

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :21.02.2018

PRONOUNCED ON:15.03.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.1911 of 2003

1.Rathinammal

2.Kannammal

3.Sangothiammal

.... Appellants

Vs.

1.Salammal

2.Shanmugham

3.Sankar

4.Mallika

5.Sivagami

.... Respondents

Prayer: Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree dated 02.02.2001 passed in A.S.No.33 of 1996 on the file of the Subordinate Court, Vellore partly reversing the decree and judgment passed in O.S.No.260 of 1991 on 28.02.1994 on the file of the Additional District Munsif of Vellore.

For Appellants :Mr.M.Muruganantham
for M/s.V.Raghavachari

For Respondents :No representation
No appearance
Set exparte vide order dated 21.02.2018

J U D G M E N T

This second appeal is directed against the judgment and decree dated 02.02.2001 passed in A.S.No.33 of 1996 on the file of the Subordinate Court, Vellore partly reversing the judgment

and decree dated 28.02.1994 passed in O.S.No.260 of 1991 on the file of the Additional District Munsif Court, Vellore.

2. The parties are referred to as per the rankings in the trial court.

3. Suit for partition.

4. The case of the plaintiffs in brief is that the plaintiff schedule properties are the joint family properties of Samundi Gounder and his son Thangavelu. Samundi Gounder and Thangavelu were the members of the joint Hindu family and they were in possession of the first item of the plaintiff schedule properties and enjoying the same treating as the joint family property. The second item of the plaintiff schedule properties is also the joint family property of Samundi Gounder and Thangavelu and during the life time of Samundi Gounder, a thatched house was constructed in the vacant sight of the second item and both were in possession and enjoyment of the same, till the life time of Samundi Gounder and after the death of Samundi Gounder, Thangavelu reconstructed into terraced house, with the joint family income and the amount contributed by all the members including the plaintiffs. Samundi Gounder died as intestate, leaving behind his son Thangavelu and the plaintiffs as his legal heirs. Another daughter Rukku of Samundi Gounder died issueless. Thus, in the entire plaintiff schedule properties, the plaintiffs and Thangavelu became entitled to their respective shares and Thangavelu was giving the share of produce to the plaintiffs from the first item of the plaintiff schedule properties and thus the plaintiffs are entitled to 3/8th share in the plaintiff schedule properties and of late, the defendants are denying the share of the plaintiffs and hence the plaintiffs claiming their due share, issued a notice dated 18.01.1991 demanding partition and to the same, the defendants sent a reply dated 04.02.1991 containing false allegations and the allegations that 0.30 cents in the first item of the plaintiff schedule properties was purchased by Thangavelu and the same is his self acquired property and the second item of the plaintiff schedule properties is also the self acquired property of Thangavelu are false. Even if there is a sale deed in the name of Thangavelu, it has been purchased only out of joint family income and enjoyed as the joint family properties and therefore the sale deed dated 26.06.1957 in the name of Thangavelu would not confer any absolute title to Thangavelu in respect of the property comprised therein. Hence, the plaintiffs, left with no other alternative had come forward with the suit for partition.

5. The case of the defendants in brief is that the suit laid by the plaintiffs is not maintainable either in law or on facts. The allegation that the first item of the suit properties is the

joint family property and treated and enjoyed as the joint family property as well as the second item of the suit property was also treated and enjoyed as the joint family property by putting up thatched house by Samundi Gounder etc., and after the death of Samundi Gounder, Thangavelu by utilising the family income, put up the terraced house in the second item of the suit properties are all false. The relationship between the parties is admitted. It is also true that Samundi Gounder and Thangavelu are the members of Hindu joint family. The joint family possessed 0.86 cents only in survey number 354/1 in item 1 of the plaint schedule and Samundi Gounder died about 38 years back when succession to the family members did not open and he died in or about 1954 or 1955 and the plaintiffs did not have any right of succession to the suit properties. Thangavelu alone succeeded to the above said 0.86 cents. 0.30 cents in item 1 was purchased by Thangavelu by way of a registered sale deed dated 26.06.1957 from Rathina Gounder and it is his separate property and after his death, the same was succeeded to by the defendants, his legal heirs. Item 2 of the suit properties belong to the defendants alone. Originally Thangavelu was granted patta for the vacant site situated in village Natham. Thangavelu enjoyed the same as the separate property and the plaintiffs never claimed any right to it. The Defendants 2 and 3 constructed a terraced house out the their own income and funds about four years back and hence item 2 of the suit properties belong to the defendants absolutely and the plaintiffs have no manner, any right or title over the same. The suit is barred by limitation. In case, the plaintiffs established that Samundi Gounder died after 1956, they would be entitled to 3/8th share in an extent of 0.86 cents only in the first item of the suit properties and hence the suit is liable to be dismissed.

6. In support of the plaintiffs' case, P.Ws.1 to 3 were examined. Exs.A1 to A7 were marked. On the side of the defendants, D.Ws.1 and 2 were examined. Exs.B1 to B13 were marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial court was pleased to dismiss the suit. On appeal, preferred by the plaintiffs, the first appellate court, on an appreciation of the materials placed on record and the submissions made, was pleased to partly reverse the judgment and decree of the trial court and thereby granted a preliminary decree for partition in favour of the plaintiffs as prayed for in respect of the first item of the plaint schedule properties and dismissed the plaintiffs' appeal as regards the second item of the plaint schedule properties. Aggrieved over the same, the plaintiffs have preferred the second appeal.

8. At the time of admission of the second appeal the following substantial questions of law were formulated for consideration.

(i) Whether the judgment and decree of the 1st appellate Court in not granting a decree and judgment only for suit 2nd item of the property is legally sustainable inasmuch as he found the suit 1st item belonged to the joint family?

(ii) Whether the decree and judgment of the 1st appellate Court in wrongly causing the onus on the appellants regarding the proof of joint family nature of the suit 2nd item is legally sustainable inasmuch as the 1st appellate Court found the suit 1st item as joint family property?

9. The plaintiffs are the daughters of Samundi Gounder. Thangavelu is the son of Samundi Gounder. The defendants are the legal heirs of the deceased Thangavelu. The first defendant is the wife and the defendants 2 to 5 are the children of the deceased Thangavelu. Claiming that the suit properties are the joint family properties belonging to Samundi Gounder and Thangavelu and further claiming that the suit properties had been treated and enjoyed only as the joint family properties, thus, claiming that the plaintiffs are entitled to 3/8th share in the plaint scheduled properties and inasmuch as the defendants have refused to accede to the demand of the plaintiffs to effect the partition of their due share in the plaint schedule properties, according to the plaintiffs, they had been necessitated to lay the suit for partition.

10. Per contra, it is admitted by the defendants that an extent of 0.86 cents in the first item alone is the joint family property of Samundi Gounder and his son Thangavelu. Further, according to them, 0.30 cents of the first item absolutely belong to Thangavelu, having purchased the same, by way of a sale deed dated 26.06.1957 and the same is not the joint family property of Samundi Gounder and Thangavelu, as put forth by the plaintiffs and further according to the defendants, the second item of the suit properties is a vacant site located in village "Natham" and the patta had been granted only in favour of Thangavelu and it is only the defendants, who had put up the superstructure thereon out of their own income and funds and the same is the self acquired property of Thangavelu and the defendants and hence, according to the defendants, the plaintiffs are not entitled to lay any claim to share in the plaint schedule properties as put forth in the plaint. As regards the extent of 0.86 cents in the first item, according to

the defendants, inasmuch as Samundi Gounder died prior to the advent of the Hindu Succession Act 1956, the plaintiffs being the daughters, are not entitled to claim any succession to the said item and in case, the plaintiffs establish that Samundi Gounder died after the advent of Hindu Succession Act 1956, they would, at the most, be entitled to claim 3/8th share in the above said item of the suit properties alone and therefore, prayed for the dismissal of the suit laid by the plaintiffs.

11. Though the trial court has dismissed the plaintiffs' suit in entirety, the first appellate court, on an appreciation of the materials placed on record was pleased to determine that the first item of the suit properties as a whole is the joint family property of Samundi Gounder and Thangavelu and further holding that though, Samundi Gounder died prior to the coming into force of the Hindu Succession Act 1956, inasmuch as the wife of Samundi Gounder namely Salammal, being entitled to equal share as that of the son as per the law then existing, accordingly, invoking the Hindu Women's Rights to Property Act, 1937 as well as the section 14 of the Hindu Succession Act 1956, accordingly proceeded to hold that the plaintiffs as the daughters of Samundi Gounder and Salammal are entitled to obtain 3/8th share in the first item of the plaint schedule properties. However, the first appellate court holding that the second item of the suit properties is the separate property of Thangavelu and the defendants, declined the relief of partition sought for by the plaintiffs with reference to the same. Challenging the same, the present second appeal has been laid.

12. Hence, in this second appeal, we are confined only as regards whether the plaintiffs are entitled to claim their share in respect of the second item of the plaint schedule properties. According to the plaintiffs, out of the income derived from the joint family properties i.e., the first item of the suit properties, the super structure had been put up on the second item of the plaint schedule properties. According to them, Samundi Gounder had put up thatched house thereon and thereafter Thangavelu out of income derived from the joint family properties as well as the contribution of the plaintiffs, put up the terraced house on the second item of the suit properties and thus, it is the case of the plaintiffs that the second item of the plaint scheduled properties is also the joint family property of Samundi Gounder and Thangavelu and hence the plaintiffs are entitled to their due share in the said item of the suit properties.

13. As rightly determined by the first appellate court on the basis of the materials placed, there is no proof placed on the part of the plaintiffs to show that the super structure either

the thatched house or the terraced house as the case may be, has been put up with the aid of the income derived from the joint family property. Further, there is no material as such placed that the vacant site of the second item belonged to the joint family consisting of Samundi Gounder and Thangavelu. According to the case of the plaintiffs Samundi Gounder had put up the thatched house in the second item of the suit properties and residing thereon and the same having been disputed by the defendants and further when according to the defendants, Samundi Gounder had been residing only in the lands, sans materials such as payment of tax, obtainment of patta etc., in the name of Samundi Gounder, we cannot come to the conclusion that Samundii Gounder had put up the thatched house in the second item of the suit properties and residing thereon as claimed by the plaintiffs. On the other hand, it is the specific case of the defendants that the second item of the suit property, being the village natham, the patta had been granted only in favour of Thangavelu and the same has been produced. Further, D.W.1 has also deposed that her father-in-law has been residing only in the lands and after marriage she and her husband put up the thatched house in the second item of the suit properties and her sons with their own income and funds had put up the terraced super structure in the second item of the suit properties and coupled with the evidence produced by the defendants as regards the second item of the suit properties namely the patta standing in the name of Thangavelu, the case of the defendants is probablised that it is only they, who had been exclusively residing in the second item of the suit properties and enjoying the same and accordingly, the second item of the suit properties not belonging to Samundi Gounder or as the case may be, the joint family consisting of Samundi Gounder and Thangavelu, it is found that not an iota of evidence has been produced by the plaintiffs to evidence that the second item of the suit property was enjoyed by Samundi Gounder. Further, it is also noted that the second item of the suit properties is not adjacent to the first item of the suit properties. As rightly determined by the first appellate court, when for the acquisition of 30 cents of land in the first item of the suit properties, the family property had come to be mortgaged by way of Ex.B5 mortgage deed, in such circumstances, the case of the plaintiffs that the second item of the suit properties had been acquired with the income derived from the joint family property as such cannot be believed and accepted in the absence of any material pointing to the same. Accordingly, it is found that the first appellate court has rightly determined that the plaintiffs have miserably failed to establish that the second item of the suit properties is the joint family property of Samundi Gounder and Thangavelu and treated as such.

14. Further, it is also noted that no proof whatsoever has

been placed by the plaintiffs to establish that either Samundi Gounder or as a case may be, the plaintiffs had been in possession and enjoyment of the second item of the suit properties at any point of time. On the other hand, it is found that the patta for the second item of the suit properties has been issued only in the name of Thangavelu marked as Ex.B7 and accordingly it is found that the same is the separate property of Thangavelu and accordingly, it is only Thangavelu and the defendants who had been in possession and enjoyment of the same, as their separate property and accordingly the plaintiffs are unable to place any material as such, to establish that the second item of the suit properties had been in possession and enjoyment of Samundi Gounder or the plaintiffs as the case may be. As already noted, there is no material placed by the plaintiffs to establish that the super structure put up on the second item of the suit properties had been built up by Samidurai and Samidurai had been residing therein.

15. In the light of the above position, the decisions relied upon by the plaintiffs' counsel reported in 1999 (2) MLJ 757 Packiam Ammal and others Vs. Pattu Ammal and others], 2014 (2) KLJ 445 [Pathukutty and Another Vs. Aisakutty and others], 1994 (2) SCC 594 [Hindalco Industries Limited Vs. Union of India (UOI) and others] are found to be not applicable to the facts and circumstances of the case at hand. Inasmuch as the second item of the suit properties has been determined to be the separate property of Thangavelu and the defendants and not the joint family property of Samundi Gounder and Thangavelu as put forth by the plaintiffs, it is found that the plaintiffs as such, would not be entitled to claim partition in the said property and in such view of the matter, the decision of the apex court relied upon by the plaintiffs' counsel dated 01.02.2018 passed in Civil Appeal numbers 188 to 189 of 2018 [Danamma @ Suman surpur and another Vs. Amar and others] as such would not be applicable to the case at hand.

16. In the light of the above said reasons, the first appellate court has rightly determined on the basis of the materials placed that the plaintiffs have miserably failed to establish that the second item of the suit properties is the joint family property of Samundi Gounder and Thangavelu. The first appellate court has not cast the onus of proof wrongly on the plaintiffs as regards the proof of the joint family nature of the second item of the suit properties and on the other hand, as per the materials placed on record, finding that it is only the defendants who have exclusive right over the said property, accordingly held that the second item of the suit properties does not belong to the joint family of Samundi Gounder and Thangavelu. The substantial questions of law formulated in the second appeal are accordingly answered against the plaintiffs.

17.In conclusion, the second appeal fails and is accordingly dismissed. No costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To

1.The Subordinate Judge,
The Subordinate Court, Vellore.

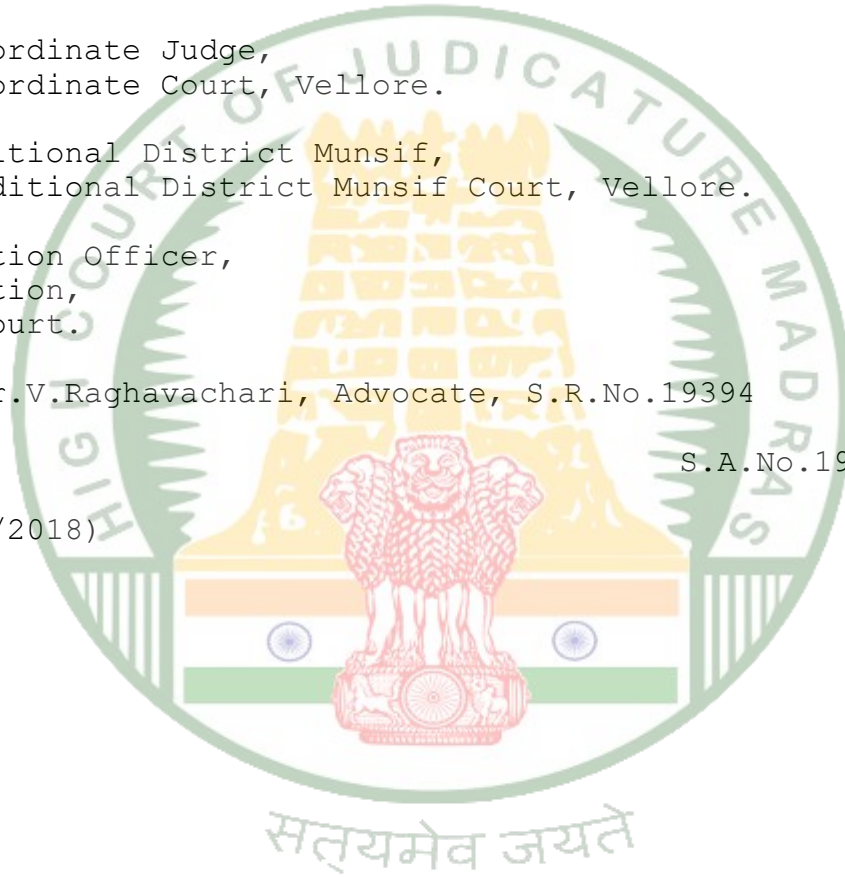
2.The Additional District Munsif,
The Additional District Munsif Court, Vellore.

3.The Section Officer,
VR Section,
High Court.

+lcc to Mr.V.Raghavachari, Advocate, S.R.No.19394

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ss(co)
GSP(05/06/2018)



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