

Reserved on :04.03.2019
Pronounced on :12.03.2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Second Appeal No.168 of 2012 &
M.P.No.1 of 2010

Mr.A.Raghu ...Appellant/Appellant/2nd Plaintiff

Vs

1. Mr.S.Arjua Pillai ..Respondent 1/REspondent/1st Defendant

2.Mr.S.Kalaiselvan ..Respondents 2 & 3/respondents 2 &
3/Defendants 2 & 3

3. Mrs.Usha Rani

4. Mr.A.Subramani (Deceased)

5. Mrs.Selvi

6. Mr.Manikandan

7. Mr.Manivannan

(Respondents 5 to 7 brought on record as LRs of the deceased
4th respondent vide Order of Court dated 07.12.2018 made in
CMP.Nos.12645 to 12647 of 2017 in S.A.No.168 of 2012 (NSKJ))

... Respondents/LRS of the
Deceased 4th Respondent

Prayer:- Second Appeal has been filed under Section 100 of C.P.C. against the judgment and decree passed in A.S.No.9 of 2007 and Cross Objections dated 29.10.2008 by the learned District Judge, Thiruvannamalai in partially confirming and partially setting aside the decree and judgment passed in O.S.No.434 of 2002 dated 23.11.2006 by the learned Principal Subordinate Judge, Thiruvannamalai.

For Appellant : Mr.D.Govinda Reddy

For Respondents: Mr.K.A.Vimal Kumar
for Mr.J.Ramakrishnan - R1
Mr.V.Anand for R2 and R3
R- 4 died
No appearance R5 to R7

JUDGMENT

Aggrieved over the finding of the first appellate Court granting declaration that the plaintiffs each are entitled to 1/4th share in the suit properties in item Nos.1 to 4 and dismissing the suit in respect of Item No.5, the present Second Appeal has been filed by the second plaintiff

2. This Second Appeal has not been admitted and it is in the notice of motion stage itself from the year 2012. Heard the learned counsel for the appellant and the learned counsel for the respondent.

3. The parties are arrayed as per their ranking before the trial Court.

4. The brief facts leading to the filing of the second appeal is as follows :

The appellant along with his brother has filed a suit in O.S.No.434 of 2002 claiming partition in respect of item nos.1 to 5 of the suit properties. Similarly, the defendants 2 and 3 in the above suit also filed a suit for partition against the appellants and his father in O.S.No.186 of 2001. Both the suits were tried together and common evidence was recorded and ultimately the suit in O.S.No.434 of 2002 was decreed and the suit in O.S.No.186 of 2001 was dismissed since partition has been granted in O.S.No.434 of 2002. The trial Court decreed the suit by holding that the plaintiffs are entitled to 1/4th share in the suit properties. Against which the appellants have filed first appeal in A.S.No. 9 of 2007 in which the first defendant had filed cross objections. The first appellate Court has held that the appellants are entitled for partition for item Nos.1 to 4 and dismissed the suit in respect of Item No.5. Thereby, allowed the cross objections filed by the first defendant in the suit. As against which the present appeal came to be filed.

5. Brief facts of the case of the plaintiff in O.S.No.434 of 2002 is as follows :

The plaintiffs are sons of the first defendant. The third defendant is daughter of the first defendant. The second defendant is the son of the third defendant. The first defendant's mother one Ammu Ammal owned two tiled houses at Durgai Amman Koil Street, Tiruvannamalai Town. The first

defendant's mother, while she was alive, gave the two tiled house one to the first defendant and another to his brother Kuppusamy Pillai in the year 1959. The first defendant sold the house given by his mother to his brother Kuppusamy Pillai. Besides, he has also partitioned the sale proceeds of the joint family jewels under partition deed dated 20.08.1959. From and out of the sale proceeds, the first defendant has purchased two tiled houses at Avalkara Street, Tiruvannamalai in or about the year 1965 and he has sold the said house in the year 1966 and purchased another tiled house bearing Door No.46, Somavarakulam Street, Tiruvannamalai in the year 1967. Again he sold the above property in the year 1972.

6. The first defendant with the active assistance of his two sons, namely the plaintiffs herein, were running a hotel cum tea stall in the name and style 'Arjuna Hotel' from 1960 to 1972. From and out of the profits earned through the said hotel, on the joint exertion of the plaintiffs and the first defendant, item Nos.1 to 4 have been purchased by the joint family consisting of the first defendant and the plaintiffs herein in the name of the plaintiff's mother Lakshmi Ammal. She has no independent income of her own to purchase those properties. When the matter stood thus, the third defendant was married in the year 1978 and she has no share in the property. The first defendant also settled 1/4th share in Item Nos.1 to 3 of the suit properties in favour of the third defendant's son Kalaiselvan under settlement deed dated 05.02.2001. The said settlement is not binding on the plaintiffs' 2/3 share. Since the plaintiffs are the members of the undivided Hindu joint family, they are entitled to 1/3rd share each in the joint family properties.

7. The first defendant filed a written statement admitting that his mother owned a tiled house in Durgai Amman Koil Street and the same was allotted to him. The said house was sold in Court auction for debts contracted by this defendant. Later he has purchased a house property in Avalkara Street out of the income from the hotel business and same was also sold to discharge the family debts. Later out of his own funds, he had purchased a house property in Somavara Kula Treet. And said property was also sold for discharging his antecedent debts. According to him, house properties are not productive and they did not yield any income. Further, the property allotted to the share of this defendant by his mother is not an ancestral property and those properties cannot be treated as ancestral properties. The allegation that the plaintiff have to be granted share in the properties and that they also assisted the first defendant in running the hotel business is also denied.

8. It is further contention of the first defendant that the first plaintiff infact was residing with his uncle Kuppusamy for a long time. He only arranged for the marriage of the first plaintiff with his brother-in-law's daughter. The second plaintiff after finishing his school joined the police force and now he is working as a Head Constable. According to him, the plaintiffs never assisted the first defendant in the hotel business and there is no joint exertion made by them. Similarly, the properties purchased in the name of his wife have been purchased by his wife out of the consideration provided by her parents. All the properties are exclusive properties of Lakshmi Ammal. According to him, after the death of the said Lakshmi Ammal, all the legal heirs are entitled to equal share in item Nos.1 to 4. Item No.5 is the self acquired property of the first defendant and he has purchased the same out of his own funds. Hence, prayed for dismissal of the suit.

9. The third defendant has filed a written statement supporting the case of the first defendant.

10. The trial Court framed the following issues for consideration in the suit :

1. Whether the plaintiffs are entitled to the preliminary decree for partition of their 2/3rd share?

2. Whether the plaintiffs are entitled to the relief of injunction against the first defendant restraining him from encumbering the suit properties?

3. Whether the suit is unnecessary in view of pendency of O.S.186 of 2001 filed by the defendants 2 and 3 in respect of suit item 1 to 4?

4. Whether the suit 5th item is the self-acquired property of the first defendant and whether it was not subject to partition?

5. To what relief, the plaintiff is entitled to?

11. The evidence was recorded in O.S.No.186 of 2001 and on the side of the plaintiffs, P.W.1 and P.W.2 were examined and Ex.A.1 to Ex.A.11 were marked and on the side of the defendants, D.W.1 was examined and Ex.B.1 to Ex.B.8 marked. The trial Court

has granted preliminary decree declaring the rights of the plaintiffs held that each are entitled to 1/4th share in the suit property. As against which, an appeal was filed by the plaintiffs in O.S.No.434 of 2002. However, the first appellate Court, considering the fact that the plaintiffs have not proved the ancestral nucleus to purchase the property in the name of their mother Lakshmi Ammal, held that the plaintiffs are entitled to each 1/4th share in item nos.1 to 4 and allowed the cross objections filed by the first defendant in respect of Item No.5 and dismissed the suit. As against which, the present appeal came to be filed.

12. The learned counsel for the appellant submitted that the trial Court has rightly come to the conclusion that the plaintiffs are entitled to equal share in the suit properties. In fact, the trial Court has found that the 5th item of the property was also purchased out of the joint family nucleus. Whereas, the first appellate Court has erroneously concluded that the fifth item of the property is the separate property of the first defendant. Such a finding of the first appellate Court is not based on the proper appreciation of evidence. The documents filed on the side of the appellant clearly show that there were sufficient joint family nucleus in the family. The conduct of the first defendant in selling various properties clearly indicate that all the properties are joint family properties. The evidence of D.W.1 also clearly show that all the properties are joint family properties. But the first appellate Court has not taken into consideration of the above evidence and documents properly and hence, submitted that the judgment of the first appellate Court in dismissing the suit in respect of Item No.5 is not based proper appreciation of evidence.

13. The learned counsel appearing for the respondent contended that absolutely there is no pleadings whatsoever in the plaint that the family had sufficient joint family nucleus. Merely because one of the house of the mother of the first defendant devolved upon the first defendant and the same was sold, the above property cannot be considered as a joint family property at all. The property given by the mother of the first defendant, is the individual property of the first defendant. It is the specific contention of the plaintiff that they have participated in the hotel business of the father and out of joint exertion, Item Nos.1 to 5 have been purchased from their joint effort. But the evidence of D.W.1 itself indicate that they have never participated in the hotel business. The hotel business was done by the father individually. At the time of business, the plaintiffs are only minors and school going children. Therefore, their contention that they have

participated in the hotel business run by the father to purchase Item Nos.1 to 5 of the properties is highly improbable and cannot be believed at all.

14. The first appellate Court taking note of the fact that the plaintiff has failed to establish any joint family nucleus to purchase the property in the name of plaintiff's mother Lakshmi Ammal held that they are not entitled to any share as claimed by them. The first appellate Court has rightly granted partition in respect of Lakshmi Ammal properties, after her death, since the plaintiffs being class-I legal heirs of Lakshmi Ammal. As far as the 5th item of the property is concerned, it is the contention of the learned counsel that the fifth item of the property has been purchased individually by the father, which has been established on record. Hence, the plaintiff is not entitled to any partition in respect of the 5th item of the property. Hence, prayed for dismissal of this second appeal.

15. The following substantial questions of law have been raised in this Second Appeal.

1. Whether the finding arrived by the District Court first appellate Court that the appellant/plaintiff has not established that the properties were purchased out of the ancestral nucleus is proper?

2. Whether the finding arrived are not contrary to comments of Ex.B.3 and corroborated by the oral evidence which clearly reveals earlier partition and sources of ancestral nucleus?

3. Acting against the documentary evidence and acting without documents amounts to substantial question of law which require interference of the High Court in Second Appeal under Section 100 of CPC?

4. Whether the Central Act Hindu Succession Act 1956 Act 30 of 1956 amendment Act 2005, 39 of 2005 can over ride the State Amendment Act relating to Womens rights over the property during their father life time?

16. This Second Appeal has been filed challenging the judgment of the first appellate Court dismissing the suit in

respect of Item No.5 of the suit property. Though the plaintiffs have filed a suit each claiming 1/3rd share in Items Nos.1 to 5 of the suit properties, on the premise that the suit properties are joint family properties purchased out of the hotel business run by the first defendant, father of the plaintiffs, wherein the plaintiffs have also put their joint efforts. Though Item Nos.1 to 4 have been purchased in the name of the mother, the 5th item of the property has been purchased in the name of the father. It is the contention of the plaintiffs that entire properties are joint family properties.

17. In the plaint pleadings, it is the case of the plaintiffs that one house property was given to the first defendant by his mother in the year 1959 and another house property was given to the first defendant's brother. The first defendant has sold the house property and purchased some other house in the year 1965. Again he sold the said house in the year 1966 and purchased some other house in the year 1967 and thereafter, he sold that property in the year 1972. Further, it is the specific case of the plaintiffs that Item Nos.1 to 5 of the suit property have been purchased out of the hotel business run by the first defendant in the name and style 'Arjuna Hotel'. The plaintiffs have also contributed to the hotel business run by the father. On the joint exertion of the plaintiffs and the first defendant, Item Nos.1 to 4 have been purchased in the name of their mother Lakshmi Ammal. The pleading of the plaint makes it clear that absolutely there is no pleading in the plaint to effect that the family had sufficient ancestral nucleus.

18. It is the contention of the plaintiffs that the house property devolved upon the first defendant by his mother is ancestral property. It is to be noted that any property inherited by the legal heirs of the woman cannot be considered as an ancestral property. At the most, the above property is to be construed as an individual property inherited from the woman. Therefore, the contention of the learned counsel that since their mother has given the property to the first defendant, the property has to be construed as joint family property, cannot be countenanced. Ex.B.3 partition deed dated 20.08.1959 would go to show that the first defendant has acquired the property only through his mother Ammu Ammal. Therefore, the property acquired by the first defendant through his mother's side utmost considered as his self acquired property and cannot be treated as a joint family property. It is not the case of the plaintiff, the properties inherited by the first defendant from his mother is also blended with the joint family properties. Therefore, without establishing any such blending, the plaintiff cannot now contend that the property inherited by the

first defendant from his mother is to be treated as a joint family property. Their own pleadings clearly indicate that the house property inherited by the first defendant has been sold and he has purchased other house and that property has also been sold before 1972. Therefore, the contention of the plaintiff that ancestral nucleus was very much available in the family, cannot be countenanced. The person who asserts that there is joint family nucleus, has to establish such fact. But, it has not been done so.

19. As far as Item Nos.1 to 4 are concerned, it is the specific contention of the plaintiffs that they assisted their father in the hotel business and out of the profits in the hotel business, item Nos.1 to 4 were purchased in the name of the mother. The pleading of the plaintiffs itself clearly establish the fact that the hotel was run by the father from the year 1960 to 1972. In this regard, the evidence of D.W.1 itself clearly indicate that when the hotel was run by D.W.1, the plaintiffs are only minors and the hotel was run by their father and there is no evidence available on record to show that they are also working in the hotel. When evidence of D.W.1 clearly indicate that at the relevant point of time, when the hotel was run by their father, the plaintiffs are minors and studying in school and it is highly improbable to contend that they had also contributed in the hotel business.

20. The first appellate Court has considered the entire evidence and found that the contention of the plaintiff that they also contributed in the hotel business and earned profits, out of which the properties have been purchased in the name of their mother, is not acceptable. It is to be noted that Item Nos.1 to 4 were purchased in the year 1972, when P.W.1, namely the appellant was a minor. Therefore, the plaintiffs actively assisted their father in the hotel business during the relevant period which resulted in high profit in the business is highly improbable. Therefore, the contention of the plaintiff that Item Nos.1 to 5 have been purchased out of hotel business cannot be countenanced.

21. Further, it is to be noted that admittedly Item Nos.1 to 4 were purchased in the name of the mother in the year 1972 itself. When the property is in the name of a female member of the Hindu family, presumption arise is that the property is an individual property. It is not the case of the first defendant that he has purchased the property in the name of his wife. Whereas, it is the specific case of the first defendant that the properties have been purchased by his wife out of the sale

consideration from her parents house. Therefore, when a female member acquires any property before or after Hindu Succession Act and such property held by such female member is presumed to be her individual property. Absolutely, there is no evidence on record to show that the family had ancestral nucleus to purchase the property.

22. Further, the contention of the plaintiffs that they have also contributed to the hotel business was also found improbable. In view of the same, the plaintiffs claiming to be joint family member and claiming a share in the property, namely the 5th item of the property, purchased by the first defendant, does not arise at all. The hotel business was being run by the first defendant. Therefore, when the property has been purchased from the individual income of the first defendant, without establishing joint family nucleus, the plaintiffs cannot claim partition in respect of the 5th item of the property. The first appellate Court thoroughly discussed the entire aspects and granted preliminary decree in respect of Item Nos. 1 to 4 and negated the relief in respect of item No.5. The same does not require any interference at all. Hence, this Court is of the view that no substantial question of law arise in this appeal, since the factual matrix itself clearly indicate the fact that there is joint family nucleus and their contribution to the hotel business, has not been established. Hence, I do not find any illegality or error in the judgment of the first appellate Court.

23. Accordingly, this Second Appeal is dismissed and the judgment and decree of the first appellate Court is confirmed. Consequently, the connected miscellaneous petition is closed. No cost.

s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

vrc
To

1. The District Judge,
Thiruvannamalai.
2. The Principal Subordinate Judge,
Thiruvannamalai.

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+1 CC to Mr.D.Govinda Reddy, Advocate sr 24260.
+1 CC to Mr.J.Ramakrishnan, Advocate sr 23023.
+1 CC to Mr.J.Ramakrishnan, Advocate sr 23023.(08/07/2019)

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