

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 13.01.2020

Date of Verdict : 30.01.2020

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

S.A.No.611 of 2004

1.Elumalai
2.Kasinathan
3.Lakshmi
4.Minor Thulasingham
5.Minor Balasundari
6.Krishnaveni (Minor)

(Minors 4 to 6 rep. by their
mother and guardian Lakshmi) ...Appellants/ Defendants
Vs.

1.Dhanakodi (died)
2.Kanniammal
3.Sivakami
4.Sivabakkiam
5.Kuppusamy
6.Munusamy ...Respondents/Plaintiff

(RR5 & 6 brought on record as LR's
of the deceased R1 viz., Dhanakodi
vide order of court dated 02.12.2019
made in CMP.Nos.361 to 363 of 2014
in SA.No.611 of 2004 (GKIJ))

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 26.06.2003, in A.S.No.54 of 2002 on the file of the Fast Track Court No.I, (Additional District Judge), Tindivanam reversing the decree and judgment dated 31.03.1998 in O.S.No.75 of 1995 on the file of the District Munsif cum Judicial Magistrate, Vanur

For Appellants : M/s.J.Prithivi
for Mr.S.Kaithamalai Kumaran

For Respondents

For R5 & 6: Mr.P.Dinesh Kumar
: R2 to 4 - given up
: R1 - died

JUDGMENT

This second appeal is directed as against the judgment and decree dated 26.06.2003, in A.S.No.54 of 2002 on the file of the Fast Track Court No.I, (Additional District Judge), Tindivanam reversing the decree and judgment dated 31.03.1998 in O.S.No.75 of 1995 on the file of the District Munsif cum Judicial Magistrate, Vanur.

2. For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

3. The case of the plaintiff in brief is as follows :-

3.1. The suit is filed for partition and injunction. The plaintiff and one, Balambal are the daughters of Sivagami Ammal and Thulasinga Gounder. She is the first wife of the first defendant. The defendants 2 to 5 are children of Narayanasami Gounder born through his second wife Balambal. The said Balambal died in the year 1990. The suit property and other properties originally belonged to Thulasinga Gounder, namely the father of the plaintiff. He had no male issues except the plaintiff and the said Balambal. Out of love and affection he settled the suit properties and other properties in favour of his wife, namely the mother of the plaintiff under the registered settlement deed dated 17.06.1946. Thereafter patta was also transferred in her name and she paid kist to the suit property and other properties, which were settled in her favour. While being so, in the year 1950, she died intestate leaving behind two daughters, namely the plaintiff and the Balambal. Therefore, they are entitled for half share each from the property derived from their mother. Even assuming that the settlement deed is not true and valid, the plaintiff and another sister Balambal inherited the suit properties after the demise of their parents. They had been in joint possession and enjoyment of the suit properties and the patta was also issued in their favour in No.262, 55 for the suit property. Thereafter the plaintiff and the said Balambal conveyed the suit property jointly in favour of Dhanakodi. They also sold some extent of the properties inherited by them from their mother as their property under registered sale deed dated 03.08.1977 to one, K.Subbareddy. Therefore, the Balambal and the defendants who claim right through the said Balambal, cannot dispute plaintiff's half share in the suit properties. The first defendant married the plaintiff and he also married the plaintiff's own sister, the said Balambal against the provision of Hindu Bigamy Prevention and Divorce Act, 1949. Therefore, the second marriage is void and it took place during the life time of the plaintiff, namely the first wife of the first defendant herein.

3.2 The said Balambal is not the legally wedded wife of the first defendant. The defendants 2 to 5 are the sons and daughters of the first defendant born through the said

Balambal. She died in the year 1990 leaving behind the defendants 2 to 5 to succeed her half share in the suit property. In fact, the plaintiff and the defendants are living together as joint family and they are in joint possession and enjoyment of the suit property. Therefore, the defendants are estopped to deny the plaintiff's half share in the suit property. The first defendant developed hot red and hostility to his son born through the plaintiff over the division of their joint family property. They filed the suit for partition and separate possession of their 2/3 share in the joint family property. In view of the dispute between the plaintiff's son and the first defendant, the defendants attempted to exclude the plaintiffs from joint possession and enjoyment of the suit properties from the year 1993. Therefore, the plaintiff frequently requested the defendants to effect partition of the suit properties, but they have been evading the same and they have attempted to put up construction in the suit properties. Hence, the suit.

4. The defendants resisted the plaintiff's case by filing written statement and stated that the plaintiff is not the wife of the first defendant and no marriage took place between the plaintiff and the first defendant. In fact, she was married to one Pachaiappa Gounder and through him, two daughters were born and one of the daughters married at Mungilpattu village and another daughter died on her childhood. The plaintiff shifted her residence after the death of her husband and she had illegal intimacy with the first defendant. Except the Balambal, the first defendant had no other wife. It is true that the plaintiff and one, Balambal are daughters of Thulasinga Gounder. The said Thulasinga Gounder executed settlement deed in favour of his wife Dhanakodi Ammal. Thereafter they also partitioned their property, in which the first item of the suit property and the second item of the suit property were allotted to Balambal, insofar as the property comprised in S.No.161/C in favour of plaintiff and thereafter she settled the property in favour of her daughters and she is in possession and enjoyment of the said property. Thereafter, the property which was allotted to Balambal also partitioned between defendants 2 to 5 and they constructed house in their respective share in the suit property. Thereafter they individually obtained electricity connection and their houses were also assessed to house tax and are regularly paying the house tax. Therefore, the suit itself is bad in law and the plaintiff is not entitled to any share in the suit property and sought for dismissal of the suit.

5. In support of the plaintiff's case, P.W.1 and P.W.2 were examined and three documents were marked as Ex.A.1 to Ex.A.3. On the side of the defendants D.W.1 and D.W.2 were examined and Ex.B.1 to Ex.B.3 were marked. On considering the oral and documentary evidences adduced by the respective parties and the submission made by the learned counsel, the

trial Court dismissed the suit. Aggrieved over the judgment and decree of the trial Court, the plaintiff preferred an appeal suit in A.S.No.54 of 2002 before the Fast Track Court No.I, (Additional District Judge), Tindivanam. The first appellate Court on appreciating the materials placed on records, allowed the appeal by reversing the judgment and decree passed by the trial Court and decreed the suit in favour of the plaintiff, and also passed preliminary decree in favour of the plaintiff. Challenging the same, the defendants have come forward with the present second appeal.

6. At the time of admission of the second appeal, the following substantial questions of law were framed :-

a) Is the lower appellate court justification in holding that there was no partition between plaintiff and her sister, overlooking that plaintiff had dealt with specific items of properties, allotted to her by executing settlement deeds Exs.P.1 and P.2.

b) Is the lower Appellate court justified in giving findings which are not based on evidence on record and the admissions made by P.W.1.

7. The learned counsel appearing for the defendants and the plaintiff are present and they reiterated the averments set out in the plaint as well as the written statement.

8. The learned counsel for the plaintiff, in support of his contention, cited the following judgments.

a) Damodara Naicker (died) and 10 others Vs. Collector of Chengalpattu District at Kancheepuram and 7 others reported in 2003 (2) CTC 551,

b) Chithra Vs. Saroja and another reported in (2017) 2 MWN (Civil) 241, and

c) Palanivelu and Others Vs. Muniappan reported in 2018 SCC Online Mad 7748.

9. Heard Mr.J.Prithivi, learned counsel appearing for the defendants and Mr.P.Dinesh Kumar, learned counsel appearing for the plaintiff.

10. This Court considered the rival submissions made by the learned counsel on either side, and the principles of law outlined in the above said positions are taken into consideration and followed as applicable to the case on hand.

11. The suit is filed for partition. Admittedly, the plaintiff and the wife of the first defendant are sisters.

They were born to one, Thulasinga Gounder through Sivagami Ammal. Thulasinga Gounder originally owned the suit schedule property and thereafter settled the same in favour of his wife Sivagami Ammal by the settlement deed dated 17.06.1946, which was not marked by either parties. Subsequently, both Thulasinga Gounder and Sivagami Ammal died in the year 1974 and 1950 respectively and thereafter property devolved in favour of the plaintiff as well as the wife of the first defendant herein. Though the plaintiff claimed half share in the suit schedule property on the basis of the partition between the plaintiff and the wife of the first defendant, she did not produce any partition deed between them. Further, the case of the plaintiff is that she was married to the first defendant even before his marriage with Balambal. Thereafter the first defendant got married with the said Balambal. The Balambal and the plaintiff are none other than own sisters. DW1 who is the first defendnat deposed that both the plaintiff as well as the said Balambal lived together with him and one Munusamy and Kuppusamy born through the plaintiff. Therefore, the plaintiff also got married with the first defendant and gave birth to two sons. Subsequently, the first defendant also got married the said Balambal and gave birth to the defendants 2 to 5.

12. While being so, after the demise of father and mother of the plaintiff, patta was issued in favour of the plaintiff as well as the wife of the first defendant, namely Balambal in patta No.55 and 262 for the property comprised in S.No.161/2 admeasuring 76 cents and S.No.161/6 admeasuring 62 cents in favour of plaintiff and the Balambal which was marked as Ex.A.1. Ex.A.2 patta was issued in favour of the plaintiff as well as Balambal in respect of the property comprised in S.No.144/12 admeasuring one acre and property admeasuring 91 cents comprised in S.No.163/2. Thereafter, the plaintiff and the said Balambal sold out the land admeasuring 72 cents comprised in S.No.161/2 and the land admeasuring 91 cents out of 97, comprised in S.No.163/2 in favour of one, Subbareddy by registered sale deed dated 03.08.1977, which was marked as Ex.A.3. In fact, in the said sale deed, the Narayanasamy, the first defendant also witnessed to the said sale deed. Therefore, no dispute about the property derived by the plaintiff and the Balambal from their mother. But the settlement deed executed by the Thulasinga Gounder in favour of his wife Sivagami Ammal was not marked before the trial court and as such the total extent settled in favour of Sivagami is not proved. Only on the strength of the patta, Ex.A1 and Ex.A2, the extent of the property mentioned in favour of the plaintiff and the said Balambal.

13. Thereafter, the plaintiff settled the property admeasuring 20 cents each to Kuppusamy and Munusamy by the registered deed which was marked as Ex.B.1 and Ex.B.2, in which it was categorically mentioned that the plaintiff is the wife of the first defendant. It is also seen from the

evidence of DW1, wherein he categorically deposed that the said Munusamy and Kuppusamy born through the plaintiff. Further the case of the plaintiff is that after the demise of her father and mother, the plaintiff and the said Balambal, the first defendant lived together and in the year 1990, the said Balambal died leaving behind the defendants 2 to 5 to succeed her share. Further, the plaintiff claimed that the said Balambal is not at all a legally wedded wife to the first defendant. However, admittedly, the defendants 2 to 5 born through the said Balambal for the first defendant. One, Kuppusamy and Munusamy born through plaintiff for the first plaintiff for the first defendant. While being so, though the plaintiff pleaded that the sons born through the first defendant filed partition suit claiming 2/3 share in the joint family property, plaintiff failed to produce any evidence to that effect. The settlement deed marked as Ex.B.1 and Ex.B.2 by the defendants categorically proved that the plaintiff settled the property admeasuring 20 cents each comprised in S.No.161/6 in favour of her sons, namely Munusamy and Kuppusamy. Now she sought for partition in S.No.161/6 admeasuring 42 cents out of 62 cents, namely the second item of the suit schedule property.

14. DW2 deposed that there was partition between the plaintiff and the said Balambal and thereafter the plaintiff settled her share in favour of his sons. After partition between the plaintiff and the Balambal, share of the Balambal have been partitioned by the defendants 2 to 5 by the partition deed dated 24.04.1986, which was marked as Ex.B.3. Thereafter separately constructed their respective houses and obtained electricity service connection and are in possession and enjoyment of their respective share. Therefore, the plaintiff is not entitled for any partition in respect of the suit property. The Trial court rightly held that the plaintiff is not entitled for any partition in respect of the suit schedule property and dismissed the suit. The first appellate court erroneously concluded, that too without any piece of evidence, the plaintiff is entitled for partition on the ground that the plaintiff is also a wife of the first defendant and it was categorically admitted by the first defendant. There is no dispute that the plaintiff also lived with the first defendant and gave birth to Munusamy and Kuppusamy. Whereas in respect of the share in the suit property, already there was a partition between the plaintiff and the Balambal and on the strength of the said partition, she also settled her share in favour of his two sons. Thereafter, the defendants 2 to 5 have partitioned the suit property and the same was also registered one, which was marked as Ex.B.3. Therefore, the findings of the first appellate court are perverse and against the evidence and they are liable to be interfered with. Accordingly, all the substantial questions of law formulated in this second appeal are answered in favour of the defendants and as against the plaintiff.

15. In view of the above discussion, this Second Appeal is allowed and the judgment and decree dated 26.06.2003 passed in A.S.No.54 of 2002 on the file of the Fast Track Court No.I, (Additional District Judge), Tindivanam, are hereby set aside and resultantly, the judgment and decree dated 31.03.1998 passed in O.S.No.75 of 1995 on the file of the District Munsif cum Judicial Magistrate, Vanur are restored. No costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To

1. The Fast Track Court No.I,
(Additional District Judge),
Tindivanam
- 2.The District Munsif cum Judicial Magistrate,
Vanur
3. The Section Officer,
V.R. Section,
Madras High Court,
Chennai.

+lcc to Mr.D.Ravichandar , Advocate SR.No. 7555

+lcc to Mr.S.Kaithaimalai kumaran , Advocate SR.No. 7108

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A.SK(22/09/2020)

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