

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 22.08.2019

CORAM: The Hon'ble Mr.Justice N.Seshasayee

S.A.Nos.509 & 510 of 2007
and
M.P.No.2 of 2007

R.Sundaramoorthy ...Appellant in both S.As/4th
defendants in O.S.No.597/94 &
Plaintiff in O.S.1468/99

Vs.

1.K.Rangaswamy Gowder
2.R.Devaraj ...1st & 2nd defendant in both O.S.
3.R.Ravichandran
4.R.Anusiya ...4th defendant in O.S.1468/1999
5.Minor R.Kirthana
6.Minor R.Sathanandam ...Respondents in both S.As
[Cause title is accepted Vide
order of Court dt.5/4/2007 made
in M.P.Nos.1 & 1 of 2007 in
S.A.S.R.No.11732 and 11735/07]

Common Prayer:- Second Appeals filed under Section 100 of Civil Procedure Code against the Judgment and Decree of the Court of the First Additional District Judge, Coimbatore dated 22-4-2004 and made in A.S.No.126 of 2002 and A.S.No.74 of 2003, confirming the Judgment and Decree of the Court of the II Additional Subordinate Judge, Coimbatore dated 9-11-2001 and made in O.S.No.597 of 1994 and O.S.No.1468 of 1999.

For Appellants : Mr.N.Thiagarajan
For Respondents : Mr.N.Ishtiaq Ahmed for
Mr.B.Mutharasu for R1
Mr.R.T.Doraisamy for R2
Mr.N.Umapathy for R3

COMMON JUDGMENT

1.1 To introduce this batch of two cases, they arise out of two separate suits. The first one is O.S. 597/1994 and laid for declaration, injunction and for an alternate relief of partition. The second suit involved was laid by the 4th defendant in the first suit in O.S.1468/1999 for bare injunction.

1.2 Both the suits were jointly tried and disposed of by a common judgement , and the partition suit was taken as the main case. Hence, parties would be referred to in terms of their rank in the partition suit.

1.3 It may be mentioned that shortly prior to the institution of the partition suit preferred by the plaintiff, the fourth defendant had laid O.S.No.1468 of 1999, which was originally laid as O.S.No.971 of 1992 for bare injunction regarding A schedule item 5. It appears that later it came to be transferred for joint trial, and was renumbered. (Thus, what in chief was the first suit became the second suit in this narrative)

1.4 This apart, the plaintiff in the partition suit laid another suit in O.S.No.1467 of 1999. This is for bare injunction.

1.5 All the three suits were tried jointly, and as already indicated a preliminary decree was passed in the first mentioned partition suit, and other suits came to be dismissed. The plaintiff did not challenge the decree dismissing his suit for injunction in O.S.No.1467 of 1999 and that became final.

1.6 Challenging the same, the said 4th defendant preferred two first appeals, and both came to be dismissed. These second appeals are filed by the 4th defendant challenging the concurrent decrees passed against him. Parties would be referred to by their rank before the trial Court.

2.1. The dispute may now be outlined:

- The dispute pertains to the properties held by one Rangasamy Gounder, who is arrayed as the first defendant in the partition suit. The plaintiff and the defendants 2 to 4 are his sons.
- The plaint schedules 7 items of properties in the A schedule. Some of these items are separately scheduled in B,C,D,E and F. The preliminary decree passed by the trial Court concerns A- schedule items 1 to 3, 5 and 6. So far as A-schedule items 4 and 7 are concerned, the trial Court held that they are the self-acquisitions of the second defendant. So far as A-schedule item no.5 is concerned, even though it was purchased in the name of the fourth defendant, the trial Court treated it as an ancestral property when it passed the preliminary decree. Aggrieved by the same, the fourth defendant preferred first appeal. The dispute presently is all about A-Schedule item 5 property.

3. These appeals are admitted for considering the following substantial questions of law;

"1. Whether the Judgment and decree of the Courts below are right in granting preliminary decree for partition only in respect of certain items of the suit properties, leaving the other items of the properties as self acquired properties of the second defendant even though the joint family was not divided by metes and bounds on the date in which he had purchased the same.

2. Is not the Courts below committed miscarriage of justice in rejecting the case of the appellant that he had purchased the property of his own funds inspite of the oral and documentary evidence adduced therein.

3. Whether the Courts below are right in holding that the properties are purchased by the appellant herein only from the joint family funds even though there was no independent evidence to prove the same."

4. The learned counsel for the appellant/4th defendant argued that;

a) A schedule item 5, measuring 5.77 acres, had been purchased by the fourth defendant out of his business income. He was running brick-kiln business at the relevant time, and the source of consideration has moved from his business income. He added that Ext.B.88 would go to establish that, notwithstanding the existence of family properties, the appellant/fourth defendant had adequate finances to provide consideration for the purchase of item 5 in A schedule, under Ext.B.10. He further argued that both the Courts below, by a strange process of reasoning, have held that item Nos.4 and 7 in the A schedule, purchased in the name of the second defendant, the elder brother of the present appellant, are his self acquisition, even as the Courts below have held that the property purchased in the name of the 4th defendant as part of ancestral family properties.

b) Substantiating his arguments, the learned counsel would submit that when item 5 of A schedule was purchased, the 4th defendant/ appellant was around 29 years. That exactly was the age of the second defendant too when A schedule item 4 was purchased under Ext.B.68. While, the Courts have recognised the fact that the second defendant had independent source of income, the same Courts refused to accept the fact that the appellant/fourth defendant too had his independent source of income which he generated

from brick kiln business. This would imply, either the properties purchased in the names of the second defendant and the fourth defendant must be their respective self-acquisitions, or all the properties must be treated as ancestral family properties. The dichotomy in differentiating these two class of properties, without any evidentiary material enabling a differentiation, would only indicate that the Courts below ought to have focused itself adequately in appreciating the evidence.

5.1 Refuting the arguments of the learned counsel for the appellant, the learned counsel for the second respondent would submit that the only fact which may give a semblance of commonality when item no.4 in A schedule was purchased in the name of the second defendant under Ext.B.68 and when item no.5 in A schedule was purchased under Ext.B.10 in the name of the appellant was their respective age at the relevant time. However, this commonality stops there as the evidence would go to indicate that the second defendant had commenced his business about 1972 and Ext.B.14 to Ext.B.68 would go to indicate that he had been doing more than one business to raise adequate finance to purchase the property.

5.2 Secondly, the father/first defendant, who was the Kartha of the family at the relevant time, himself made a statement that the property was purchased by the second defendant. When the karta of the joint family, the person best placed to speak about the fact as to who provided the finance for purchasing the property described in A - schedule item 4 under Ext.B.68, the same outweighs any possible inferences that might have to be drawn, based purely on the existence of ancestral property in the family. This apart, so far as Ext.B.68, under which the second defendant had purchased item 4 of the A - schedule is concerned, the total consideration is a bare sum of Rs.8,645, whereas, in Ext.B.10, under which the appellant claims title, the total consideration was Rs.66,000. Therefore, unless appellant shows that he had independent source of income to provide Rs.66,000/- as consideration for purchase of A schedule item 5 under Ext.B.10, he may not be able to sustain his contention. Here, it is imperative to indicate that only couple of months prior to the purchase of item 5, the first defendant's father had sold 3 items of family properties under Ext.B.5, Ext.B.6 and Ext.B.7 and the finances so raised was utilised not only for the purchase of item 5 of the A schedule under Ext.B.10, deed but, also, item 6 of A schedule in his own name.

5.3 This apart, the property purchased by the second defendant measures 1.95 acres, out of which, the second defendant himself has settled 45 cents to the appellant under Ext.B.85. So far as A schedule item 7 is concerned, the second defendant was around 47 years when the same was purchased, and by then he was in business for around 23 years and the total sale consideration is also only Rs.33,000.

6. Replying the same, the learned counsel for the appellant would argue that what the second defendant has settled under Ext.B.85, he has attempted to take it back after 20 years, that he cancelled the settlement deed under Ext.B.69, when the settlement deed provided no clause for revocation of gift.

7. So far as gift and cancellation of the deed as was argued by the counsel for the appellant is concerned, that matter has to be contested independently. And, for the present it is only a distraction.

8. On a careful consideration of the rival submissions, and also on perusing the documents produced before this Court, this Court finds substantial merit in the argument of the learned counsel for the second respondent. Even though, this Court needs to acknowledge the appellant's counsel, had made a valiant effort to convince this Court on the points he argued. The reasons can be listed:

- First, whether a property is an ancestral property or self-acquisition is one on fact, and here, even if the views of the Courts below is a plausible one, this Court may not interfere with the said finding unless perversity is manifested in their reasoning. The learned counsel for the 4th defendant could not demonstrate any such perversity in the reasoning of the first appellate court.
- As was rightly held before this Court, the consideration passed under Ext.B.10, for the purchase of A schedule item 5 was Rs.66,000/- and to show the source of income, the learned counsel for the appellant relied heavily on the brick and kiln business. Ext.B.88 is a pass-book and the first transaction was in May, 1985, whereas, Ext.B.10 is dated 11.04.1985. The pass book indicates that the amount transacted is also a paltry sums, and it does not show any withdrawal worth Rs.66,000/-. Therefore, the view of the Courts below cannot be faulted. At the same time, if Ext.B.68, sale deed is considered, it may be that the second defendant too was 30 years at the relevant time but, he was shown to be doing quite a few business since early 1970's as to enable the court to draw a presumption that he could have contributed to the purchase of the said property. Here, the evidence of the father rangasamy gounder (the first defendant) tilts the balance entirely in favour of the second defendant.
- This apart, what provides credence to this conclusion is that the 4th defendant/appellant himself has acknowledged the title of the second defendant to this property when he had accepted a property measuring 45 cents from and out of this property covered under Ext.B.85. He therefore, cannot blow hot and cold as to the title of the second defendant over A schedule item 4.

- Turning to A-schedule item 7, this property was purchased in 1996, i.e., during the pendency of the suit and necessarily the appellant cannot build an argument to contend that this property was an ancestral property.

While this Court expected the 4th defendant to build an argument on how he is entitled to A-schedule, item 5 property, his focus only was on the properties purchased by the second defendant. His strategy lost its course right here.

9. In conclusion, this Court could not persuade itself to subscribe to the arguments of the learned counsel for the appellant from every angle from which he projected his case. In the result, both the appeals are dismissed and the Judgment and Decree of the First Additional District Judge, Coimbatore made in A.S.No.126 of 2002 and A.S.No.74 of 2003, confirming the Judgement and Decree of the II Additional Subordinate Judge, Coimbatore and made in O.S.No.597 of 1994 and O.S.No.1468 of 1999 is upheld. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS I)

//True Copy//

Sub Assistant Registrar

tsg

To:

1.The First Additional District Judge,
Coimbatore.

2.The II Additional Subordinate Judge,
Coimbatore.

3.The Section Officer
VR Section, High Court, Madras.

+1cc to Mr.Mr.N.Thiagarajan , Advocate SR.No. 71897

+1cc to Mr. R.T.Doraisamy , Advocate SR.No. 71995

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