

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.06.2018

PRONOUNCED ON : 10.07.2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.2212 of 2004

Azhagammal ... Appellant/2nd Defendant

Vs.

1. Perumal

2. Kuppan

... Respondents/Plaintiff/
1st Defendant

Prayer:

Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree of the Sub Court at Dharmapuri, dated 25.03.2004 in A.S.No.9 of 1999, reversing the judgment and decree of the District Munsif Court at Dharmapuri, dated 25.02.1999 in O.S.No.693 of 1994.

For Appellant : Mr.R.Rajaramani
for M/s. Sarvabhauman Associates

For Respondents : No appearance/Set ex-parte
vide order dated 27.06.2018

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 25.03.2004 passed in A.S.No.9 of 1999 on the file of the Subordinate Court, Dharmapuri, reversing the judgment and decree dated 25.02.1999 passed in O.S.No.693 of 1994 on the file of the District Munsif Court, Dharmapuri.

2. Parties are referred to as per their rankings in the trial Court.

3. Suit for partition.

4. The case of the plaintiff, in brief, is that he and his

father, the first defendant, are members of the joint hindu family and the suit property is in their common enjoyment and the plaintiff and the first defendant originally were residing at Madhemangalam village and were owning common family properties in the said village ancestrally and were engaged in the cultivation of the said land and also engaged in cooli work and the plaintiff had two other brothers, namely, Kunjappan and Chinnaponnu and all of them including the first defendant were living jointly as members of the joint hindu family and the plaintiff and his two brothers were also engaged in cooli work at Karnataka State and earned income and accordingly, out of the income earned by the plaintiff and his brothers and also by selling the lands at Madhemangalam village, it is stated that the properties including the suit property had been acquired in the name of the first defendant, he being the Karta of the joint hindu family and hence, the first defendant cannot claim any exclusive title and separate enjoyment in respect of the said properties and the plaintiff's brother Kunjappan died at Karnataka without marriage and the plaintiff's other brother Chinnaponnu was murdered by the first defendant and in this connection, the first defendant has been awarded life sentence by the Court and Chinnaponnu also died without marriage and the first defendant, who would do anything to achieve his ends, also alienated the joint family properties without the consent of the plaintiff about two acres of lands to one Muthaiah and Maadhan and apprehending action from the first defendant, the plaintiff had not questioned the said alienations and however, the illegal acts of the first defendant continued to persist and accordingly, the first defendant started to claim that the suit property absolutely belongs to him and in this connection, the suit laid by the first defendant in O.S.No. 542/90, on the file of the District Munsif Court, Dharmapuri came to be dismissed and despite the same, the defendant claims that the suit property belongs to him absolutely with a view to deprive the plaintiff of his lawful share in the suit property and the plaintiff has learnt that the defendants 1 and 2 have joined together and created some documents with reference to the suit property with a view to defeat the right of the plaintiff and the same would not bind the plaintiff and the plaintiff is entitled to half share in the suit property and inasmuch as the first defendant failed to effect partition despite several requests, according to the plaintiff, he has been necessitated to lay the suit for partition.

5. The case of the first defendant, in brief, is that the suit laid by the plaintiff is not maintainable either in law or on facts. It is false to state that the suit property is the joint family property of the plaintiff and the first defendant. On the other hand, the suit property is the self acquired property of the first defendant and in the separate possession

and enjoyment of the first defendant and the plaintiff has no right over the suit property and hence, the suit laid by the plaintiff for partition is not maintainable. It is false to state that the family owned properties at Madhemangalam village and that the plaintiff and his brothers were engaged in cooli work at Madhemangalam village and in the State of Karnataka and earned income and it is further false to state that the family properties at Madhemangalam village were sold and out of the same and also from the income earned by the plaintiff and his brothers, the suit property and the other properties were acquired in the name of the first defendant and on the other hand, the suit property and other properties purchased were all acquired by the first defendant independently and enjoyed by the first defendant on his own and in order to assert his title in respect of the suit property, the defendant had laid the suit in O.S.No.542/90, on the file of the District Munsif Court, Dharmapuri for declaration and possession and it is false to state that the said suit had come to be dismissed. It is only the first defendant, who has been in possession and enjoyment of the suit property and other properties continuously and the defendant had also alienated certain properties to Muthaiah and Maadhan and the same has been accepted by the plaintiff and the same are all the separate properties of the defendant and the plaintiff is not entitled to claim any share in the suit property and the suit is bad for non joinder of Muthaiah and Maadhan and the plaintiff has no cause of action to lay the suit and the suit is liable to be dismissed.

6. The case of the second defendant, in brief, is that after reiterating all the contentions put forth by the first defendant, according to the second defendant, the suit property being the self acquired property of the first defendant, according to her, she had purchased the portion of the suit property from the first defendant by way of a sale deed dated 09.06.93, for a valid consideration and enjoying the same separately by obtaining patta, paying kist etc., and therefore, it is contended that the plaintiff is not entitled to claim any share in the said property and further, according to the second defendant, the plaintiff without any cause of action has come forward with the suit and hence, the suit is liable to be dismissed.

7. In support of the plaintiff's case, PWs 1 to 3 were examined, Exs.A1 to A6 were marked. On the side of the defendants, DWs 1 to 3 were examined, Exs.B1 to B6 were marked.

8. The trial Court, on an appreciation of the materials placed on record and the submissions made, was pleased to dismiss the plaintiff's suit. On appeal, the first appellate Court, on an appreciation of the materials placed on record, was

pleased to set-aside the judgment and decree of the trial Court and by way of allowing the appeal preferred by the plaintiff, decreed the suit as prayed for. Impugning the same, the present second appeal has come to be laid.

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

"1. Whether the lower appellate Court is justified in law in placing burden on the second respondent/father to prove that the properties standing in his name are not the joint family properties? Vide 2004 (3) L.W.S.C.49

2. Whether the suit for partition in the absence of all the sharers and all the family properties is maintainable in law?"

10. The plaintiff is the son of the first defendant. Materials placed on record go to show that the first defendant had two other sons, namely, Kunjappan and Chinnaponnu. However, it is found that the abovesaid two sons are not alive and died without marriage. Claiming that the suit property is the joint family property belonging to the plaintiff and his father, the first defendant, the plaintiff contended that he is entitled to half share in the suit property and as his requests for allotting half share in the suit property had not been met by the first defendant, according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

11. Per contra, it is the case of the first defendant as well as the second defendant that the suit property and other properties belong to the first defendant exclusively and they are not the joint family properties as put forth by the plaintiff and hence, it is contended that the plaintiff is not entitled to lay any claim of partition in the suit property as such. It is the case of the second defendant that she had purchased the portion of the suit property from the first defendant by way of a sale deed dated 09.06.93 and enjoying the same in her own right by obtaining patta, paying kist etc., and hence, the suit laid by the plaintiff is liable to be dismissed.

12. Admittedly, the suit property acquired by way of the sale deeds dated 28.05.58 and 10.03.67, marked as Exs.A4 and A5 stand only in the name of the first defendant. Now, according to the plaintiff, he and the first defendant being the members of the hindu joint family, though the abovesaid sale deeds stand in the name of the first defendant, as the properties comprised

therein as well as the other properties had been acquired by selling the family properties at Madhemangalam village and also out of the income earned by the plaintiff and his brothers, it is the case of the plaintiff that the suit property as well as the other properties had been acquired in the name of the first defendant, he being the Karta and thus, it is projected that the plaintiff is entitled to half share in the suit property. Per contra, it is the case of the defendants that the suit property as well as the other properties were all acquired only by the first defendant as his own properties and accordingly, disputed the claim of the plaintiff that the suit property as well as the other properties had been acquired out of the earnings of the plaintiff and his brothers as well as the sale of the family properties at Madhemangalam village.

13. Materials placed on record go to disclose that even as per the case of plaintiff, other than the suit property, the other properties had also been acquired, as projected by the plaintiff, in the name of the first defendant. That apart, the plaintiff himself has admitted in the plaint as well as during the course of his evidence that the first defendant had alienated the said properties in favour of Muthaiah and Maadhan and according to the plaintiff, he has not questioned the abovesaid sale transactions. Accordingly, as rightly argued by the defendants' counsel, if really the suit property as well as the other properties had been acquired in the name of the first defendant as projected by the plaintiff, on the first defendant alienating some of the properties in favour of Muthaiah and Maadhan, the plaintiff having knowledge about the same, would have challenged the sales effected by the first defendant. But strangely the plaintiff would aver that apprehending action on the part of the first defendant, he has not questioned the same. However, the above contention does not merit acceptance straightaway. If really, the abovesaid properties are also the joint family properties and acquired as projected by the plaintiff, on the first defendant effecting the sale in respect of certain properties as abovementioned, the plaintiff would not have been a silent spectator with reference to the same and on the other hand, would have challenged the said sale transactions. On the other hand, as rightly argued, inasmuch as the suit property as well as the other properties had all been acquired by the first defendant in his individual capacity, it is found that the plaintiff has not thrown a challenge to the alienations made with reference to some of the properties in favour of Muthaiah and Maadhan.

14. Merely because the properties stand in the name of the first defendant, it cannot be presumed that the first defendant would have acquired the properties only for the benefit of the joint family consisting of himself and his son, the plaintiff.

The suit property as well as the other properties admittedly had been acquired only in the name of the first defendant and that apart, when it is found that at the time of the acquisition of the suit property in particular, by way of Exs.A4 and A5, the plaintiff was a very young boy, the case of the plaintiff that he and his brothers had also contributed some amount for the acquisition of the suit property and as well as the other properties by way of engaging in cooli work, as such, cannot be readily accepted. With reference to the claim of the plaintiff that he and his brothers had been engaged in cooli work and earning income as projected in the plaint, the same is not been borne out by any material evidence, particularly, when it is noted that at the time of acquisition of the suit property by way of Exs.A4 and A5, the plaintiff was a small boy. Accordingly, when there is no material to hold that at the relevant point of time that the plaintiff and his brothers were earning income, it is found that the case of the plaintiff that he and his brothers has also contributed money for the acquisition of the suit property and as well as the other properties, as such, cannot be accepted.

15. Further, the case of the plaintiff is that the joint family owned properties at Madhemangalam village and by way of alienating the same also, the suit property and other properties had come to be acquired. However, with reference to the above case of the plaintiff, there is no proper pleas as well as materials to substantiate the same. The plaintiff has not clearly averred in the plaint as to what are the properties owned by the family at Madhemangalam village by giving particular S.Nos., extent of the same. Very vaguely he has averred that the joint family owned properties at Madhemangalam village. Further, the plaintiff has also not averred as to when the properties had been alienated, to whom they had been alienated and for what consideration the said alienation had been effected. Without furnishing any particulars as regards the same, the plaintiff has very vaguely averred that out of the sale of the properties at Madhemangalam village, the suit properties and other properties had been acquired in the name of the first defendant. Accordingly, it is found that the plaintiff is unable to place acceptable and reliable materials to substantiate his abovesaid case. In this connection, the plaintiff has examined one Chinnasamy as PW3 and PW3 would claim that he had purchased the properties at Madhemangalam village belonging to the parties about 40 years ago. However, even PW3 has not whispered in the chief examination as to when exactly the said sale transaction was effected and for what amount the sale was effected and the particulars of the properties alienated to him. However, during the course of cross examination, he would state that he had purchased 3 cents of land from the first defendant about 40 years ago, for a

consideration of Rs.3,000/-. Therefore, it is his case that the price was fixed at Rs.1,000/- per cent at that point of time i.e., 40 years ago and thereby he would plea that the sale consideration was Rs.3,000/- However, the same has been challenged by the defendants. There is no material to show that at that point of time, about 40 years ago, the sale price of 1 cent at Madhemangalam village was Rs.1,000/- therefore, it is found that without any material, the evidence of PW3 that he had purchased 3 cents of land for Rs.3,000/- about 40 years ago from the first defendant, as such, cannot be believed and accepted. Be that as it may, even assuming for the sake of arguments, such a property had been conveyed to PW3 for Rs.3,000/-, to say that the abovesaid amount had been utilised for the purchase of the suit property measuring about 3.80 acres of lands and the other properties acquired in the name of the first defendant as such cannot be believed straightaway. Accordingly, it is found that the plaintiff has also projected a case, as if he and his brothers had been engaged in the cooli work and contributed income for the acquisition of the properties in the name of the first defendant. As above adverted to, when there is no material placed by the plaintiff to advance his abovesaid case and when it is found that at the relevant point of time i.e., acquisition of the suit property and other properties, the plaintiff had been a very small boy, it is seen that his case that he and his brothers contributing income out of cooli work as such cannot be accepted in any manner. Thus, it is found that the plaintiff has miserably failed to establish that the amount had been contributed by him and his brothers for the acquisition of the suit property as well as the other properties in the name of the first defendant and also failed to establish that the family owned properties at Madhemangalam village and out of the alienations of the same, the suit property and other properties had been acquired. Such being the position, it is found that the trial Court, accordingly, on an appreciation of the materials placed on record rightly, held that the case of the plaintiff being found to be highly improbable, particularly, considering the age of the plaintiff at that point of time i.e., at the time of acquisition of the suit property and other properties, noted that the plaintiff and his brothers could not have contributed any amount for the acquisition of the suit property and further, the trial Court has also disbelieved the case of the plaintiff that the family owned adequate properties at Madhemangalam village and by way of the alienation of the same, the suit property and the other properties had been acquired in the name of the first defendant and accordingly, disbelieved the evidence of PW3 with reference to the same.

16. Such being the position, the first appellate Court has erred in placing the burden on the first defendant to prove that the suit property and other properties standing in his name are

not the joint family properties. In this connection, it is contended that the first appellate Court had erred in shifting the burden on the second defendant by placing reliance upon the decisions reported in 2018 (2) MWN (Civil) 264 (G.K.Palanisamy Vs. Amudhaveni and two others) and 2018 (2) MWN (Civil) 291 (Jayaprakash and others Vs. Nandhakumar and others). It is contended by the second defendant's counsel that without establishing the existence of the joint family as well as the ownership of the joint family properties, there cannot be any presumption in favour of the existence of the ancestral nucleus and without the existence of the ancestral nucleus, according to him, the first appellate Court had erred in shifting the burden on the first defendant and thereby erred in accepting the plaintiff's case. The above contention of the defendant's counsel seems acceptable. The plaintiff having come forward with the case that the consideration for the acquisition of the suit property and other properties also flowed out of the amount earned by alienating the family properties and when the plaintiff has failed to establish the very existence of the so called family properties by giving the particulars of the same and also the actual amount received by way of the same and also failed to establish that the same was also utilised for the acquisition of the suit property and other properties, it is found that the first appellate Court, ignoring the abovesaid position of law, erred in shifting the burden on the defendants to prove that the suit property and other properties standing in his name are not the joint family properties. Accordingly, it is found that the first appellate Court is found to have accepted the plaintiff's case without any material on record by erroneously shifting the burden on the defendants and thereby found to have committed a serious error in dislodging the well considered reasonings and conclusions of the trial Court for rejecting the plaintiff's case.

17. In the light of the above discussions, it is found that the first appellate Court is not justified in placing the burden on the defendants to prove that the suit property and other properties standing in the name of the first defendant are not the joint family properties and thereby consequently erred in upholding the plaintiff's case without any material on the part of the plaintiff to substantiate his case as above noted. The first substantial question of law is accordingly answered in favour of the second defendant/appellant and against the plaintiff.

18. Though it is pleaded by the defendants that the suit is bad for non joinder of necessary parties and other family properties, considering the materials placed on record and that the defendants have not established that the purchasers of the other properties from the first defendant are proper and

necessary parties to the present lis and accordingly, it is found that the above issue does not loom large for disposing the present appeal. Accordingly, it has to be held that the defendants have failed to establish that the suit laid by the plaintiff is bad for non joinder of other sharers and proper and necessary parties and all the family properties, as such. Accordingly, the second substantial question of law is answered.

19. For the reasons aforesaid, the judgment and decree dated 25.03.2004, passed in A.S.No.9 of 1999, on the file of the Subordinate Court, Dharmapuri are set-aside and the judgment and decree dated 25.02.1999, passed in O.S.No.693 of 1994, on the file of the District Munsif Court, Dharmapuri are confirmed. Accordingly the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

sli

To

1. The Subordinate Court,
Dharmapuri.
2. The District Munsif Court,
Dharmapuri.
3. The Section Officer,
V.R.Section, High Court, Madras. (2 Copies)

+1cc to Mr.V.R.Annagandhi, Advocate, S.R.No.45061

S.A.No.2212 of 2004

NM(CO)
CS/03/09/18

WEB COPY