



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 30.06.2020

(Reserved on 14.11.2019)

CORAM :

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

S.A(MD)No.953 of 2009

WEB COPY

Naganathan

... Appellant/Appellant/ Defendant

vs.

N.Senthilvelan

... Respondent/Respondent/Plaintiff

Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree in A.S.No.25 of 2008 dated 03.06.2009 on the file of the Additional District and Sessions Judge, Fast Track Court, Ramanathapuram, modifying the judgment and decree in O.S.No.26 of 2007 dated 31.03.2008 on the file of the Sub Judge, Ramanathapuram.

For Appellant

: Mr.M.Thirunavukkarasu

For Respondent

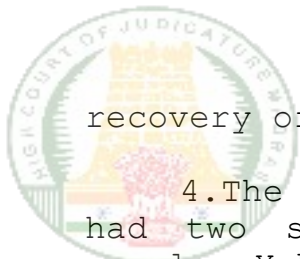
: Mr.J.Anandkumar

JUDGMENT

This appeal has been filed against the judgment and decree in A.S.No.25 of 2008 dated 03.06.2009 on the file of the Additional District and Sessions Judge, Fast Track Court, Ramanathapuram, confirming the judgment and decree in O.S.No.26 of 2007 dated 31.03.2008 on the file of the Sub Judge, Ramanathapuram.

2.The appellant is the defendant and the respondent is plaintiff. For convenience, the parties are referred to as per their rank in the suit.

3.The case of the plaintiff is that one Vasudevan borrowed a loan of Rs.50,000/- from him on 28.01.2005 on executing Ex.A1-pro note and also borrowed another loan of Rs.50,000/- from the plaintiff on 22.02.2005 on executing Ex.A2-pro note. The debtor Vasudevan and the defendant Naganathan are brothers and they lived with their parents in a Hindu joint family. While so, their father Kuppusamy Konar died on 28.04.2003 and their mother pre-deceased their father. After their father's death, both Vasudevan and the defendant jointly enjoyed the undivided joint family property. While so, Vasudevan died on 08.07.2005 and he did not pay the loan of Rs.1,00,000/- borrowed from the plaintiff with interest. According to the plaintiff, the defendant inherited the property of Vasudevan after his death and therefore, he is liable to pay the loan amount borrowed by Vasudevan with interest. Therefore, the plaintiff issued Ex.A3-advocate notice to the defendant and even after the receipt of the same, the defendant did not turn up to pay the loan borrowed by his brother Vasudevan. Hence, the plaintiff filed O.S.No.26 of 2007 before the Sub Court, Ramanathapuram, for



recovery of the loan amount with interest.

4.The case of the defendant is that his father Kuppusamy Konar had two sons namely, Vasudevan and defendant and one daughter namely, Yehambara Eashwari and Vasudevan was leading a wayward life and since he demanded partition of family properties, his father Kuppusamy Konar had orally partitioned the properties in October 2000, by which, Vasudevan was paid Rs.3,00,000/- towards his share in the family properties and thereafter, he was doing agency business independently from 2001 and the defendant came to know that Vasudevan borrowed loan from various persons and due to pressure from the creditors, he committed suicide on 08.07.2005. According to the defendant, he is not having any joint ownership or right either in the properties or in the business of the deceased Vasudevan and at no point of time, he had lived jointly with Vasudevan and he did not at all know about the alleged borrowal of the loan amount from the plaintiff. Thus, he is not liable to pay the loan borrowed by his brother Vasudevan and prayed for dismissal of the suit.

5.Before the trial Court, the plaintiff examined himself as PW1 and marked Exs.A1 to A4. On the side of the defendant, the defendant examined himself as DW1 and examined two other witnesses as DWs 2 and 3 and marked Exs.B1 to B11 and Exs.X1 and X2 were also marked. Considering the oral and documentary evidence, the trial Court decreed the suit, holding that since the oral partition is not proved, the defendant is liable to discharge the debt borrowed by his deceased brother Vasudevan only to the extent of his share. On appeal, the lower appellate court dismissed the appeal, holding that after the Hindu Succession (Amendment) Act, 2005 came into force, the individual interest will not devolve by survivorship, but devolve by testamentary or intestate succession and the co-parcenary property shall be deemed to have been divided as if a partition had taken place and therefore, the defendant is liable to pay the debt only to the extent of the deceased Vasudevan's share in the family properties. As against the concurrent judgments, the defendant has filed this appeal and this Court by order dated 15.10.2009, admitted the appeal on the following substantial questions of law:-

''(i)Whether in law the suit as framed by the plaintiff is maintainable since the plaintiff has not produced any particulars with respect to the property to get a charge decree?

(ii)Whether in law the plaintiff is entitled to get a decree for the pro note executed by the defendant's brother and when there is a prohibition under the Hindu Law that there cannot be a attachment after the death of an undivided co-parcener since his interest cease and passes to other co-parceners by survivorship?''

6.Heard both sides.



7. Perusal of record shows that though the defendant denied the suit pro notes as not genuine and stated that scribe to the pro note was not examined, he did not deny the signature and thumb impression found therein and though he contended that from the signed blank papers obtained from Vasudevan, suit pro notes were fraudulently created, both the Courts found that the same was not proved by oral or documentary evidence. Thus, both the courts below held that execution of Exs.A1 and A2 pro notes is proved. As regards the plea of partition, though the defendant would state that his father partitioned the properties in October 2000, by which, Vasudevan received cash amount of Rs.3,00,000/- towards his share and he and his sister were allotted with properties, perusal of record shows that the alleged partition was oral partition held in the presence of mediators and DW2 one of the mediators, has clearly stated that the alleged sum of Rs.3,00,000/- was not given to Vasudevan in his presence and further, DW1/defendant in his cross would state that he did not get any receipt from Vasudevan for the receipt of Rs.3,00,000/- by him and no change was made in the revenue records pursuant to the alleged oral partition. Thus, both the courts below found that the alleged oral partition was also not proved. It is to be noted that partition should be in written and registered as per Section 17 of the Registration Act, then only, the right on the property can be transferred to the other sharers. Therefore, both the courts below relying upon Section 6(3) of the Hindu Succession (Amendment) Act, 2005, which states that where a Hindu dies after the commencement of the Act, his interest in the property of a Joint Hindu Family governed by the Mitakshara Law, shall devolve by testamentary or intestate succession as the case may be, and not by survivorship and the coparcenary property shall be deemed to have been divided as if partition had taken place, held that the defendant is liable to pay the debt amount to the plaintiff from the share of the deceased Vasudevan and accordingly decreed the suit.

8. As rightly contended by the appellant, Hindu Succession (Amendment) Act, 2005, came into force only on 09.09.2005, but the defendant's brother died on 08.07.2005 prior to the amendment and therefore, the Amendment Act which has only prospective effect, will have no application to the case on hand. Whereas, Section 289 of the Mitakshara Law will come into play which reads as follows:-

'289. Undivided coparcenary interest, when liable for coparcener's debt - (1) According to Mitakshara law as applied in all the states, the undivided interest to a coparcener may be attached in his lifetime in execution of a decree against him for his personal debt. If it is attached in his lifetime, it may be sold after his death irrespective of the fact that the order for sale was made in his lifetime, or after his death. However, it cannot be attached after his death (except where the coparcener is the father), for it then ceases to be his interest and



passes to the other coparceners by survivorship. It is only an attachment effected during the lifetime of the debtor that will prevent the accrual of his interest to his coparceners by survivorship.''

9.It is seen from the above, a person lending money to a Hindu who has no separate property of his own, has no chance of recovering back his money, unless he obtains a mortgage or a charge on the undivided interest of the debtor in the joint family property or where he has not obtained such a mortgage or charge, he obtains a decree against the debtor and attaches his undivided interest in the joint family property in the lifetime of the debtor. It is, however, different where the debtor is a father, grandfather or great-grandfather.

10.In the case on hand, the plaintiff has given money to the defendant's brother on 28.01.2005 on pro notes and only after the death of the debtor on 08.07.2005, the plaintiff has laid the present suit for recovery of money. Admittedly, no steps were taken by the plaintiff to attach the undivided interest of the coparcenar/Vasudevan during his lifetime as per Section 289 of the Mitakshara Law and therefore, he is not entitled to the relief prayed for in the suit for recovery of money.

11.Accordingly, the substantial questions of law are answered against the plaintiff. The judgment and decree in A.S.No.25 of 2008 dated 03.06.2009 on the file of the Additional District and Sessions Judge, Fast Track Court, Ramanathapuram, and the judgment and decree in O.S.No.26 of 2007 dated 31.03.2008 on the file of the Sub Judge, Ramanathapuram, are set aside and the suit is dismissed.

The second appeal is allowed. No costs.

Sd/-

Assistant Registrar (CS II)

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/ /2020

Sub Assistant Registrar(CS)

To

1)The Additional District and Sessions Judge,
Fast Track Court,
Ramanathapuram.

2)The Sub Judge,
Ramanathapuram

S.A(MD)No.953 of 2009

DATED : 30.06.2020

KK(08.07.2020) 4P 3C