

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.01.2019

PRONOUNCED ON : 04.02.2019

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.1097 of 2004

Marappa

...Appellant

Vs

Chikka Nanjappa

... Respondent

Prayer:- Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree in A.S.No.33 of 2002 on the file of the learned Subordinate Judge, Hosur dated 30.09.2003 in confirming the judgment and decree in O.S.No.512 of 1993 on the file of the learned District Munsif, Thenganickottai dated 27.06.2002.

For Appellant : Ms.R.Sripriya, for
Mr.V.Ragavachari

For Respondent : Mr.J.Hariharan for
Mr.V.Nicholas

JUDGMENT

The defendant in the suit for declaration and injunction is the appellant herein. Having lost in the appeal against the decree passed against him, the present second appeal is filed.

2. Brief facts, leading to the appeal, are follows:-

The parties are blood brothers born to one Pappaiah through his second wife Marakka. Their father Pappaiah had two more sons by name Bairapa and Nanjappa born through his first wife.

3. The plaintiff who is the respondent herein contended that the suit schedule properties were his separate self acquired properties purchased under three different sale deeds from out of his self earning. The family members divided the joint family properties orally as early as 1949. Later division of the joint family properties among the sons of Pappaiah reduced into writing on 19.03.1965 without effecting any change in the earlier oral partition, which was acted upon and parties enjoying their respective shares independently.

4.The suit schedule properties bearing S.Nos.656/1, 656/2, 797 at Kannamanapalli Village, Kempatti Taruft were purchased by the plaintiff from different persons under four sale deeds dated 07.09.1961; 13.12.1966; 16.03.1968 and 22.03.1969. In S.No.797 an extent of 3.43 acres were purchased on three different dates and 1.62 acres of land in S.No.656/1 and 28 ½ cents of land in S.No.656/2 were acquired by the plaintiff under the sale deed dated 13.12.1966.

5.After the oral partition which took place in the year 1949, the defendant had taken possession of the property and enjoying the same putting separate ridges indicating the metes and bounds he has also sold some of the properties which got through the partition. Now, the defendant with an intention to cause trouble and harassment and to knock away the suit properties claiming share in the suit properties. Hence, to declare the exclusive right of the plaintiff in the suit property and permanent injunction restraining the defendant from interfering with the possession of the property.

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6.The respondent herein as defendant in the suit has resisted the suit on the ground that there was no oral partition among the family members during the year 1949 as alleged in the plaint. It is impossible

for such a division of the properties in the year 1949 since, the defendant was only 3 years old at that time. The plaintiff, as elder brother in the family acted as Manager of the joint family till the year 1974. On 08.04.1974, there was partition among the plaintiff and the defendant through panchayat.

7.As per the panchayat, the defendant is entitled for half share in the suit properties. The UDR patta stands jointly in the name of the plaintiff and the defendant. As per the partition deed dated 08.04.1974, the properties allotted to the respective sharers are in their possession and enjoyment. The patta, chitta and adangal and all other revenue records have been mutated in their respective names. The suit properties were jointly purchased by the plaintiff and the defendant in the name of the plaintiff. The plaintiff cannot claim exclusive right over the properties, just because the properties were purchased in his name. सत्यमेव जयते

8.The partition was not effected between the two wives of Pappaiah till 08.04.1974. There was no division of property between the plaintiff and the defendant who are the second wife sons of Pappaiah. Since, the defendant is entitled for half share in the suit

property, the suit filed by the plaintiff seeking declaration over the suit property, as an absolute owner is not maintainable.

9.The trial Court, based on the pleadings, has framed necessary issues and after considering the evidence placed before it, allowed the suit as prayed for with costs.

10.Aggrieved by the decree and judgment declaring the title in favour of the plaintiff and consequential injunction, the defendant has preferred an appeal before the Subordinate Court, Hosur in A.S.No.33 of 2002.

11.On re-appreciation of evidence, the First Appellate Court confirmed the judgment and decree passed by the trial Court in O.S.No.512 of 1993. Having lost the case before both the Courts below, the defendant has preferred the Second Appeal.

12.At the time of admission, this Court has formulated the following substantial questions of law:-

“a)Whether the Courts below are right in decreeing the suit when the appellant is the part owner in respect of the suit properties ?

b) In the absence of proof of separate funds and earnings by the plaintiff, whether there is not a legal presumption as regards the ancestral nature of the property?

c) Whether the Courts below have not overlooked the Revenue Records in which the name of the defendant is included as in possession of the property? "

13. The learned counsel for the appellant/defendant would submit that suit properties were purchased by the respondent/ plaintiff from out of the joint family earnings. The appellant/ defendant and the respondent/ plaintiff were jointly enjoying the property allotted to them under the partition deed dated 20.03.1965. The plaintiff and the defendant who are the sons of Pappaiah born through his second wife, 'B' schedule properties were given. The partition among the plaintiff and the defendant took place only in the year 1974. Till then, they were living together and enjoying the family property jointly and purchased the suit properties from out of the joint family earnings.

14. The plaintiff being the elder member of the family, some properties were purchased in his name. When the plaintiff has not produced any evidence to show that he had independent income apart

from the jointly family earnings, which the plaintiff and the defendant got together, under the partition deed dated 20.03.1965, the Courts below ought not to have believed the case of the plaintiff that the suit properties were purchased from out of his personal earnings.

15. With reference to Muchalika dated 08.04.1974, which was marked as Ex.B.9, the learned counsel for the appellant would submit that the family properties which they got from their father through the partition deed - Ex.A.1, were enjoyed jointly by the brothers. The suit properties were purchased only from the income derived from the joint family properties. The plaintiff had no other source of income to buy the suit properties. In the year 1974, when they thought fit to divide the property from among themselves and got separated, a panchayat had been convened and Muchalika was entered upon. One of the Scribe of Muchalika by name, Narayanappa has deposed about the circumstances under which the panchayat held and had spoken about the execution of the document. Narayanappa was not only the Scribe of the document but also Karnam of the suit village. The Courts below ought not to have disbelieved his evidence regarding panchayat and the Muchalika Ex.B.9.

16.The learned counsel for the appellant would emphasise that Ex.A.1 is not a document of division of properties among the plaintiff and the defendant. It is only division of properties between the senior wife and junior wife of Pappaiah. The appellant and the respondent are sons of Pappaiahs' Junior wife. There was no division between the appellant and the respondent in the year 1965. The tax receipts were issued in the name of the respondent being the eldest member of the family. Under the partition deed dated 19.03.1965 - Ex.A.1, the mother of the parties was also given a share. While so, the respondent cannot claim exclusive right over the properties.

17.Per contra, the learned counsel for the respondent would submit that the partition deed - Ex.A.1 executed on 19.03.1965 is reiteration of the oral partition took place in the year 1949. The appellant is a party to the document. Subsequent to this partition, accepting this partition, the appellant has sold some of the properties which he has got through the partition to third parties as well as the respondent herein. The Muchalika - Ex.B.9 dated 08.04.1974 is a concocted document and execution of the same is denied, as forged. Being an unregistered document, Ex.B.9 cannot be looked into and for want of sufficient stamp duty, the document is liable to be impounded.

Even though, the appellant has examined the socalled Scribe and the attesting witness of Ex.B.9, the document is inadmissible in evidence. While so, the Courts below have rightly rejected Ex.B.9. Hence, the appellant herein has no legs to agitate before this Court in the Second Appeal.

18.The kist receipts or issuance of patta and joint patta will not confer any title to the appellant over the suit property. After the family property divided by metes and bounds, the respondent from out of the income derived through the property allotted to him had purchased the suit properties. The question of establishing the fact that he had separate source of income apart from the joint family property, does not arise. Once the joint family property being divided among the brothers and given exclusive possession and enjoyment, that properties become exclusive properties of the respective parties. Therefore, the second appeal is liable to be dismissed for lack of bona fide.

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19.As a rebuttal to the submission, the learned counsel for the appellant would rely upon the following two judgments:-

(i) **D.S.Lakshmaiah and others v. L.Balasubramanyam and others**
(Manu/SC/0639/2003) and

(ii) **Rangammal v. Kuppuswami and others** (Manu/SC/0620/2011).

20. The learned counsel for the appellant would submit that the burden of proving the joint family nucleus has been wrongly shifted on the appellant/defendant by the Courts below. Having established that there was joint family property and there was no other source of income for the plaintiff to acquire the suit properties, the respondent/plaintiff ought to have shown evidence that he had independent source of income to purchase the suit properties. The partition deed – Ex.A.1 relied by the respondent/ plaintiff is of the year 1965. Whereas, one of the suit property was purchased in the year 1961 itself much prior to the date of partition deed. Even the said partition was not between the appellant and the respondent but only between the two wives of Pappaiah. Contrarily, according to the respondent/plaintiff, the family properties were divided as early as in the year 1949 and the same was reduced into writing in the year 1965.

21.Ex.A.1 - partition deed dated 19.03.1965 has been executed by Bairapa and Nanjappa who are the sons of Pappaiah born through his senior wife Maramma along with Nanjappa and Marappa sons of Pappaiah born through junior Maramma. The properties have been divided into two and has been placed under two schedules. The properties in 'A' schedule has been allotted to first wife senior Maramma and her sons Bairapa and Nanjappa and 'B' schedule properties have been allotted to second wife Junior Maramma and her sons Nanjappa and Marappa.

22.Ex.A.2 is the sale deed dated 07.09.1961. This sale deed has been executed in favour of the respondent/Nanjappa, in respect of the portions of the land falling under S.No.695/1, 797 and S.No.657. If really, Ex.A.1 partition deed was in respect of the joint family properties, then, the properties covered under this sale deed - Ex.A.2 ought to have found place either of the schedule 'A' or 'B'. When the parties not included these items of property in 1965 partition deed, in which, the appellant is one of the signatory, it clearly indicates that Pappaiah having two wives with four sons had divided the family properties as early as in the year 1949 itself, which fact is also found place in the recital of Ex.A.1. Therefore, the contention of the appellant

that there was no division of property among the family members in the year 1949 or the properties acquired in the name of the respondent/ plaintiff before the year 1974 were from out of the family nucleus does not stand the test of legal scrutiny.

23.The properties purchased by the respondent/ plaintiff in his name vide Ex.A.2 in the year 1961 does not find place in the partition deed – Ex.A.1, in which, the appellant/ defendant is one of the signatory. If really, the properties were purchased in the name of elder member of the joint family members, the parties to the partition ought not to have allowed to exclude this property. It is to be bear in mind, when the oral partition effected in the year 1949 and came to be reduced into writing in the year 1965, there were other stake holders born to the first wife of Pappaiah apart from the appellant and respondent who were the sons born through the second wife of Pappaiah. So, the reference of 1949 partition in Ex.A.1 and non inclusion of the property covered under Ex.A.1 sale deed in the partition deed clearly proves the case of the respondent/ plaintiff that there was partition among the sons of Pappaiah much prior to 1965.

24.Now, while advertng to Ex.B.9 - Muchalika relied by the appellant/defendant, the properties dealt in this deed does not include the properties referred in the partition deed Ex.A.1. If really, the contentions of the appellant that the properties given to them under Ex.A.1 partition deed dated 16.03.1965 was enjoyed jointly by him and the respondent till 08.04.1974, the day on which Ex.B.9 was executed, then, all the properties allotted to them in schedule 'B' of the partition deed Ex.A.1 should have been included. Neither the partition deed - Ex.A.1 nor the properties covered under Ex.A.1 is referred in this deed. This glaring omission renders Ex.B.9 doubtful apart from the legal objection raised by the respondent that being unregistered and deficit stamped, it is inadmissible in evidence. Therefore, mere inclusion of name in revenue records without any basis will not confer any title or right of enjoyment over the properties. Through documents and by conduct the respondent has established title and possession to get decree of declaration and injunction over the suit properties. Therefore, this Court holds that the Second appeal deserves to be dismissed.

25.In the result, the Second Appeal is dismissed. The decree and judgment passed by the First Appellate Court in A.S.No.33 of 2002

dated 30.09.2003 in confirming the judgment and decree passed in O.S.No.512/1993 is hereby confirmed. There shall be no order as to costs.

04.02.2019

jbm

Index: Yes
Speaking order

To

1.The Subordinate Judge,
Hosur.

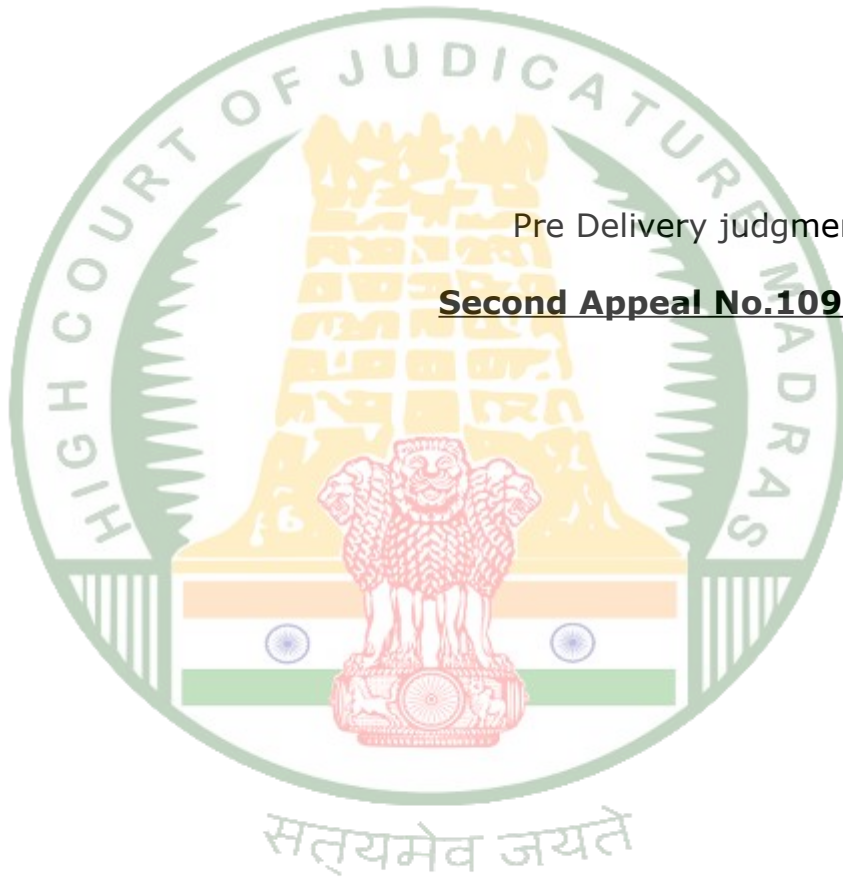
2.The District Munsif,
Thenganickottai.



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Dr.G.JAYACHANDRAN.J.,

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Pre Delivery judgment made in
Second Appeal No.1097 of 2004

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