

IN THE HIGH COURT OF JUDICATURE AT MADRAS
Reserved on : 05.08.2019
Pronounced on :03.09.2019
CORAM

THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN

S.A.No.720 of 2015
and
M.P.No.2 of 2015
and
C.M.P.No.14701 of 2019

Hemalatha

...Plaintiff / Appellant / Appellant

Vs

1.M.Kannivel
2.K.Suriyakumari
3.K.Sridhar

R2 Deleted, vide order of Court
dated 26.10.2015 made in M.P.No.1
of 2015 in S.A.No.720 of 2015.

... Defendants / Respondents / Respondents

PRAYER: The Second Appeal filed under Section 100 of CPC, against the judgment and decree of the learned V Additional City Civil Judge, Chennai, in A.S.No.236 of 2013 dated 28.03.2014 in confirming the judgment and decree of the Learned XVIII Assistant City Civil Judge, Chennai, in O.S.No.3955 of 2010 dated 10.10.2012.

For Appellant : Mr.K.S.V.Prasad

For R1 & R3 : Mr.Ashok Rajaraman

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JUDGMENT

The plaintiff in O.S.No.3955 of 2010 on the file of the XVII Assistant City Civil Court, Chennai, is the appellant herein.

2. O.S.No.3955 of 2010 had been filed by the plaintiff, K.Hemalatha, against her father M.Kannivel, her mother K.Suriyakumari and her elder brother K.Sridhar, seeking partition and separate possession of 1/4th share in item Nos.1

and 2 of the suit schedule property and also for future mesne profits. Consequent, the death of the mother K.Suriyakumari, the plaintiff had been amended seeking undivided 1/3rd share of the suit schedule properties. The suit schedule properties were land and building at New No.136 and Old No.90/2, Ayya Mudali Street, Chintadripet, Chennai - 600 002 and Vacant land bearing plot No.7A measuring 3,598 sq.ft., in Rajalakshmi Nagar, Valaripuram Village, Sriperumpudur Taluk, Kanchipuram District. By Judgment dated 10.10.2012, the said suit was dismissed. Challenging that Judgment, the plaintiff filed A.S.No.236 of 2013 before the V Additional City Civil Court, Chennai. By Judgment dated 28.03.2014, the appeal was also dismissed. Challenging that Judgment, the plaintiff had filed the present Second Appeal.

3. The Second Appeal had been admitted on 14.06.2019, on the following substantial question of Law:-

"Whether the appellant can propound that the income arising from the business which was started by the grandfather in which according to her, the father was also participating and according to her flowed towards purchasing of the property, would give the property the character of an ancestral property"

O.S.No.3955 of 2010 (XVIII Assistant City Civil Court, Chennai):-

4. The plaintiff claimed that her paternal grandfather M.V.Mohanavel, was the owner of a property at Old No.42, V.N.Doss Road, Border Thottam, Chennai - 2. On his death, the 1st defendant, M.Kannivel succeeded to the property. He sold the property to one N.S.Rathinam in the year 1981. It was claimed that out of the sale proceeds, the 1st defendant, M.Kannivel had purchased the suit property at New No.136 and Old No.90/2, Ayya Mudali Street, Chintadripet, Chennai - 600 002. The plaintiff further claimed that the second item of suit property had been purchased from and out of the sale proceeds of the property at new No.90/1, old No.71/1, Ayya Mudali Street, Chintadripet, Chennai - 600 002, which originally belonged to the maternal grandfather of the plaintiff by name A.P.Krishnasamy. Since the 2nd defendant, mother of the plaintiff was one of the legal heir and since the second item of suit property namely, Vacant land at Valarpuram Village, Sriperumbudur Taluk, had been purchased out of the sale proceeds, it was claimed that she was entitled to the share of the said property also. The plaintiff therefore claimed that she was entitled to an undivided 1/4th share in the suit properties and later on the death of her mother she claimed an undivided 1/3rd share in the suit properties.

5. In the written statement filed by the defendants, it had been stated that Mohanavelu Mudaliar, father of the 1st defendant

was the owner of the property at Old No.1/10, New No.42, Vijayanarayanadoss Road, Pudupakkam, Chennai - 2, measuring 1,370 sq.ft. On his death, the 1st defendant who was his son and his widow, Valliammal and his four daughters Usharani, Rajeswari, Santhakumari and Kumari, who was a minor inherited the property. The 1st defendant inherited an undivided 1/6th share. Thereafter, his mother and three sisters namely, Usharani, Rajeswari and Santhakumari released their respective shares to the 1st defendant. Consequently, he become entitled to an undivided 5/6th share. Later, he and Kumari who had retained her 1/6th share had sold the property to N.S.Rethinam by sale deed dated 20.11.1980. The 1st defendant had received only a sum of Rs.18,750/- as his share and he had spent the money towards family expenses. Consequently, the allegation that the property at Old No.90/2, New No.136, Ayya Mudali Street, Chintadripet, Chennai - 600 002, was purchased out of the sale proceeds of the property belonging to his father was denied by the 1st defendant. It was also stated that the suit property was purchased after more than one year after the sale. With respect to the second item of suit property, it was purchased by the second defendant out of her own funds and therefore it was her exclusive property. It was therefore claimed that the plaintiff cannot seek any share over the suit properties.

6. The defendants also filed an additional written statement, once again reiterating that there was no substantial ancestral nucleus and even if 1/6th share could be said to be the ancestral nucleus amounting Rs.7,750/- it is inconceivable that the first item of suit property could have been purchased for a consideration of Rs.46,500/-. It was stated that the said property was purchased only out of the self-acquired earnings of the 1st defendant. It was also stated that the second item of suit property was the separate property of the 2nd defendant. It was again reiterated that the suit should be dismissed.

7. On the basis of the above pleadings, the following issues were framed:-

- "(i).Whether the plaintiff is entitled for 1/4th share in the suit property and for separate possession?
- (ii).Whether the suit properties are coparcenary ancestral property or the separate properties of defendants 1 and 2?
- (iii).Whether the plaintiff is entitled to future profits as prayed for?
- (iv).To what other relief?"

8. The following additional issue was also framed owing to the death of the 2nd respondent:

"(i) Whether the plaintiff is entitled to get 1/3rd of share in the suit properties and mesne profits?"

9. During trial, the plaintiff was examined as PW-1. She marked Exs.A1 to A21. Ex.A1 was the Release deed executed in favour of the 1st defendant by his mother and three sisters, dated 27.10.1980. Ex.A2 was the Sale deed executed by the 1st defendant and his minor sister in favour of N.S.Rethinam, dated 20.11.1980. Ex.A3 was the Sale deed for the purchase of the first item of suit property, dated 31.12.1981. Ex.A4 was the Sale deed for the purchase of the second item of suit property by the second defendant, dated 11.03.1999. Exs.A16, A17, A18, A19, A20 and A21 were the notices exchanged between the parties. On the side of the defendants, the 1st defendant was examined as DW-1. He marked Exs.B1 to B5 which were bills for the expenses towards the marriage of the plaintiff.

10. On the basis of the oral and documentary evidence, the learned XVIII Assistant Judge, City Civil Court, Chennai, held that the plaintiff had failed to prove that two items of suit properties were purchased by the 1st and 2nd defendants from and out of the sale proceeds belonging to her paternal and maternal grandfathers. It was stated that contrary to the pleadings the paternal grandfather had four other daughters apart from the 1st defendant and it was observed that this was suppression of material fact. It was also stated that the 1st item of suit property was purchased after more than a year after the sale of the property of inherited by the 1st defendant. Moreover, Ex.A3, which was the Sale deed in favour of the 1st defendant with respect to the first item of suit property clearly covenanted that it was his absolute property. It was therefore held that the plaintiff had failed to prove that the first item of suit property had been purchased from and out of the sale proceeds of the property which belonged to the paternal grandfather of the plaintiff.

11. With respect to the second item of suit property, it was stated that the plaintiff herself had admitted that it was purchased from the earnings of the 1st defendant by the 2nd defendant. It was therefore stated that the averments in the plaint that the source of purchase was the sale consideration received by sale of the property belonging to the maternal grandfather had not been established by the plaintiff. In view of the above observations, the suit was dismissed with respect to both the items of the suit property.

A.S.No.236 of 2013(V Additional City Civil Court, Chennai):-

12. The plaintiff then filed a First Appeal challenging the Judgment of the Trial Court. The learned First Appellate Court Judge, again found as a fact that the first item of suit property had been purchased by the 1st defendant after more than a year after the sale of the property which was originally owned by his father. It was also again observed that the plaintiff had suppressed the fact that her paternal grandfather had other legal heirs and the 1st defendant had, for due consideration, obtained a release of the shares of four of the other legal heirs. The First Appellate Court Judge also concurred with the finding of the Trial Court on facts with respect to the source of purchase of both the items of suit property and held that they were the absolute property of the 1st and 2nd defendants respectively. He also held that the plaintiff had not proved that the properties had been purchased from and out of the joint family nucleus. The learned Judge therefore dismissed the First Appeal.

S.A.No.720 of 2015:-

13. The plaintiff then filed the present Second Appeal before this Court. The Second Appeal had been admitted on 14.06.2019, on the following substantial question of Law:-

"Whether the appellant can propound that the income arising from the business which was started by the grandfather in which according to her, the father was also participating and according to her flowed towards purchasing of the property, would give the property the character of an ancestral property"

14. After the substantial question of law was framed the appellant filed CMP.No.14701 of 2019 seeking to raise further additional grounds of appeal.

15. Heard arguments advanced by Mr.K.S.V.Prasad, learned counsel for the appellant and Mr.Ashok Rajaraman, learned counsel for the respondents.

16. To reiterate, the appellant was the plaintiff in the suit and the respondents were defendants. For the sake of convenience, the parties would be referred as Plaintiff and defendants.

17. The plaintiff had filed O.S.No.3955 of 2010 seeking partition and separate possession of 1/4th undivided share in two items of suit property. The first item of suit property is land and building at New No.136 and Old No.90/2, Ayya Mudali Street, Chintadripet, Chennai - 600 002. The second item of suit property is Vacant land bearing Plot No.7A measuring 3,598 sq.ft., in Rajalakshmi Nagar, Valaripuram Village, Sriperumpudur Taluk, Kanchipuram District. The plaintiff claimed that the first item of suit property had been purchased by her father / 1st defendant from and out of the sale of the property at Old No.42, V.N.Doss Road, Border Thottam, Chennai, which was inherited by him. It was claimed that the property inherited belonged to her paternal grandfather M.V.Mohanaavel. It was claimed that her father, the 1st defendant had inherited the property and had later sold it along with his youngest sister to one N.S.Rethinam in the 1981 and that he had purchased the first item of suit property from and out of the sale consideration. It was therefore claimed that the first item of suit property, having been purchased from the sale of property belonging to her grandfather had attained the colour of an ancestral property and therefore she was entitled to an undivided 1/4th share.

18. The facts however do not bear out the claim of the plaintiff. It has come out during evidence that M.V.Mohanaavel, the paternal grandfather of the plaintiff was the absolute owner of the property at Old No.42, V.N.Doss Road, Border Thottam, Chennai. He died interstate. Therefore, his widow and one son and four daughters inherited the property in equal shares, namely, 1/6th share each. It must be mentioned here that the Plaintiff had suppressed this fact and the fact that her grandfather also left behind four daughters. In their hands this 1/6th share was their absolute property. Subsequently, by Ex.A1, the mother of the 1st defendant, Valliammal and three of the four daughters namely, Usharani, Rajeswari and Santhakumari, released their undivided 4/6th share for valuable consideration to the 1st defendant, who therefore became entitled to an undivided 5/6th share. The other 1/6th share belong to the youngest daughter Kumari who was a minor. The 1st defendant and his youngest sister Kumari, sold their 5/6th and 1/6th shares to N.S.Rathinam by Sale deed dated 20.11.1980 which was marked as Ex.A2. After more than a year, on 31.12.1981 by Ex.A3, the 1st defendant purchased the first item of suit property.

19. During the course of arguments, it was stressed by the learned counsel for the appellant / plaintiff that there was a lathe business and the 1st defendant was continuing the said business and it was also out of the business income that the

first item of suit property was purchased. However, even though a substantial question of law was framed based on that submission of the learned counsel for the appellant / plaintiff, it is seen that there are no pleadings at all to substantiate such averment. Nowhere in the plaint has the plaintiff whispered about a business being run by her paternal grandfather M.V.Mohanavel. Any averment in the written statement cannot automatically be declared as proof in favour of the plaintiff without the plaintiff first stating the same by pleading and establishing the same through cogent evidence. The burden was heavily on the plaintiff to prove that the property originally in the hands of the 1st Defendant was ancestral property. Both the Courts have returned a definite finding of fact that this has not been proved.

20. On the other hand, both the courts below have held that it has been established that the first item of suit property was the absolute property of the 1st Defendant. When M.V.Mohananvel died, his widow and one son and four daughters equally inherited 1/6th undivided share. This proves that it was the absolute property of M.V.Mohanavel. This inheritance became the absolute property in the hands of each one of his legal heirs. The first item of suit property cannot be therefore stated that to be ancestral property. Moreover, the 1st defendant had, for valuable consideration obtained release of 4/6th share from his mother and three sisters. He therefore became entitled to an undivided 5/6th share. The other 1/6th share was retained by his younger sister. This property was thereafter sold to one N.S.Rathinam by Sale deed dated 20.11.1980, Ex.A2. After more than a year by Ex.A3 dated 31.12.1981, the first item of suit property had been purchased. Consequently, I hold that there is no infirmity in the judgments of both the Courts below and therefore the dismissal of the Original Suit and the First Appeal with respect to the first item of suit property is confirmed.

21. With respect to the second item of suit property it had been ordered as follows on 26.10.2015 in M.P.No.1 of 2015:

"The suit is filed for partition and in the affidavit filed in support of the petition, it is stated that the appellant is giving up the second item of the schedule property as described in the suit schedule which belongs to the mother who is arrayed as second respondent herein and has no claim against the second respondent.

2. This petition is filed to strike out the second respondent from the short and long

cause title.

3. Mr.Ashok Rajaaraman appearing for the respondents 1 to 3 has no serious objection for allowing this petition. He has also made an endorsement to that effect.

4. In view of the same, MP.No.1 of 2015 is allowed."

Consequently, the dismissal of the Suit and the First Appeal with respect to the second item of suit property is confirmed.

22. The learned counsel for the appellant / plaintiff had placed several judgments for consideration of this Court but unfortunately, in the absence of pleadings with respect to the source of funds from the business of the paternal grandfather, I hold with respect to the substantial question of law that the source of income, if any, which has not been pleaded, from the said business can never be considered as the source for purchase of the item of suit property.

23. The Appellant had also filed C.M.P.No.14701 of 2019 seeking to raise additional ground of appeal. I hold that the grounds of appeal can never be stretched beyond the pleadings and accordingly, the said application is dismissed.

24. In the result, the Second Appeal is dismissed. No order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

To

- 1.The V Additional City Civil Court, Chennai.
- 2.The XVIII Assistant City Civil Court, Chennai.
- 3.The Section officer
VR Section, Madras High Court

+1cc to Mr.Ashok Rajaraman, Advocate sr.76028
+2cc to Mr.K.S.V.Prasad, Advocate sr.75998

Judgment made in
S.A.No.720 of 2015

svi(co)
nr 30/09/2019