



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : 17.03.2021

CORAM

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THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN

SA(MD)No.263 of 2015
and M.P(MD)No.1 of 2015

Samikannu ...Appellant/Appellant/1st Defendant

Vs.

1.Jeyamari ... 1st Respondent/Respondent/Plaintiff

2.Kuzhanthai Therasa

3.M.Samikannu ... Respondents 2 & 3/
Respondents 2- 3/Defendants 2-3

4.Azhaguraja

5.Vairavan

6.A.Rayappan

7.Britto Francis Mary

8.Swikinraj

9.Sengolraj

10.Arokiyasamy ..Respondents 4 -10/Respondents 4 - 10/
Defendants 4 - 10

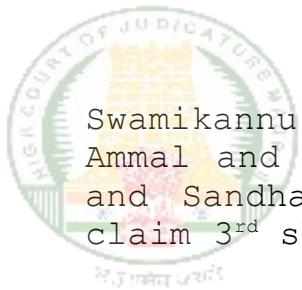
PRAYER:- Second Appeal filed under Section 100 of Civil Procedure Code against the Judgment and Decree dated 09.02.2012 passed by the Subordinate Judge, Sivagangai, made in O.S.No.37 of 2004 and confirmed by the judgment and decree dated 29.01.2014 made in A.S.No.13 of 2012 on the file of the District Judge, Sivagangai.

For Appellant : Mr.V.Janakiramulu
For R1 : Mr.N.Tamilmani
For R2 : Mr.L.Saravanan
For R3,4 & 7-10 : No appearance

JUDGMENT

The first defendant in O.S.No.37 of 2004 has come up with this Second Appeal aggrieved by the decree for partition granted in the said suit and confirmed on appeal in A.S.No.13 of 2012.

2. The suit was laid by the first respondent herein claiming 1/3rd share in the property contending that the suit property originally belonged to Mariarathinam, who died leaving behind 5 children, the plaintiff Jeyam Mery, the first defendant



Swamikannu, the second defendant Kulandhai Theresu, one Thainish Ammal and one Sandhanamary. It is also stated that Thainish Ammal and Sandhanamary died issueless. Therefore, the plaintiff would claim 3rd share in the suit property.

3. The suit was resisted by the first defendant contending that as the building was very old and the same has become dilapidated, he has renovated the building. He would also contend that the father namely, Mariarathnam had orally gifted the property to him and required him to take care of his sisters. The second defendant and other defendants filed a written statement supporting the cause of the plaintiff. It was brought to the notice of the court that Sandhanamary had left behind certain heirs and they are necessary parties to the suit. Hence, they were impleaded as the defendants 6 to 10. Since Sandhanamary died leaving behind her husband and children, they are entitled to 1/4th share.

4. At trial, the plaintiff examined herself as PW.1 and Exs.A.1 to A.3 were marked. The first defendant was examined as D.W.1 and the second defendant Kulanthai Theresu was examined as D.W.2. Exs. B1 to B2 were marked.

5. The trial court, upon a consideration of evidence on record, concluded that since the relationship is admitted, the plaintiff is entitled to a share in the property. It however found that since Sandhanamary's heirs have been impleaded in the suit, they would be entitled to 1/4th share. The plaintiff would be entitled to only 1/4th share. The trial Judge disbelieved the theory of oral gift and the claim for improvements made by the 1st defendant. On the said findings, the trial Judge decreed the suit granting 1/4th share to the plaintiff.

6. Aggrieved, the 1st defendant filed an appeal in A.S.No.13 of 2012. The appellate court, on a re-consideration of evidence on record, concurred with the findings of the trial court and upheld the judgement and decree of the trial court. Hence, this second appeal.

7. The following questions of law have been framed by this court at the time of admission:

i) Whether the courts below were right in ignoring the documents produced by the appellants both before the trial court and at the appellate stage in proof of his defence?

ii) Whether the suits for partition by the plaintiff /1st respondent and granting relief of partition of suit property into 1/4th share are justified on the defence taken by the appellant for



rendering yeomen services throughout his life from his tender of 8 years to the respondents 1 and 2, their children, children of deceased Santhana mary and maintenance of Thaneesh Ammal for more than 18 years in the absence of his father?

iii) Whether the appellant's exercise in creating equitable mortgage over the properties from 1968 to 1997 on six occasions in his name on the basis of the revenue documents and property assessment in his name did not establish the recognition of absolute right of appellant conferred by the entire family including the present respondents?

iv) Whether the lower appellate court is right in simply dismissing the appeal suit without any reference or discussion or finding over the documentary evidence sought to be marked as additional evidence and non-consideration of the same have not vitiated the judgment and decree of the appellate Judge?

v) Whether the claim for partition by the respondents sisters of the appellant in equal proportion is maintainable against the appellant when the material points for spending substantial amount for the marriage and consequent customary rights and other functions of each and every children of respondents continuously for several years?

8. I have heard Mr.V.Janakiramulu, learned counsel appearing for the appellant, Mr.N.Tamilmani, learned counsel appearing for the first respondent and Mr.L.Saravanan, learned counsel appearing for the second respondent.

9. Mr.V.Janakiramulu, learned counsel appearing for the appellant, elaborating on the question of law would submit that the appellate court erred in rejecting the documents filed by him along with I.A.No.51 of 2013. He would also contend that the documents filed along with I.A.No.51 of 2013 would prove exclusive possession of the first defendant, which would, in turn, go to prove the oral gift pleaded by him. It is also his case that the plaintiff should have paid the court fee under section 37(1) of the Tamil Nadu Court Fees and Suit Valuation Act, 1955, not under section 37(2) of the said Act as she was excluded from possession of the property. He would also contend that marriage expenses incurred by him should have been taken into account while determining the shares of the daughters particularly, the married daughters.

10. Contending contra, Mr.N.Tamilmani, learned counsel appearing for the first respondent/plaintiff would submit that



once relationship is admitted and there is neither testamentary nor non-testamentary instrument in favour of the first defendant, the first defendant cannot deny the share of the plaintiff as the daughter of Mariarathinam. He would also submit that the claim of oral gift cannot be entertained since the oral gift is not recognized under law. He would point out that as a co-owner, the plaintiff is deemed to be in joint-possession. Therefore, the court fee paid under section 37(2) of the Tamil Nadu Court Fees and Suit Valuation Act, 1955, is sufficient. He would also contend that acts of the first defendant in managing the property would not denude the plaintiff's right of share in the property.

11. I have considered the rival submissions made on either side.

12. Both the courts below, on appraisal of evidence on record, have concluded that the plaintiff is entitled to a share. In fact, the first defendant had admitted the right of the plaintiff. All that is pleaded by the first defendant is that he has put up a construction and he has spent money for the marriage of the sisters. That by itself would not be a ground to deny a share to the sisters. Once it is found that the property belonged to the father and he died leaving behind the plaintiff, the defendants 1 and 2 and two other children, all of them are equally entitled to the property. The claim of the first defendant that his father has orally gifted the property cannot be sustained since there is legal prohibition against oral gifts.

13. The appellate court had taken note of the documentary evidence that is made available as well as the documents that were sought to be filed along with I.A.No.51 of 2013 and it had held that those documents will not affect the right of the plaintiff. Therefore, there is no basis of the first question of law.

14. As regards the second question of law, unless law provides reduction of share to other heirs in lieu of services rendered by one of the sharers, the same cannot be taken into account by the court. May be it is true that the appellant had maintained the sisters and the children of the deceased sisters, but that by itself would not enable the court to reject the claim of the sisters for a share over the property. Unfortunately, for the appellant, law of succession does not depend upon the services rendered by one of the heirs to others. Hence, the second question of law has to be answered against the appellant.

15. May be the appellant had exercised certain rights over the property by mortgaging the property. Unless he pleads and proves ouster, the court cannot deny a share to the plaintiff. Hence, the third question of law is also answered against the



appellant. As pointed out earlier, the appellate court has referred to the documents that were available as well as the documents filed along with I.A.No.51 of 2013 and have reached the conclusion that the appellant has miserably failed to prove his contentions. I do not think that the appellate court could be blamed for non-application of mind. Hence, the fourth question of law is also answered against the appellant.

16. Admittedly, the plaintiff is unmarried. The appellant would not have spent any amount for her marriage. Therefore, the appellant is not entitled to claim marriage expenses against the plaintiff's share.

17. In view of the answers to the questions of law as above, this Second Appeal fails and accordingly, the same is dismissed. The Judgment and Decree dated 29.01.2014 passed by the District Judge, Sivagangai, made in A.S.No.13 of 2012 confirming the judgment and decree dated 09.02.2012 made in O.S.No.37 of 2004 on the file of the Subordinate Judge, Sivagangai, is confirmed. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (T&P)

// True Copy //

/ /2021

Sub Assistant Registrar (CS)

CM

To

1. The Subordinate Judge, Sivagangai

2. The District Judge, Sivagangai.

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The Section Officer-2 copies

VR Section,

Madurai Bench of Madras High Court, Madurai.



+1 CC to Mr.V.JANAKIRAMULU, Advocate (SR-12239[F] dated 18/03/2021)

+1 CC to Mr.N.TAMILMANI, Advocate (SR-12302[F] dated 18/03/2021)

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