

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 29.01.2018

PRONOUNCED ON : 02.02.2018

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.597 of 2003

C.Allimuthu .. Appellant/Appellant/Defendant

Vs.

1.Chinnapillai ammal (deceased) .. Respondent/Respondent/
Plaintiff

2.K.Ellappan Konar ... Respondent

(R2 brought on record as legal
representative of deceased
sole respondent vide order
of Court dated 11.02.2010
made in CMP.Nos.228/2010)

Prayer :- Second Appeal has been filed under Section 100 of CPC
against the Judgement and Decree dated 08.04.2002 made in
A.S.No.61 of 1999 on the file of the Subordinate Court,
Kallakurichi, confirming the Judgment and Decree dated
18.02.1999 made in O.S.No.58 of 1992 on the file of the I
Additional District Munsif, Kallakurichi.

For Appellant : Mr.Dhanaram
for Mr.G.Ethirajulu

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

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JUDGMENT

This second appeal is directed against the Judgement and
Decree dated 08.04.2002 passed in A.S.No.61 of 1999 on the file
of the Subordinate Court, Kallakurichi, confirming the Judgment
and Decree dated 18.02.1999 passed in O.S.No.58 of 1992 on the
file of the I Additional District Munsif, Kallakurichi.

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 the plaintiff's husband Ramasamy Konar and the defendant are the sons of Chinnathambi Konar and Chinnathambi Konar and his two sons were members of undivided Hindu Joint Family and the suit properties belonged to the above said joint family ancestrally and the plaintiff's husband died in 1962 and the plaintiff's mother-in-law died even prior to the plaintiff's marriage and the plaintiff's father-in-law died about 15 years ago and out of the wedlock between the plaintiff and Ramasamy Konar, a male child was born and died on the same date in the year 1960 and inasmuch as the suit properties belonged to the Hindu Joint Family consisting presently of the plaintiff and the defendant, accordingly, the plaintiff is entitled to obtain half share in the suit properties and also, the profits derived there from and claiming her share in the suit properties, the plaintiff made several requests to the defendant and as the same had not been acceded to by the defendant, the plaintiff sent a registered notice through her advocate on 23.12.1990 and to the same, the defendant sent a reply containing false allegations and it is false to state that the plaintiff had been settled the properties by way of a settlement deed dated 23.09.1964 and the plaintiff is not aware of the same and the defendant is in possession and enjoyment of the suit properties as the family manager and hence, the suit for partition.

5. The case of the defendant, in brief, is that the suit is not maintainable either in law or on facts and out of the suit properties, in the first item, in Survey No.80/10 out of 45 cents 16 1/2 cents and in the second item, in Survey No.84/11 out of 27 cents 16 1/2 cents belonged to the plaintiff and the remaining extent in the items 1 & 2 of the suit properties and the items 3 to 11 of the suit properties belonged to the defendant and the claim of half share in the suit properties by the plaintiff is not sustainable and the suit properties belonged to the defendant's father Chinnathambi Konar absolutely and neither the plaintiff nor her husband could claim any share in the said properties and the plaintiff's husband died during the life time of the defendant's father and it is false to state that the male child born to the plaintiff and her husband died on the date of his birth and in order to provide support to the plaintiff, on the demise of her husband, as requested by the plaintiff, the above said items of properties were settled in favour of the plaintiff to be enjoyed by her during her life without any alienation and accordingly, the remaining properties were in possession and enjoyment of the defendant and his father

and after the demise of his father, the same had been in possession and enjoyment of the defendant and other than the properties comprised in the settlement deed, the plaintiff is not entitled to lay any claim or right over the suit properties and the defendant is not liable to pay any profits derived from the suit properties and the suit laid by the plaintiff is barred by limitation and hence, liable to be dismissed.

6. In support of the plaintiff's case, PW1 was examined and Exs.A1 & A2 were marked. On the side of the defendant, Dws1 & 2 were examined and Exs.B1 was marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the Courts below were pleased to accept the plaintiff's case and accordingly, granted the reliefs sought for by the plaintiff. Impugning the same, the present second appeal has been laid.

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

" (i) Is not the co-sharer lost her title by ouster even assuming that the suit properties are the joint family properties?

(ii) Is not the suit barred under the law of limitation filed after the lapse of 28 years from the date of execution of Deed of settlement in favour of the plaintiff?

(iii) Whether the suit for partition is maintainable without any prayer to set aside the settlement deed executed in favour of the plaintiff?"

9. The plaintiff's husband and the defendant are the sons of Chinnathambi Konar and according to the plaintiff's case, claiming that the suit properties are the joint family ancestral properties of Chinnthambi Konar and his two sons and accordingly, on the demise of her husband, the plaintiff being entitled to obtain half share in the suit properties, inasmuch as her requests to effect amicable partition of her share in the suit properties has been denied by the defendant without any legal basis and the same also was not acceded to, after the issuance of the legal notice, she has been necessitated to lay the suit for partition.

10. The defendant resisted the claim of the plaintiff contending that the suit properties are the self acquired properties of his father Chinnathambi Konar and inasmuch as the plaintiff's husband died during the life time of Chinnathambi Konar, at the request of the plaintiff to provide support to her, some properties were settled in favour of the plaintiff and excluding the same, the plaintiff is not entitled to lay any claim or right over the remaining suit properties and hence, according to the defendant, the plaintiff's suit for partition is not maintainable and barred by limitation and hence, liable to be dismissed.

11. From the materials placed on record, particularly, as seen from the evidence of the defendant examined as DW1, it is seen that the suit properties are the ancestral properties of Chinnathambi Konar. That apart, as rightly found by the Courts below, no document has been placed by the defendant to evidence that the suit properties are the self acquired properties of Chinnathambi Konar. In such view of the matter, when it has been clearly admitted by the defendant during the course of his evidence that the suit properties are the ancestral properties of Chinnathambi Konar and when it is not in dispute that the plaintiff's husband Ramasamy Konar and the defendant are the sons of Chinnathambi Konar, it is found that, as rightly found by the Courts below, the suit properties are the undivided joint family ancestral properties of the Hindu family consisting of Chinnathambi Konar and his two sons. It is found that the plaintiff's husband Ramasamy Konar died in 1962 during the life time of Chinnathambi Konar and it is the case of the defendant that in order to provide support to the plaintiff, living as a widow, it is stated that some properties were settled in her favour described in the written statement and therefore, it is contended that other than the said properties, the plaintiff is not entitled to lay any claim or right over the remaining suit properties. The settlement deed projected by the defendant dated 23.09.1964 has been marked as Ex.B1. The plaintiff has disputed the same and contended that she is not aware of any such settlement in her favour as projected by the defendant. When it is noted that the suit properties are the ancestral joint family properties of the plaintiff's husband and the defendant or as the case may be, the plaintiff and the defendant, as rightly determined by the Courts below, even assuming that Ex.B1 has come to be executed, the same cannot be given legal credence as Chinnathambi Konar would not be competent to settle the joint family properties in favour of the plaintiff and in this connection, a useful reference may be made to the decision reported in AIR 1987 SC 1775 (Thamma Venkata Subbamma (Dead) by Lr Vs. Thamma Rattamma and Ors.) and the position of law, as regards the same, is adumbrated in the above said decision as follows:

Issues: Whether a gift by a coparcener of his undivided coparcenary interest to another coparcener was void? Holding: According to the Mitakshara law, no coparcener can dispose of his undivided interest in coparcenary property by gift. There was no estoppel or other kind of personal bar which preclude the donor from asserting his right to recover the transferred property. The legislature did not provide for any gift by a coparcenary of his undivided interest in the coparcenary property either to a stranger or to another coparcener. Therefore, the personal law of the Hindus, governed by Mitakshara school of Hindu law, a coparcener could not make a gift of interest. Under the proviso to Section 6 of the Hindu Succession Act, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through female relative then the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession. The devolution of interest in coparcenary property by survivorship had been altered to testamentary or intestate succession. Therefore, a coparcener can make gift of his undivided interest in the coparcenary property to another coparcener or to a stranger with the prior consent of all other coparceners. Such a gift would be quite legal and valid. Hence appeal is dismissed."

It is also found that the above position of law is reiterated in the decision reported in CDJ 2003 MHC 060 (Kanna Gounder & Another Vs. Arjuna Gounder).

12. From the above said decisions, it is seen that the coparcener is precluded by law to make the gift of the interest of the undivided share and accordingly, it is found that Ex.B1 transaction cannot be given any legal credence. That apart, when according to the defendant, the properties comprised in Ex.B1 has been settled in favour of the plaintiff and on the other hand, when it is the specific case of the plaintiff that she is not aware of the said settlement and when as seen from the materials placed through the evidence of DWs 1 & 2 that the

plaintiff, on the demise of her husband, had been living in her mother's residence thence from, it is found that the plaintiff has not accepted the settlement deed marked as Ex.B1 and accordingly, it is found that there is no material placed on record, on the side of the defendant to hold that the plaintiff had accepted Ex.B1 settlement transaction and has been in possession and enjoyment of the properties comprised therein. Therefore, it is found that the defendant has failed to establish the validity of Ex.B1 settlement deed and in the light of the above position, when it is found that Chinnathambi Konar is not competent to settle the undivided joint family properties by way of Ex.B1 and further, when it is seen that Ex.B1 has not been shown to have been accepted by the plaintiff, the alleged donee and when it is further seen that the properties settled had not been shown to be in the exclusive enjoyment of the plaintiff and on the other hand, when it is found that inclusive the settled properties, all the properties are only in the possession and enjoyment of the defendant as the co-owner, the Courts below have rightly disbelieved Ex.B1 transaction and accordingly, determined that the same would not in any manner disentitle the plaintiff to seek her lawful share in the suit properties.

13. However, it is argued that Ex.B1 should be construed as a family arrangement and so viewed, it is stated that inasmuch as the plaintiff had been granted certain properties by way of the settlement deed, pursuant thereto, the plaintiff is not entitled to lay any claim or interest in the remaining suit properties. However, there is no recital contained in Ex.B1 precluding the plaintiff from claiming share in the other properties belonging to the family. Further, when it is found that the plaintiff is the daughter-in-law of Chinnathambi Konar and as such, entitled to half share in the suit properties, to say that the plaintiff had been given only a pittance of the properties of the family and that to only for her life enjoyment and to say that the other properties had been taken by the other co-owners as such cannot be accepted in any manner. If really, the parties had intended to make a family arrangement of the family properties, as rightly determined by the Courts below, the plaintiff should have been given the due share, to which, she is entitled to in respect of the suit properties. On the other hand, when it is found that the alleged family arrangement effected under Ex.B1 is inequitable and further, when the plaintiff is not a party to the so called family arrangement and the plaintiff has also not been put on notice about the family arrangement prior to her claim of share in the suit properties and as above seen, when the plaintiff has not shown to have Ex.B1 transaction and when no recitals are found in Ex.B1 precluding the plaintiff from claiming her share in the suit

properties as per law. It is found that the transaction projected as the family arrangement marked as Ex.B1 cannot at all be believed /accepted and as rightly determined by the Courts below, the same cannot be termed as a family arrangement and binding upon the plaintiff.

14. It is contended by the defendant's counsel that the plaintiff, after her husband demise in the year 1962, did not lay claim of right or share in the suit properties and only made a claim of share in the suit properties in 1999 and having laid the suit in the year 1999 nearly 37 years, after the death of her husband, it is stated that the plaintiff's suit is barred by limitation. However, when it is found that admittedly the suit properties are the joint family properties of the plaintiff and the defendant as above seen and when it is found that the defendant as such has not pleaded any adverse possession by way of ouster and accordingly, when it is further found that the defendant is in possession and enjoyment of the suit properties only as a co-owner on behalf of the plaintiff, the other co-owner, accordingly, it is found that the plaintiff's suit cannot be rejected on the point of limitation, particularly, when the defendant has failed to establish that ousting the plaintiff, he had been in possession and enjoyment of the suit properties on his own by exhibiting hostile attitude openly, continuously and uninterruptedly beyond the statutory period and in such view of the matter, the Courts below had been rightly disbelieved the above case of the defendant on the question of limitation.

15. It is found that sans material on the part of the defendant to hold that he has perfected title to the suit properties by ouster, as above discussed, it can be seen that the plaintiff has not lost her right to claim partition of her share in the suit properties as a co-owner and accordingly, it is seen that the suit laid by the plaintiff is not barred by limitation and further, when it is found that the settlement deed or the family arrangement marked as Ex.B1 cannot be given any legal credence in the light of the above discussions and when the plaintiff is not a party to the same and also not established to have accepted the same and also by way of the same, the plaintiff has not been precluded by law to seek her lawful share in the suit properties, there is no need for the plaintiff to seek for setting aside of the above said transaction and accordingly, the substantial questions of law formulated in this second appeal are answered in favour of the plaintiff and against the defendant.

At the end, the second appeal fails and accordingly, is dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

sms
To

1. The Subordinate Judge, Kallakurichi.
2. The I Additional District Munsif, Kallakurichi.

+1cc to M/s.Sarvabhauman Associates, Advocate, S.R.No.8087

S.A.No.597 of 2003

GJII(CO)
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