

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.09.2019

CORAM

THE HON'BLE MR.JUSTICE P.RAJAMANICKAM

S.A.No.1404 of 1999

1.Pachiammal

2.Maruthappa Udayar

... Appellants

Vs.

1.Ponnuswami Udayar

2.Dharmalingam

3.Kulandaivel Udayar

4.Periaswami Udayar

5.Chinnapillai Udayar

6.Alagappan

7.Mathuram

8.Poongavanathammal

... Respondents

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the decree and judgment passed in A.S.No.321 of 1997 by the II District Judge, Tiruchirapalli, dated 18.09.1998, reversing the decree and judgment in O.S.No.97 of 1990 dated 27.09.1996 passed by the Subordinate Judge, Ariyalur.

For Appellants : Mr. M.V.Krishnan

For Respondents : M/s. T.R.Seturaman for R1, R4 & R5
S.Parimala
(No appearance)

: R2, R3 & R6 - Set ex-parte

JUDGMENT

This second appeal has been filed by the plaintiffs against the judgment and decree passed by the II Additional District Judge, Tiruchirapalli, in A.S.No. 321 of 1997 dated 18.09.1998, reversing the judgment and decree passed by the Subordinate Judge, Ariyalur, in O.S.No.97 of 1990 dated 27.09.1996.

2. The Appellants herein had filed a suit in O.S.No.97 of 1990 on the file of the Sub-Judge, Ariyalur, to divide the suit property into two equal shares and allot one such share to them and also for rendition of accounts. The learned Sub-Judge, Ariyalur, by the judgment dated 27.09.1996 had passed a preliminary decree directing to divide item Nos.1, 5, 7, 8, 11, 13, 19, 20, 28 and 29 into eight equal shares and allot three such share to the first plaintiff and one such share to the second plaintiff. In respect of other items he directed to divide the said items into four equal shares and allot one such share to the first plaintiff. He has not granted any relief with regard to the prayer for rendition of accounts. Feeling aggrieved, the defendants 1, 3, 4, 7 and 8 filed an appeal in A.S.No.321 of 1997 on the file of the II Additional District Judge, Tiruchirapalli. The learned II Additional District Judge, Tiruchirapalli, by the judgment dated 18.09.1998 had allowed the said appeal and set aside the judgment and decree passed by the trial Court in O.S.No.97 of 1990 and dismissed the said suit without costs. Aggrieved by the same, the plaintiffs have filed the present Second Appeal.

3. For the sake of convenience, the parties are referred to as described before the trial Court.

4. The averments made in the plaint are in brief as follows:

(a) The suit properties originally belonged to one Arunachalathudayar. The said Arunachalathudayar died intestate prior to 1966 leaving behind him two daughters viz., Unnamalai Ammal and Pachaiyammal. The said Unnamalai Ammal and Pachaiyammal had partitioned the properties of Arunachalathudayar 20 years ago and in the said partition, the suit properties were allotted to the share of Pachaiyammal. After the death of the said Pachaiyammal, her sons viz., 1) Ponnusamy Udayar (D1), 2) Periyasamy Udayar (D7), 3) Chinnapillai (D8) and one Thangavel had succeeded to the properties of Pachaiyammal. The Eighth defendant and the said Thangavel did not marry. Thangavel sold his share to the third parties and subsequently died. The first defendant had executed a registered settlement deed dated 28.06.1966 in respect of his 1/4th share in favour of his sister Chinnammal.

(b) The said Chinnammal died intestate 10 years ago. After her death, her daughter (first plaintiff) and her husband (second plaintiff) succeeded to the said property and each of them are entitled to 1/8th share in the said property. The first plaintiff is the daughter of the said Chinnammal and the second plaintiff and she was married to the first defendant. On

21.11.1975, the eighth defendant executed a registered settlement deed in respect of his 1/4th share in favour of minor child of the first defendant and the first plaintiff. Four years ago, the said minor child namely, Karuppusamy died and hence, his mother (first plaintiff) being the sole legal heir, succeeded to the said property. So, the first plaintiff is entitled to 3/8th share and the second plaintiff is entitled to 1/8th share and totally both the plaintiffs are entitled to 1/2 share in the suit properties. Hence, on 27.05.1989, the first plaintiff had sent a lawyer's notice. Since the first defendant had developed antagonistic attitude towards the plaintiffs and executed a sale deed in favour of the defendants 2 and 3 in respect of items 34 and 38, they have been impleaded as defendants. In the aforesaid sale deeds, the first defendant had sold the properties to the defendants 4, 5 and 6 also and hence, they have also been impleaded as defendants. Since the defendants did not come forward for amicable for partition, the plaintiffs were constrained to file the above suit for the relief of partition and rendition of accounts.

5. The averments made in the written statement filed by the defendants 1 and 8 and adopted by the seventh defendant are in brief as follows:

(a) The suit properties are not the properties of Arunachalathudayar alone, but it includes the family properties of Chithidayar Govindasami Udayar also. All the suit properties have been treated as the family properties of the said Chithidayar Govindasami Udayar and after his death, his four sons viz., the defendants 1, 7 and 8 and deceased Thangavel succeeded to his properties. Arunachalathudayar died 40 years ago, leaving behind his wife Meenakshi Ammal and two daughters Pachaiyammal and Unnamalai Ammal before the commencement of the Hindu Succession Act, 1956. As per the Hindu law then in force, Meenakshi Ammal succeeded to the estate of Arunachalathudayar. She was enjoying her husband's estate as a limited owner and after the advent of Hindu Succession Act, 1956, her limited estate enlarged into an absolute one under Section 14(1) of Hindu Succession Act, 1956. She was enjoying her husband's estate as absolute owner and died 25 years ago. After her demise, her two daughters Pachaiyammal and Unnamalai Ammal succeeded to her estate. The two daughters orally divided the properties which were got from their mother. Pachaiyammal married Chithidayar Govindasami Udayar and to them two daughters and four sons viz., Alamelu, Chinammal, Periyasamy (D7), Chinnapillai (D8), Ponnusamy (D1) and Thangavel were born. Chithidayar Govindasami Udayar died in the year 1970 leaving his two daughters and four sons as mentioned above. His wife Pachaiyammal pre-deceased him. Even during the life time of

Pachaiyammal, her husband Chithidayar Govindasami Udayar enjoyed his properties along with his wife's properties without any difference. Properties of both were treated as joint family properties of Chithidayar Govindasami Udayar. Pachaiyammal has allowed her husband to treat her properties as also as the family properties of Chithidayar Govindasami Udayar. There was no separate patta in her name for her mother's property.

(b) After the demise of Chithidayar Govindasami Udayar, his two daughters allowed the defendants 1, 7, 8 and deceased Thangavel to take the properties and gave up their shares in favour of the four brothers. The four brothers enjoyed the properties of the Chithidayar Govindasami Udayar without any division till date. Prior to the demise of the said Chithidayar Govindasami Udayar, all the properties stood in patta No.330 standing in the name of father Chithidayar Govindasami Udayar. Chinnammal died about 10 years ago. The other sister Alamelu is alive. Thangavel died 15 years ago unmarried. Chinnapillai (D8) is also still unmarried. The defendants 1, 7 and 8 still remain undivided as members of joint family. The patta for joint family properties stands in the name of the defendants 1 and 7. Since all others have been treated as joint family properties during the life-time of Chithidayar Govindasami Udayar and after his demise by his sons to the exclusion of Chinnammal and Alamelu they have acquired prescriptive title also. During the life-time of Chithidayar Govindasami Udayar, Thangavel entertained antagonistic attitude towards his father and brothers and created hardship and troubles to his father and brothers. He has executed simple mortgage deed dated 16.09.1993 in favour of one Kandasami in respect of his undivided 1/4th share in the family properties. Finding that the said Thangavel created troubles to the interest of other family members, the first defendant executed a settlement deed in respect of his 1/4th share on 28.06.1966 in favour of his elder sister Chinnammal in order to save the properties. But the patta has not been transferred in the name of Chinnammal. The settlement deed was not came into force and the possession continues with the first defendant only. The original settlement deed also with the first defendant. The first defendant alone paying kist for his share.

(c) The eighth defendant is unmarried. He has executed a settlement deed dated 21.11.1975 in favour of the first defendant's minor child Karuppusamy appointing his maternal Grand- Father (second plaintiff) as guardian as he was living with the first defendant on the sole ground of avoiding the aforesaid creditor of Thangavel. The said deed is also a sham and nominal one. The said document did not create any right to the said Karuppusamy. The said original settlement deed also

not handed over to either minor or his guardian. The said document is still with the eighth defendant. The possession also only with the eighth defendant. Since the properties are undivided and enjoyed by the defendants 1, 7 and 8 jointly, the settlement deed executed by the first defendant in favour of his sister Chinnammal and the settlement deed executed by the eighth defendant in favour of minor son of Karuppusamy of the first plaintiff and the first defendant are void in entirety and no right passes either to Chinnammal or to Karuppusamy. Since the aforesaid settlement deeds are void in entirety, the plaintiffs cannot claim any share in the properties covered by the aforesaid settlement deeds. After the demise of minor Karuppusamy, the first plaintiff left the suit village and has been living in her father's house. She had connected with another man and got a female child through him. She attempted to get patta in her name but it was thwarted by the defendants. Further she attempted to dispose of the properties and the same was also stopped by the timely action of the first defendant. She issued notice in respect of properties covered by document No.1481/66 for which the suitable reply has been given. At the instigation of her father (second plaintiff), she filed the above suit for partition. The plaintiffs are not entitled to get any share based on the aforesaid settlement deeds. The first defendant has been mortgaging the family properties after the demise of Chithidayar Govindasami Udayar. The first defendant has been acting as family Manager, since Periyasami Udayar is not worldly-wise. He sold family properties to defendants 2 and 3 for family necessity with the consent of other co-parceners namely, the defendants 7 and 8. The alienations by the first defendant in favour of the defendants 2 and 3 cannot be impeached by the plaintiffs. There is no cause of action for the suit. Therefore, the defendants 1 and 8 prayed to dismiss the suit.

6. The averments made in the written statement filed by the second defendant are in brief as follows:

The second defendant had purchased 4 cents in S.No.232/19 for valuable consideration. He is a bona fide purchaser for value without notice and therefore, he prayed to dismiss the suit.

7. The averments made in the written statement filed by the third defendant are in brief as follows:

The third defendant had purchased 5 cents in S.No.232/21 and another SF.No.232/22 for the valuable consideration of Rs.1,500/- under the registered sale-deed dated 03.04.1989 from the first defendant and others. The third defendant has been

put in possession of the same. Therefore, the third defendant prayed to dismiss the suit.

8. Based on the aforesaid pleadings, the learned Sub-Judge, Ariyalur, had framed necessary issues and tried the suit. During trial, on the side of the plaintiffs, the plaintiffs 1 and 2 examined themselves as P.Ws.1 and 2 respectively. They had marked Exs.A1 to A4 as exhibits on their side. On the side of the defendants, the first defendant examined himself as DW1 and the eighth defendant was examined as DW2 and they also examined two more witnesses on the side of the defendants as D.Ws.3 and 4. They had marked Exs.B1 to B59 as exhibits.

9. The learned Sub-Judge, Ariyalur, after considering the materials placed before him found that Ex.B2 settlement deed was executed by the first defendant in respect of his 1/4th share in item Nos.1, 5, 7, 8, 11, 13, 20, 28 and 29 and in the said properties, the plaintiffs 1 and 2 are entitled to 1/8th share each. He further found that Ex.B3 settlement deed was executed by the eighth defendant in respect of his 1/4th share of the entire properties and as such, the first plaintiff is entitled to 1/4th share in the entire properties. Accordingly, he has passed a preliminary decree directing to divide items 1, 5, 7, 8, 11, 13, 19, 20, 28 and 29 into eight equal shares and allot three such shares to the first plaintiff and one share to the second plaintiff and that the remaining items to be divided into four equal shares and one such share shall be allotted to the first plaintiff. With regard to the prayer made by the plaintiffs for rendition of accounts, the learned Sub-Judge did not record any finding. Aggrieved by the same, the defendants 1, 3, 4, 7 and 8 filed an appeal in A.S.No.321 of 1997 on the file of the II Additional District Judge, Tiruchirapalli. The learned II Additional District Judge, Tiruchirapalli, had allowed the said appeal and set aside the judgment and decree passed by the trial Court and dismissed the suit without costs. Feeling aggrieved, the plaintiffs have filed the present second appeal.

10. This Court, at the time of admitting the second appeal, has formulated the following substantial questions of law:-

"1.Whether the learned District Judge ought to have followed the Ruling reported in A.I.R.1977 Supreme Court Page No.2230 and A.I.R. 1967 Supreme Court Page No.1124 and upheld the plaintiff's claim?

2. Whether the learned District Judge ought to have followed the ruling reported in 60 M.L.J. Page No.85 and confirmed the judgment of the trial Court?"

11. When this second appeal came up for hearing on 03.09.2019, the appellants' side arguments heard. Since there was no representation for the respondents, the matter has been posted today for the Respondents' side arguments. Today also no representation for the respondents. Hence, the matter has been passed over and taken up at 2.15 P.M. At that time also there is no representation for the respondents. Hence, the respondents called absent and set ex-parte. After considering the arguments advanced by the learned counsel for the appellants, perusing the records, the judgment is being passed in the Second Appeal.

12. Substantial questions of law 1 and 2:

The learned counsel for the appellants has submitted that the first Appellate Court erred in reversing the well considered judgment of the trial Court. He further submitted that since the defendants 1 and 8 admitted in their written statement that they had executed the settlement deeds, the burden is upon them to prove that the said settlement deeds were not acted upon. He further submitted that the first Appellate Court failed to consider that the defendants 1 and 8 failed to prove that the aforesaid settlement deeds were executed only with a view to save the property from the creditors of the late Thangavel. He further submitted that the first Appellate Court failed to consider that the defendants 1 and 8 have not adduced any satisfactory evidence that the aforesaid settlement deeds were not at all acted upon. He further submitted that admittedly, during pendency of the suit, the defendants 1 and 8 had executed the documents cancelling the aforesaid settlement deeds and that itself would show that they had executed the aforesaid settlement deeds.

13. He further submitted that once a gift settlement deeds validly executed and got accepted by the donees, the donor has no right to cancel the said gift deeds. He further submitted that the first Appellate Court failed to consider that some of the suit properties originally belonged to Pachaiyammal (female member) and the said properties cannot be blended with the family properties of her husband as held by the Hon'ble Supreme Court in AIR 1977 SC 2230. He further submitted that the first Appellate Court failed to consider the law laid down by the

Hon'ble Supreme Court in AIR 1967 SC 1124 and law laid down by this Court in 60 MLJ 85.

14. The learned counsel for the appellants further submitted that the trial Court taking into consideration of all the aforesaid facts had rightly decreed the suit as aforesaid, but the first Appellate Court without considering the aforesaid facts in proper prospective had reversed the findings of the trial Court and dismissed the suit. Therefore, he prayed to allow the second appeal and set aside the judgment and decree passed by the first Appellate Court reversing the judgment and decree passed by the trial Court.

15. It is an admitted fact that the first plaintiff is the daughter of the second plaintiff and that the first plaintiff was married to the first defendant and they got one male child by name Karuppusamy. It is also an admitted fact that the first plaintiff is the daughter of the own sister of the first defendant namely, Chinnammal. It is also an admitted fact that the defendants 1, 7, 8 and one Thangavel are sons of one Chithidayar Govindasami Udayar and Pachaiyammal. It is also an admitted fact that the said Chithidayar Govindasami Udayar and Pachaiyammal had two daughters namely, Alamelu and Chinnammal besides four sons. It is also an admitted fact that the said Chithidayar Govindasami Udayar got some items of the suit properties and his wife Pachaiyammal got certain properties from her father Arunachalathudayar.

16. The instant suit has been filed for partition claiming right based on the Ex.A1 settlement deed said to have been executed by the first defendant dated 28.06.1966 in favour of his sister Chinnammal (mother of the first plaintiff and wife of the second plaintiff) and another settlement deed dated 21.11.1975 (Ex.A2) said to have been executed by the eighth defendant in favour of minor child Karuppusamy, who is the son of the first plaintiff and the first defendant.

17. The defendants 1 and 8 in their written statement have not denied the execution of the aforesaid settlement deed, but their contention is that the said documents are sham and nominal and they did not come into force. Their further contention is that since one of their brothers namely, Thangavel borrowed a loan and executed a simple mortgage on 16.09.1965 in favour of one Kandasamy and in order to save their interest in the aforesaid properties, they had executed the aforesaid settlement deeds. Their further contention is that though the aforesaid

documents were executed, the possession was only with them and the original settlement deeds were also only with them and hence the said settlement deeds were never acted upon. Their further contention is that the original settlee namely, Chinnammal, in respect of the settlement deed on 28.06.1966 did not claim any right during her life time. Their further contention is that in respect of the properties covered under the settlement deed dated 21.11.1975, the first plaintiff did not claim any right immediately after death of her son and the aforesaid fact also would show that the aforesaid settlement deeds never acted upon.

18. The plaintiffs have not produced the original settlement deeds dated 28.06.1966 and 21.11.1975, and they have produced only registration copies of the aforesaid settlement deeds marked as Exs.A1 and A2. On the contrary, the defendants 1 and 8 have produced the original settlement deeds and marked as Exs.B2 and B3 respectively. There is no explanation from the plaintiffs as to why they have not produced the original settlement deeds. They have not given any reason under what circumstances, the original settlement deeds came to the hands of the defendants 1 and 8.

19. In Ex.B2 settlement deed as many as 11 items of the properties have been mentioned, out of which the property measuring 9 cents situated in S.No.287/2 is not at all mentioned in the plaint schedule. Further out of the aforesaid 11 items, except one item i.e., the property situated in S.No.336/8 measuring 13 cents, all other items with specific extent and specific boundaries mentioned and in such a case, it is not known why the plaintiffs had included those properties also in the plaint seeking partition.

20. In Ex.B3 settlement deed as many as 38 items mentioned. In all the aforesaid items, it is stated that 1/4th share gifted. It appears that based on the particulars mentioned in Ex.B3, the plaintiffs have mentioned the list of properties in the plaint schedule.

21. Admittedly, Ex.B2 settlement deed was executed by the first defendant in favour of her sister Chinnammal (mother of the first plaintiff and wife of the second plaintiff) on 28.06.1966 and in the said document, as already pointed out 11 items mentioned with specific extent and with specific boundaries and in a such case, if really the said document was executed with an intention to gift properties mentioned in the said document, the settlee namely, Chinnammal would have taken

possession of the said properties on the date of execution of the said document itself. But, the plaintiffs have not filed any proof to show that the said Chinnmmal had taken possession of the said properties.

22. Admittedly, the revenue records like Patta, Chitta not transferred either to the name of Chinammal or the plaintiffs. Even assuming that the said settlement deed was executed with an intention to gift the properties, if the possession was not handed over to her, she would have filed a suit for recovery of possession of the said properties, but, she has not filed any suit during her life time.

23. In the plaint, it is stated that the minor child Karuppusamy, who is the son of the first plaintiff and the first defendant died four years ago, before filing of the suit but, immediately, the first plaintiff has not filed any suit claiming partition based on Ex.B3 settlement deed. In respect of the properties covered under Ex.B3 settlement deed also, the first plaintiff has not produced any documentary evidence to show that either her son or herself enjoyed the said properties along with the defendants. Further, as already pointed out that the plaintiffs have not given any explanation for not producing the original settlement deeds. The trial Court without considering the aforesaid facts has mechanically decreed the suit. But, first Appellate Court after taking into consideration of the facts has rightly dismissed the suit.

24. In Smt. Pushpa Devi Vs. The Commissioner of Income Tax, New Delhi, AIR 1977 SC 2230 (cited supra) the Hon'ble Supreme Court has held that a Hindu female, not being a coparcener, cannot blend her separate property with joint family property.

25. In Girijanandini Devi and others Vs. Bijendra Narain Choudhary, AIR 1967 SC 1124 (cited supra) the Hon'ble Supreme Court has held that in a Hindu Undivided family governed by the Mitakshara Law, no individual member of that family, while it remains undivided, can predicate that he has a certain definite share in the property of the family.

26. In Appayya Banga (dead) and others Vs. Koraga alias Santhappa Kajava MLJ 85 (cited supra) this Court has held that the principle that in a case of confusion of boundaries the Court will not inference unless some equity is super-induced by

the act of the parties has to be applied with reference to the special circumstances of each case.

27. In this case, the facts are totally different. In this case the defendants have not pleaded that the said Pachaiyammal had blended her properties with the family properties. The case of the defendants is that the said settlement deeds are sham and nominal documents and they never acted upon. Therefore the aforesaid decisions are irrelevant and they will not apply to the facts of this case.

28. For the aforesaid decision, this Court is of the view that the first Appellate Court has properly appreciated the evidence and came to the conclusion that Exs.B2 and B3 settlement deeds are sham and nominal documents and they were never acted upon and through the said documents no right was transferred to the settlees. In the said factual findings, this Court cannot interfere. Accordingly, the substantial questions of law are answered against the appellants/plaintiffs.

29. In the result, this Second Appeal is dismissed. The judgment and decree passed by the first Appellate Court are confirmed. It is open to the first plaintiff to file a suit for partition in respect of the properties which devolve upon her son Karppusamy as a co-parcener from the ancestral property. No costs.

Sd/-

Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

dna

To

1.The II Additional District Judge,
Tiruchirapalli

2.The Sub-Judge,
Ariyalur.

CC: The Section Officer,
High Court, Madras-104.

S.A.No.1404 of 1999

RR(CO)
CB(04/09/2020)