

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.09.2019

PRONOUNCED ON : 01.10.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.761 Of 2005

1. Srirangam alias Sridevi

2. V. Alamelu

...
Appellants/Plaintiffs

Vs.

1.Venkatesan

2. Prakash

3. Bhaskar

4. Kanniappan

5. Susheela

6. Chandra

... Respondents /Defendants 2,5, 6, 1, 3 & 4

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 30.11.2004 made in A.S.No.78 of 2003 on the file of the Additional Subordinate Judge, Chengalpet, modifying the judgment and decree dated 25.06.2003 made in O.S.No.95 of 1996 on the file of the District Munsif, Chengalpet.

For Appellants : Mr.R.S.Varadarajan

For Respondents : Mr.R.Karunakaran for R1 to R3
Given up R4 to R6.

JUDGMENT

This second appeal has been filed by the plaintiffs 2 and 3 against the judgment and decree passed by the Additional Sub-Judge, Chengalpet in A.S.No.78 of 2003 dated 30.11.2004 modifying the judgment and decree passed by the District Munsif, Chengalpet, in O.S.No.95 of 1996 dated 25.06.2003.

2. Originally one Nagammal had filed a suit in O.S.No.95 of 1996 on the file of the District Munsif, Chengalpet, to divide the suit properties into five equal shares and allot one such share to her. During pendency of the said suit, she died and the plaintiffs 2 and 3 impleaded themselves as LR's of the original plaintiff Nagammal.

3. The learned District Munsif, Chengalpet, by the judgment dated 25.06.2003 had passed a preliminary decree directing to divide the suit properties into five equal shares and allot one such share to the plaintiffs 2 and 3. Aggrieved by the same, the defendants 2, 5 and 6 had filed an appeal in A.S.No.28 of 2003 on the file of the Additional Sub-Judge, Chengalpet. The learned Additional Sub-Judge, Chengalpet, by the judgment dated 30.11.2004 had partly allowed the said appeal and modified the judgment and decree passed by the District Munsif Court, Chengalpet to the effect that the plaintiffs 2 and 3 are entitled to 1/15th share in the suit properties except in item Nos.6, 33, 34 and 35. He dismissed the suit in respect of the item Nos.6, 33, 34 and 35. Feeling aggrieved, the plaintiffs 2 and 3 had filed the present second appeal.

4. For the sake of convenience, the parties are referred to as described before the trial court.

5. The averments made in the amended plaint are, in brief, as follows:

a) The suit 'A' and 'B' schedule properties are the self-acquired properties of late Ethiraju Pillai who died intestate in the year 1987. The first plaintiff is the wife and the defendants 1 to 4 are the sons and daughters of late Ethiraju Pillai and the first plaintiff. After the death of Ethiraju Pillai, the first plaintiff and the defendants 1 to 4 succeeded to the suit properties as his legal heirs. The suit properties are the joint family properties. The first plaintiff is entitled to 1/5th share in the suit properties and the defendants 1 to 4 are entitled to 1/5th share each.

b) After the death of Ethiraju Pillai, the suit properties were managed and the lands were cultivated by the defendants 1 and 2, being the male members and shared the income with the first plaintiff and the defendants 3 and 4 till the middle of 1988. Thereafter, the first plaintiff was deprived of her rightful share in the income from the suit properties. Item No.6 of the suit properties was purchased by late Ethiraju Pillai from and out of the income from the joint family properties. For proper adjudication, the defendants 5 and 6 were impleaded as parties.

c) The defendants 1 and 2 began to take an hostile attitude towards the first plaintiff. She was not allowed to participate in the incomes and her demand for partition of the suit properties was not acceded to by the defendants. Hence the first plaintiff had issued a lawyer's notice on 06.08.1989 demanding partition. Except the defendants 1 and 3, the others returned the notices. But none chose to issue any reply. Hence the first plaintiff was constrained to file a suit for partition.

6. During pendency of the said suit, the first plaintiff

had executed a registered Will dated 31.05.1990 in respect of her undivided 1/5th share in the suit property in favour of her grand daughters viz., the plaintiffs 2 and 3. Thereafter, the first plaintiff died on 20.12.2001 and after her death, the said Will came into force and the plaintiffs 2 and 3 succeeded to the share of the deceased Nagammal. Hence, the plaintiffs 2 and 3 impleaded themselves as parties.

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

a) The first plaintiff had filed the suit at the instigation of her eldest son Kanniappan (first defendant) and who remained exparte, with the evil intention of claiming share in the self-acquired properties of the second defendant. The first defendant has been supporting the first plaintiff in the above suit. The second defendant denies the allegation that the suit 'A' and 'B' schedule properties are the self acquisition of Ethiraju Pillai and that after his death, the first plaintiff and the defendants were succeeded to the suit properties and that the first plaintiff is entitled to 1/5th share in the suit properties. The second defendant had been the Secondary Grade Teacher from 11.09.1969 and thereafter he had been promoted as Tamil Pandit. He was having good income of above Rs.1500/- p.m., as a teacher and from tuition also, he had earned and saved monies and had sufficient amount and purchased Item Nos.1 to 5 of plaint 'A' schedule properties for proper and valuable consideration under the sale deed dated 12.03.1986 from one Pandurangan and others. The Patta No.705 for the said items stands in the name of the second defendant. With the above said income, the second defendant had purchased item No.33 under a sale deed dated 07.04.1982 from one Senthamarai. He had purchased items 10, 19 and 20 under a registered sale deed dated 19.04.1984, Item 16 under a sale deed dated 27.02.1986 and Item 34 under a sale deed dated 19.05.1988. Thus the second defendant alone is having title to the said items. They are not joint family properties.

b) From the date of purchase of the aforesaid items, the second defendant alone has been in exclusive possession and enjoyment of the said items as an absolute owner. Patta Nos.705 and 685 for the aforesaid items stand in his name. He has been paying the kists and has been exercising all acts of ownership thereon. These items are not liable to be divided. Still the second defendant is employed as a teacher getting a monthly income of Rs.2488/- and besides his income of Rs.900/- p.m., as a tuition master.

c) The plaintiff and the first defendant have been in possession of Grama Natham S.No.1006/2 - 0.05 acre with thatched construction. The said property is a joint family property. The plaintiff and the first defendant are having joint family oil engine of 6 H.P., bore pipe of 75 feet, two buffaloes and two

cows. Even though the plaintiff is aware of the existence of all those properties, she has not included them in the plaint with ulterior object. So the suit is bad for partial partition.

d) The plaintiff and the first defendant are living together and are having jewels of 7½ sovereigns. The third defendant is the owner of the items 25 to 32 of the plaint 'A' schedule as they were purchased by her under two sale deeds. So the items 25 to 32 are not joint family properties and they cannot be divided. The tractor which is mentioned in item No.36 was the separate property of the second defendant and the same was purchased by him. R.C also stood in his name. The second defendant had sold the said tractor for Rs.26000/- on 03.07.1989 to one V. Selvaraj. The share claimed by the plaintiff is excessive. The plaintiff is not in joint possession of the suit properties and hence the suit was not valued properly for the purpose of court fees and jurisdiction. Therefore, the second defendant prayed to dismiss the suit.

8. The averments made in the written statements filed by the defendants 5 and 6 are in brief as follows:

Item No.6 of the suit property was not purchased by Ethiraju Pillai as stated in the plaint. The said property was purchased in the name of defendants 5 and 6 out of the money given by their mother and hence the said property is the absolute property of the defendants 5 and 6 in which the plaintiff cannot claim partition.

9. The averments made in the rejoinder filed by the first plaintiff are in brief as follows:-

It is false to state that the first defendant had instigated the first plaintiff to file the suit. The allegation that the second defendant has been a secondary grade teacher from 11.09.1969 and that he was getting an income of Rs.1500/- p.m., and save money are specifically denied. His income per month at the time of his early service was less than Rs.300/- In fact he was living away from the family and he used to get money from the family for his livelihood. His income was not sufficient to maintain his family. The allegation that the second defendant purchased the properties out of his own income is false. It was only Ethiraju Pillai who purchased the properties in the name of the second defendant. Further, the said Ethiraju Pillai purchased Item No.6 in the name of the children of the second defendant. After filing of the suit, the first plaintiff came to know that the defendants 1 and 2 had fraudulently and collusively brought about a registered partition deed dated 17.05.1988 between themselves thereby partitioning all the suit properties without the first plaintiff's knowledge and consent. The said partition deed will not bind upon the first plaintiff. Further the second defendant has not even disclosed the same in his written

statement. It is false to allege that the third defendant is the absolute owner of Items 25 to 32. The said items also purchased by Ethiraju Pillai. It is false to allege that the tractor was purchased by the second defendant out of his own funds and subsequently he sold to one V. Selvaraj. The said property was also purchased by Ethiraju Pillai. Hence, the first plaintiff is entitled to 1/5th share in all the items of the suit properties.

10. The averments made in the additional written statement filed by the defendants 2, 5 and 6 are in brief as follows:

The allegation made in the rejoinder that the income of the second defendant at the time of joining service was less than Rs.300/- and the said amount was not sufficient to maintain his family are all false. The allegation that Ethiraju Pillai had purchased the property in the name of the second defendant and also in the name of the defendants 5 and 6 are all false. The allegation that originally the plaintiff namely Nagammal had executed a Will on 31.05.1990 in favour of the plaintiffs 2 and 3 in a sound and disposal state of mind are all false. The said Will was never acted upon. Therefore, the defendants 2, 5 and 6 prayed to dismiss the suit.

11. Based on the aforesaid pleadings, the learned District Munsif, Chengalpet, framed necessary issues and tried the suit. During trial, on the side of the plaintiffs, the plaintiffs 1 and 3 were examined as P.Ws.1 and 2 and two more witnesses were examined as PW3 and PW4. They marked Exs.A1 to A9 as exhibits. On the side of the defendants, the second defendant was examined as DW1 and one more witness was examined as DW2. They had marked Exs.B1 to B15 as exhibits.

12. The learned District Munsif, Chengalpet, after considering the materials placed before her, found that the suit properties are the self-acquired properties of Ethiraju Pillai and as such, the first plaintiff and the defendants 1 to 4 are entitled to 1/5th share each in the suit properties. She also found that the first plaintiff viz., Nagammal executed Ex.A9 Will in favour of the plaintiffs 2 and 3 when she was in sound and disposing state of mind in respect of the 1/5th share of the suit properties. Accordingly, she passed a preliminary decree directing to divide the suit properties into five equal shares and allot one such share to the plaintiffs 2 and 3. Aggrieved by the same, the defendants 2, 5 and 6 had filed an appeal in A.S.No.78 of 2003 on the file of the Additional Sub-Judge, Chengalpet. The learned Additional Sub-Judge, Chengalpet, by the judgment and decree dated 30.11.2004 had allowed the appeal partly and modified the judgment and decree passed by the trial court to the effect that the plaintiffs 2 and 3 are entitled to 1/15th share in the suit properties except in items 6, 33, 34

and 35. He dismissed the suit in respect of the item Nos.6, 33, 34 and 35. Feeling aggrieved, the plaintiffs 2 and 3 had filed the present second appeal.

13. This court at the time of admitting the second appeal has formulated the following substantial questions of law:

"1. Whether the lower appellate court was right in excluding items 6, 33, 34 and 35 of the plaint schedule property from the partition after having come to the conclusion that all the plaint aschedule properties were properties of late Ethiraju Pillai and that even the properties purchased in the individual name of the some of the defendants had thrown into hotch-pot of the joint Hindu family as evident from Ex.A-6 prior to partition deed?

2. Whether the court below was right in law in concluding that the appellants are entitled only for 1/15th share in spite of the findings that the properties shown in Ex.A6, the partition deed, were to be treated as properties of the late Ethiraju Pillai?"

14. Substantial Questions of law 1 and 2:

The learned counsel for the appellants has submitted that the first appellate court erred in modifying the well considered judgment of the trial court. He further submitted that since admittedly the Ethiraju Pillai got ancestral properties and during his life time, some of the items were purchased in the name of the second defendant and after the death of Ethiraju Pillai, the defendants 1 and 2 had partitioned the said properties under Ex.A6 dated 17.05.1988, the first appellate court ought not to have dismissed the suit in respect of the items Nos.6, 33, 34 and 35. He further submitted that since the second defendant claims that he purchased items Nos.33, 34 and 35 out of his own earnings, the burden is upon him to prove the fact that he purchased the property without aid of the income from the joint family properties but he failed to discharge the said burden. He further submitted that the evidence of PW1 and PW4 would clearly establish that even though the second defendant was employed as Secondary Grade Teacher in a school, his salary was not sufficient to maintain his family, he used to get money and other materials from the joint family and as such, the findings of the first appellate court that the items Nos. 33, 34 and 35 are self-acquisition of the second defendant are not correct. He further submitted that even though the item No.6 stands in the name of the defendant Nos.5 and 6, the said item was also subjected to partition under Ex.A6

and as such, the defendants 5 and 6 cannot claim that the said item is their separate property. Therefore, he prayed to allow this second appeal and set aside the judgment and decree passed by the first appellate court and restore the judgment and decree passed by the trial court.

15. The learned counsel for the appellants in support of the aforesaid contentions, relied upon the decision of this court in Muthusamy Vs. S. Kaliammal and others, 2017 (3) CTC 79.

16. Per contra, the learned counsel for the respondents 1 to 3 submitted that since the second defendant was working as a teacher at Tiruvallur Taluk, his wife sold her jewels and gave money to the first defendant with a request to purchase the property (item No.6) in the name of her children (defendants 5 and 6). The first defendant had purchased item No.6 in the name of defendants 5 and 6 by showing his wife as a guardian. He further submitted that even though the said property (item No.6) was also subjected to partition in Ex.A6, in the said document, neither the defendants 5 and 6 nor their guardian was a party and hence, Ex.A6 will not bind upon the defendants 5 and 6. He further submitted that the item Nos.33 and 34 were not included in Ex.A6 and that itself would show that the said properties are the separate properties of the second defendant. He further submitted that admittedly the second defendant was working as a teacher and from and out of his earnings only items 33 and 34 were purchased. He further submitted that in the written statement itself, the second defendant had categorically stated that he purchased the tractor which is shown in item No.36 out of his own earnings and he sold the same to one Selvaraj. But the said Selvaraj was not added as a party. Further, the second defendant had produced the receipt with regard to the selling of the said tractor to one Selvaraj and marked the said receipt as Ex.B8. He further submitted that the trial court failed to consider the aforesaid facts in a proper perspective. But the first appellate court has rightly considered the aforesaid facts and evidence in a proper perspective and rightly dismissed the suit in respect of the item Nos.6, 33, 34, and 35 and in the said factual findings, this court cannot interfere. Therefore, he prayed to dismiss the second appeal and confirm the judgment and decree passed by the first appellate court.

17. It is an admitted fact that the original plaintiff viz., Nagammal is the wife of Ethirajulu Pillai and the defendants 1 and 2 are his sons and defendants 3 and 4 are his daughters. It is also an admitted fact that the defendants 5 and 6 are the sons of the second defendant.

18. Though in the plaint, it is stated that the suit properties are the self- acquisition of late Ethiraju Pillai,

the original plaintiff viz., Nagammal while examining herself as PW1 has admitted in her evidence that her husband viz., Ethiraju Pillai got 2¼ acres from his ancestral properties by way of partition which took place between himself and his brothers. Further Ex.A6 would show that the defendants 1 and 2 partitioned their family properties on 17.05.1988. In the said document, it is stated that the properties mentioned in the said document belonged to their ancestors. Both the courts below taking into consideration of the aforesaid recital found in Ex.A6 concurrently found that though some of the properties purchased in the name of the defendants 2 and 3, the said properties are the joint family properties. Challenging the said findings, the defendants 2 and 3 did not file any second appeal or cross-objection. So, it has to be presumed that the defendants 2 and 3 have accepted the findings of the first appellate court. So, it is clear that the properties mentioned in Ex.A6 except item Nos.6 and 36 are the joint family properties.

19. The first appellate court has held that since the item No.6 was purchased in the name of the defendants 5 and 6 and they were not parties in Ex.A6, the said document will not bind upon the defendants 5 and 6. According to the defendants 2, 5 and 6, the wife of the second defendant and mother of the defendants 5 and 6 had sold her jewels and gave money to the first defendant with a request to purchase the property in the name of her sons viz., defendants 5 and 6. Hence, the first defendant had purchased item No.6 in the name of the defendants 5 and 6 by showing her wife as guardian. To substantiate the said plea, the defendants 5 and 6 have not examined their mother as witness before the court. Further, though the defendants 5 and 6 were not parties in Ex.A6, their father viz., the second defendant was the party in the said document. If really item No.6 was not the property purchased from the joint family funds, he would not have allowed to include the said property in Ex.A6. Therefore, the findings of the first appellate court that item No.6 is the separate property of the defendants 5 and 6, cannot be accepted.

20. In so far as item Nos.33 and 34 are concerned, according to the second defendant, he purchased the said items out of his own earnings under Exs.B3 and B4 respectively. In Ex.B3, sale consideration is shown as Rs.6550/-. In Ex.B4, the sale consideration is shown as Rs.5250/- The said properties were purchased in the year 1984 and 1986 respectively. Admittedly, the second defendant was employed as teacher from the year 1969 and that being so, he would have purchased items Nos.33 and 34 out of his own earning. It is pertinent to note that in Ex.B4, the first defendant signed as one of the identifiers of the sellers before the Sub-Registrar. If really the said properties were purchased from the funds of the joint

family property, he would have included the said properties also in Ex.A6 but the said properties were not included. Therefore, the said properties might have been separate properties of the second defendant.

21. In Muthusamy Vs. S. Kaliammal and others (cited supra), this court has held that when the joint family possessed of properties is admitted, the junior member who sets up title in himself has to prove that the said properties were acquired by him out of his own income. In this case, as already pointed out that the second defendant was working as teacher from the year 1969 and even on the date of the said deed, he continued in the said job and that being so, he could have purchased items 33 and 34 out of his own earnings. Further, if really the said properties were purchased from the funds of the joint family properties, the first defendant would not have allowed to leave the said properties in Ex.A6 partition deed. Therefore, this court is of the view the first appellate court has rightly held that the item Nos.33 and 34 are the self-acquisition of the second defendant.

22. In original plaint item No.35 is omitted. After item No.34, instead of mentioning item No.35, it has been mentioned as item No.36. In the amended plaints, it has been correctly mentioned as item No.35. In so far as the item No.35 is concerned, the said item is a tractor. The second defendant has categorically stated in his written statement that he purchased the said tractor out of his own funds and sold the same to one Selvaraj. He also produced the receipt and marked as Ex.B8. But the plaintiffs have not impleaded the said Selvaraj as a party. Further in Ex.A6 also, the said tractor has been referred to and it was allotted to the second defendant with a right to sell the same to discharge the family debts. Therefore, the said property is not available for partition.

23. For the aforesaid reasons, this court is of the view that the findings of the first appellate court with regard to item No.6 has to be set aside and the said item also is liable to be partitioned. In so far as the item Nos.33, 34 and 35 are concerned, the findings of the first appellate court has to be upheld. Accordingly, the substantial questions of law are answered.

24. In the result, the second appeal is partly allowed. The Judgment and decree of the first appellate court is set aside in respect of the item No.6 and the said item also to be divided into fifteen equal shares and one such share be allotted to the plaintiffs 2 and 3/appellants. In respect of item Nos.33, 34 and 35 are concerned, the judgment and decree passed by the first appellate court are confirmed. In respect of other items also,

the judgment and decree passed by the first appellate court are confirmed.

25. Considering the facts and circumstances of the case, the parties are directed to bear their respective costs.

Sd/-

Assistant Registrar (CO MDU)

//True Copy//

Sub Assistant Registrar

gv

To

1.The Additional Subordinate Judge,
Chengalpet.

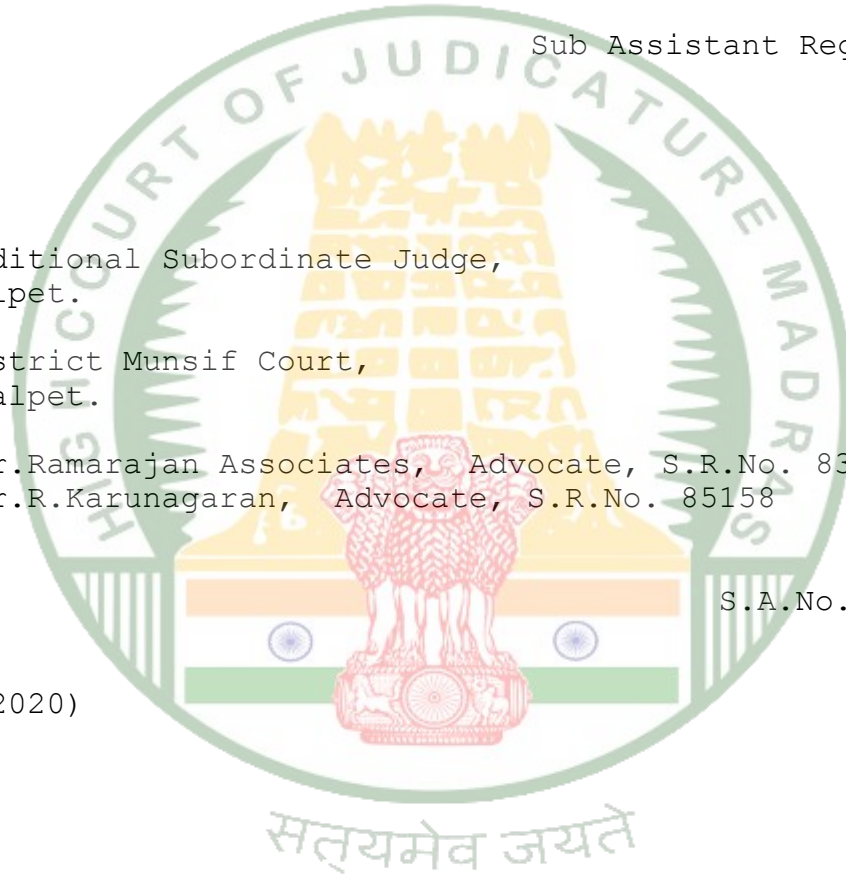
2. The District Munsif Court,
Chengalpet.

+1cc to Mr.Ramarajan Associates, Advocate, S.R.No. 83922

+1cc to Mr.R.Karunagaran, Advocate, S.R.No. 85158

S.A.No.761 Of 2005

TM(CO)
GN(07/10/2020)



WEB COPY