

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 06.11.2019	Delivered on: 19.11.2019
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CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No. 1467 of 2005

Sarasu

... Appellant/Plaintiff

Vs.

1.Sengodu @ Sengoda Gounder(died)

...Respondent/1st Defendant

2.Perumayee

3.Sankar

..2nd & 3rd Respondents/2nd & 3rd Defendants

(R1 died, Appellant and Respondent No.3 are his legal representatives vide order of this court dated 06.11.2019 in USSR No. 1154/2015)

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 27.06.2005 made in A.S.No.49 of 2005 on the file of the Principal Subordinate Judge, Salem reversing the judgment and decree dated 04.01.2005 made in O.S.No.99 of 2003 on the file of the Principal District Munsif Court, Salem.

For Appellant : Mr. T.Murugamanickam
Senior Counsel for
Mr.V.Rajesh

For Respondents: Mr.K.Doraisamy
Senior Counsel
for M/s.Muthumani Doraisamy for R2

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R1 Died

JUDGMENT

This Second Appeal has been filed by the plaintiff against the judgment and decree passed by the Principal Sub-Judge, Salem in A.S.No.49 of 2005 dated 27.06.2005 reversing the judgment and decree passed by the Principal District Munsif, Salem, in O.S.No.99 of 2003 dated 04.01.2005.

2. The appellant herein had filed a suit in O.S.No.99 of 2003, on the file of the Principal District Munsif, Salem, for the relief of declaration of her title over the suit property and for recovery of possession. The learned Principal District Munsif, Salem, by the judgment dated 04.01.2005 had decreed the suit as prayed for without costs and directed the defendants 1 to 3 to handover the possession to the plaintiff within two months from the date of the judgment. Aggrieved by the same, the second defendant had filed an appeal in A.S.No.49 of 2005 on the file of the Principal Sub-Judge, Salem. The learned Principal Sub-Judge, Salem, by the judgment dated 27.06.2005 had allowed the said appeal and set aside the judgment and decree passed by the trial Court and dismissed the suit without costs. Aggrieved by the same, the plaintiff has filed the present second Appeal.

3. For the sake of convenience, the parties are referred to as described before the trial Court.

4. The averments made in the plaint are, in brief, as follows:-

(a) The plaintiff is the daughter of the first defendant. The second defendant is the daughter-in-law of the first defendant and the third defendant is the son of the second defendant. The first defendant's father Periyanna Gounder purchased the suit property under a registered sale deed dated 13.07.1967. The said Periyanna Gounder died intestate 15 years ago. After his death, the first defendant had inherited the suit property as his legal heir. Thereafter, the first defendant executed a registered settlement deed dated 06.12.1995 in favour of the plaintiff in respect of $\frac{1}{2}$ share of the property which was inherited by him from his father and also handed over the possession to the plaintiff. On the same date, the plaintiff and the first defendant had entered into an agreement and as per the said agreement, the first defendant has to collect the rent from the tenants and pay the same to the plaintiff. Accordingly, the first defendant had collected the rent from the tenants and paid to the plaintiff till the year 2000 and thereafter, the first defendant did not pay the amount to the plaintiff after collecting the rent from the tenants. However, the plaintiff was waiting patiently, as her father would pay the amount. On 26.11.2001, the property tax for the suit property was transferred to the name of the plaintiff.

(b) Since the first defendant had not paid the rent which was collected from the tenants, the plaintiff had issued a lawyer's notice on 15.11.2001, calling upon the first defendant to pay the amount which was collected as rent from the tenants. After receipt of the said notice, the first defendant on 06.12.1995 had sent a reply notice with false averments. In the said reply notice, he had stated that he cancelled the

settlement deed dated 06.12.1995 which was executed in favour of the plaintiff through the cancellation deed dated 05.10.2000. He further stated that he had executed a document in favour of the defendants 2 and 3 on 05.10.2000 settling all the properties which were inherited from his father including the suit properties. The first defendant is not entitled to cancel the settlement deed unilaterally. So, the cancellation deed dated 05.10.2000 and also the document which was executed by the first defendant in favour of the defendants 2 and 3 are not binding upon the plaintiff. Further, the first defendant had stated that the possession is only with him from 05.10.2000. Hence, it has become necessary for the plaintiff to file the above suit for the relief of declaration of her title and for delivery of possession of the suit property.

5. The averments made in the written statement filed by the defendants 1 to 3 are, in brief, as follows:-

(a) It is true that the plaintiff is the daughter and the second defendant is the daughter-in-law of the first defendant and the third defendant is the son of the second defendant. It is also true that on 13.07.1967, the first defendant's father Periyanna Gounder had purchased the suit property. It is also true that the said Periyanna Gounder died. It is also true that on 06.12.1995, the first defendant had executed a registered settlement deed in favour of the plaintiff but the same had been cancelled by the first defendant on 05.10.2000. The settlement deed dated 06.12.1995 was not at all acted upon. Further, the possession was not handed over to the plaintiff. For the notice issued by the plaintiff, the first defendant had sent a suitable reply on 06.12.1995. The averments made in the said reply notice are all true. The settlement deed dated 06.12.1995 was obtained by the plaintiff and her henchmen by threatening the first defendant but possession was not given to the plaintiff. It is false to state that the first defendant had executed an agreement to the plaintiff agreeing that he will collect the rent from the tenants and pay the same to the plaintiff. The alleged agreement might have been fabricated by using the signature of the first defendant. Hence, the said document is not valid in law.

(b) It is false to state that the first defendant had collected the rents from the tenants up to the year 2000 and paid the same to the plaintiff up to the year 2000 and thereafter, he did not pay the amount. The suit has not been properly valued for the purpose of Court fees and jurisdiction. The suit property absolutely belong to the first defendant. The defendants 2 and 3 executed a release deed in favour of the first defendant on 05.10.2000 and hence, the defendants 2 and 3 are unnecessary parties to the suit. Therefore, the defendants 1 to 3 prayed to dismiss the suit.

6. The first Appellate Court, while sending the material records to this Court, did not send the additional written statement filed by the defendants. However, the learned counsel for the appellant has filed a copy of the additional written statement filed by the first defendant in the typed set of papers.

7. The averments made in the additional written statement filed by the first defendant are in brief as follows:-

The suit property was purchased by the first defendant's father Periyanna Gounder under a registered sale deed dated 13.06.1967 and after his death, the first defendant inherited the suit property as his legal heir. In respect of the said property, the first defendant had executed a registered settlement deed in favour of his daughter (plaintiff) on 06.12.1995 in respect of $\frac{1}{2}$ share of the property and the same is the suit property. He also handed over the possession of the suit property to the plaintiff. Thereafter, an agreement was entered into between the plaintiff and the first defendant. In the said agreement, the first defendant agreed to collect the rent from the tenants and pay the same to the plaintiff. Accordingly, he collected the rent and paid to the plaintiff. The reply notice dated 06.12.2001 was not issued on the instruction given by the first defendant. Further, the first defendant did not execute any cancellation deed on 05.10.2000. Since the defendants 2 and 3 insisted the first defendant to execute a Will in favour of them in respect of the remaining property, the first defendant had signed in the document prepared by the defendants 2 and 3 believing that it was only a Will. Further the first defendant has not signed in the vakalat and in the written statement. The first defendant had cancelled the vakalat which was given to the previous counsel by issuing a lawyer's notice dated 04.08.2004. The averments made in the original written statement are denied by the first defendant and he has no objection for decreeing the suit as prayed for.

8. The first Appellate Court did not send the additional written statement filed by the defendants 2 and 3 also. However, from the judgments of the Courts below, it is seen that in the additional written statement filed by the defendants 2 and 3 they had pleaded that the first defendant had purposely changed his version and supported the case of the plaintiff. They further pleaded that the averments made in the additional written statement filed by the first defendant are all false. They also pleaded that the attitude of the first defendant is against the truth and denied and hence, they prayed to reject the additional written statement filed by the first defendant.

9. Based on the aforesaid pleadings, the learned District Munsif, had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined

herself as PW1 and also examined one more witness as PW2. She marked Exs.A1 to A8 as exhibits. On the side of the defendants, the first defendant was examined as DW1, the second defendant was examined as DW2 and one more witness was examined as DW3. They marked Exs.B1 to B9 as exhibits.

10. The learned District Munsif, after considering the materials placed before him found that after executing Ex.A1 settlement deed dated 06.12.1995 in favour of the plaintiff, the first defendant cannot cancel the said document unilaterally. He further found that though the first defendant in the original written statement had supported the case of the defendants 2 and 3 but subsequently, by engaging the another counsel had filed an additional written statement in which, he had admitted the execution of the settlement deed in favour of the plaintiff and possession also handed over to her and also admitted that in pursuance of an agreement between him and the plaintiff, he collected the rent and paid to the plaintiff. He also found that even assuming that possession was not given, at the time of executing the settlement deed, that would not invalidate the gift which was given by the first defendant in favour of the plaintiff. Accordingly, he decreed the suit as prayed for and directed the defendants to hand over the possession to the plaintiff within a period of two months from the date of the judgment.

11. Aggrieved by the same, the second defendant had filed an appeal in A.S.No.49 of 2005 on the file of the Principal Sub-Judge, Salem. The learned Principal Sub-Judge, Salem, found that since originally the suit property was purchased by the first defendant's father Periyanna Gounder, after his death, the first defendant inherited the property and hence, the suit property is the ancestral property of the first defendant. He further found that since the suit property is the ancestral property, the first defendant cannot execute a settlement deed in favour of the plaintiff. He further found that the plaintiff and the defendants 1 to 3 are coparceners and hence, the plaintiff has to file a suit for partition. Accordingly, he allowed the appeal and set aside the judgment and decree passed by the trial Court and dismissed the suit. Feeling aggrieved, the plaintiff has filed the present Second Appeal.

12. This Court, at the time of admitting the second appeal, has formulated the following substantial question of law:-

"Whether the finding of the lower appellate Court that the property forming subject matter of the suit in favour of the plaintiff is ancestral property is opposed not only to the pleadings, but also the evidence on record? "

13. Heard Mr.T.Murugamanickam, the learned Senior Counsel, assisted by Mr.V.Rajesh, learned counsel for the

appellant/plaintiff and Mr.K.Doraisamy, the learned Senior Counsel, assisted by M/s.Muthumani Doraisamy, the learned counsel for the second respondent.

14. Substantial Question of law:

The learned Senior Counsel for the appellant/plaintiff has submitted that in the original written statement filed by the defendants 1 to 3, they had categorically admitted that the suit property was purchased by the first defendant's father Periyanna Gounder under a registered sale deed dated 13.07.1967 and the said Periyanna Gounder subsequently died. He further submitted that the first defendant being the sole heir of the said Periyanna Gounder, after the death of the said Periyanna Gounder, the first defendant alone inherited the properties which were purchased by the said Periyanna Gounder under a registered sale deed dated 13.07.1967. He further submitted that since the first defendant inherited the said properties from his father, the said property is his separate property.

15. He further submitted that, it is not the case of the defendants that the said properties are the ancestral properties and it is also not their case that the first defendant treated the said properties as Joint Family properties, but the first Appellate Court has taken a view that the suit properties are ancestral properties and the plaintiff and the defendants 1 to 3 are the coparceners and hence, the first defendant is not entitled to execute Ex.A1 settlement deed in favour of the plaintiff. He further submitted that the first Appellate Court committed grave error in holding that the suit properties are the ancestral properties of the first defendant. He further submitted that since the suit property is the separate property of the first defendant, he is entitled to execute a settlement deed in favour of the plaintiff.

16. He further submitted that the evidence on record would show that in pursuance of Ex.A1 settlement deed, the possession of the suit property has also been given to the plaintiff. He further submitted that though the defendants 1 to 3 had filed a common written statement denying the allegations made in the plaint that there is no agreement between the first defendant and the plaintiff for collecting the rent and paying to her, in the additional written statement the first defendant had categorically admitted that he only collected the rent from the tenants and paid the same to the plaintiff. He further submitted that even assuming that the possession was not given that would not invalidate the gift which was made under Ex.A1. He further submitted that taking into consideration of all the aforesaid facts, the trial Court had rightly decreed the suit as prayed for, but, the first Appellate Court had erroneously reversed the well considered judgment and decree of the trial

Court and dismissed the suit and therefore he prayed to allow the Second Appeal and set aside the judgment and decree passed by the first Appellate Court and restore the judgment and decree of the trial Court.

17. The learned Senior Counsel for the appellant/plaintiff in support of his contentions relied upon the following decisions:-

1) P.Periasami (Dead) by LR's. Vs. P.Periathambi and others, 1996-1-L.W.21.

2) Bachhaj Nahar Vs. Nilima Mandal and another, (2008) 17 SCC 491.

18. Per contra, the learned Senior Counsel for the second respondent has submitted that it is an admitted fact that the first defendant's father Periyanna Gounder had purchased the suit property and other properties under a registered sale deed dated 13.07.1967 and after his death, the first defendant succeeded to his properties. Since the first defendant inherited the properties from his father, it has to be treated as his ancestral property. He further submitted that since the suit property is the ancestral property, after the birth of the first defendant's son, the coparcenary revives and hence, without consent of other coparceners, he cannot execute a settlement deed in favour of his daughter (plaintiff). He further submitted that admittedly the possession of the suit property is only with the defendants and that itself would show that the Ex.A1 settlement deed was not acted upon. He further submitted that since Ex.A1 settlement deed was not acted upon, the first defendant had rightly cancelled the same under Ex.B6 and execute a registered release deed (Ex.B7) in favour of the defendants 2 and 3. He further submitted that the first defendant had admitted the aforesaid facts in his reply notice and also in the original written statement, but subsequently he was won over by the plaintiff and hence he took 'U' turn and supported the case of the plaintiff. He further submitted that since the suit property is the ancestral property, the settlement deed executed by the first defendant in favour of the plaintiff is invalid. He further submitted that the trial Court without considering the aforesaid facts had mechanically decreed the suit as prayed for, but, the first Appellate Court had rightly set aside the judgment and decree passed by the trial Court and dismissed the suit and in the said factual findings, this Court cannot interfere and therefore, he prayed to dismiss the Second Appeal.

19. In support of the aforesaid contentions, the learned Senior Counsel for the second respondent relied upon the decision in *Shyam Narayan Prasad Vs. Krishna Prasad and others*, (2018) 7 SCC 646.

20. It is an admitted fact that the first defendant's father Periyanna Gounder had purchased the suit property and other properties under a registered sale deed dated 13.07.1967 and thereafter, he died leaving behind his only son first defendant as his sole legal heir. The defendants in their written statement have not taken a plea that the suit properties are the ancestral properties to the first defendant in which, the defendants 2 and 3 also having shares as coparceners and Ex.A1 settlement deed executed by the first defendant in favour of the plaintiff is invalid on the ground that no consent had been obtained from them. On the contrary, they had taken a plea that the first defendant had executed the settlement deed in favour of the plaintiff and subsequently, he cancelled the same. The defendants, nowhere stated either in the original written statement or in the additional written statement that the suit properties are the ancestral properties.

21. In *Bachhaj Nahar Vs. Nilima Mandal and another* (cited supra), the Hon'ble Supreme Court in para No.13 has observed as follows:-

"13. The object of issues is to identify from the pleadings the questions or points required to be decided by the Courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the Court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue. As a result the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief. Therefore, the Court cannot, on finding that the plaintiff has not made out the case put forth by him, grant some other relief. The question before a Court is not whether there is some material on the basis of which some relief can be granted. The question is whether any relief can be granted, when the defendant had no opportunity to show that the relief proposed by the Court

could not be granted. When there is no prayer for a particular relief and no pleadings to support such a relief, and when the defendant has no opportunity to resist or oppose such a relief, if the Court considers and grants such a relief, it will lead to miscarriage of justice. Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief."

22. From the aforesaid decision, it is clear that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief. It is also clear that the Court cannot, on finding that a party has not made out the case put forth by him, grant some other relief. In this case, as already pointed out that the defendants have not at all taken a plea in the written statement and also in the additional written statement that the suit property is the ancestral property in which, the defendants 2 and 3 are also having right. On the contrary, in para No.3 of the original written statement, they admitted that the suit property was purchased by the first defendant's father Periyanna Gounder on 13.07.1967. They also admitted that the first defendant had executed a settlement deed in favour of the plaintiff on 06.12.1995, but the same was cancelled on 05.10.2000.

23. It is also to be pointed that in para No.9 of the written statement, the defendants had pleaded that the suit property absolutely belongs to the first defendant. They also pleaded that the defendants 2 and 3 had released their rights through a registered release deed dated 05.10.2000 and hence they are unnecessary parties to the suit. Under the said circumstances, it is not known how the first Appellate Court has held that the suit property is the ancestral property in which the plaintiff and the defendants 2 and 3 also got right.

24. In P.Periasami (Dead) by LRs. Vs. P.Periathambi and others, (cited supra), the Hon'ble Supreme Court in para No.5 has observed as follows:-

"5. In view of the interpretation put by the Full Bench of the Madras High Court that the sons in such a situation would get self acquired property of their father by inheritance, having the status as tenants-in-common, they would not thus treat such properties in their hands, even though joint in

enjoyment, as joint Hindu family properties. Likewise the income derived therefrom, if employed to purchase other property, would not cloak the new acquisition with the character of joint Hindu family property but may otherwise be joint properties. We would rather decide this matter on this principle, and we do so accordingly, to hold that the properties which came from the elder, self acquired as they were, and there being no grandsons, cannot be held by the parties to be joint Hindu family properties but as joint properties simpliciter, capable of partition on that basis."

25. In view of the aforesaid decision also, it is clear that the property inherited by the son from his father is his separate property in which during his life time, his son cannot claim any right.

26. In Shyam Narayan Prasad Vs. Krishna Prasad and others, (cited supra), on 31.07.1987, certain family property was partitioned between one Gopalji Prasad and his five sons namely, Laxmi Prasad, Ayodhya Prasad, Shyam Narayan Prasad, Dr. Onkarnath Gupta and Sureshkumar. The sons of Laxmi Prasad filed a suit for a declaration that the document dated 30.01.1990 (Ex.P24) executed between the defendants 1 and 2 (Shyam Narayan Prasad and Laxmi Prasad) is invalid and for certain other reliefs. In that case the Hon'ble Supreme Court in paragraph No.16 has held as follows:-

"16. Therefore, the properties acquired by defendant No.2 in the partition dated 31.07.1987 although are separate property qua other relations but it is a coparcenary property insofar as his sons and grandsons are concerned. In the instant case, there is a clear finding by the trial court that the properties are ancestral properties which have been divided as per the deed of partition dated 31.07.1987. The property which had fallen to the share of defendant No.2 retained the character of a coparcenary property and the plaintiffs being his sons and grandson have a right in the said property. Hence, it cannot be said that the suit filed by the plaintiffs was not maintainable."

27. But in the present case the facts are totally different. In this case, the first defendant has not acquired the property through partition. He got the property by way of inheritance. Hence, the suit property is his separate property. Therefore, the aforesaid decision will not apply to the facts of this case.

28. As already pointed out that the suit property and other properties were purchased by the first defendant's father Periyanna Gounder under a registered sale deed dated 13.07.1967. So, it was self acquired property for the said Periyanna Gounder. As per Section 8 of the Hindu Succession Act, after his death, the first defendant being only son and as sole legal heir, inherited the said properties. Therefore, it is the separate property for the first defendant. By no stretch of imagination, it can be said as ancestral property. In case the first defendant got the suit property in a partition, as a coparcener, then as soon as his son is born, the coparcenary revives but, in this case, the first defendant has not acquired the property as a coparcener. On the contrary, he inherited the property of his father under Section 8 of the Hindu Succession Act. So, the said property is the separate property and during his life time, his son or daughter cannot claim any right. But without taking into consideration of the aforesaid facts, the first Appellate Court mis-constructed the position of law and arrived at a conclusion that the suit property is the ancestral property in which, the plaintiff and defendants 2 and 3 are having equal share as coparceners. The said finding is against the law and therefore, the same is liable to be set aside.

29. For the aforesaid reasons, the findings of the first Appellate Court are liable to be set aside. Accordingly, the substantial question of law is answered in favour of the appellant/plaintiff.

30. In the result, the Second Appeal is allowed. The judgment and decree passed by the first Appellate Court are set aside and the judgment and decree passed by the trial Court are restored. The defendants 2 and 3 are directed to deliver vacant possession of the suit property to the plaintiff within a period of two months from the date of receipt of a copy of this judgment. Considering the facts and circumstances of the case, the parties are directed to bear their respective costs.

s/d-

Assistant Registrar(CS I)

True Copy

Sub-Assistant Registrar

dna

To

1.The Principal Subordinate Judge, Salem.

2.The Principal District Munsif Court, Salem.

Copy to

The Section Officer
VR Section
High Court, Madras 104.

+1 CC to Mr.V.Rajesh, Advocate sr 95980.

+1 CC to Mr. Muthumani Doraisamy, Advocate sr 95921.

S.A.No. 1467 of 2005

VGI (CO)
SP(10/11/2020)



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