

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 05.08.2019

C O R A M

THE HONOURABLE MRS.JUSTICE R.HEMALATHA

S.A.No.18 of 2010

and

M.P.No.1 of 2010

L.Kandasami ... Appellant /Plaintiff

Vs.

1. Chandrammal

2. Suguna

3. Gayathri

4. Dayanidhi @ Dayalan ... Respondents/Defendants

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure against the decree and judgment dated 09.01.2009 passed in A.S.No.28 of 2008 by the Subordinate Judge, Vellore, reversing the decree and judgment dated 24.03.2008 passed in O.S.No.100 of 1994 by the Additional District Munsif, Vellore.

For Appellant : Mr.R.Ganesan

For Respondents : Mr.T.Dhanyakumar

JUDGMENT

The appellant is the plaintiff in O.S.No.100 of 1994 on the file of the Additional District Munsif, Vellore and respondent in A.S.No.28 of 2008 on the file of the Subordinate Judge, Vellore.

2. The parties are referred to as per their ranking in the original suit and at appropriate places, their ranks in the present appeal would also be indicated, if necessary.

3. The appellant/plaintiff filed the above suit for declaration of his title to the suit property and also for recovery of possession from the respondents/ defendants.

4. The brief case of the plaintiff is as follows. The plaintiff is the absolute owner of the suit property in S.No.79/1 of Idayanjath Village, Vellore measuring 0.50 acres. The suit property originally belonged to one Krishnasami Gounder and Ramasami Gounder. One Kannammal, the mother of the first defendant purchased the suit property through two

registered sale deeds dated 12.07.1952 (Ex.A1 and Ex.A2). According to the plaintiff the total extent of S.No.79/1 is 1.01 cents with a well and that his mother Kannammal purchased 0.64 cents and 2/3 share in the well. His further contention is that the remaining 1/3 share in the well and 0.32 cents of land is the ancestral property of Kandasami, Purushotaman and others. Subsequently, Kannammal settled the suit property in favour of the plaintiff through a registered settlement deed dated 04.02.1984 (Ex.A3). The plaintiff had further contended that ever since the date of execution of the settlement deed (Ex.A3), he has been in possession and enjoyment of the property. While so, when the plaintiff was away from the suit village, the first defendant took forcible possession of 0.50 cents in the suit property. Therefore, he filed the suit for a declaration of his title to the suit property and also for recovery of possession from the respondent/defendant.

5. During the pendency of the suit, the first defendant died and his Legal heirs were impleaded as defendants 2 to 6.

6. The first and second defendant filed their respective written statements and the defendants 3, 5 and 6 adopted the written statement filed by the 2nd defendant. In the written statement, the first defendant had contended that the suit property was already partitioned between the plaintiff and the first defendant through a registered partition deed dated 06.05.1983 (Ex.B1) by which the northern portion of the property was allotted to the share of the plaintiff and the southern portion was allotted to the share of the first defendant. According to him, the plaintiff and the first defendant were enjoying their respective shares ever since the date of partition deed and therefore, the suit filed by the plaintiff is liable to be dismissed.

7. The 2nd defendant in her written statement had contended that the defendants have been in possession and enjoyment of the southern portion of the suit property and therefore, they have prescribed title to the suit property by adverse possession and prescription. It is further contended by her that the settlement deed was not acted upon and therefore, the suit filed by the plaintiff is liable to be dismissed.

8. In the trial court, the plaintiff examined himself and one another witness and marked Ex.A1 to Ex.A11. The 2nd defendant examined herself and marked Ex.B1. After full contest, the Additional District Munsif, Vellore decreed the suit in favour of the plaintiff vide his decree and judgment dated 24.03.2008. Aggrieved over the same, the defendants filed an appeal in A.S.No.28 of 2008 before the Subordinate Judge, Vellore. The learned Subordinate Judge, Vellore allowed the appeal and dismissed the suit filed by the plaintiff vide his decree and judgment dated 09.01.2009, against which, the present second appeal is filed with the

following substantial questions of law.

(i) Whether Kannammal had lost her right over the properties covered under Ex.A1 and Ex.A2 in view of her attestation in Ex.B1.

(ii) Whether right and title to the property can be divested by mere attestation without knowing the contents of the document?

(iii) Whether Kannmmal has no right to execute the settlement deed Ex.A3.

9. The second appeal when came up for admission on 19.01.2010, notice regarding admission was issued to the respondents. Subsequently, the case was posted today.

10. The trial court in its judgment has held that since the mother of the plaintiff has settled the property in favour of the plaintiff, the plaintiff is entitled for the relief of declaration and injunction as prayed for by him. However, the first appellate court had held that since there was a partition deed between the plaintiff and the first defendant through Ex.B1, the suit filed by the plaintiff is liable to be dismissed. It is further observed by the first appellate court that since the plaintiff himself has admitted during the course of cross examination that there was a partition between him and the first defendant on 06.05.1983 (Ex.B1), he cannot maintain the present suit.

11. Mr.R.Ganesan, learned counsel appearing for the appellant contended that the mother of the plaintiff had settled the properties purchased by her through Ex.A1 and Ex.A2 in favour of the plaintiff through a registered settlement deed Ex.A3. He would also contend that when the settlement deed is a registered instrument, no oral evidence can be let in to contradict the recitals contained in the settlement deed, as per Section 91 and 92 of the Code of Civil Procedure.

12. His further contention is that since the first defendant had no pre-existing right over the suit property, the partition deed Ex.B1 will not clothe the first defendant with any right or title over the suit property.

13. Per contra, Mr.T.Dhanyakumar, learned counsel appearing for the respondents drew the attention of this court to the evidence of the plaintiff, wherein, he had admitted the execution of the partiton deed between him and the first defendant duringthe year 1983. His next contention is that though the suit property stands in the name of the mother of the plaintiff and the first defendant, the father of the plaintiff and the first defendant, purchased the suit property in his wife's name. He would therefore contend that after the death of the father, the plaintiff and the first defendant had partitioned the suit property through a registered partition deed (Ex.B1), in which the mother also

signed as a witness. He would therefore contend that the suit filed by the plaintiff is liable to be dismissed.

14. The bone contention of the learned counsel appearing for the appellant is that the partition deed Ex.B1 cannot be enforced, since there was no pre-existing right on the plaintiff and the first defendant over the suit property, on the date of entering into the partition deed.

15. When the plaintiff claimed title to the suit property through the settlement deed Ex.A3, the defendants claimed 1/2 share in the suit property through the partition deed Ex.B1. Though the partition deed resembles an exchange, it is not an exchange. There is no conveyance, but only transformation of the property. The estate in common is transformed, that is, it takes only another form namely, two or more estates to be possessed and enjoyed severally. By the partition a co-sharer gets a separate allotment by virtue of his antecedent title as co-sharer and there is no acquisition of property with an independent right.

16. A person cannot convey title merely because he was recognised as a co-sharer by another person when in fact he is not having any pre-existing right over such share.

17. A full bench of this court in Vairavan Chettiar V. Srinivasachariar reported in Vol.13 L.W. 475, has observed that it is difficult to see how there can be any co-parcenary between the father and sons as regards self-acquired property over which the sons have no legal claim or enforceable rights. Co-parcenary and survivorship imply the existence of co-ownership and of right of partition enforceable at law and a mere moral injunction can hardly be the foundation of a legal right.

18. So far as a mother's self acquisitions are concerned, a son though undivided has only a spes successions and he stands in relation to that property in the same position as an heir under Hindu Law. Therefore, there cannot be any quarrel about the proposition that a person not having a pre-existing right over a property, can neither claim a share as a matter of right nor venture to act upon such property in the capacity of a sharer. If it is the self-acquisition of the father, he can always treat his self acquired property as a joint family property and throw the same, into the common hotch pot and can enter into a partition with his sons. But this is altogether a different case where the suit property belonged to the plaintiff's and the first defendant's mother absolutely.

19. Though there is a contention in the written statement that the properties were purchased by the father of the plaintiff and the first defendant in the name of their mother, the same has not been substantiated. Even assuming that the properties were purchased by the father in the name of his

wife, Section 3(1)(a) of Benami Transactions (prohibition) Act 1988 would come into operation.

20. Section 3(1)(a) of the Benami Transaction (prohibition) Act, 1988 is extracted hereunder.

3. Prohibition of benami transactions.:- No person shall enter into any benami transaction.

1. Nothing in sub-section (1) shall apply to the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife of the unmarried daughter.

21. In the instant case, absolutely there is no pleading by the first defendant that the suit properties were not purchased by his father for the benefit of his mother. In the absence of a specific pleading, it has to be presumed that the purchase of the property by the father in the name of his wife was for the benefit of his wife.

22. The mother of the plaintiff and the first defendant, purchased the property during the year 1952. Though as per Hindu Succession Act 1937, the mother of the plaintiff had limited right on the date of purchase the properties, the same had blossomed into an absolute right as per Section 14 to the Hindu Succession Act 1956. It is relevant to extract Section 14 of the Hindu Succession Act.

Section 14. Property of a female Hindu to be her absolute property.

(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation.-- In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or

under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.

23. A perusal of the settlement deed also shows that the settlor had settled the properties in favour of the plaintiff and the possession was also given to him on the date of the settlement deed. The settlor had not reserved the right of cancellation of the settlement deed. The plaintiff had produced the registered settlement deed Ex.B3 and the original sale deeds Ex.A1 and Ex.A2. Therefore, the learned Additional District Munsif, Vellore was right in decreeing the suit.

24. The first appellate court without advertng to the provisions of law, had dismissed the suit merely based on the admissions made by the plaintiff as regards the execution of the partition deed Ex.B1. Even assuming that the partition deed Ex.B1 was executed, since both the plaintiff and the defendant did not have any pre-existing right on the date of execution of partiton deed, they cannot calim any right over the suit property through the partition deed Ex.B1.

25. As already observed, the property is the self acquired property of the mother of the plaintiff and since she has executed a settlement deed Ex.A3 in favour of the plaintiff, the plaintiff is entitled for a declaration and injunction as prayed for by him.

26. In the result,

(i) The second appeal is allowed. No costs. The connected miscellaneous petition is closed.

(ii) The decree and judgment dated 09.01.2009 passed in A.S.No.28 of 2008 by the Subordinate Judge, Vellore is set aside.

(iii) The decree and judgment dated 24.03.2008 passed in O.S.No.100 of 1994 by the Additional District Munsif, Vellore is upheld.

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Sd/-

Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

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To

1. The Subordinate Judge,
<https://hcservices.ecourts.gov.in/hcservices/>
Vellore.

2. The Additional District Munsif,
Vellore.

3. The Section Officer,
V.R. Section, High Court,
Madras.

+1cc to Mr.T.Dhanyakumar, Advocate, S.R.No. 67280
+1cc to Mr.R.Margabandhu, Advocate, S.R.No. 66809

S.A.No.18 of 2010 and
M.P.No.1 of 2010

SR(CO)
GN(06/02/2020)



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