) and sale agreement with U.Shridhar (Ex.B-6) executed by Adimoolam. The legal notices and acknowledgement, exchanged between the parties.

11. From these exhibits and the ocular evidence of PW-1 and DW-1 nowhere it could be seen that the suit properties were ancestral property or property acquired through joint exertion of the family members or acquired through the joint family source. In fact, in the plaint it is pleaded that it is the property inherited through great grandfather of the plaintiffs. Whereas, the first plaintiff in the evidence had deposed in chief examination that the property in his father's name from and out of the joint exertion of the family members. In the cross examination, he has deposed that, the property at Dhamal village given by his maternal grandfather to his mother was sold to purchase the suit property. No document is filed to substantiate these statements. As pointed out by both the Courts that the first plaintiff has signed the sale agreement Ex.B-6 dated 10.09.2006 entered between his father Adimoolam(first defendant) and U.Shridhar (second defendant) as one of the witnesses.

12. Though in the plaint it is specifically pleaded that the suit property is their ancestral property, documents like sale deeds Exs.A-4 and A-5 prove that the property was purchased by Adimoolam in the year 1983 and 1984. The plaintiffs have not proved that they contributed for the improvement of the joint family property and the property purchased was out of their joint exertion and got blended with the hotchpotch of the joint family property. There is no evidence to show that there was any joint family nucleus and their father Adimoolam was the kartha of the family. In the absence of proof to say that the suit properties were ancestral properties and as coparners the sons and daughter of the first defendant is entitled for share by birth, the judgment of the trial Court as confirmed by the first appellate Court is legally and factually correct.

13. The substantial questions of law formulated by this Court at the time of admission is in respect of burden of proof. On whose shoulder the burden of proof lies in the case of this nature whether the plaintiffs who claim the property is ancestral property or the defendant who holds the property in his name?.

14. The law of evidence as envisaged in Sections 101 to 103 of the Indian Evidence Act, 1872 with no uncertainty say, whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove those facts exist. The burden of proof in a suit or proceedings lies on the person who would fail if no evidence at all were given on either side. The burden to prove a fact is upon the person who wants the court to believe the existence of the said fact.

15. In this case, it is the plaintiffs who have pleaded that the suit property is the ancestral property of Adimoolam family, which consist of Adimoolam, his four sons and a daughter. Whereas their own documents go to show that the property was purchased by Adimoolam only in the year 1983 and 1984. PW-1 and the documents relied by him does not prove the existence of ancestral property. Contrarily, PW-1 in his evidence, at one place he has stated that his maternal grand mother gave some property which was sold by Adimoolam to purchase the suit property. However, except the oral evidence, no documentary evidence is relied by the plaintiffs to prove this fact.

16. Since the existence of the fact that the plaintiffs and the other defendants (except 2nd defendant), were living in a hindu undivided joint family, they had joint family nucleus and they all have contributed to the joint family estate which includes the suit property is not proved by the plaintiffs, the onus is not on the defendants but squarely upon the plaintiffs. The Substantial Questions of Law answered accordingly.

17. In the result, the Second Appeal is dismissed with costs. The judgment and decree passed in O.S.No.7 of 2007, dated 16.04.2013 as confirmed by the first appellate Court in A.S.No.2 of 2013 dated 03.07.2015 are hereby confirmed. Consequently connected Miscellaneous Petition is also dismissed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1.The District Judge No.II, Kanchipuram.

2.The Subordinate Judge, Kanchipuram.

+1cc to Mr.Perumbulavil Radhakrishnan, Advocate SR.No.17356

+1cc to Mr.B.Singaravelu, Advocate Sr.No.17309

SSD (CO)

sm:6.4.2018

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