

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 17.07.2018
PRONOUNCED ON : 06.08.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.No.2087 of 2004

1. Parasuraman
2. Sumathi ..Appellants/2nd & 9th Defendant/
2nd & 9th Respondent

Vs.

1. Sekar ..1st Respondent/Plaintiff/Appellant
2. Periyasami
3. Samidurai Udayar
4. Periyasami
5. Murugesan
6. Selvi
7. Rajeswari
8. Janaki ..Respondents 2to8/Defendants 1,3 to 8/
Respondents 1,3 to 8

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree of the Additional District Court (Fast Track Court) at Kallakurichi, dated 27.02.2003 in A.S.No.21 of 2002, reversing the judgment and decree of the I Additional District Munsif Court at Kallakurichi, dated 23.09.1998 in O.S. No.958 of 1989.

For Appellants : Mrs. Mythili Suresh
for M/s. Sarvabhauman Associates

For Respondents: No appearance/Set ex-parte
vide order dated 17.07.2018

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 27.02.2003, passed in A.S.No.21/2002, on the file of the Additional District & Sessions Judge, Fast Track Court, Kallakurichi, reversing the judgment and decree dated 23.09.1998, passed in O.S. No.958/89, on the file of the First Additional District Munsif Court, Kallakurichi.

2. The second appeal has been admitted on the following substantial questions of law:

"1. Whether in law, the judgment and decree of the learned appellate Judge reversing the judgment of the trial Court without assigning reasons is sustainable?

2. In the absence of any satisfactory proof of marriage in the manner known to law, has not the lower appellate Court committed a grave error in law in accepting and acting upon a reply notice alleged to have been issued by the second respondent which has not been proved in accordance with law?"

3. Considering the scope of the issues between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

4. Suffice to state that the plaintiff has laid the suit for partition contending that he is the son of the first defendant born out of the wedlock with the plaintiff's mother Jayalakshmi and further, according to the plaintiff, the first defendant developed illicit relationship with one Ponnammal and out of the same, the second defendant and the ninth defendant were born to Ponnammal and thus, according to the plaintiff, the defendants 2 and 9 are not entitled to claim any share in the suit properties as such and further, according to the plaintiff, the defendants 7 and 8 are his sisters and they had been added as a necessary parties in the event of they seeking any claim of share in the suit properties as per the amended Succession Act and alleging that the first defendant had alienated certain properties belonging to the family to the defendants 3 to 6 and contending that the suit properties are the family properties belonging to the first defendant and the plaintiff and as such, the plaintiff being entitled to half share in the suit properties, accordingly, it is the case of the plaintiff that he has been necessitated to lay the suit for partition.

5. The third defendant has filed the written statement admitting that the plaintiff is the son of the first defendant and however, according to the third defendant, his wife had purchased certain properties from the first defendant and as the said sale is effected for legal necessity and for the welfare of the first defendant's family, the sale is binding upon the plaintiff and the plaintiff is not entitled to question the same and accordingly, prayed for the dismissal of the plaintiff's suit.

6. Similarly, the sixth defendant has also filed the written statement contending that the first defendant for discharging his antecedent debts, alienated the third item of the suit properties in his favour and accordingly, the said sale is binding upon the plaintiff and hence, prayed for the dismissal of the suit.

7. The ninth defendant, through her mother, has filed the written statement contending that the plaintiff is not the son of the first defendant and that no marriage took place between the first defendant and the plaintiff's mother Jayalakshmi as claimed in the plaint and on the other hand, it is the case of the ninth defendant that the marriage had taken place only between the first defendant and her mother Ponnammal and out of the wedlock, the ninth defendant and the second defendant were born and accordingly contending that the plaintiff not being the legitimate son of the first defendant, put forth a case that the plaintiff is not entitled to lay any claim of share in the suit properties as such. Further, according to the ninth defendant, the suit properties are not the family properties belonging to the first defendant and the plaintiff as claimed in the plaint and further, it is stated that Periasamy had alienated the properties belonging to him and it is contended by the ninth defendant that the suit properties are not available as such for partition and accordingly, it is stated that the plaintiff has no cause of action to lay the suit and prayed for the dismissal of the plaintiff's suit.

8. In support of the plaintiff's case PWs 1 and 2 were examined, Exs.A1 to A4 were marked. On the side of the defendants, DWs 1 to 3 were examined, Exs.B1 to B7 were marked.

9. Based on the appreciation of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court had dismissed the plaintiff's suit. However, the first appellate Court had set-aside the judgment and decree of the trial Court and thereby entertained the suit as prayed for by the plaintiff. Impugning the same, the present second appeal has been laid.

10. The trial Court has held that the plaintiff has failed to establish that a valid marriage took place between his mother Jayalakshmi and the first defendant and accordingly holding that the plaintiff has not established the validity of the marriage invitation card marked as Ex.A1 and on that premise, further holding that the plaintiff has not placed any proof to show that the first defendant and his mother Jayalakshmi had been living together as husband and wife and the plaintiff had been born to them during the said wedlock and on that premise, decline to accept the case of the plaintiff that he is the legitimate son of the first defendant. However, the first appellate Court, on the basis of the exchange of notices between the plaintiff's mother Jayalakshmi and the first defendant marked as Exs.A2 and A3 and considering the fact that by way of Ex.A3 reply notice, the first defendant himself having admitted that he had married the plaintiff's mother Jayalakshmi and further, as the plaintiff had also marked the wedding invitation card as Ex.A1 and also noting that Periasamy had described the plaintiff also as one of his sons in the sale deeds marked as Exs.A4 and B1, on a cumulative analysis of the abovesaid materials, held that the

plaintiff has established that he is the son of the first defendant born on account of the wedlock between the first defendant and Jayalakshmi.

11. As determined by the first appellate Court, the trial Court merely because the plaintiff has failed to establish as to when the invitation card Ex.A1 has come to be printed, etc., has discountenanced the plaintiff's case. However, considering the contents of the notices marked as Exs.A2 and Ex.A3, which notices have not been repudiated by the defendants in the written statement as such and accordingly, as determined by the first appellate Court, when Periasamy, in the reply notice marked as Ex.A3, has admitted that he has married the plaintiff's mother Jayalakshmi, however, attributing immoral character on her part, but he having admitted that a marriage took place between him and Jayalakshmi, the plaintiff's mother, accordingly, it seen that as determined by the first appellate Court, the marriage had indeed taken place between the first defendant and the plaintiff's mother Jayalakshmi and further, as per the contents of Ex.A3 reply notice, it is found that as per the case of the first defendant, by way of a panchayat determination, the marriage held between Jayalakshmi and the first defendant got dissolved and it is further seen that, thereafter, according to the first defendant, he had married Ponnammal and out of the said marriage, the defendants 2 and 9 were born to them. However, when admittedly the marriage of the first defendant with Jayalakshmi, the plaintiff's mother, had already taken place as could be seen from the reply notice sent by the first defendant marked as Ex.A3 and when the said marriage has not been dissolved in the manner known to law till date, accordingly, it is found that the marriage between the first defendant and Jayalakshmi is still subsisting and thus, it could be seen that the plaintiff is the son born to the first defendant out of his wedlock with Jayalakshmi. Accordingly, it is seen that acknowledging the plaintiff as his son, in the sale deeds marked as Ex.A4 and Ex.B1, the first defendant has admitted the plaintiff to be his son. No doubt, the first defendant in the abovesaid sale transactions has also admitted that the defendants 2, 7 to 9 are also his children. But the fact remains that the plaintiff is the legitimate son of the first defendant and in such view of the matter, the contentions put forth by the defendants' counsel that the plaintiff has failed to establish the marriage between his mother and the first defendant and that he had been born to them out of the said wedlock as such cannot be accepted and accordingly, it is found that the plaintiff is the son of the first defendant.

12. The reading of the plaint would go to show that the plaintiff would claim that the suit properties are the joint family properties of the first defendant and thereby, the plaintiff seeks to claim half share in the suit properties by way of the same. It is seen that the plaintiff claims the suit

properties to be the joint family properties of the first defendant and as such, the plaintiff is entitled to obtain half share in the same. The abovesaid case of the plaintiff has been seriously contested by the ninth defendant. According to ninth defendant, there is no family property as such belonging to the first defendant as put forth in the plaint and it is stated that the properties owned by the first defendant had been alienated by him and even the first defendant's father did not own any ancestral property as such. Therefore, it is contented that there is no question of the first defendant owning any joint family properties as projected in the plaint and accordingly, it is stated that the suit properties are not available for partition and prayed for the dismissal of the plaintiff's suit. The plaintiff has not projected in the plaint as to on what basis he put forths a case that the suit properties are the joint family properties of the first defendant. The plaintiff has not averred in the plaint as such that the first defendant's father Maari had owned ancestral properties and accordingly, by devolution, the said properties came to be acquired by the first defendant and accordingly, the suit properties are the joint family properties. There is no such plea put forth in the plaint. That apart, no material whatsoever has been placed by the plaintiff to hold that Maari, the first defendant's father, owned any ancestral property. To evidence the same, there is no material forthcoming on the part of the plaintiff. From the materials placed on record, it is found that by way of Exs. A4 and B1, the first defendant had alienated certain properties and from the recitals contained therein, it is found that the properties comprised therein had been styled only as the separate properties of the first defendant and accordingly, it is found that the first defendant had alienated the same for the necessities as described therein. The abovesaid sale transactions are not shown to be effected by the first defendant for any immoral or illegal purposes. Accordingly, it is found that the abovesaid properties being the separate properties of the first defendant and when the said properties are not shown to be alienated by the first defendant for any illegal purposes as such and even assuming for the sake of arguments that the abovesaid sale transactions had been made by the first defendant for meeting his own ends, still it is found that the plaintiff would be bound by the sale transactions effected by the first defendant on account of the pious obligation theory.

13. As above noted, there is no material forthcoming on the part of the plaintiff to hold that the suit properties are the ancestral properties of the first defendant. Only on the plaintiff establishing that Maari had owned ancestral properties, it could be seen that the plaintiff would be entitled to make a claim of partition in respect of the same as projected in the plaint. However, the plaintiff has not made out any case by placing acceptable materials to evidence that the suit properties are the ancestral properties of the first

defendant or the joint family properties of the first defendant and plaintiff as such. On the other hand, the documents marked as Exs.A4 and B1 would go to show that the properties comprised therein are the separate properties of the first defendant. Thus, it is found that, as rightly determined by the trial Court, the plaintiff has not established the case projected by him that the suit properties are the family properties of the first defendant and the plaintiff as such. Further, according to the ninth defendant, Maari, the first defendant's father only held the properties on his own and the same could be evidenced from the sale deeds marked as Exs.B2 and B3 and on a perusal of the recitals contained in Exs.B2 and B3, it is found that Maari had acquired certain properties on his own and thus, it is found that the properties comprised in Exs.B2 and B3 are only the self acquired properties of Maari. Further, it could be seen that Maari had four wives and out of love and affection, he had settled certain properties in favour of his fourth wife Jothimani and the settlement deed has been marked as Ex.B4. Thus, it is found that Maari had been owning separate properties and had been dealing with the same as his own and it is thus found that there is no proof whatsoever placed to hold that any of the suit properties belonged to Maari ancestrally. Thus, it is found that the properties owned by Maari as could be seen from the available materials, are only his separate properties and accordingly, he had dealt with the same as above noted. Further, even assuming for the sake of arguments that the first defendant had inherited the separate properties of Maari, after his demise, the said suit properties would come into the hands of the first defendant only as his independent properties and not as the joint family properties of the first defendant and the plaintiff, as such, vide the decisions reported in AIR 1979 MADRAS 1 (The Additional Commissioner of Income-tax, Madras-1 V. P.L.Karuppan Chettiar), 1993 Supp (1) Supreme Court Cases 580 (Commissioner of Income Tax V. P.L.Karuppan Chettiar), (1986) 3 Supreme Court Cases 567 (Commissioner of Wealth Tax, Kanpur and Others V. Chander Sen And Others), (2008) 3 Supreme Court Cases 87 (Bhanwar Singh V. Puran And Others) and the latest decision (2016) 4 Supreme Court Cases 68 (Uttam V. Saubhag Singh and Others), (2017) 1 MLJ 759 (Chinna Palanisamy Gounder Vs. Latha and others) and (2017)-2-L.W.343 (M.Palaniappan & another Vs. Nachimuthu). Accordingly, it is found that the plaintiff without any basis has come forward with the case as if the suit properties are the joint family properties of the first defendant and the plaintiff and that the plaintiff is entitled to half share in the same. When the abovesaid case of the plaintiff has been disputed vehemently and despite the same, the plaintiff having not placed any material to hold that Maari owned the suit properties ancestrally and the first defendant had acquired the same through his father, etc., and on the other hand, the available materials would go to show that Maari and the first defendant had been dealing with their separate properties as per their volition, it is found that, as rightly determined by the trial Court, the plaintiff has miserably

failed to establish that the suit properties are available for partition on the date of the suit and in such view of the matter, it is found that the plaintiff's suit has to fail.

14. In the light of the above discussions, considering the fact that the plaintiff has failed to establish that the suit properties are the joint family properties of the first defendant and the plaintiff and on the other hand, from the material placed on record, the properties described in the available materials are found to be only the separate properties of the first defendant and Maari and accordingly, when it is noted that the plaintiff is not the only son to the first defendant and on the other hand, when it is seen that the plaintiff, the second defendant and defendants 7 to 9 are all the children of the first defendant and furthermore, when the first defendant is alive, it does not stand reason as to how the plaintiff could maintain the suit for partition as regards the separate properties of the first defendant. If at all the plaintiff has any right to claim partition in the separate properties of the first defendant, the same could be worked out by the plaintiff only on the demise of the first defendant and in respect of the properties available on the death of the first defendant. Accordingly, it is seen that when as on date, the father of the parties, namely, the plaintiff and the defendants 2, 7 to 9 is alive, it is found that the plaintiff's suit is found to be premature and accordingly, on the above reasonings also, it has to be held that the plaintiff has no cause of action to lay the suit for partition as regards the separate properties of the first defendant, even assuming the same are available. In this connection, a useful reference can be made to the decision reported in 2017-4-LW681 (Balakrishnan and others Vs. Selvi and others).

15. Considering the above aspects of the matter, it is found that the first appellate Court had not adverted its mind to the nature of the suit properties as to whether they are really the joint family properties or the separate properties and whether they are available for partition as on the date of the suit and whether the plaintiff has any cause of action to claim partition etc., and without considering the abovesaid aspects of the matter, the first appellate Court had on holding that the plaintiff is the son of the first defendant, accordingly, on that premise, proceeded to hold that all the suit properties are the joint family properties of the first defendant and the plaintiff and accordingly, the plaintiff is entitled to claim partition in respect of the same. However, the abovesaid approach of the first appellate Court is found to be erroneous. Without determining the nature of the properties available as on the date of the suit for partition and considering the abovesaid reasonings, when it is found that at the most, the properties if available, could only be deemed to be the separate properties of

the first defendant and accordingly in respect of such separate properties of the first defendant, the children of the first defendant including the plaintiff would not be entitled to claim partition during the life time of the first defendant, the substantial questions of law formulated in the second appeal are accordingly answered.

16. For the reasons aforesaid, the judgment and decree dated 27.02.2003 passed in A.S.No.21 of 2002 on the file of the Additional District Court (Fast Track Court) at Kallakurichi are set aside and the judgment and decree dated 23.09.1998 passed in O.S. No.958 of 1989 on the file of the I Additional District Munsif Court at Kallakurichi, are confirmed. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

MEMORANDUM OF COSTS

APPELLANTS/PETITIONERS () COSTS.

	RS.	P.
Stamp for Vakalatnama	10.00	
do. used for the memo	36.00	
do. for enclosures	920.00	
Value of copy stamp-paper used enclosures	8.00	
Batta and Postage	270.00	
Translation and printing/Typing charges	nil	

	1244.00	

Sd/-

Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

bga/sli

To

1. The Additional District Sessions Judge,
Fast Track Court, Kallakurichi.
2. The First Additional District Munsif Court,
Kallakurichi.
3. The Section Officer, V.R.Section, High Court, Madras.

+ 1 cc to M/s. Sarvabhauman Associate, Advocate SR.53802

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MR (CO)

EU (25/09/2018)

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