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IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 17.03.2021

JUDGMENT PRONOUNCED ON : 23.03.2021

CORAM

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

S.A.No.1173 of 2005

1.T.Boopathi

2.T.Kumar

...Appellants/Appellants/Plaintiffs

...Versus...

1.K.Thiruvengadam (Died)

2.K.Varadharajan

3.K.Manavalan

4.Kanagammal

[R4 brought on record as L.R's of the deceased 1st respondent viz.,K.Thiruvengadam vide order of Court dated 25.01.2021 made in C.M.P.No.6896/2020 in S.A.No.1173/2005(TKRJ)]

...Respondents/Respondents/Defendants

PRAYER:This Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree in A.S.No.167 of 1999 dated 13.08.2004 on the file of the Additional District and Sessions Judge, Fast Track Court No.I, Chennai, confirming the judgment and decree made in O.S.No.3732 of 1996 dated 17.11.1998 on the file of the VII Assistant Judge, City Civil Court, Chennai.

For Appellants :: Mr.C.Kulanthaivel

For R1 :: Died

For R2&R3 :: M/s.R.T.Shyamala

For R4 :: M/s.Reshmi Christy

J U D G M E N T

The unsuccessful plaintiffs are the appellants herein.

2. For the sake of convenience the parties are referred as per ranking before the trial Court.



3. The appellants/plaintiffs filed a suit for partition seeking 6 and 12 shares respectively in the schedule properties. The plaintiffs are the sons of the first defendant-Thiruvengadam filed the suit in O.S.No.3732/1996 seeking share in the property in Item Nos.1&2 of the schedule suit properties.

4.The plaint proceeds, on the premise that the Item Nos.1&2 of the properties are purchased from and out of the ancestral nucleus obtained by selling the ancestral property in Survey No.486/4 and therefore they are entitled for a share since his father first defendant is having a strained relationship with the mother of the plaintiff, Kanagammal, and she filed a suit for maintenance taking advantage of the strained relationship between the father and mother of the plaintiff, the second defendant, paternal uncle-younger brother of the first defendant has taken a major share in the suit property leaving a small portion of the first defendant and hence the suit.

5. Pre suit, notice were issued under Exhibits A3 to A6. The defendants 1&2 filed a common written statement denying the right of the plaintiff inter-alia contended that Ganapathy Naicker and his sons Kuppuswamy Naicker and Manavala Naicker never had any ancestral property as pleaded in the plaint. As per Ex.A1 Sale Deed Kuppuswamy Naicker has purchased the property from and out of his self-earning and the same is self-acquired property of Kuppuswamy Naicker. On his death, the widow and the two sons namely Thiruvengadam and Varadharajan-defendants 1&2 have partitioned in the property wherein Thiruvengadam-the first defendant, father of the plaintiff was allotted 1201 sq.ft in Item No.1 of the property and balance being allotted to the second defendant and the plaintiffs who are the sons of the first defendant Thiruvengadam at the instigation has filed a false case claiming partition to crab the property.

6. Before the trial Court, the plaintiff was examined as P.W.1 and the maternal grant father Govindaraj Naicker was examined as P.W.2 and mother of the plaintiff of the first plaintiff -Kanagammal was examined as P.W.3 and Exhibits A1 to A6 were marked. The first defendant was examined as D.W.1 and D.W.2 is the third defendant/Manavalan who is the brother of the Kuppusamy (younger grandfather/Junior grandfather of the plaintiff) and marked Exs.B1 -Encumbrance Certificate and Exs.B2 and B3.

7. Both the Courts below has held that the plaintiff has miserably failed to show and demonster their exist ancestral property in Survey No.486/4 in the Ukkotai native village and from and out of the sale of that property this suit property was



purchased. Accordingly, dismissed the suit. So is the appeal and hence, the Second Appeal.

8. The above Second Appeal was admitted on 21.10.2005 on the following Substantial Questions of Law:-

1. Whether the decree and judgment of the Courts below in not granting a share to the appellants with respect to the suit items is legally sustainable inasmuch as the suit first item of the property admittedly has been purchased by the grandfather of the appellants?

2. Whether the judgment and decree of the Courts below in stating that the partition took place pursuant to Ex.A2 is legally sustainable inasmuch as no proper share was allotted to the father of the appellants?

3. Whether the judgment and decree of the Courts below in coming to the conclusion that the suit second item is not joint property and the same has been allotted to the third respondent herein in oral partition by the grandfather of the appellants is legally sustainable inasmuch as there is no evidence for oral partition?

4. Whether the judgment and decree of the Courts below is legally sustainable inasmuch as it has caused the onus of proving the nature of the property on the appellants when especially Ex.A1 stands in the name of grandfather of the appellants?"

9. Heard the learned counsel for the appellants.

10(a).The learned counsel for the appellant argued that based upon the evidence of P.W.2 Govindaraj Naicker, maternal grandfather of the plaintiff and also the answer elicited from the cross-examination of D.W.2 Manavalan, third defendant who is the brother of the Kuppuswamy (paternal grandfather of the plaintiff).

(b) The relationship between the parties are the plaintiffs 1&2 are the sons of the first defendant Thiruvengadam. The second defendant is the brother of the first defendant. The third defendant is the brother of the grandfather of the plaintiff.



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11. During the pendency of the Second Appeal, the first defendant/first respondent Thiruvengadam died and hence his wife and brother sons are become L.Rs. Since sons are already arrayed as appellants hence widow is impleaded as 4th respondent represented by the Advocate M/s.Reshmi Christy and represented by M/s.R.T.Shyamala on behalf of R2 and R3.

12. The learned counsel for the plaintiff/appellant could contend that there was an ancestral property available in the hands of the grandfather of the plaintiff viz., Kuppuswamy. Kuppuswamy and the third defendant/Manavalan are brothers that they are sold the property in Survey No.486/4 in the village in Sriperumbudhur Taluk and from and out of the sale proceeds of the said property, they have said to have purchased Item No.I of the suit property which is a vacant site in West Mambalam, Chennai.

13. According to the plaintiff's counsel on the death of the Kuppuswamy, the widow and the defendants 1&2 Thiruvengadam and Varadharajan have entered into a partition under Exhibit A2 on 26.06.1992 whereby a small extent of under 1201 sq.ft alone was allowed to the share of the first defendant Thiruvengadam, the father of the plaintiffs herein. Pending suit the Thiruvengadam has also sold the another his share of 217 sq.ft his brother D2 Varadharajan as per Sale Deed. The said Sale Deed is subject matter of O.S.No.4133/2007 before the VIth Assistant City Civil Court, Chennai. Since the major issue is pending before this Court in the Second Appeal on an application under Section 10 of C.P.C, the trial of that case is ordered to be stayed. The core issue that has to be gone into is Whether Ex.A2, dated 26.06.1992 partition deed entered between the wife of Kuppuswamy and two sons Thiruvengadam and Varadharajan viz., D1 and D2 (R1&R2) herein is sustainable in law or not?

14. The learned counsel for the appellant/plaintiff could contend that since their exist a joint family nucleus, by selling the same, they have purchased the property and therefore Item No.I has assumed the character of ancestral property and plaintiffs are being the grand-son of Kuppuswamy are entitled to a share and hence the partition suit. He also draw my attention to the finding rendered by the trial Court on Ex.A2 that there was no positive evidence to show that their existed an ancestral property and further from and out of the sale proceeds they have purchased the Item No I of the suit property. Accordingly, rejected the case of the plaintiff and accepted the case of the defendants 1&2 and upheld Ex.A2 Partition Deed. The lower Appellate Court has stated that the Item No.II of the property is a Government poromboke and hence it is not available for partition. Now the lis is between the plaintiff and second respondent.



15. M/s.Reshmi Christy, learned counsel on behalf of the 4th respondent, wife of late Thiruvengadam could contend that she supports the case of the plaintiff since she was leaving separately away from her husband and filed a suit for maintenance from her husband. Taking advantage of the strained relationship between the husband and wife, the second defendant who is the brother of her husband as clandestinely taken the major share and a token share was given to the her husband namely the first defendant and he is also dead. Under Ex.A2 is inequitable and so unsustainable in law. So is the argument of the counsel for the appellant.

16. Heard the learned counsel for the respondent.

17. The learned counsel for the respondent submitted in support of the judgment and decree below.

18. The pleading and evidence reveals that the first defendant is the father of the plaintiffs 1&2, second defendant is the brother of the first defendant and the third defendant is the brother of the first defendant's father. There are two items in the suit property. As per the plaint and as per the evidence of P.W.2, item No.1 is ancestral property at the hands of the first defendant, having purchased from the sale of ancestral property.

19. The relationship between the parties are as under:

In the village of Ukkotai, Ganapathy Naicker had two sons by name Kuppusamy Naickar and Manavalan Naickar. The said Kuupusamy Naickar had purchased the property. After the death of said Kuppuswamy Naicker, in the said suit property there was a family partition under Ex.A2 between the wife of the Kuppusamy Naickar and the first defendant viz., Thiruvengadam and the second defendant viz., Varadharajan and their sons as the plaintiffs herein. The third defendant viz., G.Manavalan is the brother of the Kuppusamy Naickar.

20. The Trial Court has come to the conclusion that the first item of the suit property is self acquired property of the Kuppuswamy.

21. In respect of Item No.2, both the Courts below have held that item No.2 of the suit property is situated in Government Porambok and hence, the same is not available for partition though the third defendant is residing there. The Lower Appellate Court has confirmed the finding rendered by the Trial Court on the premise that in the absence of any document to show that in the sale of the ancestral property, item No.I of the suit property in Survey No.411 was purchased and also taking

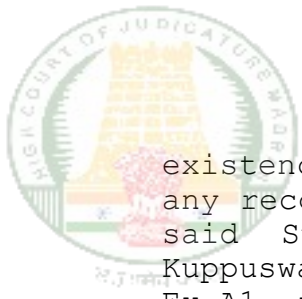


note of the evidence of P.W.2 and Ex.A2, has held that the partition deed under Ex.A2 is valid and plaintiffs have come forward to the specific plea that by selling the property in Survey No.486/4 to an extent of 46 cents, have purchased the first item of the suit property and they have not filed any documents to substantiate the same. Furthermore, the oral evidence let in does not disclose the availability of joint family property. Accordingly, the said findings have been confirmed by the Lower Appellate Court.

22. On perusal of the recital Ex.A1, it is seen that the property is self-acquired property of Kuppuswamy Naicker, Manavala Naicker-(third respondent is the younger brother). On his death, the widow of Kuppuswamy Naicker and the defendants 1&2 have partitioned in the property under Ex.A2 partition deed. It is a specific case of the appellants/plaintiffs that their exist and ancestral nucleus in Survey No.486/4 in Ukkotai village and it was sold for the purpose of purchasing the item No.I of the suit property in the year 1968.

23. Both the Courts below, after perusing the documentary evidence as well as oral evidence has come to the conclusion that the plaintiff has come forward with a specific plea of existence of ancestral nucleus in Survey No.486/4. However no scrap of evidence has been let in to show their exist ancestral property has rightly pointed out by the Lower Appellate Court. No documents has filed to show whether Manavalan or Kuppuswamy is the owner of the alleged ancestral property. No documents to show that the grandfather or great grandfather of the plaintiff had possessed the land in Survey No.486/4. Had there been any cultivation of those lands, it could have definitely reflected in revenue records, no patta or citta has been filed to show and they had possessed the said lands in the said Survey No. Neither any documents has been filed nor any supporting documents by way of revenue records has been filed before the trial Court. Though the plaintiff has taken a specific plea that the said ancestral property was sold in order to purchase item No.I of the property. Neither the sale deed of the alleged ancestral property nor the certified copy, there be has been filed before the trial Court.

24. On the contrary, the defendants had filed Ex.B1 which is a Encumbrance Certificate in respect of the above said Survey No.486/4 scanning from 1942 to 1968 wherein, there is no valid only with respect to any transaction in the above stated Survey No and hence both the Courts below has rightly appreciated the documentary evidence of Exs.A1, A2 and B1 and rightly come to the conclusion that the existence of the ancestral nucleus, as alleged by the plaintiff is not proved and nor even any piece of the evidence has been filed before the Court as to alleged the



existence of any such property. Neither any document of title or any records to show that the so called ancestral property in the said Survey No was owned or possessed or cultivated by Kuppuswamy or his father at any point of time. Except filing Ex.A1, no other documents has been filed by the plaintiff, other than Ex.A1, which is a Sale Deed in favour of the grandfather of the plaintiff, namely Kuppuswamy.

25. It remains to be stated that if the family had any lands in Survey No.486/4 as projected by the plaintiff, has spoken to by P.W.2 there should be some documents to show the title or revenue documents to show her possession or patta or chitta to show that the ancestral of nature of property.

26. Per contra, Ex.B1 Encumbrance Certificate for the period 1940 to 1968 shows that there is no entry at all the plaintiff has not taken any steps to produce any document to substantiate his plea as to the existence of the ancestral nucleus for the purchase of Item No.I of the suit property.

27. It is trite in law that in a suit for partition to the plaintiff alleges that the suit property was purchased from the sale proceeds of ancestral nucleus then burden of proof lies on the shoulder of the plaintiff to show that their exist an ancestral property. From and out of the said ancestral property, the income was derived or the said ancestral property was sold and from the sale proceeds, the suit property now sought for partition is purchased. Absolutely, the plaintiff has miserably failed to demonstrate these two aspects. Neither existence of ancestral property nor the alleged sale of the ancestral property is proved before the trial Court and hence both the Courts below has rightly appreciated the oral and documentary evidence and rightly come to the conclusion that the plaintiff has failed discharge the burden of proof on the shoulders of the plaintiff. Accordingly, disallowed the claim of the plaintiff. Such finding rendered by both the Courts below does not suffer from any irregularity or illegality warranting interference.

28. On re-appreciation of the evidence and also taking note of the recital of Exs.A1 and A2, I find that the plaintiffs have failed to discharge the burden proof that the suit property was purchased from and out of sale of ancestral property and hence, both the Courts below has rightly held that the suit is not an ancestral property and accordingly rejected the case of the plaintiff in view of the existence of Ex.A2 Partition Deed and hence, the Substantial Questions of Law does not arise in the factual situation of the case. Accordingly, the Substantial Questions of Law are held in negation against the appellants.



29. In the result,

(i) This Second Appeal is dismissed. No costs.

(ii) The judgments and decrees of the First Appellate Court and the Trial Court are confirmed.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

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To

1. The Additional District and Sessions Judge,
Fast Track Court No.I,
Chennai.
2. The VII Assistant Judge,
City Civil Court,
Chennai.
3. The Section Officer,
VR Section,
High Court, Madras - 104.

+lcc to M/s.R.T.Shyamala, Advocate, S.R.No.19221
+lcc to Mr.C.Kulanthaivel, Advocate, S.R.No.19075

S.A.No.1173 of 2005

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