

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 24.09.2020

Pronounced on : 29.09.2020

Coram:

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

S.A.No.974 of 2010

and

M.P.No.1 of 2010

Karuppasamy ... Appellant/Appellant/Defendant

/versus/

Kuppayal ... Respondent/Respondent/Plaintiff

Prayer: Second Appeal has been filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 22.04.2010 made in A.S.No.7 of 2007 on the file of the Additional District Judge (Fast Track Court-II), Gobichettipalayam confirming the judgment and decree dated 20.06.2005 made in O.S.No.213 of 2002 on the file of the District Munsif Court, Sathyamangalam.

For Appellant : Mr.R.T.Doraisamy

For Respondent : Mr.S.Silambanan, Senior Counsel for
M/s Profexs Associates

JUDGMENT

(The case has been heard through Video conference)

The second appeal is filed by the defendant in the suit for partition filed by his sister. The parties are son and daughter of late Ammasai Gounder. Out of three items of properties, the trial Court held that, items 1 and 2 of the suit schedule properties are the self acquired property of the deceased Ammasai Gounder, who died intestate. Therefore, his son (defendant) and his daughter (plaintiff) are entitled for $\frac{1}{2}$ share each. So far the 3rd item property, the trial Court held

that it is the property of Marayal (the mother of plaintiff and defendant). The said Marayal during her life time, had settled the 3rd item property in favour of the defendant. So, the plaintiff has no share in it. Accordingly, the preliminary decree for partition in respect of item 1 and 2 property was passed by the trial Court.

2.The defendant went on appeal before the Additional District Judge, Gopichettipalayam. The first appellate Court dismissed the appeal and confirmed the trial Court decree. Hence this second appeal.

3.The learned counsel for the appellant submitted that, the items 1 and 2 of the suit property were purchased on 26/05/1950 and 25/06/1965 under sale deeds Ex.A-1 and Ex.A-2 respectively by selling the ancestral properties on 12/07/1948 and 13/07/1962 under Ex.B-36 and Ex.B-1 respectively. So, items 1 and 2 properties are brought from the nucleus of the ancestral properties. These properties have been blend to the hotchpot of the ancestral properties being purchased from the income of the nucleus. In spite of Ex.B-1 and Ex.B-36, the Courts below erred in observing that the defendant failed to prove these two properties were purchased in the name of Ammasai Gounder, out of the sale proceeds of the ancestral properties and the income derived from the ancestral properties.

4.The learned counsel for the respondent counters the above submission by reading the recital in Ex.B-36 dated 12/07/1948 which says the property is sold to discharge loans. The learned counsel would submit that the first item property was purchased two years after the sale of ancestral property to discharge the loans and the second item property was purchased 3 years after selling the ancestral property. Therefore, these properties are the self acquired properties of Ammasai Gounder. Being the daughter of the said Ammasai Gounder, the plaintiff have equal share in the property. The suit properties never carry the trappings of ancestral property. The defendant, who pleads that they were purchased from ancestral nucleus, had not produced any evidence to prove it.

5.As per the plaint, Kuppayal (plaintiff) and Karuppasamy are daughter and son of Ammasai Gounder. 1 and 2 items properties were purchased by Ammasai Gounder and the third item property was purchased in the name of his wife Marayal. Both Ammasai Gounder and Marayal died intestate. Being their daughter and son, the plaintiff and the defendant are the first class legal heirs. While so, attempts are made by the defendant to alienate the property without the consent of the plaintiff. Hence, partition by metes and bound and consequential delivery of $\frac{1}{2}$ share in the properties sought.

6.The suit resisted by the defendant on the ground that, the items 1 and 2 properties are not self acquired properties of Ammasai Gounder. They were purchased in the name of Ammasai Gounder from the sale proceeds of the ancestral properties. The plaintiff got married during the life time of her father Ammasai Gounder, who died on 10/03/1985. On the death of Ammasai Gounder, items 1 and 2 properties devolved upon the defendant by survivorship. The defendant is in absolute possession and enjoyment of the item 1 and 2 properties since 1985, being the sole surviving coparcener. As far as Item 3 of the suit property, it was purchased by Marayal from out of her income. During her life time, she settled it to the defendant under settled deed dated 26/04/1985. Marayal died on 30/11/1986. By virtue of her settlement deed, the defendant is in absolute possession and enjoyment of the 3rd item property. Thus, nothing available for the plaintiff to seek partition.

7.The plaintiff was never in joint possession of the suit properties. After marriage, she never had contact with her parental house. She did not attend the funeral of her parents nor shared the funeral expenses. Her plaint is bereft of details about the date of her parent's death. She is not even aware of the fact that the 3rd item property was settled in favour of the defendant by Marayal. The plaintiff is residing with her family separately in the house given by Marayal. This proves that the plaintiff was never in joint possession of the suit properties as alleged.

8.Further, during his life time, Ammasai Gounder was suffering from asthma. To meet out his medical expenses, the defendant borrowed loan from different persons and repaid it with interest. He alone has shared the expenses for reconstructing the joint well and he has also spend money to improve the property by reclaiming the soil and laying pipe lines to draw water. Therefore, the plaint suffers from ouster and adverse possession. सत्यमेव जयते

9.Based on the rival contention raised in the pleadings, The trial court has framed the following Issues for consideration-

- 1) Whether the plaintiff is entitled for a preliminary decree of partition for $\frac{1}{2}$ share in the suit schedule property ?
- 2) What other relief ?

10.On the side of the plaintiff, two witnesses were examined. Documents A-1 to A-13 marked as exhibits. On the side of the defendant, three witnesses were examined. Documents B-1 to B-36 marked as exhibits.

11.The trial Court on considering Ex.B-3, the sale deed

dated 27/11/1953 in favour of Marayal and Ex.B-4 the settlement deed dated 26/04/1985 executed by Marayal in favour of her son Karuppasamy (defendant) held that the plaintiff has no share in 3rd item property.

12.As far as the items 1 and 2, the trial Court held that they are the self acquired property of Ammasai Gounder who died intestate. Hence, the plaintiff have ½ share in it, because the defendant has failed to establish that it was purchased from the ancestral nucleus. Regarding the documents relied by the defendant to prove he spend for his father's treatment by borrowing loans and he improved the property from out of his exertion, the trial Court has observed that the plaintiff after marriage was living with her husband, therefore it is the obligation of the son(defendant) to take care of his father and improve the property which is in his possession. Unfortunately, the trial Court neither framed issue regarding ouster and adverse possession. No discussion or finding about it could be seen in the trial Court judgment.

13.The point for determination framed by the lower appellate Court is,

Whether the appeal suit can be allowed as prayed for?.

14.However, while deciding the appeal the lower appellate Court has formulated, ?first question that need to be answered in the appeal is whether the items 1and 2 of the suit property are self acquired or ancestral property of the Ammasai Gounder and the second question is whether the item 3 of the suit property solely belong to the defendant?.

15.After analysing the evidence, the lower appellate Court has concluded that the items 1 and 2 of the suit properties are the self acquired properties of Ammasai Gounder and item 3 of the suit property belongs to the defendant. Accordingly, dismissed the appeal and confirmed the judgment and decree of the trial Court.

16.The Learned counsel for the appellant being aggrieved by the concurrent judgments of the Courts below, contend that, in the absence of contra evidence to show, Ammasai Gounder had other source of income apart from the income derived from ancestral landed property, in all probability these properties could only be the ancestral property purchased from the ancestral nucleus. But, the Courts below has erred in shifting the burden on the defendant to prove the ancestral character of the item 1 and 2 property, in spite of Ex.B-1 and Ex.B-36. He

also contended that if at all the plaintiff have any claim in these properties, her share can only be $\frac{1}{4}$ and not $\frac{1}{2}$ after effecting notional partition with Ammasai Gounder. Even that share the plaintiff has lost by ouster after the death of Ammasai Gounder on 10/03/1985. As per the law prevailing on the date of Ammasai Gounder death, the defendant being his only son, got the property absolutely. The Amended Hindu Succession Act, 39/2005, which came into effect subsequently has no application in the present case.

17.The learned counsel for the respondent/plaintiff would submit that, it is an admitted fact that Ammasai Gounder died on 10/03/1985 intestate. The defendant has failed to prove that the item 1 and 2 are ancestral properties. Assuming it is an ancestral property, even then, after the recent judgment of the Hon'ble Supreme Court in Vineeta Sharma ?-vs-Rakesh Sharma reported in (2020 (5) CTC 302, the daughter becomes a coparcener by birth and entitle to share the ancestral property along with the son. Therefore, after the clear pronouncement on Section 6 of the Amended Hindu Succession Act, the issue whether the property carry the character of ancestral property or self acquired property will have no difference in the result.

18.The evidence emanated in the trial does not indicate either the sale consideration in Ex.B-36 and Ex.B-1 was sufficient to purchase properties under Ex.A-1 and Ex.A-2 or Ammasai Gounder had other source of income. Nevertheless, mere proof of alienation of a ancestral property does not lead to the presumption that the properties acquired by Ammasai Gounder is ancestral property.

19.In Appalaswami v.Suryanarayanamurti reported in AIR 1947 PC 189, the Privy Council has held that, ?The Hindu law upon this aspect of the case is well settled. Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property is joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self acquisition to establish affirmatively that the property was acquired without the aid of the joint family property. ?

20.When similar issue came up for consideration, the Division Bench of the Karnataka High Court, in Dandappa Rudrappa Hampali And others - vs - Renukappa Alias Revanappa And others

reported in [AIR 1993 Kant 148] , has held that,

"All properties inherited by a male Hindu from his father, father's father or father's paternal grand father, is 'ancestral property'. A person may possess ancestral property as well as his self acquired property; it is permissible for a coparcener to blend his self acquired property with that of the ancestral or joint family property. A property acquired with the aid of the joint family property also becomes joint family property. The person acquiring a property if has command over sufficient joint family property, with the aid of which the new property could be acquired, there is a presumption that the acquired property belongs to the joint family. In such a case the acquieser has to show that his acquisition was without the aid of any joint family assets. However the initial burden is on the person who asserts, that the newly acquired asset is of the joint family to prove, that the acquieser had command over sufficient joint family assets with the aid of which he could have acquired the new asset. ?"

21.This court on considering the facts of the case, holds that, in the absence of proof that items 1 and 2 of the suit schedule properties were purchased only from the aid of the ancestral property and the sale proceeds was sufficient to buy these properties, the presumption should be that it was the self acquired property. Therefore, this Court finds no error or illegality in the conclusion of the Courts below. Ammasai Gounder having died intestate leaving behind his widow and two children and his widow also died intestate later, the remaining legal heirs namely the plaintiff and the defendant are entitled for $\frac{1}{2}$ share each in the property.

22.To sum up, the father Ammasai Gounder died on 10/03/1985. Mother Marayal died on 30/11/1986, the suit for partition was filed on 23/09/2002 after issuance of pre-suit notice for partition on 02/12/2000. There is no substantial material evidence to prove the property sold under Ex.B-1 and Ex.B-2 was the source and aid for purchasing the property covered under Exs. A-1 and A-2.

23. There is no evidence to hold the defendant has ousted the plaintiff after the demise of Ammasai Gounder. There are some stray admissions by the plaintiff in the cross examination to the effect that the defendant paid the kist and dealt the property as his own and he borrowed money to meet out his father's medical treatment. However, the same is retracted in the later part of the cross examination. Also the defendant has placed documents to show that he has invested to improve the property and spent for his fathers treatment and funeral. These points are left open for the defendant to be canvassed during the final decree proceedings, when the property is divided by

equitable moiety. Liberty is given to the defendant to agitate these point during the final decree proceedings.

24.As far as the preliminary decree for partition, which is impugned in this second appeal, for the reasons stated above, this Court is of the view that the judgment and decree of the trial Court as confirmed by the lower appellate Court deserves to be upheld.

25. Accordingly, this Second Appeal is dismissed. No order as to costs. The judgments and decrees of the Courts below are confirmed. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(S-II)

//True copy//

Sub Assistant Registrar

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To

1. The Additional District Judge
(Fast Track Court-II),
Gobichettipalayam.

2. The District Munsif Court,
Sathyamangalam.

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S.A.No.974 of 2010

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