

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.09.2019

CORAM:

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.212 of 2014

1. Dhanalakshmi
2. Ramani
3. Radhika

..Appellants/Plaintiffs

Vs.

1. Raji Gounder
2. Basheratha Marthandan
3. Padmini Gopalakrishnan
4. Gopalakrishnan
(R1 remained exparte
in the Courts below)

..Respondents/ Defendants

PRAYER: Second Appeal filed under Section 100 of C.P.C., to set aside the judgment and decree of the learned II Additional District Judge, Tindivanam, dated 22.02.2013 in A.S.No.19 of 2012, confirming the judgment and decree of the learned Principal Subordinate Judge, Tindivanam, dated 18.08.2011 in O.S.No.141 of 2008.

For Appellants : Ms.J.Prithvi for
Mr.S.Kaithamalai Kumaran

For Respondents (R2 to R4) : Mr.M.Venkadesan

J U D G M E N T

The plaintiffs in O.S.No.141 of 2008 whose suit for partition was dismissed by the trial Court on its confirmation by the lower appellate Court in A.S.No.19 of 2012 have come up this second appeal.

2. The suit was filed by them seeking partition and separate possession of 3/4th share in the suit property which according to them belonged to the husband of the 1st plaintiff and the father of the plaintiffs 2, 3 one Arumuga Gounder who died in the year 1998 leaving behind the plaintiffs and the 1st defendant to succeed to his estate. Even in the plaint, it is stated that the suit properties were purchased by the deceased Arumuga Gounder and one Sarathambal under a Sale Deed dated 09.05.1989 and the same was orally partitioned between them. After the death of Arumuga Gounder, the 1st defendant had sold the suit properties to the 2nd defendant under a Sale Deed dated

07.10.2004. The 2nd defendant had inturn sold the properties to the defendants 3 and 4 subsequently. The plaintiffs who were not parties to the said sale Deed dated 07.10.2004 would claim the sales had not binding on the share and seek partition.

3. The 1st defendant remained ex-parte. The defendants 2,3 and 4 contested the suit, while admitting that the suit property was purchased by Arumuga Gounder and Sarathambal and that there was a partition amongst them. It was claimed by the defendants 2,3 and 4 that the 1st defendant sold the property for the benefit of the family in his capacity as the Kartha of Joint family, therefore, the sale is binding on the plaintiffs. It was also contended that the sale itself was effected for repaying the debts of the family.

4. The Courts below agreed with claim of the defendants that the 1st defendant was the Kartha of the joint family and he had sold the property in his capacity as Kartha and therefore, the sale would be binding on the plaintiffs. On the said conclusion, the Courts below dismissed the suit.

5. Aggrieved, by the said conclusion, the plaintiffs have come up with this second appeal.

6. The following questions of law were framed at the time of admission:

- i) Whether the Courts below are incorrect to held that the suit property sold by the first defendant as a joint family Manager? (sic)
- ii) Whether the appellants/plaintiffs are entitled to one-third share in the suit property as pleaded in the plaint?

7. I have heard Ms.J.Pirithvi, appearing for Mr.S.Kaithamalai Kumaran, learned counsel for the appellants and Mr.M.Venkadesan, learned counsel for respondents.

8. The learned counsel for the appellants, elaborating on the questions of law would contend that the plaintiffs have come to Court with a specific plea that the properties belonged to Arumuga Gounder and it was inherited by the plaintiffs and the 1st defendant on his death in the year 1998 under Section 8 of the Hindu Succession Act, as it is the self acquired property of Arumuga Gounder. Thus the plaintiffs had claimed a equal $\frac{1}{4}$ th share each along with the 1st defendant.

9. Referring to the written statement filed by the defendants, the learned counsel would submit that there is no plea on the part of the defendants to the effect that the suit

properties are ancestral properties of Arumuga Gounder or that a Joint Hindu family existed or that Arumuga Gounder and the 1st defendant are the coparceners. According to the learned counsel, in the absence of the pleadings that the suit properties are the ancestral properties or Joint family properties belonging to Arumuga Gounder, the Courts below erred in concluding that the 1st defendant had sold the properties in his capacity as Kartha of the so called joint family.

10. The learned counsel would also point out that both the Courts below had discussed the issue relating to coparcenary property and the powers of a Kartha without their being plea to the effect and in the absence of any issue regarding the character of the properties. It is seen from the judgment of the trial Court that only two issues were framed in the suit which are as follows:

- i) Whether the plaintiffs are entitled to 3/4th share in the suit property?
- ii) What other reliefs the plaintiffs are entitled to?

11. There was no issue framed regarding the character of the property, since there was no pleading on the side of the defendants. Though the courts below had gone into the question of the power of the Kartha of a Joint Hindu Family to alienate its property for legal necessities, which was not contemplated by the parties. Both the Courts below, according to the learned counsel for the appellants had misdirected themselves in coming to the conclusion that the 1st defendant sold the property in his capacity of the Kartha of the joint family.

12. The learned counsel would also draw my attention to the specific finding of the trial Court wherein it concludes that the suit property was self acquired property of Arumuga Gounder and that there was no joint family. The trial Court had observed that the suit property was not the ancestral property of Arumuga Gounder and it is the property purchased by Arumuga Gounder. The trial Court also further concludes that the 1st defendant cannot be construed as the Manager or Kartha of the family after having recorded a finding to that effect, the trial Court went on to conclude that the 1st defendant sold it in his capacity of the Kartha of the joint family and the said sale would be binding on the plaintiffs. The lower appellate Court also concurred with the trial Court.

13. The decision of the Hon'ble Supreme Court reported in 2007-3-L.W.475 in the case of Makhan Singh (D) by Lrs. Vs Kulwant Singh was also brought to the notice of the lower appellate Court. The lower appellate Court however observed that since the plaintiffs and the 1st defendant were living

together, and the property was sold for the benefit of the members of the family, the property should be treated as joint family property since the 1st defendant is the Kartha of the joint family. I am unable to accede to the conclusions of the Courts below. As already stated, the plea of the plaintiffs is that the property is self acquired property of Arumuga Gounder and they are entitled to 1/4th share each under Section 8 of the Hindu Succession Act.

14. In defence, it was not pleaded by the defendants that the property was a joint family property or ancestral property tainted with the colour of coparcenary property so as to make the male member as Kartha. In the absence of any such pleading and in absence of any issue to the effect, the Courts below had, in my opinion gone wrong in going into the question of the character of the property. Even otherwise, there is no evidence to show that the property was ancestral property of Arumuga Gounder or that Arumuga Gounder purchased the properties from and out of the income or sale proceeds of some other property that existed.

15. Regarding both the above aspects, the Hon'ble Supreme Court in 2007-3-L.W.475 cited supra, has held that the inheritance of the asserts of the father by a son under Section 8 of the Hindu Succession Act would only mean that he takes it as individual and it cannot be termed as ancestral property or the son inherited it as a Karth of Joint family. While doing so, the Hon'ble Supreme Court has observed as follows:

"6. He has submitted that the document Ex.P-4 which is a copy of the application submitted by the defendant before the Sub-Registrar to mark his presence on 10.08.1992 and a statement recorded by the Sub-Registrar contemporaneously clearly showed that the property belonged to him and him alone without the slightest hint that it was Joint Hindu Family property, and it was after an amendment of the written statement that the plea that the property in question was Joint Hindu Family Property had, for the first time, been taken. It has also been pleaded that there was no evidence whatsoever to show that the aforesaid property had been purchased from the income of the Joint family so as to give it the character of a Joint Hindu Family property and that the onus which lay on the defendant as the propounder of the joint family, as envisaged by the judgment of this Court in D.S.Lakshmaiah & Anr. Vs. L.Balasubramanyam & Anr (2003) 10 SCC 310 = 2004-3-L.W.49 had clearly not been discharged. It has, further, been argued that the finding of the High Court that a decree for 11 marlas

of land could not be granted as this land had been purchased by Dula Singh during his life time and had passed on to his son by succession after his death in 1966 was therefore Joint Hindu Family in the hands of his sons too was wrong as observed in K.V.Narayanaswami Iyer Vs.K.V.Ramakrishna Iyer & ors. (1964) 7 SCR 490 as there was no presumption in law that a property purchased in the name of a member of a family had ipso-facto the character of Joint Hindu Family property unless it could be shown that the family possessed a nucleus for the purchase of the same. It has, further, been pleaded that the finding of the High Court that the 11 Marlas purchased by Dula Singh in his own name which developed on his sons after his death in 1966 too had the character of Joint Hindu Family property was also an erroneous assumption in the light of the judgment of this Court in Commissioner of Wealth Tax, Kanpur & Ors. Vs. Chander Sen & Ors. (1986) 3 SCC 567 = (1987) Vol. 100 L.W.347 in which it has been held that there could be no presumption that if the property purchased by a father fell to his son by inheritance it was deemed to be in his position as a Karta of a Hindu Undivided Family."

16. In view of the above decision of the Hon'ble Supreme Court, it is clear that the burden of proving that the property was a coparcenary property or ancestral property is on the person who asserts it to be coparcenary or ancestral property, only upon such proof, the validity of alienation by the 1st defendant as the Kartha or Manager of such a coparcenary or a joint family could be looked into.

17. In the case on hand, there is neither pleading nor evidence to show that the property is ancestral in nature or that it belonged to the joint family, it is settled law that there is no presumption that a joint family owns joint family properties. The lower appellate Court has after referring to the judgment of the Hon'ble Supreme Court reported in 2004-3-L.W.49 in D.S.Lakshmiah & Anr Vs. L.Balasubramanyam & Anr wherein the Hon'ble Supreme Court had held that the burden of proving that the property is a joint family on the person who asserts it, had come to the conclusion that the 1st defendant is a a Manager of the joint family based on evidence of P.W.1 which reads as follows:

"எனது கணவர் ஆறுமுகம் 1998ல் காலமாகி விட்டார். அவர் காலம் ஆன பின்பு, ம் பிரதிவாதி எங்கள் குடும்பத்தை பார்த்து வந்தார்."

18. The said admission at best would only prove that the 1st defendant as a male member was taking care of the family and the same would not make him a Kartha of the joint family with a power to alienate the property. Even such power can be exercised only for legal necessities.

19. For the foregoing reasons, I find that the conclusions of the Courts below are perverse and contrary to the law laid down by the Hon'ble Supreme Court as well as this Court. In the absence of the pleadings and the categorical proof as to the nature of the property, the Courts below were not right in concluding that the 1st defendant acted as a Manager or Kartha of the joint family in selling the property in the year 2004. Therefore, the 1st question of law answered in favour of the appellant concluding that 1st defendant was only a heir who inherited the property under Section 8 of the Hindu Succession Act and he cannot be treated as a Manager of the Joint family to be empowered to sell the properties of the other heirs also.

20. In view of the answer to the 1st question of law, the second appeal is allowed, the Judgment and decree of the Courts below are set aside, the suit in O.S.No.141 of 2008 will stand decreed as prayed for. However, there shall be no order as to costs.

Sd/-

Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

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To

1. The II Additional District Judge,
Tindivanam.

2. The Principal Subordinate Judge,
Tindivanam.

Copy to:

The Section Officer, VR Section, High Court, Madras.

+1cc to Mr.M.Venkadeshnan , Advocate SR.No. 82947

+1cc to Mr.A.K.Kumarasamy, Advocate SR.No. 82627

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A.SK(19.05.2021)