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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 29.01.2019

DATED: 15.02.2019

CORAM :

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

S.A. No. 2075 of 2002

And

C.M.P.No. 367 of 2014

Kothandapani .. Appellant/1st Appellant/1st Defendant

Vs.

1. K.Subramanian .. Respondent/1st respondent/plaintiff-1

2. Venkatesan (deceased)

3. Munusamy ..Respondents/2 and3 respondents/Defendants 2and 3

4. Lakshmi .. Respondent/4th respondent /7th defendant

5. Abdul Rahim

6. K.Mani

7. Indirani

8. Perumal

9. Arumugha Gounder

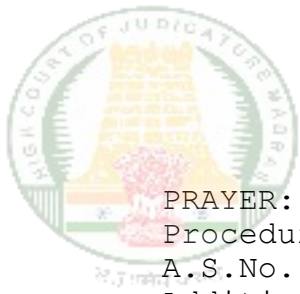
.. Respondents/Appellants 2 to 6/Defendants
4-6, 8, 9

10. Sethurani

11. Thirumal

12. Latha

13. Murugan ... Respondents 10 to 13 brought on record
as LR's of the deceased R2 vide order of
Court dated 21.03.2018 made in C.M.P.No.
364 to 366 of 2014 in S.A.No. 2075 of 2002
(MDIJ)



PRAYER: This Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and Decree passed in A.S.No. 174 of 1999 and dated 04.04.2002 on the file of the Additional District Judge, Villupuram, in confirming the Judgment and Decree passed in O.S.No. 862 of 1993 and dated 30.08.1999 on the file of Principal District Munsif, Thirukoilur.

For Appellant : Mrs. V.Srimathi

For 1st Respondent : Mr.Jayaraman
for Mr.K.Semmalai

For RR 3, 4 & 10 to 13 : Mr.K.V.Balakrishnan

JUDGMENT

The first defendant in O.S.No. 862 of 1993 on the file of the Principal District Munsif Court, Thirukoilur, is the appellant herein.

2. O.S.No. 862 of 1993 had been filed by two plaintiffs K.Subramanian and his mother Pappammal against three other sons of the second defendant, namely Kothandapani, K.Venkatesan and K.Munusamy and also against Abdul Rahim, who was shown as the fourth defendant. Pending the suit, the second plaintiff Pappammal died. The 5th to 9th defendants were also brought on record. The said suit had been filed seeking partition and separate possession of originally 1/5th share in the suit property and subsequent to the death of the second plaintiff for 1/4th share in the suit property and also for past and future mesne profits. By Judgment and Decree dated 30.08.1999, the suit was decreed.

3. Thereafter, the 1st, 4th to 6th, 8th and 9th defendants filed A.S.No. 174 of 1999 before the District Court, Villupuram. By Judgment and Decree dated 04.04.2002, the learned Additional District Judge, Villupuram dismissed the appeal.

4. Challenging that Judgment, the first defendant alone had filed the present Second Appeal. The Second Appeal had been admitted on the following substantial questions of law:-

"1. Whether the Courts below are right in not appreciating the nature of property under Ex.A-1 and should it not have



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held that no consideration had passed for purchase of schedule mentioned property?;

2. When the plaintiff, defendants 2 and 3 have divided the properties excluding the suit property, would it not establish the suit property was never treated as the property of Kootha gounder?;

3. When the parties themselves have admitted that division had taken place in respect of all the properties of the family and nothing remains TO BE DIVIDED, are the courts right in decreeing the suit of plaint?; and

4. Whether the Courts below are right in not applying the provisions of Order 41 Rule 2 Criminal Procedure Code liberally, when document sought to be marked proves and establishes the nature of the property?."

Pending the Second Appeal, the second respondent Venkatesan, who was the second defendant in the suit also died and his legal representatives were brought on record as 10th to 13th respondents.

O.S.No. 862 of 1993 - Principal District Munsif Court, Thirukoilur:

5. The first plaintiff K.Subramanian, the first defendant Kothandapani, the second defendant K.Venkatesan and the third defendant K.Munusamy were the four sons of the second plaintiff Pappammal and her husband Koothappa Gounder. The suit property originally belonged to Koothappa Gounder. It was stated that the first defendant was in enjoyment of the suit property. The father, Koothappa Gounder had purchased the suit property by a sale deed dated 06.05.1972 for adequate consideration of Rs.7,000/- from the first defendant. He was in enjoyment of the property. He died in the year 1987. After his death, the property had devolved on to the first two plaintiffs and the first, second and third defendants since they were Class - I legal heirs. The second plaintiff died pending the suit on 16.07.1995. Consequently after her death, the first plaintiff claimed undivided 1/4th share in the suit property. It was claimed that the first defendant was in enjoyment of the suit property. It was under these circumstances that the suit had been filed seeking partition and separate possession of 1/4th undivided share and for payment of past and future mesne profits. The suit property had been described as land measuring 5.40 cents in S.No. 286/1, Veerapandi Village, Arakandanallur, Villupuram.

6. The first, second and third defendants filed a written



statement. It was denied that the suit property had been purchased for adequate consideration by Koothappa Gounder by sale deed dated 06.05.1972. It was stated that the first defendant led a wayward life prejudicial to the interest of his family. Consequently, a sham and nominal sale deed was created to protect the property. This sale deed was executed on 06.05.1972 in favour of Koothappa Gounder. It was claimed that the sale deed was not acted upon. It was further stated that the first defendant had been in continuous possession and had also prescribed title. It was stated that the plaintiffs have not claimed any right till the death of Koothappa Gounder or after her death. It was also stated that one portion of the property had been sold by the first defendant in favour of the fourth defendant for adequate consideration. It was also stated that there had been a partition of the other properties of Koothappa Gounder among the first plaintiff and the second and third defendants. In that partition, the suit property was not included which indicated that it was the exclusive property of the first defendant. It was therefore stated that the suit should be dismissed.

7. The fourth defendant also filed a written statement in which it had been claimed that the first defendant had been in possession of the suit property for the past 25 years. He had also built a house. It was stated that the fourth defendant had purchased the 8 ½ cents property on 09.08.1989 from Jarina Begum, who had in-turn purchased the said property from the first defendant by sale deed dated 05.10.1988. It was also stated that there had been further transactions in the suit property. It was also stated that further portion had been purchased on 03.08.1989. It was claimed that the sale deed had been effected to the knowledge of all the parties to the litigation. It was claimed that the suit should be dismissed.

8. The 5th to 9th defendants also filed their written statement. In the written statement, it was claimed that the first defendant had perfected title by adverse possession. It was stated that in the years 1988 - 1989, the first defendant had sold portions of the property to various purchasers. It was claimed that consequently the suit for partition should be dismissed.

9. On the basis of the above pleadings, the learned Principal District Munsif, Thirukoilur, framed the following issues for trial:-

"(i) Whether the sale deed dated 06.05.1972 in favour of the father of the first plaintiff executed by the first defendant was a true and valid document for



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adequate consideration?;

(ii) Whether it is true that various portions of the suit property had been sold to the 4th to 9th defendants and whether the sale deeds are valid documents?;

(iii) Whether the first plaintiff is entitled for undivided 1/4th share in the suit property?;

(iv) Whether the first plaintiff is entitled for past mense profits of Rs.8,000/-?;

(v) Whether the first plaintiff is entitled for future mense profits?;

(vi) If it is found that the plaintiff is entitled for a share whether under equity, the shares to be allotted to the first to third defendants can be allotted to the 4th to 9th defendants?;

(vii) Whether the suit is bad for non-joinder of necessary parties?; and

(viii) To what other reliefs is the plaintiff entitled to?"

10. During trial, the first plaintiff Subramanian examined himself as PW-1 and examined another witness Venugopal as PW-2. The first defendant Kothandapani examined himself as DW-1 and examined two other witnesses Kannu Gounder and Venugopal as DW-2 and DW-3. The plaintiff marked Exs. A-1 to A-20. Ex.A-1 was the sale deed dated 06.05.1972 in favour of Koothappa Gounder by the first defendant; Ex.A-2 dated 03.08.1989 was the sale deed executed in favour of the fourth defendant by the first defendant; Ex.A-3 dated 03.08.1989 was the sale deed in favour of the fourth defendant executed by Elumalai; Ex.A-4 dated 06.07.1993 was the notice issued by the plaintiff; Ex.A-5 dated 17.07.1993 was the reply notice; Ex.A-6 was the patta No. 222 in favour of Koothappa Gounder; Ex.A-7 dated 22.06.1964 was the sale deed in favour of Koothappa Gounder; Exs. A-8 to A-13 were the tax receipts; Ex.A-14 dated 04.07.1968 was the promissory note executed by the first defendant in favour of Lakshmi Ammal; Ex.A-15 dated 09.12.1968 was another promissory note executed by the first defendant in favour of Lakshmi Ammal; Ex.A-16 dated 14.11.1971 was the promissory note executed in favour of the third defendant by the first defendant; Ex.A-17 was the satisfaction receipts in O.S.No. 223 of 1972; Ex.A-18 dated

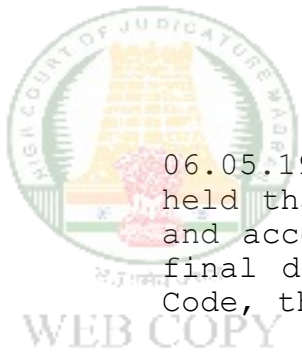


29.06.1972 was the mortgage deed in favour of Palani Ammal; Ex.A-19 dated 29.06.1963 was the release deed executed by the first defendant in favour of Koothappa Gounder and his sons; and Ex.A-20 was the Adangal in the name of Koothappa Gounder.

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11. The defendants marked Exs. B-1 to B-27. Ex.B-1 dated 18.09.1968 was the sale deed executed by the first defendant; Ex.B-2 dated 24.06.1985 was the patta No.406 in the name of Koothappa Gounder; Exs. B-3 to B-12 were the tax receipts said to have been paid by the first defendant; Exs. B-16 and B-17 were the electricity connection receipts in the name of the first defendant; and Exs. B-18 to B-22 were the tax receipts in the name of the first defendant.

12. On the basis of the oral and documentary evidence, the learned Principal District Munsif, Thirukoilur, observed that in 1963, there was a partition deed in the family of Koothappa Gounder and thereafter the first defendant was living separately. It was observed that the first defendant had admitted that the signature in Ex.A-1 sale deed was his and that he had executed it. It was therefore observed by the learned Principal District Munsif that the onus of proof had shifted to the first defendant to prove that it had been executed without adequate consideration and that it was a sham and nominal document. It was stated that in Ex.A-1 the debts have been clearly given. Before the execution of the sale deed, the first defendant had borrowed Rs.1,000/- each from the second and third defendants. The first defendant had also borrowed money from Mugaiyur Panchayat Union for digging of Well and Motor pump set and for installing Motor pump set to a sum of Rs.5,000/-. Koothappa Gounder had purchased the property to repay the said debts. It was found that the second and third defendants did not come forward to give evidence regarding the promissory notes said to have been executed in their favour. This was particularly commented by the Principal District Munsif since it had been stated that the two promissory notes have been fabricated. It was found on the basis of the evidence that Koothappa Gounder had actually discharged the loan to the Mugaiyur Panchayat Union. It was also found that the first defendant had not mentioned about these debts in the written statement. The evidence of DW-1, namely, the first defendant was rejected by the learned Principal District Munsif. Exs. A-14 and A-15 were promissory notes for Rs.400/- and Rs.250/- in favour of Lakshmi Ammal. Under Ex.A-16, the first defendant is said to have borrowed a sum of Rs.1,500/- from the third defendant. However none of the documents have been proved in manner known to law by examining necessary witness. On the basis of the oral and documentary evidence, the learned Principal District Munsif held that it cannot be concluded that the sale deed in favour of Koothappa Gounder in Ex.A-1 dated



06.05.1962 was a sham and nominal document and consequently, held that the plaintiff was entitled to a share in the property and accordingly decreed the suit. It was also observed that in final decree proceedings under Order 20 Rule 18 Civil Procedure Code, the parties can work out their respective shares.

A.S.No. 174 of 1999 - Additional District Court, Villupuram:

13. The 1st, 4th to 6th, 8th and 9th defendants filed the said Appeal. It is pertinent to point out that the second and third defendants did not prefer any appeal against the Judgment of the trial Court. The Appeal came up for consideration before the Additional District Court, Villupuram, on 04.04.2002. Before the said Court, I.A.No. 1 of 2002 had also been filed under Order 41 Rule 27 to take on record additional documents. The documents sought to be produced were partition deed dated 26.04.2001 and a sale deed in favour one Seth. The learned Additional District Judge framed necessary points for consideration. It was found that the partition deed dated 26.04.2001 was not related to the suit property. It was further found that the documents were subsequent to the institution of the suit. Therefore, the two documents were rejected. With respect to the other points for consideration, the learned Additional District Judge, concurred with the findings of fact of the Principal District Munsif. It was specifically found that the debts had not been proved and they were not genuine debts. It was also found that the patta was in the name of Koothappa Gounder and the tax receipts were also in the name of Koothappa Gounder. It was therefore found that there was mutation of records in the name of Koothappa Gounder. Consequently, it was held that the sale deed Ex.A-1 was a true and valid document. Accordingly, it was further held that the plaintiff was entitled to a share in the property and therefore, the appeal was dismissed.

S.A.No. 2075 of 2002 and C.M.P.No. 367 of 2014:

14. As stated above, the first defendant alone filed the Second Appeal before this Court. The Second Appeal had been admitted on the following substantial questions of law:-

"1. Whether the Courts below are right in not appreciating the nature of property under Ex.A-1 and should it not have held that no consideration had passed for purchase of schedule mentioned property?;

2. When the plaintiff, defendants 2 and 3 have divided the properties excluding the suit property, would it not establish the suit property was never treated as the property of Kootha gounder?;



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3. When the parties themselves have admitted that division had taken place in respect of all the properties of the family and nothing remains TO BE DIVIDED, are the courts right in decreeing the suit of plaint?; and

4. Whether the Courts below are right in not applying the provisions of Order 41 Rule 2 Criminal Procedure Code liberally, when document sought to be marked proves and establishes the nature of the property?."

15. In the year 2014, nearly 12 years after the filing of the Second Appeal, C.M.P.No. 367 of 2014 had been filed under Order 41 Rule 27 Civil Procedure Code to take on record as additional evidence the partition deed dated 26.04.2001. In the affidavit filed in support of the said application, it had been stated that in the partition deed, it had been mentioned that there are no other properties to be partitioned among the plaintiff and the second and third defendants and consequently it was claimed that this was an evidence to substantiate the fact that the suit property was the exclusive property of the first defendant. However, I have to disagree with the said contention.

16. The said partition deed is dated 26.04.2001. The suit had been instituted in the year 1993. The Judgment had been delivered by the trial Court on 30.08.1999. The plaintiff had been granted an undivided 1/4th share in the suit property. When the suit property was the subject matter of litigation, it cannot be the subject matter of any partition deed independent of the litigation. If it is to be considered so, then the pendency of the suit and the pendency of the Second Appeal would have no meaning at all. The partition deed had been executed pending the first Appeal. The First Appellate Court had rejected to take on record the said document stating that it was a document subsequent to the institution of the suit. Not only for that reason, but also for the reason that since the suit property is the subject matter of litigation and also the subject matter of the First Appellate Court, it was only natural that the suit property was not included in the partition deed. Therefore, I hold that C.M.P.No. 367 of 2014 cannot be considered and accordingly, the said Civil Miscellaneous Petition is dismissed.



17. With respect to the first substantial question of law framed, I hold that both the Courts below had correctly decided that Ex.A-1 was a true and valid document. It is seen that it is of the year 1972. Koothappa Gounder had died in the year 1987. The said document had not been challenged by the first defendant or any right had been claimed by the first defendant during the lifetime of the Koothappa Gounder. The revenue records have been mutated in the name of Koothappa Gounder. These are findings of facts. Moreover, it had also been found that the second and third defendants have not come forward to give evidence with respect to the promissory notes mentioned in the sale deed Ex.A-1. It is also seen that the first defendant had not proved about the existence of the debts. The documents which have been produced, particularly the promissory notes in the name of Lakshmi Ammal have no relevance at all. For all these reasons, with respect to the first substantial question of law I hold that the Courts below have correctly construed that Ex.A-1 is a true and valid document.

18. With respect to the second substantial question of law, I again hold that the plaintiff and second and third defendants in their partition could not have included the suit property as an item of property subjected to partition since the suit property was the subject matter of the present litigation, which has been pending from the year 1993. I therefore hold that non inclusion of the suit property in the partition among the plaintiff and the second and third defendants will not establish that the property was not treated as the property at Koothappa Gounder.

19. The third substantial question of law relates to whether non inclusion of the property in the partition deed would indicate that there are no other properties to be divided. Again I hold that the suit property is the subject matter of the present litigation and consequently, it could not have been included in any partition deed among the parties.

20. With respect to the fourth substantial question of law, I hold that the principles under Order 41 Rule 27 of Civil Procedure Code had been correctly applied by the First Appellate Court. Even this Court had rejected the said document since the suit property is the subject matter of the present litigation and therefore, could not have been the subject matter of a partition deed among the parties.



21. In view of all these reasons stated above, I hold that the appellant had not made out any case. Consequently, the Second Appeal is dismissed with costs. The Judgments and Decree of the First Appellate Court and the Trial Court are both confirmed.

Sd/-
Assistant Registrar(CCC)

//True copy//

Sub Assistant Registrar

vsg

To

1. Additional District Court,
Villupuram.
2. The Principal District Munsif, Thirukoilur.
3. The Section Officer, VR Section, High Court, Madras

+lcc to Mr.V.Raghavachari, Advocate SR.No.13831

S.A. No. 2075 of 2002
And
C.M.P.No. 367 of 2014

GP(CO)
GMY(06/09/2019)