



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 09.09.2021

Pronounced on : 07.02.2022

CORAM:

THE HONOURABLE MRS. JUSTICE S. KANNAMMAL

S.A.No.379 of 2019
and
C.M.P.Nos.5544 & 5548 of 2019

Ethiraj ...Appellant/Respondent/Defendant

Versus

Sarojammal (died)

1.Pattammal
2.Chellammal

...Respondents/Appellants/Plaintiffs

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree dated 28.09.2018 in A.S.No.14 of 2017 on the file of the District Judge, District Court II, Kancheepuram, reversing the judgment and decree dated 27.07.2017 in O.S.No.196 of 2010 on the file of the Subordinate Judge, Kancheepuram (in so far as item No.8 of schedule A property and item Nos.2 to 5 of schedule B property).

For Appellant :Mr.G.Punniakoti

For Respondents :Mr.Y.Jyothish Chander

JUDGMENT

This Second Appeal has been directed against the judgment and decree dated 28.09.2018 passed by the District Judge, District Court II, Kancheepuram, in A.S.No.14 of 2017 modifying the judgment of the trial Court to the following extent:

"The plaintiffs are entitled to get 2/3 share in all items of A schedule property excluding the new house buildings constructed in the 8th item of



A schedule property. The plaintiffs are entitled to 2/3 shares in all items of B schedule properties."

2. Aggrieved over the above said judgment, the appellant who is the defendant in the suit, has come forward with the present Second Appeal.

3. The appellant herein is the defendant and the respondents herein are the plaintiffs before the trial Court. The suit in O.S.No.196 of 2010 was filed by the respondents herein claiming for passing of preliminary decree.

"preliminary decree for partition and separate possession directing the defendants to divide the suit A & B schedule properties, into 3 equal shares and allotting two such shares to the plaintiffs by appointing an Advocate commissioner for dividing the same in the final decree proceedings and for costs of the suit."

4. The case of the respondents before the trial Court is that the respondents 1 and 2 and the defendant are the children born to one Varadhan and Saroja Ammal. The said Varadhan died intestate 25 years ago leaving behind the property described as A schedule and the appellant and the respondents are entitled to equal share as Class-I legal heirs including Saroja Ammal, his wife. According to the respondents, the schedule properties are joint family properties and the appellant was the family manager and he managed the said properties and the income derived from A schedule properties, the appellant acquired B schedule property in his name instead of joint family. Therefore, the respondents herein have issued legal notice on 05.08.2007 calling upon the appellant to divide schedule properties into four equal shares and allot three such shares to the respondents 1 and 2 and their mother who was the first plaintiff in the suit and died during the pendency of the appeal. Since the appellant has not come forward to divide and allot respective shares, the respondents herein filed the suit.

5. Resisting the suit, the appellant filed a written statement denying the averments made in the plaint filed in support of the suit inter alia stating that A schedule property was belonging to one Kullappa Naidu who was grand father and



after his demise, his father was in a peaceful and possession and enjoyment and the respondents herein have no right in the suit property since their father Varadhan had not purchased any landed property in his name out of his own income. As regards the B schedule property, according to the appellant herein, it was purchased by him out of his own income. According to the appellant, the respondents/plaintiffs have no right to claim B schedule property since it was self acquired property of the appellant and also that respondents being women cannot claim partition and to reside in a portion of the house.

6. Before the trial Court, in order to prove their respective cases, on behalf of the respondents/plaintiffs herein P.W.1 was examined and Exs.A1 to A5 were marked and on behalf of the appellant/defendant, he himself examined as D.W.1 and got marked Exs.B1 to B8.

7. Upon consideration of both oral and documentary evidence, the trial Court has decreed the suit for partition and held that the respondents herein including their mother are entitled to get $2/3^{\text{rd}}$ share with regard to item Nos.1 to 7 of A schedule property and item No.1 of B schedule property and as regards the B schedule of property, the respondents are not entitled to share in regard to item No.8 of A schedule and item Nos.2 to 5 of B schedule property.

8. Aggrieved over the judgment and decree passed by the trial Court, the respondents herein along with their mother one Saroja Ammal preferred an appeal before the District Judge, District Court II, Kancheepuram, in A.S.No.14 of 2017.

9. On consideration of the findings of the Court below as well as the contentions raised by the respective parties coupled with the evidence available on record, the lower Appellate Court modified the judgment and decree of the trial Court to the extent as already indicated above. Challenging the said decree and judgment of the lower Appellate Court, the appellant/defendant has come forward with the present appeal.

10. While admitting the present appeal, the following substantial questions of law were framed for consideration:

"1. Whether the lower Appellate Court was right in concluding that item No.8 of the 'A' Schedule



WEB COPY

property will also be available for partition ignoring the grant of Natham Patta to the appellant.

2. Whether the lower Appellate Court was right in concluding that items 2 to 5 of the 'B' Schedule property were also ancestral properties in the absence of any evidence to whom that there was sufficient nucleus and surplus income from the ancestral properties which would have formed the source of consideration for purchase of those properties under Ex.B2."

Issue No.1:

11. There is no dispute that item No.8 of the A schedule property is a house property and natham patta Ex.A5 was standing in the name of the appellant herein which was granted on 26.04.1995. The learned counsel for the appellant would contend that the lower appellate Court erroneously reversed the findings of the trial Court with regard to acquisition of item No.8 of A schedule property by the appellant herein by way of issue of natham patta by his own occupation and enjoyment. It is the case of the respondent herein, the said item No.8 of A schedule property belonged to their father who enjoyed the same till his death and after his demise, the family members including the appellant and the respondents were enjoying continuously. It is the specific case of the appellant herein in his written statement that item No.8 of A schedule property is a residential house hence the women of a hindu person cannot claim partition in the house of a died intestate person and women are entitled only to reside in house portion till their life time and the plaintiffs are not entitled to partition in the above said property. On perusal, the trial Court based on Ex.A5/patta, observed that the property cannot be considered to be the property of Varadhan who is the father of appellant and respondents and held that the respondents cannot claim any share in that property.

12. The lower appellate Court after re-appreciating the oral and documentary evidence held that the respondents herein are entitled for share in the item No.8 of A schedule property. The lower appellate Court in its judgment at para 15 has discussed elaborately about the nature of the item No.8 of the A schedule property. The lower appellate Court has rightly observed that



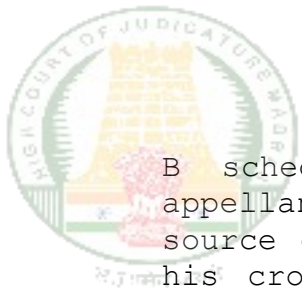
the clear case of the appellant herein that the above said property was continuously enjoyed by his grand father, father and plaintiffs. The lower appellate Court have also rightly observed that the case of the appellant herein is not that he newly occupied the above said grama natham and obtained patta in favour of him. The appellant herein made clear admission that he is the only male member and the kartha of his family. It is not disputed that the appellant obtained patta in the year 1994 after the death of his father and father of the appellant was in possession of the house during his life time.

13. On perusal of the evidence of the appellant in his cross examination also made clear admission that till the marriage of his sisters all were residing as joint family and all the family members were residing in the thatched house. The appellant herein has not claimed any exclusive right in his written statement. The lower appellate Court based on the clear and categorical admission made by the appellant herein rightly held that the respondents herein are entitled for partition in item No.8 of A schedule property. The lower appellate Court has also discussed about the Section 123 of Hindu Succession Amendment Act, 2005 (39 of 2005) and rightly held that the respondents are entitled to partition in the item No.8 of A schedule property. Further, the lower appellate Court has also rightly concluded that the appellant and the respondents are equally entitled to share in the item No.8 of A schedule property excluding the house recently constructed by the appellant and it may be dealt at the time of final decree by adopting equity and this Court does not find any infirmity in the finding of the lower appellate Court and this issue is answered in favour of the respondents.

Issue No.2:

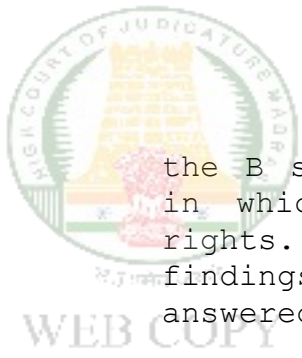
14. The learned counsel for the appellant herein would contend that in the absence of any evidence to show that there was sufficient nucleus and surplus income from the ancestral properties which would have formed the source of consideration for purchase of those properties under Ex.B2, the lower appellate Court has erroneously held that items Nos.2 to 5 of the B schedule property were also ancestral properties and sought for setting aside the erroneous finding of the lower appellate Court.

15. Per Contra, the learned counsel for the respondents would submit that out of income derived from A schedule properties the



B schedule properties were purchased in the name of the appellant as family manager and the appellant has no other source of income. It is pertinent to note that the appellant in his cross examination before the trial Court has deposed that from out of the income he earned from doing coolie work and also by selling the jewels of his wife he purchased the item Nos.2 to 5 of the B schedule properties. The lower appellate Court has rightly observed that the appellant has not adduced any acceptable evidence to prove that the item Nos.2 to 5 of the B schedule properties were purchased independently from the income earned by him by doing coolie work. The lower appellate Court has also rightly observed the admission made by the appellant herein that he raised paddy crops in the joint family properties and the marriage of his sister Chellammal was arranged by him. The lower appellate Court has also rightly observed that the respondents herein that proved the initial burden that the joint family has source of income and the appellant has not proved his source of income. It is also rightly observed by the first appellate Court, though the appellant and respondents are living separately it cannot be construed that the respondents are separated from the joint family properties and the marriage of women would not cease the joint family status. It is further observed that the possession of co-owner is for and on behalf of the other co-owner also. The lower appellate Court has also relied on the judgment reported in 1996 1 MLJ Page No.320 in the case of Kandasamy and Another Versus Adi Narayanan and Another. In the above case, it has been held that a person claiming certain property belongs to the joint family he must show initially that the joint family had sufficient neclues out of which such later acquisition could have been made and after that it is for the kartha of the family to explain that the acquisition were made out of his separate fund. The lower appellate Court has also relied on the judgment reported in 2016 (3) CTC Page No.501 in the case of S.Thiyagarajan and Others Versus Chitkala Govindasamy and Others, in which it has been held that the burden will always lies on kartha to prove that the properties are purchased from his individual income.

16.When it is initially proved that incomes were derived from the joint family property, the burden shifts on to the appellant herein to prove that the items Nos.2 to 5 of the B schedule properties were purchased separately from out of his own income. It is also not the specific case of the appellant that he left the joint family and was not dealing with the joint family property. Since the appellant has not proved the same the lower appellate Court has rightly held that item Nos.2 to 5 of



the B schedule properties are also joint family properties and in which both appellant and respondents are entitled equal rights. Hence, this Court does not find any infirmity in the findings of the lower Appellate Court and the issue No.2 is answered in favour of the respondents.

17.In the light of the above discussion, this Second Appeal is dismissed confirming the decree and judgment passed by the lower appellate Court. The parties shall bear their own costs though out. Consequently, connected Miscellaneous Petition is closed.

SD/-
ASSISTANT REGISTRAR

// TRUE COPY //

SUB ASSISTANT REGISTRAR

suk
To

1.The District Judge,
District Court II,
Kancheepuram.

2.The Subordinate Judge,
Kancheepuram.

+1cc to Mr.G.Punniakoti, Advocate Sr.8160
+1cc to Mr.Y.Jyothish Chander, Advocate Sr.7830

S.A.No.379 of 2019

gsm[co]
srg 22/04/2022