

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 21.08.2017

Delivered on:19.01.2018

CORAM:

THE HONOURABLE MR.JUSTICE S.BASKARAN

Second Appeal No.767 of 2011
and M.P.No.1 of 2011

Easwaren,
Aged about 35 years
S/o. Late Ammavasai Gounder
No.43/7, Pillaiyar Koil Street
Kasipalayam
Gopichettipalayam (T.K.)
Erode District ..Appellant/1st Defendant

Versus

1. Kamaleshwari
2. Visalachi ..Respondents 1 and 2/
Plaintiffs 1 and 2
3. Janaki ...Respondent No.3/Defendant No.3

Prayer: Second appeal is filed u/s 100 of Civil Procedure Code against the judgment and decree dated 14-09-2010 made in A.S. No.11 of 2010 on the file of the Sub Court, Gopichettipalayam, modifying the judgment and decree dated 05-11-2009 made in O.S.No.351 of 1999 on the file of District Munsif Court, Gopichettipalayam.

For Appellant .. Mr. M. Narayanaswamy

For Respondent .. Mr. N. Chinnaraj for R1

JUDGMENT

Challenging the judgment and decree dated 14-09-2010 made in A.S. No.11 of 2010 on the file of the Sub Court, Gopichettipalayam, reversing the judgment and decree dated 05-11-2009 made in O.S.No.351 of 1999 on the file of District Munsif Court, Gopichettipalayam, the present Second Appeal has been filed. The 1st Defendant, who lost before the Courts below is the Appellant before this Court.

2 The Second Appeal is admitted on the following substantial questions of law:-

"1. Whether the appellate court was right in granting decree for partition of th suit property to female heirs, when admittedly the father Ammasai gounder died intestate on 03.02.1980?

2. Whether the Appellate Court was correct in not appreciating the documents to prove the exclusive possession of the 1st defendant over the suit property ?

3. Whether the appellate court was correct in rejecting the plea of ouster by relying on Ex.A.23, power of attorney ?

4. Whether the appellate court is correct in rendering a finding that the married daughters are entitled to a share in the ancestral property to their father who died prior to the date of amendment ?"

3. The Appellant in this Second Appeal is also the Appellant in the First Appeal and the 1st Defendant in the Suit. The Respondents 1 to 3 are the Respondents 1 to 3 in the First Appeal and the 1st Plaintiff, 2nd Plaintiff and 3rd Defendant respectively in the Suit.

4. For the sake of convenience, both parties are hereinafter referred to as they were arrayed in the Trial Court.

5. The case of the Plaintiffs is that, the Suit properties originally belonged to one Ammasai Gounder. He derived the property through partition deed dated 25-01-1979. He died intestate on 03-02-1980 leaving behind his wife Marayal/2nd Defendant, one son Easweran/1st Defendant and three daughters' viz. Kamaleswari/1st Plaintiff, Visalachi/2nd Plaintiff & Janaki/3rd Defendant. According to the Plaintiffs, the Suit properties was enjoyed by their father Ammasai Gounder as an absolute owner. After demise of Ammasai Gounder, the Suit properties was orally partitioned and the properties are in possession of the parties concerned. Since the Plaintiffs are not able to enjoy the property as per their will and pleasure, they approached the Defendants, requesting them to divide the suit properties into four equal shares and allot two such shares to the Plaintiffs by way of registered partition deed, but, the Defendants refused to do the same. Hence, the Plaintiffs filed the suit for partition to divide the suit properties into five equal shares and allot two such shares to the Plaintiffs.

6. The 2nd and 3rd Defendants sailed along with the Plaintiffs and submit their written statement.

7. The case of the contesting 1st Defendant is that an extent of 2.61 Acre in New Survey No.91/2 at Thadappalli Village was orally allotted to the Plaintiffs and the 3rd Defendant. The above property was sold by them on 23-03-1995 through one Power Agent viz. Raghupathy. No share was allotted to the 2nd Defendant, since she satisfied herself with food and shelter alone. Entire suit property is under his exclusive possession from the date of his father's death with the knowledge of the Plaintiffs and 3rd Defendant. Since the Plaintiffs and the 3rd Defendant are ousted from the property by the 1st Defendant and the continuous possession and enjoyment is with the 1st Defendant for over and above the statutory period of more than twelve years, the 1st Defendant is having title by way of adverse possession. Hence, he sought for dismissal of the suit.

8. Pending suit, the 2nd Defendant Maraya, mother of the Plaintiffs, 1st Defendant and 3rd Defendant, died intestate. Thereby, the Plaintiffs claimed to divide the suit properties into four equal shares and allot two such shares to them.

9. On a perusal of evidence and the documents, it is found that in the year 1994, both the Plaintiffs and the Defendants including the 1st Defendant jointly executed a Power of Attorney to one Raghupathy. On the strength of the Power of Attorney deed, the said Power Agent Raghupathy executed a Sale Deed in favour of one Kunchaya alias Kaliammal on 23-03-1995. Therefore, the learned Trial Court Judge found that the 1st Defendant indirectly admitted that there was no partition in writing till 1995. Since the sale deed was executed, on behalf of all the legal heirs of Ammasai Gounder on 23-03-1995, the Plaintiffs are deemed to be in possession of the suit property till 1995. The suit was filed in the year 1999. By considering the evidence on record, the ouster plea of 1st Defendant was allowed by the Trial court and it also came to the conclusion that there was no partition in writing among the parties. Considering all those facts, the Trial Court decreed the suit and passed preliminary decree to divide the suit properties into four equal shares and allot two such shares to the Plaintiffs.

10. Aggrieved over the said finding, the unsuccessful 1st Defendant preferred an Appeal in A.S.No.11 of 2010 before the Sub Court, Gopichettipalayam. The learned Subordinate Judge treated the suit properties as ancestral properties of Ammasai Gounder, on the strength of Ex.A1, a partition deed dated 25.01.1979 entered among the brothers of Ammasai Gounder. It is pointed out that Ex.P.1-Partition deed would reveal that the suit properties are the ancestral properties of Ammasai Gounder and his brother

Masaiappa Gounder and on that basis, the First Appellate Court, divided the suit properties into eight equal shares and allotted 2/8 shares to the Plaintiffs and accordingly passed preliminary decree by way of modifying the Trial Court judgment.

11. As against the 1st Appellate Court decree and judgment, this second appeal has been preferred by the 1st Defendant on the grounds that both the Trial Court and the 1st Appellate Court failed to appreciate properly the factual aspects and the law relating to the ouster pleaded by the 1st Defendant. It is also contended by the First Defendant/Appellant that the learned First Appellate Judge failed to see that even unmarried daughter is not entitled to have a share in the family property, if partition had been effected prior to Hindu Succession Amendment Act came into force.

12. Heard the arguments advanced by both sides. The learned Counsel for the 1st Defendant emphasized on two points. The 1st contention is that the daughters are not entitled to get the share of his father, since he died in the year 1980. The learned counsel relied on the provisio of sub-clause iv. of Section 29A of The Hindu Succession Act, 1956, which reads as follows:-

"nothing in this Chapter shall apply to a daughter married before the date of commencement of the Hindu Succession (Tamilnadu Amendment) Act, 1989 (Tamilnadu Act 1 of 1990, with retrospective effect from 25-03-1999)".

Further, the 1st Defendant Counsel relied on Section 6 sub clause iii. of Hindu Succession (Amendment) Act, 2005, and contended that before 20th day of December 2004, if a male Hindu has died, the daughters are not entitled to get share in the property.

13. In my considered opinion, the 1st Defendant is under the wrong notion as if the daughters are not entitled to any share in the ancestral properties, as that of his son prior to the above amended Acts. The said contention is true if the properties are the coparcenary property of the Defendants. However, there is no evidence on record to prove that the Suit properties are the coparcenary properties. As per Section 8 of The Hindu Succession Act, 1956, the general rules of succession in the case of males is that the property of a male Hindu dying intestate shall devolve firstly upon the heirs, being the relatives specified in Class-I of the Schedule. As per the Schedule, son and daughter shall simultaneously take each one share. Therefore, the claim of the 1st Defendant is not sustainable one.

14. The other plea raised by the 1st Defendant is "ouster". It is admitted by both parties that on 29-04-1994 a General Power of Attorney deed was executed in favour of one Raghupathy and

through him, a portion of their property was sold by way of a registered Sale Deed dated 23-03-1995, which is evident in Ex.A23 and D13. Therefore, it is proved that till 1995, the Plaintiffs and the 3rd Defendant are deemed to be in possession of the suit property. The suit was filed in the year 1999. Therefore, the question of ouster will not arise. Hence, it is clear that the 1st Defendant failed to establish his claim on that ground also.

15. Both the Plaintiffs and the Defendants have not pleaded that the suit properties are the coparcenary properties of Ammasai Gounder. Plaintiffs pleaded that the suit properties are the absolute property of the deceased Ammasai Gounder. The same was not disputed by the 1st Defendant in his written statement. Without pleadings, the First Appellate Court treated the properties as coparcenary properties and accordingly passed preliminary decree. However, the Plaintiffs failed to prefer any appeal challenging the decree and judgment of the First Appellate Court. However the claim of the 1st Defendant cannot be entertained for the reason stated above. In such circumstances, the 1st Defendant who is the Appellant in this second appeal is not entitled to get any relief as sought for in this Second Appeal and the grounds raised in the Second Appeal are not suffice to set aside the finding of the First Appellate Court. As such, the Substantial questions of law formulated in the Second Appeal are answered accordingly.

16. In the result, the Second Appeal is dismissed. The judgment and decree passed in A.S.No.11 of 2010, by the First Appellate Court is confirmed. Consequently, connected miscellaneous petition is closed. No costs.

Sd/-

Assistant Registrar(CS ix)

//True Copy//

Sub Assistant Registrar

nvsri

- 1.The Sub Court, Gopichettipalayam
- 2.The District Munsif Court, Gopichettipalayam.
- 3.The Section Officer, V.R.Section, High Court, Madras.

+lcc to Mr. N. Chinnaraj, Advocate SR.No. 4200

+lcc to Mr. M. Narayanaswamy, Advocate SR.No. 4441

Second Appeal No.767 of 2011

ASK(14/12/2018)