



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 29.07.2021

CORAM:

THE HON'BLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD) No.636 of 2013

and

M.P. (MD) No.2 of 2013

G.Manickaraj ... Appellant/1st respondent/1st defendant

-vs-

1.P.Manjula

2.P.Thirupathi

3.P.Sutha ... Respondents/Appellants 1 to 3 /
Plaintiffs 1 to 3

4.K.Ravi

5.K.Parn @ Pethanan

6.K.Manikandan

7.K.Rajvel

8.G.Selvan

9.M.Selvan

10.T.Rengasamy

11.N.Sentrayan

12.S.Selvi

13.D.Murugan

14.G.Paulpandian ... Respondents / Respondents 2 to 11
Defendants 2 to 12

Prayer :- Second Appeal filed under Section 100 of Civil Procedure Code to set aside the Judgment and Decree dated 12.07.2011 made in A.S No.53 of 2010 on the file of the Sub Court, Uthamapalayam reversing the judgment and decree dated 13.11.2009 made in O.S No.179 of 2008 on the file of the District Munsif Court, Uthamapalayam.



For Appellant : Shri.R.Vijayakumar

For Respondents : Shri.C.Murugavel for Shri.N.Dilipkumar
for R1 to R3

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R4 to R14 - No appearance.

The first defendant in O.S No.179 of 2008 on the file off the District Munsif Court, Uthamapalayam is the appellant in this second appeal. The suit was filed by the respondents 1 to 3 herein seeking partition in the suit schedule four items. The suit properties belonged to Ganapathy Gounder. The first defendant and the 12th defendant are his sons. The plaintiffs were born to the 12th defendant. D2 to D11 had purchased portions of the fourth item from the first defendant.

2.The case of the plaintiffs is that D1 and D12 entered into a partition on 07.02.1970. It was reduced into writing and registered (Ex.A1). The deed contained three schedules. "A" schedule properties were allotted to their grand father. "B" schedule properties were allotted to the 12th defendant. "C" schedule properties were allotted to the first defendant. The first defendant sold "C" schedule property (corresponding to fourth item in the present suit schedule) to the 12th defendant vide sale deed dated 22.03.1973. This was re-conveyed on 13.08.1981 by a registered settlement deed (Ex.A2). The plaintiffs claimed that they became aware of the reconveyance only in the year 2008. Since the suit schedule fourth item is a joint family property of the plaintiffs and the 12th defendant, the 12th defendant was not competent to convey the same to the first defendant in any form, let alone by way of settlement. Seeking their 3/4th share in all the four items in the suit schedule, the suit was filed.

3.The 12th defendant remained ex parte. The appellant contested the proceedings. Issues were framed. The second plaintiff examined himself as PW.1. Exs.A1 to A13 were marked. The appellant examined himself as DW.1 and Exs.B1 to B10 were marked. After considering the evidence on record, the trial court dismissed the suit by judgment and decree dated 13.11.2009. The plaintiffs filed A.S No.53 of 2010 before the Sub Court, Uthamapalayam. By the impugned judgment and decree dated 12.07.2011, the first appellate court reversed the decision of the trial court and granted preliminary decree as prayed for in respect of the fourth item. Aggrieved by the same, the first defendant filed this second appeal.

4.The second appeal was admitted after framing substantial questions of law as to whether Central Act 39 of 2005 would be applicable and whether the first appellate court was right in



hands of the 12th defendant.

5.The counsel for the plaintiffs contended that except what was allotted to him under Ex.A1 partition, their father did not have any other property or avocation ; the consideration paid by him to the first defendant for purchasing the suit fourth item on 20.03.1973 thus came only from joint family nucleus and therefore it should be treated as joint family property ; once it is treated as joint family property, the 12th defendant could not have settled the entire fourth item in favour of his brother/the first defendant. Therefore, the first appellate court rightly granted preliminary decree as regards the 3/4th share.

6.The answer to the first substantial question of law lies in the statutory provision itself. It is beyond dispute that through a registered instrument, the property had been dealt with and alienated in the year 1981 itself (Ex.A2). Therefore, the subsequent amendments made to the Hindu Succession Act cannot have any application. Therefore, I answer the first substantial question of law in favour of the appellant.

7.The entire issue turns on the validity of the disposition made by the 12th defendant in favour of the first defendant. The foundational premise of the plaintiffs is that the suit fourth item is a joint family property. To characterise a property purchased by the head of the family as a joint family property, certain conditions must be satisfied. The existence of a joint family nucleus must be established. These are essentially matters of pleading and proof. The plaint is silent on these aspects. What has not been pleaded cannot be proved. This is one aspect of the matter. The second aspect is that the alienation has not been formally questioned. The first plaintiff Manjula was born in the year 1971. The second plaintiff was born in the year 1976. The third plaintiff was born in the year 1980. The suit came to be filed only in 2008. The alienation was not questioned within twelve years or within three years after the plaintiffs attained majority. The alienation was made on 30.01.1981. The revenue records were also mutated thereafter. The first defendant had also parcelled the fourth item and made individual alienations in favour of D2 to D11. The trial court had made an observation that the 12th defendant was accompanying the plaintiffs and attending almost all the suit hearings but he chose to remain conveniently ex parte. The trial court rightly concluded that the suit was barred by limitation. The first appellate court failed to deal with the reasons assigned by the trial court for non-suiting the plaintiffs. The grounds of limitation and total want of pleading as regards the fulfillment of the conditions to treat the fourth item as a joint family property cannot be overcome at all by the plaintiffs. I answer the second substantial question of law also in favour of the appellant. Since the appellant is concerned only with the fourth item of suit

with items 1 to 3, the impugned judgment and decree



passed by the first appellate court is set aside insofar as the fourth item is concerned. The second appeal is allowed accordingly. No costs. Connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-II)

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/ /2022

Sub Assistant Registrar(CS)

skm

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To

- 1.The Subordinate Judge, Uthamapalayam.
- 2.The District Munsif, Uthamapalayam.

Copy to : The Record Keeper,
V.R.Section, Madurai Bench of the Madras High Court.
(2 copies)

+1 CC to M/s.N.DILIP KUMAR, Advocate (SR-24853[F] dated 02/08/2021)

+1 CC to M/s.R.VIJAYAKUMAR, Advocate (SR-24643[F] dated 30/07/2021)

S.A. (MD) No.636 of 2013
and
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29.07.2021

na (CO)

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