



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on: 30.01.2018
Delivered on: 13.02.2018

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CORAM :
THE HONOURABLE MR.JUSTICE **S . S . SUNDAR**

Second Appeal (MD) No.9 of 2018
and
C.M.P. (MD) No.259 of 2018

1.Kanniappan
2.Arumugham
3.Annar @ Annavi
4.Sakthivel
5.Rajalakshmi
6.Devaraj @ Ponnan
7.Sangan

: Appellants / Respondents /
Defendants 2 to 8

-Vs-.

1.Pachaiyammal
2.Marudhappan
3.Selvaraj
4.Chandra

: Respondents/Appellants/Plaintiffs

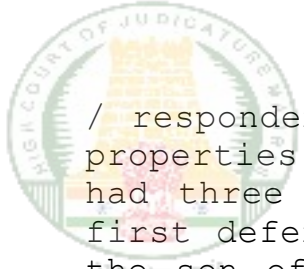
Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 31.01.2017 made in A.S.No.5 of 2016 on the file of Principal District Court, Karur, reversing the judgment and decree dated 27.11.2015 made in O.S.No.77 of 2010 on the file of the Subordinate Court, Kulithalai.

For Appellant : Mr.R.Ramadurai

JUDGMENT

The defendants 2 to 8 in the suit in O.S.No.77 of 2010 on the file of the Sub Court, Kulithalai, are the appellants in the above Second Appeal.

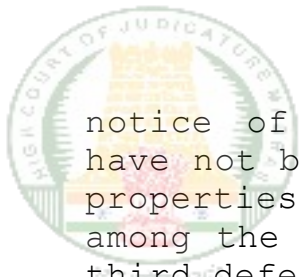
2.The respondents herein, as plaintiffs, filed the suit in O.S.No.77 of 2010 for partition and separate possession of the suit properties in all the suit properties and for other incidental reliefs. The suit properties are described in three schedules - schedule A, B and C. It is the case of the plaintiffs



/ respondents that suit 'A' schedule properties are the ancestral properties of one Palaniyandi. It is also stated that Palaniyandi had three sons by name Pichai, Arumugam and Malaikolundan. The first defendant is the wife of Pichai and the second defendant is the son of first defendant. Arumugam is the third defendant and plaintiffs are the wife and children of Malaikolundan. It is stated that Pichai was the eldest son who managed all the suit 'A' schedule properties after the demise of his father and that suit 'B' schedule properties were purchased in the name of his wife, namely, the first defendant under four different sale deeds and that 'B' schedule properties were treated and enjoyed as joint family properties by the said Pichai and his two brothers Arumugam and Malaikolundan. It is further stated that out of the joint family income and nucleus for the benefit of the said joint family suit 'C' schedule properties were also purchased in the name of third defendant under a registered sale deed dated 18.09.1982. It is further stated that the suit 'C' schedule properties were also kept, treated and enjoyed by all the members of the joint family as the joint family properties. It is further stated that all the suit properties were kept in common and enjoyed by all the three brothers as joint family properties. After the death of first defendant, defendants 4 to 8 were impleaded as legal heirs of the first defendant being the children of first defendant's predeceased daughter, one Periyakkal. It is further stated that the eldest son of Palaniyandi, namely, the husband of the first defendant died about 20 years back leaving behind the defendants 1 and 2 as his legal heirs. It is stated that the plaintiffs are the wife and son and daughters of the third son of Palaniyandi by name Malaikolundan.

3. In the written statement filed by the first defendant, the relationship between the parties is admitted. The fact that the suit 'A' schedule properties belong to Palaniyandi is not disputed. However, it is contended by the defendants 1 and 2 that there was an oral partition of suit 'A' schedule properties about 35 years back and that therefore, the suit for partition is not maintainable. It is specifically stated that during the life time of Palaniyandi, namely, the grand father of plaintiffs 2 to 4, 'A' schedule properties were divided among the three sons and all of them are in enjoyment of the properties allotted to them in the oral partition. It is further stated in the written statement that all the three sons of Palaniyandi are in enjoyment of the properties allotted to them in the oral partition and has obtained patta independently and that they are in exclusive possession and enjoyment of the properties allotted to them. The defendants 1 and 2 also pleaded ouster but has not detailed as required in law.

4. The third defendant also filed an independent written statement taking a stand similar to that of defendants 1 and 2. It is pertinent to mention that it is the specific case of the third defendant that item 1 to 10 as referred to in the reply



notice of defendants 1 and 2 and situated at Keeranur Village have not been divided among the brothers and that therefore, those properties situated in Keeranur Village should be divided equally among the shareholders. But no counter claim is preferred by the third defendant.

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5. Before the trial Court, the plaintiffs have examined two witnesses and marked Ex.A1 to Ex.A19. Defendants 2 and 3 examined themselves as D.W.1 and D.W.2 and marked Ex.B1 to B70. The trial Court accepted the case of the defendants that properties described in 'A' schedule are enjoyed separately by the plaintiffs and defendants and accepted the oral partition that was pleaded by defendants. The trial Court further held that the plaintiffs have not proved their case that the suit 'B' schedule properties were purchased in the name of the first defendant out of the joint family income. Similarly, the trial Court also found that there is no proof showing that 'C' schedule properties were purchased out of the joint family income in the name of third defendant. Aggrieved by the judgment and decree of the trial Court, the plaintiffs have preferred an appeal in A.S.No.5 of 2016 before the Principal District Court, Karur. Along with the appeal, the plaintiffs also filed an interlocutory application in I.A.No.331 of 2016 to receive a document, namely, a sale deed dated 16.11.1999 as additional evidence. The lower appellate Court allowed the application as the said document would show that the three sons of Palaniyandi have jointly sold the properties in favour of a third party in respect of one of the properties of the joint family. After the trial Court received the document as additional evidence, it was marked as Ex.A20. The appellate Court on the appreciation of evidence came to the conclusion that the suit 'A' schedule properties were being enjoyed as the joint family properties and that there was no final partition among the parties in respect of 'A' schedule properties as oral partition during the life time of Palaniyandi is improbable.

6. Insofar as 'B' schedule properties are concerned, the appellate Court held that the plaintiffs have not proved their case that the 'B' schedule properties were purchased in the name of first defendant out of the income from the joint family properties. However, insofar as 'C' schedule properties are concerned, the lower appellate Court rendered a finding that the 'C' schedule properties, purchased under Ex.B66 to B68 are also the joint family properties as the third defendant himself admitted in his evidence that the properties described in 'C' schedule were purchased by him utilising the income from the joint family properties, which were in his possession. The evidence of third defendant was mainly relied upon by the lower appellate Court. Thus, the suit was partly decreed in respect of 'A' and 'C' schedule and that the relief in respect of 'B' schedule properties was not granted by the appellate Court. Aggrieved by the judgment and decree of the lower appellate Court, the defendants 2 to 8 have filed the above Second Appeal.



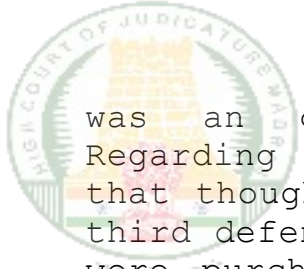
7. In the Second Appeal, the appellants have raised the following substantial questions of law:

(i) Whether the Lower Appellate Court is correct in coming to conclusion that onus of proof lies on the defendants about existence partition amongst the parties even after production of separate sale deeds and patta in their name?

(ii) Whether the Lower Appellate Court is correct in coming to conclusion that burden of proof not lies with the plaintiff, who have asserted that the properties that the properties in the suit 'C' schedule were purchased in the name of the 3rd defendant from and out of joint family nucleus income? (improperly framed)

(iii) Whether the judgment and decree of the lower Appellate Court is sustainable when the plaintiff conveniently excludes the properties in their name and sought for partial partition?

8. The lower appellate Court has considered the pleadings, evidence both oral and documentary in a proper perspective. First of all, in this case, it is not in dispute that the suit 'A' schedule properties are the joint family properties of Palaniyandi. The relationship between the parties is not in dispute. Learned counsel appearing for the appellants reiterated only the grounds raised in this Second Appeal. The suit 'A' schedule consists of 52 items of properties. The findings with regard to 'A' schedule properties will have some relevance to decide as to the character of 'B' and 'C' schedule properties. The partition pleaded in this case is one which occurred about 35 years prior to the suit. It is even admitted by the defendant that the said oral partition was at the time when Palaniyandi was alive. It is stated that the properties were allotted to his three sons by him. It is improbable to come across a partition during the life time of father without any reservation or allotment of any property to the father himself. The third defendant himself has admitted in the written statement that substantial properties, namely, items 1 to 10 referred to in the reply notice of defendants 1 and 2 and located in Keeranur Village and referred to in reply notice are enjoyed in common and that there was no partition in respect of those properties. Mainly on the basis of some entries in revenue records, it cannot be presumed that there was an oral partition by metes and bounds. The document Ex.A20 also suggest that the properties were enjoyed in common till 16.11.1999 and that the parties to the registered document clearly admit that they are enjoying the suit 'A' schedule properties jointly. Hence, the findings of the lower appellate Court regarding the oral partition in respect of 'A' schedule properties are well founded and that therefore, this Court is unable to accept the case of the appellants that there



was an oral partition regarding 'A' schedule properties. Regarding 'C' schedule properties, the lower appellate Court held that though 'C' schedule properties were purchased in the name of third defendant, they are also the joint family properties as they were purchased out of the income derived from the joint family properties. The third defendant has admitted even in the written statement that some of the properties described in 'A' schedule were in his enjoyment. It is to be seen in this case that no one has come forward with a specific case about the extent of properties allotted to them in the oral partition that was pleaded by them in the written statement. No independent witness was examined on the side of the defendant regarding the date and time of the oral partition pleaded by them. It can be seen that the oral evidence on the side of the defendants is so uncertain that they have pleaded ignorance and the evidence on the side of the defendants are neither reliable nor specific with regard to the nature of oral partition and manner of allotment to each one of the three sons. When one of the appellants has categorically admitted that substantial properties in Keeranur Village were not divided among the parties, it can be presumed that the oral partition pleaded is not complete and the evidence in this case would only suggest that there was allotment of some of the properties by father during his life time for convenience which was never intended as a final partition by metes and bounds determining the rights of the parties and disrupting the status.

9. The oral partition was specifically negated by the lower appellate Court on the appreciation of evidence and this Court has no reason to interfere with the findings of the lower appellate Court with regard to the existence of 'A' schedule properties as joint family properties and to grant relief to the plaintiffs insofar as 'A' schedule properties are concerned.

10. Insofar as 'C' schedule properties are concerned, it is the case of the third defendant that 'C' schedule properties were purchased under Ex.B66 to B68, dated 18.09.1982 (two sale deeds) and 03.09.1994 respectively. Though the sale deeds stand in the name of third defendant, it is also the case of the third defendant that 'C' schedule properties under these documents were purchased out of his own income and the income derived from the properties allotted to him in the partition. It is true that he has relied upon separate patta issued in his name under Ex.B61 and Ex.B62 kist receipts to show that he is in exclusive possession of the properties. The defendant himself admitted that substantial properties described in 'A' schedule were not allotted to any one specifically and that those properties are kept in common. As pointed out earlier, the father was alive at the time when the oral partition took place. When some of the properties were given to individual members of the joint family for enjoyment by the father himself leaving substantial properties of the joint family properties to be enjoyed in common, it cannot be said that there



was a complete partition of all the joint family properties unless there is evidence which would indicate that the parties were in exclusive possession and enjoyment of the properties allotted to them. The intention should be to divide the properties with severance of status. Since the third defendant in his deposition is not specific with regard to the manner in which the oral partition was effected and admit that the allotment was only in respect of some of the joint family properties, it cannot be concluded that there was complete partition orally among the three brothers during the life time of the father. Now in this case, it is also found that the third defendant is not doing any business except farming in the lands that belonged to the joint family. When it is admitted that the third defendant has no other independent source of income, the lower appellate Court is right in holding that the properties purchased by the third defendant must be from the income which he derived from the joint family properties which are in his holdings. It is true that the third defendant is only a junior member of the family. Since the third defendant admit that there was no other independent source of income except the income from the properties which were in his enjoyment, the lower appellate Court is right in holding that the third defendant has admitted the existence of joint family nucleus as it has been held that 'A' schedule properties continued to be the joint family properties. Since the oral partition pleaded by the defendants has been specifically negatived by the lower appellate Court, as a consequence the properties which are described in 'C' schedule and alleged to have been purchased in the name of third defendant out of the income derived from the other properties in his possession, this Court has no hesitation to confirm the findings of the lower appellate Court. Having regard to the admission of third defendant and the findings of the lower appellate Court, this Court is unable to find any question of law that arises for consideration in this Second Appeal. Since the settled position of law has been properly applied by the lower appellate Court, this Court do not find any reason to interfere with the findings of the lower appellate Court with regard to 'A' and 'C' schedule properties.

11.As a result, the above Second Appeal is dismissed and the findings of the learned Principal District Judge, Karur in A.S.No.5 of 2017 insofar as 'A' and 'C' schedule properties are confirmed. There is no order as to costs. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CO)

/True Copy/



To

1. The Principal District Judge, Karur.

2. The Subordinate Judge, Kulithali.

+1 cc to M/S.R.Ramadurai, Advocate in SR No.48373

Second Appeal (MD) No.9 of 2018
13.02.2018

PK/SV-MMS/SAR-2/26.03.2018 : 7P/4C