



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 16.08.2021

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A.(MD)No.372 of 2014

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1.Kasi Viswanathan

2.Subburaj

(Appellants 1 & 2 are declared as majors and
guardianship discharged vide order dated 02.04.2013
in M.P.(MD)No.2 of 2012)

... Appellants / Respondents 1 & 2 / Plaintiffs

-Vs-

1.Rajendran

2.Muthuchamy ... Respondents 1 & 2 / Appellants / Defendants
7 & 8

3.Krishnamaniam (Died)

4.Alagammal

5.Marimuthu

6.Kesavan

7.Murugan

8.Selvam ... Respondents 3-8 / Respondents 3-8 / Defendants
1-6

(Petitioners 1 and 2 are recorded as Lrs of the deceased R3 vide
order dated 02/04/2013 made in MP(MD) No.4 of 2012)

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree of the lower appellate Court dated 27.07.2010 made in A.S.No.368 of 2004 on the file of the Additional Subordinate Judge, Dindigul, reversing the judgment and decree of the trial Court dated 31.08.1999 made in O.S.No.165 of 1997 on the file of the II Additional District Musnif, Dindigul.

For Appellants : Mr.Vinoth
for Mr.R.Subramanian

For R1 & R2 : Mr.A.Hariharan

For R4 to R6 : Dismissed

For R7 : No appearance

For R8 : Mr.H.Lakshmi Shankar

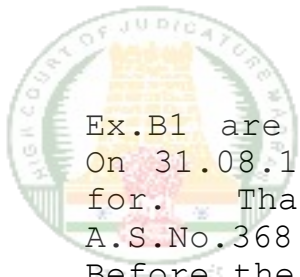
**JUDGMENT**

The plaintiffs in O.S.No.165 of 1997 on the file of the II Additional District Munsif, Dindigul, are the appellants in this second appeal.

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2. The said suit was for partition. It was filed on behalf of the appellants by their mother Andiammal. The appellant's father Krishnamaniam was shown as the first defendant. The case of the appellants was that the suit properties are the ancestral properties that belonged to the Hindu Joint family comprising the plaintiffs and the first defendant. The plaintiff's mother Andiammal was the fifth wife of the first defendant Krishnamaniam. The first defendant had settled the other wives but left out the children born through the fifth wife Andiammal. The second defendant Alagammal was the sister of the first defendant. The third defendant Marimuthu had obtained power of attorney from the first and second defendants. The plaintiffs alleged that D1 to D3 endeavored to encumber the suit properties. The plaintiffs demanded partition and separate possession of their 1/2 share in the suit items. During the pendency of the suit, the first defendant, vide Ex.B1, had alienated a few items in favour of D7 and D8 who are none other than the grand children of the first defendant born through the first wife namely Muthammal. The sixth defendant Selvam had purchased the suit items 2 to 5 under Ex.B2 and item No.1 under another document which was not marked.

3. The defendants 7 and 8 filed written statement controverting the plaintiff averments. They pointed out that the claim of the plaintiffs that the suit properties are ancestral properties is utterly false. They are self acquired properties of the first defendant. The first defendant had incurred several debts and to discharge the same, he had sold away the properties. The defendants 7 and 8 pointed out that some of the items belonging to the first defendant were deliberately not included in the suit schedule. Therefore, the suit was bad for partial partition. Some of the purchasers of the properties of D1 have not been arrayed as defendants. Therefore, the suit is bad for non-joinder of necessary parties. They also contended that they had purchased certain items that were included in the suit schedule under Ex.B1 for valuable consideration. The first defendant had sold those items covered under Ex.B1 to bona fide purchasers. He had obtained a consideration of Rs.2,20,000/-. The plaintiffs did not choose to impeach the said sale. Based on the rival pleadings, the trial Court framed the necessary issues. The plaintiff's mother Andiammal examined herself as P.W.1 and marked Ex.A1 to Ex.A9. The eighth defendant Muthusamy examined himself as D.W.1 and marked Ex.B1 to Ex.B7. After a consideration of the evidence on record, the trial Court came to the conclusion that the sale made in favour of D7 and D8 is not valid. It also held that the properties covered under



Ex.B1 are joint family properties and are amenable to partition. On 31.08.1999, the trial Court passed preliminary decree as prayed for. That was put to challenge by the defendants 7 and 8 in A.S.No.368 of 2004 before the Additional Sub Court, Dindigul. Before the first Appellate Court, D7 and D8 filed a certified copy of the judgment and decree made in O.S.No.915 of 1994, in which, the suit properties were declared as self acquired properties of Krishnamaniam. In the light of Ex.B8, the first appellate Court chose to reverse the decision of the trial Court and dismissed the suit in toto. Aggrieved by the same, this second appeal came to be filed.

4.The second appeal was admitted on the following substantial questions of law:-

1.Whether in the law the lower appellate Court right in receiving the additional evidence without following the procedures under Order 41 Rule 27 and 28 of C.P.C.?

2.Whether the lower appellate Court is right in holding that the suit is not hit by *lis pendens*?

After hearing the learned counsel on either side on 09.08.2021, the additional substantial questions of law were also framed.

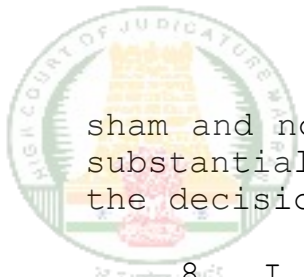
(3) Whether the first appellate court ignored the averments set out in Ex.A9 notice issued by the defendants 7 and 8?

(4) Whether the first appellate court ought to have sustained the finding of the trial court that the sale covered under Ex.B1 in favour of the defendants 7 and 8 is sham and nominal?

5.Heard the learned counsel on either side.

6. The learned counsel for the appellants at the very outset conceded that the trial Court had chosen to grant relief only in respect of the property covered under Ex.B1. But the decree passed by the trial Court had gone beyond the terms of the judgment rendered by him. The plaintiffs had not chosen to file any appeal. He therefore fairly submitted that he would remain content that if the judgment passed by the trial Court is restored and the decree is passed in terms thereof. The plaintiff does not propose to impeach the sale made by D1 in favour of D6-Selvam. This submission made by the learned counsel for the appellants is placed on record.

7. The learned counsel reiterated the other contentions set out in the memorandum of grounds and submitted that Ex.B1 came into existence subsequently in point of time. He also would contend that Ex.B8 was allowed to be marked without adhering to the procedure set out in Order 41 Rule 28 of C.P.C., The first appellate Court had ignored the fact that D7 and D8 have themselves earlier demanded partition by issuing Ex.B9-notice by treating the suit properties as ancestral properties. He pointed out that Ex.B1 came into existence subsequent to the filing of the suit and it is obvious that it was a

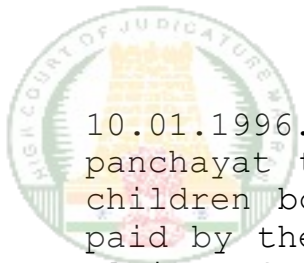


sham and nominal document. He called upon this Court to answer the substantial questions of law in favour of the appellants and restore the decision of the trial Court.

8. I carefully considered the rival contentions and went through the evidence on record. In view of the concession made by the learned counsel for the appellants, the scope of this Court is confined only to the validity of Ex.B1. The trial Court has held that Ex.B1 is invalid. The first appellate Court chose to reverse the decision of the trial Court in view of Ex.B8. One of the substantial questions of law framed in the appeal is whether the first appellate Court was right in receiving the additional evidence without following the procedure set out under Order 41 Rule 27 and 28 of C.P.C. As rightly contended by the learned counsel for D7 and D8, Ex.B8 is only a certified copy of the decree passed in O.S.No.915 of 1994 on the file of the District Munsif Court, Dindigul. The first defendant Krishmaniam had instituted the said suit and the suit properties set out therein had been declared as absolute properties of the plaintiffs and the defendants therein have been restrained by the decree of the permanent injunction. Since this is a public document and since the appellants herein did not even file any counter in I.A.No.101 of 2007, the first appellate Court cannot be faulted for straight away marking the said document. There was no need and necessity to take recourse to the procedure laid down in Order 41 Rule 28 of C.P.C. I answer this substantial question of law against the appellants and in favour of the contesting respondents.

9. The next question is whether Ex.B1 is hit by *lis pendence*. O.S.No.165 of 1997 was filed on 26.02.1997. Ex.B1 was executed by the first defendant on 12.09.1997. It is also seen that after receiving the suit notice, the first defendant executed Ex.B1. It is obviously hit by *lis pendens*. Therefore, the first appellate Court could not have held that the suit is not hit by *lis pendens*. I answer this substantial questions of law in favour of the appellants.

10. Now the core issue is whether the first appellate Court was justified in reversing the decision of the trial Court by relying on Ex.B8. One observation has to be made straight away here. Ex.B8-decree covers as many as 9 items. Ex.B1-sale deed covers 6 items. Item No.4 and Item No.6 of the sale deed (Ex.B1) pertaining to Survey Nos.307/2C and 307/2A are not mentioned in Ex.B8. Of-course, the learned counsel for the contesting respondents would strongly urge that the said decree binds the plaintiffs also and that therefore, it is not open to them to challenge the same. I am not persuaded by the said submission. As rightly pointed out by the learned counsel for the appellants, Ex.B8 dated 10.01.1996 made in O.S.No.915 of 1994 is an *exparte* decree. Of-course, declaration had been granted that the suit items set out therein are the absolute properties of Krishnamaniam. This decree was passed on



10.01.1996. A mere look at Ex.B2 dated 29.05.1995 would show that panchayat took place between Krishnamaniam on the one hand and the children born through the first wife Muthammal. The consideration paid by the purchaser Selvam under Ex.B2 was utilised to settle the claims of the children born through the first wife. From this, one can safely infer that since there was a challenge to the rights of Krishnamaniam, he was constrained to file the said suit in O.S.No.915 of 1994 on the file of the Principal District Munsif Court, Dindigul and since the issues had been settled, the defendants therein allowed the matter to be decree exparte. This is evident from the sequence of events.

11. Though Ex.B8 is no-doubt an admissible piece of evidence, it pertains to assertion of the right of Krishnamaniam that the properties are the self acquired properties and is admissible under Section 13 of the Indian Evidence Act. But the appellate Court was clearly wrong in placing reliance on the same. It is one thing to say that the document is admissible and relevant. It is another thing to say that issues can be determined in the light of the contents of the said document. As already pointed out, the first defendant Krishnamaniam had married five times. The contest is between the children born through the first wife and the children born through the fifth wife. Others are not in the picture. The children born through the fifth wife claim 1/2 share in the property. For enforcing the said claim, they filed the instant partition suit. After filing of the partition suit, Ex.B8 had come into existence. Ex.B1 interestingly was executed by the first defendant by joining the plaintiffs as eo-nominee parties. There is absolutely no merit in the contention of the learned counsel for D7 and D8 that Ex.B1 was executed and consideration was received for the benefit of the minors. The minors were demanding adjudication of their claim against Krishnamaniam. Therefore, the contention that Ex.B1 was executed for their benefit has only to be stated to be rejected. Earlier, D7 and D8 issued Ex.A9-notice, in which, they have themselves taken a stand that D1 was attempting to alienate and encumber the ancestral properties. Having taken such a stand, it is not open to D7 and D8 to now claim that the properties covered by Ex.B1 are the self acquired properties of Krishnamaniam. The trial Court rightly came to the conclusion that Ex.B1 is invalid. However, the first appellate Court had gone entirely by the decree in O.S.No.915 of 1994 (Ex.B8). I have already noted that Ex.B8 could not have been given much credence.

12. Therefore, I answer the other substantial questions of law in favour of the appellants and set aside the impugned judgment and decree passed by the first appellate Court. Krishnamaniam had passed away during the pendency of the appeal. The contest is only between the children born through the fifth wife and the children born through the first wife. The appellants conceded that they will not have any objection for D7 and D8 to take the other half share. The plaintiffs/appellants herein will have half share in the



suit items covered under Ex.B1 and item No.14. The defendants 7 and 8 will be entitled to the remaining 1/2 share.

13. The second appeal is allowed accordingly. No costs.

Sd/-

Assistant Registrar (CS III)

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Sub Assistant Registrar(CS)

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To

1.The Additional Subordinate Judge, Dindigul.

2.The II Additional District Musnif, Dindigul.

3.The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.R.SUBRAMANIAN, Advocate (SR-26473[F] dated 17/08/2021)

+1 CC to M/s.H.LAKSHMI SHANKAR, Advocate (SR-26553[F] dated 17/08/2021)

+2 CC to M/s.A.HARIHARN, Advocate (SR-26678[F] dated 18/08/2021)

S.A. (MD) No. 372 of 2014

16.08.2021

MGJ/PM(11.11.2021) 6P 9C