

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.08.2019

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.295 of 2013

1.S.Thangavelu

2.S.Nagaraj Appellants/Plaintiffs

Vs

1.N.Sundarasamy @ Sundaram

2.N.Subbaiyan ... Respondents/Defendants

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgement and Decree made in A.S.No.16 of 2011 on the file of the I Additional District Court at Coimbatore dated 28.11.2011 confirming the Judgement and Decree made in O.S.No.526 of 2008 on the file of the III Additional Subordinate Judge at Coimbatore dated 02.09.2010.

For Appellants : Mr.B.Nedunchezhiyan

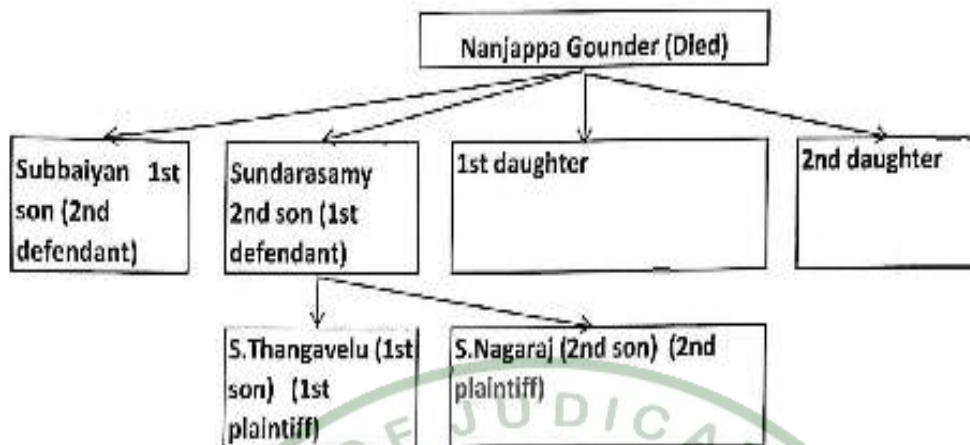
For Respondent 1: No Appearance

For Respondent 2: Mr.L.Mouli

JUDGMENT

The unsuccessful plaintiffs in both the Courts below are appellants before this Court. The parties are referred to in the same array as in the suit. The following genealogy is given for a better understanding of the relationship between the parties.

2.Plaintiff's case:



2.1. The case of the plaintiffs is that the said Nanjappa Gounder and his brother one Chinni Gounder have purchased 4.41 acres of agricultural land in Survey No.1083/2, Kalapatti Village, Coimbatore. On 03.06.1942, under a partition deed the brothers had partitioned the property with Nanjappa Gounder taking an extent of 2.95 acres and his brother remaining. Thereafter on 31.08.1965 there was a partition between Nanjappa Gounder and his two sons, the 1st and 2nd defendants. After the death of the said Nanjappa Gounder, there was an oral partition between the two brothers with each being allotted 1.47½ acres in the suit survey number.

2.2. The plaintiffs would contend that on the death of their grand-father they were entitled to 1/3rd share in the suit property and they have been approaching their father, the 1st defendant on several occasions to partition the property, however, he had not come forward to amicably settle the property and therefore the suit for partition.

3.Written Statement:

The 2nd defendant who is the paternal uncle of plaintiffs is the only contesting defendant since the 1st defendant remained ex parte. The 2nd defendant would contend that after the oral partition between him and the 1st defendant, the 1st defendant had sold his portion vide sale deed dated 17.02.1975 and the 2nd defendant had retained the property which was given in the oral partition and the plaintiffs are now attempting to usurp the property. The plaintiffs have no share in the property and are therefore not entitled to the partition.

4. Trial Court:

The learned III Additional Subordinate Judge, Coimbatore by Judgement and Decree dated 02.09.2010 was pleased to dismiss the suit for partition stating that the plaintiffs have no right, title or interest in the suit properties.

5. Appellate Court:

5.1. The said Judgement and Decree was taken up on appeal in A.S.No.16 of 2011 by the plaintiffs to the I Additional District Judge, Coimbatore. The learned I Additional District Judge, Coimbatore by Judgement and Decree dated 28.11.2011 was pleased to confirm the Judgement and Decree of the Trial Court. The Appellate Court had clearly held that the property in question was the self acquired property of Nanjappa Gounder and therefore under the Hindu Succession Act, 1956, it was only defendants 1 and 2 who are entitled to the property and plaintiffs have no right to make a claim.

5.2. The learned Judge had also observed that besides defendants 1 and 2, there were two daughters of Nanjappa Gounder, however, they have not made any claim in the suit property. The fact that the plaintiffs' father, the 1st defendant had sold his share as early as in the year 1975 would clearly confirm the oral partition. With this view the appeal was dismissed.

6. Second Appeal:

Challenging the concurrent Judgement and Decree the plaintiffs have filed the Second Appeal. This Court while admitting the Second Appeal has framed the following Substantial Questions of Law:

"1. Whether the first Appellate Court is right in recording that both the parties have patently ignored the Rules as to primary and Secondary evidence?

2. Whether the suit property of the joint family property and the appellant is entitled to the share in the suit property?"

7. Submissions:

7.1. Mr.B.Nedunchezhiyan, learned counsel arguing on behalf of the appellants would submit that the entire Judgement and Decree of both the Courts below is on the basis of xerox copies of the documents and despite observing that the parties have patently ignored the rules as to primary and secondary evidence the Appellate Court has proceeded to confirm the Judgement and Decree of the Trial Court.

7.2. Mr.L.Mouli, learned counsel appearing on behalf of the respondent would submit that the properties in question is the self acquired property of Nanjappa Gounder and the plaintiffs have no right, title or interest in the same during the life time of the 1st defendant (their father) and the 2nd defendant (their paternal uncle). That apart the properties have been partitioned and the brothers have been enjoying their respective shares and therefore no exception can be taken to the Judgement and Decree of the Courts below.

8. Discussion:

8.1. Heard the parties and perused the documents. From the documents it is clearly evident that the property is the self acquired properties of Nanjappa Gounder under Ex.A.1. There was a partition between Nanjappa Gounder and his brother Chinni Gounder, in and by which the said Nanjappa Gounder became entitled to the suit schedule property. Thereafter, under Ex.B.3 partition deed dated 31.08.1965 the said Nanjappa Gounder and defendants 1 and 2 have partitioned suit properties and other properties and the suit has been allotted to the share of the father Nanjappa Gounder. On his demise the suit property is devolved on both his sons and his two daughters.

8.2. The factum of the oral partition stands proved on a reading of Ex.B.7 in and by which, the 1st defendant viz., the father of the plaintiffs had sold his entire share. However the plaintiffs totally suppressed Ex.B.7 sale deed and proceed as if the entire property namely 2.95 acres remained intact.

8.3. The Appellate Court has rightly observed that the suit property being the self acquired property of Nanjappa Gounder, under the provisions of Section 8 of the Hindu Succession Act, 1956 his sons are entitled to the share. The plaintiffs do not have any share in the property during the life time of their father. The argument of the learned counsel for the plaintiffs that the xerox copies have been relied upon by the Courts below to pronounce Judgement cannot be countenanced. Further the plaintiffs have only filed xerox copies of the partition deed of the year 1942.

8.4. Be that as it may, the document would clearly show the devolution of the properties amongst the legal heirs of Nanjappa Gounder and the same would also show that the property which has been allotted to the share of the plaintiff's father is no longer with him but has been disposed by him and the suit is filed for the remaining extent, which is the share of the 2nd defendant. The joint family status had been severed upon the oral partition. The Substantial Questions of law are answered against the plaintiffs.

9. The Second Appeal stands dismissed confirming the order of the Courts below. No costs.

s/d-
Assistant Registrar(CS VIII)

True Copy

Sub-Assistant Registrar

To

1.The I Additional District Judge,
Coimbatore.

2.The III Additional Subordinate Judge,
Coimbatore.

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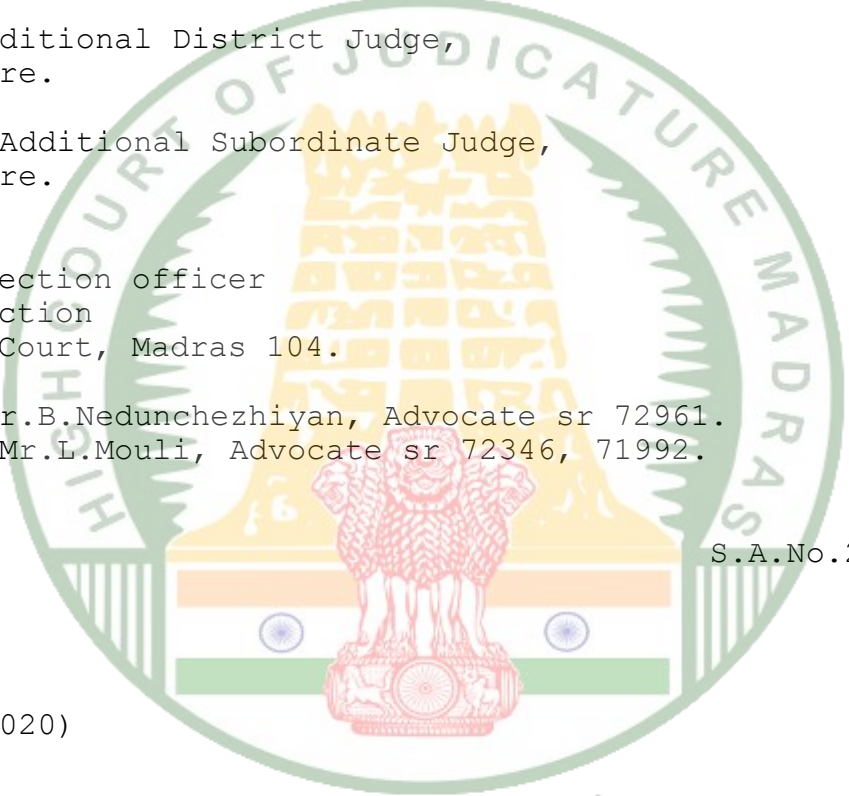
The Section officer
VR Section
High Court, Madras 104.

+1 CC to Mr.B.Nedunchezhiyan, Advocate sr 72961.

+2 Ccs to Mr.L.Mouli, Advocate sr 72346, 71992.

S.A.No.295 of 2013

EV(CO)
SP(02/03/2020)



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