

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.06.2019

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.747 of 2006

1.K.V.Komarasamy

2.Easwari ...Appellants / Appellants /Defendants 1 & 2

Vs

1.Jayakumar ...1st Respondent /Ist Respondent/Plaintiff

2.Manoharan ...2ndRespondents/Respondent/
3rd defendant

Prayer :- Second Appeal filed under Section 100 of the Civil Procedure Code, preferred against the judgment and decree of the learned Principal District Judge of Erode District at Erode in A.S.No.180/2002 dated 28.4.2004, confirming the judgment and decree of the learned Subordinate Judge of Bhavani in O.S.No.17 of 1999 dated 30.10.2001.

For Appellants : Mr.Sharath Chandran

For Respondents : Mr.N.Manokaran [R1]

R2 - No appearance

JUDGMENT

The defendants 1 and 2, who are unsuccessful both before the trial Court and also the first appellate Court, are the appellants herein. The plaintiff/first respondent has laid a suit for partition and for permanent injunction. Parties would be referred to by their ranks before the trial Court.

2.1 The dispute pertains to a partition of the estate of a certain Thavasiappa Gounder, who is said to have left under a specific share, to which the plaintiff was entitled to. There are five items of properties which have a consolidated extent of 4.84 acres, and they are agricultural lands. The suit properties were held by Thavasiappa Gounder as ancestral properties.

2.2 Thavasiappa Gounder was married to Karuppayammal and they had four children namely Eswari, Subramaniam, Pavayee and Rasammal. Thavasiappa Gounder died some 25 years prior to the institution of the suit in the year 1999. His daughter Pavayee pre-deceased him even as a minor. According to the plaint, his son Subramaniam also pre-deceased Thavasiappa Gounder. Thereafter, Karuppayammal, Eswari, Rasammal had divided the properties in equal shares. Rasammal, the mother of the plaintiff died when the plaintiff was barely seven years old, and the plaintiff as her son, claims partition of his 1/3 share as the successor to his mother's estate.

2.2. In between, both the plaintiff and the first defendant had laid separate suits in O.S.No.1169/94 and O.S.No.181/95 respectively on the file of District Munsif Court, Bhavani, for injunction against each other. In the suit laid by the first defendant in O.S.No.181/95, he had pleaded that on 31.01.1994, he had purchased 10/12th share of the suit properties from Karuppayammal. It may be stated here that the first defendant had married Eswari, the second defendant, one of the co-sharers of the suit properties. Both the suits were tried jointly and by a common judgment, it came to be dismissed and no appeal was preferred against it.

3.1 The defendants 1 and 2 are the contesting defendants and it is their case that the suit property was an ancestral property in the hands of Thavasiappa Gounder, and that it originally belonged to Thavasiappa Gounder's father Kumarasamy Gounder. While so, Thavasiappa Gounder had died some 30 years prior to the institution of the suit, whereupon Vide a notional partition under Section 6 of the Hindu Succession Act (as it stood then), half share came to be allotted to Thavasiappa Gounder and the other half share came to the share of his son Subramaniam. The half share of Thavasiappa Gounder equally devolved on his widow, Karuppayammal, his son Subramaniam and his two surviving daughters namely the second defendant (Eswari) and the plaintiff's mother Rasammal. In other words, Subramaniam had 5/8 share in the suit properties, whereas all the female heirs were entitled to 1/8 share each.

3.2. Subramaniam died a bachelor few years after the death of his father Thavasiappa Gounder. On his death, the share he was holding in the suit properties devolved on his only heir, his mother Karuppayammal, and Karuppayammal herself had 1/8 share and on obtaining her son's Subramaniam's $\frac{1}{2}$ share, her entire share in the property enlarged to 5/8 share.

3.3 While so, on 30.11.1994, Karuppayammal had sold what she claim as her 10/12th share in the suit property to the first defendant (husband of the second defendant). So far as

plaintiff is concerned, he can claim not more than 1/8 share.

4. Before the trial Court, both the parties adduced oral and documentary evidence. The trial Court held that the sale deed executed by Karuppayammal is a sham document, as no consideration had passed under it, and that Karuppayammal purported to sell a larger share than her due in the property, and it accordingly granted a preliminary decree for 1/3 share in the suit properties. It also entered a finding that Subramaniam had pre-deceased Thavasiappa Gounder.

5. The first appellate Court adopted the same line of reasoning of the trial Court and arrived at an identical conclusion and dismissed the appeal preferred by the defendants 1 and 2. Hence, they are before this Court.

6. This appeal is admitted on the following substantial questions of law :

1. Are the courts below right in calculating the shares of parties overlooking the principles of Hindu Law?
2. Is the lower appellate court justified in holding that Ext.A-4 sale deed is a sham and nominal document overlooking that there is no pleadings by the parties to that effect?
3. Is the lower appellate court being the final court of facts, justified in not considering the oral evidence let in by the parties?

7. The learned counsel for the appellants argued that while P.W.1 (father of the plaintiff) in his chief examination had deposed that Subramaniam had pre-deceased his father, consistent with the plea in the plaint, in his cross-examination he has tacitly admitted that Subramaniam might have died only after the death of Thavasiappa Gounder. In particular, he would say Subramaniam had died even before he (P.W.1) married Rasammal and that he knew nothing about the family of Thavasiappa Gounder, prior to his marriage to Rasammal, and whereas on the side of the defendants, the first defendant was examined as D.W.1, and he in his testimony has asserted that Subramaniam had died only after the demise of Thavasiappa Gounder and this has not been rebutted to the contra. At any rate, the trial Court has rendered a finding that :

- (a) Subramaniam had died only before the death of Thavasiappa Gounder, if that is so, then the shares of the parties will work out in the way it has been pleaded by the defendants.
- (b) Turning to Ext.A-4, Karuppaayammal, the vendor under Ext.A4 sale deed was alive when the plaintiff laid the suit. This is evident from the cross-examination of D.W.1 (first defendant), wherein while deposing on 12.09.2001, he has testified that his mother-in-law (Karuppaayammal) was available. Ext.A-4 cannot be challenged in the absence of the executant of the document. Secondly, there is hardly any pleading alleging that Ext.A-4 was sham. Thirdly, even if it was a sham document, unless fraud is established at the instance of the maker or executant of the document, it cannot be gone into in view of the Benami Transactions (Prohibition) Act, 1988.

8. The learned counsel for the first respondent would now argue that, the very fact Karuppaayammal purported to deal with a share larger than her entitlement itself would imply that the document was a fraudulent document obtained by fraud from an illiterate lady. Necessarily, if Ext.A-4 goes that property would come to the common pool, and that the property has to be divided equally between Karuppayammal, Eswari and Rasammal.

9.1 Since the argument of the first respondent counsel is rooted in an alleged fraud played in obtaining Ext.A-4, sale deed by the first defendant, a decision on the same would settle the issue. This is the document which was executed by Karuppaayammal and it is now seen that she was alive, which this Court comes to know from the cross-examination of D.W.1 . well after the institution of the present suit. And, when enquired in the course of the arguments, the learned counsel for the appellant showed the death certificate of Karuppayammal, having died sometime in 2006. The point is not when Karuppayammal died, but all about whether she was alive when the suit was laid. She, during her lifetime did not choose to challenge Ext.A-4. Even in her lifetime, the plaintiff has no locus standi to challenge it either. Secondly, the fact that Karuppayammal had purported to convey her share larger than hers does not ipso facto render the date of conveyance invalid. After all, under Section 8 of the Transfer of Property Act, 1882, Karuppayammal was entitled to transfer only so much right that she possessed, and even if anything was transferred in excess of her right that cannot invalidate the entire transaction, and that which was in excess of her right alone would not take effect.

9.2 As already indicated, if Subramaniam had died only after Thavasiappa Gounder, as regarding which, the Courts below have entered a finding, then his share would go to Karuppayammal. In

that eventuality, the ratio would work only in the manner as indicated by the defendants. Accordingly, the plaintiff would be entitled to 1/8 share in the suit properties.

10. This appeal is accordingly allowed and the judgment and decree of the learned Principal District Judge, Erode District at Erode dated 28.4.2004 in A.S.No.180/2002, is set aside and the plaintiff's 1/8 share in the suit property, and there shall be a preliminary decree for partition to the extent of the share declared. No costs.

Sd/-

Asst.Registrar (CCC)

/true copy/

Sub Asst. Registrar

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To:

- 1.The Principal District Judge
Erode.
- 2.The Subordinate Judge
Bhavani.
- 3.The Section Officer
VR Section, High Court, Madras.

S.A.No.747 of 2006

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