



IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 12.02.2019

PRONOUNCED ON : 22.02.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.1195 of 2005

Chinnasamy ...Appellant/Plaintiff
Vs.
1. Periyasamy
2. Ramadoss ...Respondents/Defendants

Prayer:

Second Appeal filed under Section 100 of Civil Procedure Code, against the decree and judgment in A.S.No.34 of 2004 on the file of the subordinate judge, Kallakurichi dated 17.12.2004 in confirming the judgment and decree in E.A.No.822 of 2000 in E.P.3 of 2000 in O.S.No.805 of 1992 on the file of the District Munsif, Kallakurichi dated 04.11.2003.

For Appellant : Ms.U.Sabapathi Manonmani
for Mr.V.Ragavachari

For Respondents : No appearance. Set exparte vide
order dated 12.02.2019.

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 17.12.2004 passed in A.S.No.34 of 2004 on the file of the subordinate court, Kallakurichi, confirming the fair order and decree dated 04.11.2003 passed in E.A.No.822 of 2000 in E.P.3 of 2000 in O.S.No.805 of 1992 on the file of the District Munsif Court, Kallakurichi.

2. For the sake of convenience, parties are referred to as per their rankings in the trial court.

3. The petitioner has preferred the claim application under Order 21 Rule 58 of the code of Civil Procedure and as per his case, the first respondent is the decree holder in O.S.No.805 of 1992 and the second respondent is the judgment debtor and the first respondent had initiated the Execution Proceedings against



the second respondent for recovering the suit amount by initiating action in respect of the petition schedule property by attaching and bringing the same for sale and it is stated that the petition schedule property is the self acquired property of the petitioner and he had purchased the western half of the said property from Marimuthu Padayachi for Rs.70/-by way of an oral sale and constructed a hut and residing in it. Lateron, he had purchased the eastern half of the petition schedule property from one Palanimuthu Padayachi by way of the sale deed dated 12.12.1955 and constructed a terraced house and residing in the same and thus, it is only the petitioner who has title, possession and enjoyment of the petition schedule property and he is also paying house tax in respect of the same and also has prescribed title to the same by way of adverse possession on account of his long and continuous enjoyment of the same beyond the statutory period and the second respondent has no title or right over the same and therefore, the first respondent/decree holder is not entitled to proceed against the petition schedule property belonging to the petitioner on the footing that the same belongs to the second respondent and accordingly it is stated that the petitioner has been necessitated to raise the attachment effected in respect of the petition schedule property and hence the petition.

4. The first respondent resisted the abovesaid claim application preferred by the petitioner contending that the petitioner is the father of the second respondent and the joint family consisting of the petitioner and the second respondent ancestrally owned 5 acres of land and out of the income derived from the same, the petitioner had acquired the petition schedule property and it is only the second respondent, who is in the possession and enjoyment of the petition schedule property and the petitioner is residing in a thatched shed house and the suit debt had been incurred by the second respondent only for meeting the family necessity and needs and therefore, the same is binding upon the petitioner and only with a view to defeat the decree obtained by the first respondent, the claim application has been falsely preferred by the petitioner and therefore, sought for the dismissal of the claim petition.

5. In support of the Petitioner's case, P.Ws.1 and 2 were examined and Exs.A1 to A4 were marked. On the side of the respondent R.W.1 was examined. No document has been marked.

6. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the courts below were pleased to dismiss the claim application preferred by the petitioner. Aggrieved over the same, the present second appeal has been preferred by the petitioner.



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7. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration.

- "a) Whether the courts below are justified in dismissing the claim petition even without adjudicating the title of the appellant?
- b) Whether the courts below are justified in holding that the second respondent is the manager of the family, when there is no absolute pleadings and evidence to that effect?
- c. Whether a claim petition could be disposed of even without framing an issue?

8. The materials placed on record go to show that the first respondent, based on the decree obtained by him against the second respondent in O.S.No.805 of 1992, had laid the Execution Proceedings against the second respondent for the collection of the amount due to him and proceeded to execute the decree by attaching the petition schedule property and bringing the same for sale. Claiming that the petition schedule property absolutely belongs to him, the petitioner/claimant, has preferred the claim application under Order 21 Rule 58 of the Civil Procedure Code. The petitioner claims title to the petition schedule property by way of two modes and according to the petitioner, he had purchased the western half portion of the petition schedule property by way of an oral sale for Rs.70/- from one Marimuthu Padayachi and constructed a hut therein and residing in it and subsequently purchased the eastern half portion of the petition schedule property by way of the registered sale deed dated 12.12.1955 from Palanimuthu Padayachi and put up a terraced house in the property and residing therein and the house tax had been assessed in his name and thus, the petitioner has claimed independent title in respect of the petition schedule property and contended that the second respondent has no title or right in respect of the same and therefore, according to him, the first respondent is not entitled to proceed against the second respondent in the Execution Proceedings by way of initiating action against the petition schedule property belonging to the petitioner and therefore, sought for the raising of the attachment in respect of the same.

9. Per contra, the first respondent has putforth the case that the petitioner is the father of the second respondent/judgment debtor and both the petitioner and the second respondent owned ancestrally 5 acres of land and out of the income derived there from, the petition schedule property had been acquired in the name of the petitioner and according to



him, it is only the second respondent, who is residing in the petition schedule property and furthermore, he had also taken a plea that inasmuch as the debt had been incurred by the second respondent for meeting the family expenses and needs, the debt is binding upon the petitioner and only to defeat the action in recovering the debt from the second respondent, the petitioner has come forward with the false application and therefore, sought for the dismissal of the same.

10. Considering the claim of title to the petition schedule property by the petitioner, as could be seen from the certified copy of the sale deed dated 12.12.1955 marked as Ex.A1, it is found that as put forth by the petitioner, he has purchased the eastern half portion of the petition schedule property from Palanimuthu Padayachi and it is thus found that the petitioner has clearly established that, it is he, who owns the eastern half of the property by way of Ex.A1 sale deed. Even, the first respondent in his counter, has admitted that the petition schedule property had been acquired only in the name of the petitioner, however, would plead that the same had been acquired in the name of the petitioner out of the income derived from the ancestral property. According to the first respondent, the joint family consisting of the petitioner and the second respondent owned 5 acres of land and out of the income derived from the said land, the petition schedule property had come to be acquired in the name of the petitioner. However, the abovesaid case of the first respondent is being seriously refuted by the petitioner. When, even as per the admitted case of the first respondent, the petition schedule property had been acquired in the name of the petitioner and when the petitioner has established by way of Ex.A1 sale deed that the eastern half portion of the petition schedule property had been purchased by him independently and enjoying the same by putting up the house construction thereon and considering the house tax receipts projected by the petitioner marked as Exs.A3 and A4 standing in the name of the petitioner, it is evident that it is only the petitioner, who had put up the construction in the petition schedule property and enjoying the same. As regards the claim of oral sale by the petitioner with reference to the western portion of the petition schedule property in the year 1950, though there is some contradiction in the case with regard to the evidence adduced by the petitioner as to the vendor from whom the abovesaid portion had been purchased, still it is seen that the first respondent has admitted that the petition schedule property, in entirety, had been purchased in the name of the petitioner and in such view of the matter, on the basis of the abovesaid contradiction, qua the vendor's name of the western portion of the petition schedule property, the claim of title of the petitioner to the western portion cannot be disbelieved. Furthermore, the abovesaid case of the petitioner



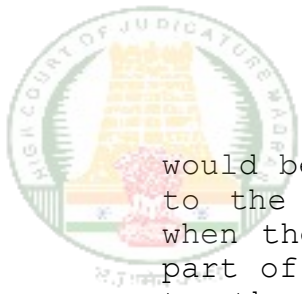
stands fortified considering the description of the property mentioned in Ex.A1 sale deed. As abovenoted, according to the petitioner's case, he had purchased the western half of the petition schedule property in the year 1950 by way of an oral sale and the eastern half portion by way of Ex.A1 sale deed dated 12.12.1955. According to the petitioner, after purchasing the western half portion, he had put up a thatched house and enjoying the same and while describing the property purchased under Ex.A1, it has been clearly averred that the said property is lying to the east of the house belonging to the petitioner and this would only go to establish that inasmuch as the western half of the petition schedule property had already been acquired by the petitioner by way of an oral sale and enjoying the same by putting up the hut construction, accordingly, while describing the property acquired by the petitioner by way of Ex.A1 with reference to the eastern half side, it has been described as lying to the east of the house belonging to the petitioner and as above noted when the first respondent himself had admitted that the suit property, in entirety, had been acquired only in the name of the petitioner, in all, it is found that the petitioner has established his claim of title to the petition schedule property. As above pointed out, the petitioner has established that it is only he who has been in the possession and enjoyment of the petition schedule property. The petitioner has marked house tax receipts in his name as well as the intimation sent to him by the Revenue authorities as regards the grant of patta in respect of the petition schedule property marked as Ex.A2.

11. When admittedly the petition schedule property is accepted to have been acquired in the name of the petitioner and as above discussed, when the documents projected in the matter and the description of the property given in Ex.A1 all would go to show that it is only the petitioner who has acquired the petition schedule property as putforth by him, in such view of the matter, when the first respondent has taken the plea that the petition schedule property had been acquired in the name of the petitioner out of the income derived from the joint family property and when the abovesaid defence projected by the first respondent is being refuted by the petitioner in toto, it is for the first respondent to establish that the joint family consisting of the petitioner and the second respondent owned ancestral property and the ancestral property owned by them yielded income at the relevant point of time and out of the income derived there from, the petition schedule property had come to be acquired in the name of the petitioner. However, with reference to the abovesaid defence putforth by the first respondent, absolutely there is no material projected on the part of the first respondent. The first respondent examined as R.W.1, during the court of cross examination, has admitted that



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the house tax in respect of the petition schedule property stands only in the name of the petitioner and admitted that there is no material to evidence that the petition schedule property stands in the name of the second respondent and would claim that the petitioner and the second respondent owned 9 acres of lands and admitted that he has no document to show that they had alienated the same and also admitted that he does not know the survey number of the 5 acres of land owned ancestrally by the petitioner and the evidence of R.W.1 being above, it is seen that there is no basis for the claim of the first respondent that the petitioner and the second respondent jointly owned ancestral property and the same had yielded income and out of the said income, the petition schedule property had been acquired in the name of the petitioner. Merely because the petition schedule property stands in the name of the petitioner/the father of the second respondent, that alone, would not be the basis for holding that he would have acquired the said property only out of the income derived from the ancestral property. When the petitioner and the second respondent has not been shown to be owning any ancestral property as such and also not shown to be deriving any income from the alleged ancestral property and when from the documents projected in the matter it is found that the petition schedule property had been acquired only by the petitioner out of his own funds and when there is no material placed on the part of the first respondent to hold that the second respondent has any claim of title, interest or right in the petition schedule property in any manner and the same has been in his possession and enjoyment at any point of time, in such view of the matter, as rightly putforth by the petitioner's counsel, the courts below, without considering the abovesaid aspects of the matter in the right perspective as per law and the principles governing thereof, seems to have erroneously held that the petition schedule property is not owned by the petitioner and accordingly erroneously determined that the first respondent is entitled to proceed against the petition schedule property on the footing that the same belong to the second respondent when there being no material to hold that the petition schedule property belong to the second respondent in any manner. The reasonings adduced by the courts below that as regards the joint family consisting of the petitioner and the second respondent, the second respondent is the manager of the joint family and therefore, the debt incurred by the second respondent is binding upon the petitioner / the father of the second respondent, when with reference to the same there is absolutely no pleading or evidence projected in the matter, it is seen that the courts below had erroneously presumed that the petitioner and the second respondent lived as joint family members and that it is the second respondent who had been managing the said joint family and therefore, the debt incurred by the second respondent



would be binding upon the father, the petitioner. With reference to the abovesaid contention putforth by the first respondent, when there is no proper plea as well as evidence adduced on the part of the first respondent and also sans any material pointing to the same, it is found that the courts below had, on an erroneous presumption, proceeded to hold that the debt incurred by the son would be binding upon the father ignoring the principles of law governing the abovesaid issue.

12. It is vehemently putforth by the petitioner's counsel that the courts below had proceeded to dispose of the claim application preferred by him under Order 21 Rule 58 without following the mandatory requirements provided therein and on that footing alone, according to her, the impugned judgment / fair order and decree of the courts below are liable to be set aside. Order 21 Rule 58 of Civil Procedure Code reads as follows:

58. Adjudication of claims to, or objections to attachment of, property - (1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained:

Provided that no such claim or objection shall be entertained-

(a) where, before the claim is preferred or objection is made, the property attached has already been sold; or

(b) where the court considers that the claim or objection was designedly or unnecessarily delayed.

(2) All questions (including questions relating to right, title or interest in the property attached) arising between the parties to a proceeding or their representatives under this rule and relevant to the adjudication of the claim or objection, shall be determined by the court dealing with the claim or objection and not by a separate suit.

(3) Upon the determination of the questions referred to in sub-rule(2), the court shall, in accordance with such determination,-

(a) allow the claim or objection and release the property from attachment either wholly or to



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such extent as it thinks fit; or

(b) disallow the claim or objection; or

(c) continue the attachment subject to any mortgage, charge or other interest in favour of any person; or

(d) pass such order as in the circumstances of the case it deems fit.

(4) Where any claim or objection has been adjudicated upon under this rule, the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(5) Where a claim or an objection is preferred and the court, under the proviso to sub-rule(1), refuses to entertain it, the party against whom such order is made may institute a suit to establish the right which he claims to the property in dispute; but, subject to the result of such suit, if any, an order so refusing to entertain the claim or objection shall be conclusive.

As per Order 21 Rule 58(2), it is found that, when a claim application has been preferred, all questions including questions relating to right, title or interest in the property attached arising between the parties to a proceeding or their representatives and relevant to the adjudication of the claim or objection, shall be determined by the court dealing with the claim or objection and not by a separate suit. Furthermore, Order 21 Rule 58(4) declares that adjudication made by the court under this rule, the order made by it in respect of the same shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree. A combined reading of clause(2) and clause (4) of Order 21 Rule 58 would go to show that the claim application preferred under Order 21 Rule 58 should be determined in the nature of a civil suit and accordingly questions relating to the title, right or interest in respect of the property attached should be independently determined by the concerned court by framing appropriate issues as if it is a regular suit and the parties are also not relegated to put forth their contentions by way of a separate suit and they are directed to resolve the dispute by filing the claim application in the executing court itself. In such view of the matter, when the abovesaid Rule read in toto directs that the claim application should be determined by the executing court as if it were a civil suit, in such view of the matter, as rightly putforth by the petitioner's counsel, the trial court without considering the scope and ambit of the abovesaid provisions of law in the right perspective, seems to have



disposed of the claim application preferred by the petitioner in a summary fashion without framing any issue relating to the right, title or interest involved in the matter and also without considering the materials placed on record in the right perspective. Similarly, the first appellate court has also failed to consider the relevant points for determination as regards the issues involved in the subject matter between the parties as per law and had proceeded to dispose of the appeal without formulating the appropriate points for determination as regards the title, right or interest in the subject matter as put forth by the respective parties. It is thus found that the approach of the courts below in disposing of the claim application in a perfunctory manner, without adhering to the principles and procedures adumbrated under Order 21 Rule 58, on that score also it is found that the impugned judgment / fair order and decree of the courts below are liable to be set aside.

13. In the light of the above discussions, when it is noted that the petitioner has established his claim of title, possession and enjoyment of the petition schedule property as put forth by him by placing acceptable and reliable materials and when the first respondent has failed to place any material holding that the second respondent has any claim of title, right or interest in the petition schedule property in any manner as put forth by him, in such view of the matter, when the first respondent is not entitled to proceed against the property belonging to the petitioner for realising the decree amount due to him from the second respondent and when the first respondent has also failed to establish that the debt incurred by the second respondent is binding upon the petitioner and when the courts below had adjudicated the said issues involved in the matter without framing any issues as regards the question of title, right or interest qua the subject matter and when the first respondent has failed to establish the existence of any ancestral nucleus and income derived there from and when the first respondent has failed to note that the separate character of the petition schedule property of the petitioner cannot assume the character of the joint family property on the mere pleas of the first respondent sans any material pointing to the same as above discussed and when the claim application has been disposed of by the courts below without adhering to the procedures and principles contemplated under Order 21 and Rule 58 of Civil Procedure Code, in all, it is found that the judgment / fair order and decree passed by the courts below are liable to be set aside. For the reasons aforesaid, it is found that the petition schedule property belongs to the petitioner, and the second respondent has no claim of title, right or interest in respect of the same and in such view of the matter I hold that the first respondent is not entitled to proceed against the petition schedule property in the



execution proceedings levied by him against the second respondent for the recovery of the debt due to him from the second respondent following the decree obtained by him in O.S.No.805 of 1992. The substantial questions of law formulated in the second appeal are accordingly answered in favour of the petitioner and against the first respondent.

14. In conclusion, the judgment and decree dated 17.12.2004 passed in A.S.No.34 of 2004 on the file of the subordinate court, Kallakurichi, confirming the fair order and decree dated 04.11.2003 passed in E.A.No.822 of 2000 in E.P.3 of 2000 in O.S.No.805 of 1992 on the file of the Principal District Munsif, Kallakurichi are set aside and consequently, E.A.No.822 of 2000 filed by the petitioner stands allowed with costs and accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

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To

1. The subordinate court,
Kallakurichi.
2. The District Munsif,
Kallakurichi.
3. The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.V.Radhavachari, Advocate, S.R.No.16415

S.A.No.1195 of 2005

RGN(CO)
RGA(28/10/2021)