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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.04.2022

CORAM:

THE HONOURABLE MR. JUSTICE N.ANAND VENKATESH

SA.No.624 of 2012

1. Kuppayee

2. Aanai Gounder ..Appellants/Appellants/ Defendants

Vs.

1.Chinna Pillai @ Chinnaponnu

2. Vaithilingam ..Respondents/Respondents/Plaintiffs

Prayer: Second Appeal filed under section 100 of the Code of Civil Procedure against the judgment and decree dated 16.02.2012 passed in A.S.No.14 of 2011 on the file of Sub Court, Mettur, confirming the judgement and decree dated 23.12.2010 passed in O.S.No.25 of 2008 before the District Munsif's Court, Mettur.

For Appellant : Mr.C.Prabakaran

For Respondents : Mr.A.Sundaravadhanan

Judgment

The defendants are the appellants in this Second Appeal.

2. The respondents/plaintiffs filed the suit seeking for the relief of partition and for allotment of 6/12 share in the suit property. The plaintiffs also claimed for the relief of declaration to declare the partition deed dated 23.4.2007 as null and void.

3. The case of the plaintiffs is that the 1st plaintiff and the 1st defendant are co-sisters. The 2nd plaintiff is the son of the 1st plaintiff and the 2nd defendant is the son of the 1st defendant. One Vaithi was the father-in-law of the 1st plaintiff and the 1st defendant and he was the grandfather of the 2nd plaintiff and the 2nd defendant. The said Vaithi had two sons viz. KolandaiGounder and Manthiram and also a daughter



Kolandaiyammal. The 1st plaintiff married KolandaiGounder and the 1st defendant married Manthiram.

4. The further case of the plaintiffs is that the properties in Survey Nos. 11/6 to 11/9 and 11/11 at Panapuram Village are joint family properties to which Vaithi and his two sons are entitled to 1/3rd share each. On 11.6.1962, a settlement deed was executed, marked as Ex.A1, through which the said KolandaiGounder gifted his 1/3rd share in the joint family properties in Survey Nos. 11/6 to 11/9 and 11/11, in favour of the 1st plaintiff. Subsequently, the 1st plaintiff got married to the said KolandaiGounder and she gave birth to the 2nd plaintiff. The father in law viz. Vaithi died intestate in the year 1963. The husband of the 1st plaintiff viz. KolandaiGounder also died 13 years before the suit was instituted. The husband of the 1st defendant viz. Manthiram died 25 years before the suit was instituted. Thereby the plaintiffs were claiming 6/12 share in the suit property jointly.

5. The grievance of the plaintiffs is that the defendants were not coming forward to effect the partition. In the meantime, the plaintiffs came to know that the defendants executed a partition deed dated 23.4.2007, marked as Ex.A2 and they partitioned the suit property in excess of their share. Left with no other alternative, a legal notice was issued by the plaintiffs on 20.12.2007 marked as Ex.A3. Since the defendants were not coming forward to effect the partition and to cancel the partition deed executed on 23.4.2007, the present suit came to be filed seeking for the relief of partition and for declaring the partition deed dated 23.4.2007 as null and void.

6. The defendants filed a written statement. They took a stand that there was already a partition among the family members that took place in the year 1962 and the 1/3rd share that was allotted to KolandaiGounder was settled in favour of the plaintiffs. This was the stand taken insofar as the suit properties situated in Survey Nos. 11/6 to 11/9 and 11/11. Insofar as the suit properties situated at Survey Nos. 10/5D, 10/5F, 10/5H, 10/5I, 10/5C, 10/5E and 10/5G are concerned, the defendants took a specific stand that it exclusively belonged to the husband of the 1st defendant and that the plaintiffs cannot claim any share in those properties. Accordingly, the defendants sought for the dismissal of the suit.

7. Both the Courts below after considering the facts and circumstances of the case and on appreciation of oral and documentary evidence, concurrently held in favour of the plaintiffs and the suit was decreed as prayed for. Aggrieved by



the same, the present Second Appeal has been filed by the defendants.

8. When the Second Appeal was admitted, the following substantial question of law was framed by this Court:

Whether the Courts below were right in holding that the joint family continued and there was no earlier partition and hence the plaintiffs will be entitled for the relief of partition sought for by them after declaring the Partition Deed dated 23.04.2007 as null and void and Whether such a finding is perverse and is contrary to the oral and documentary evidence that are available on record ?

9. Heard Mr.C.Prabakaran, learned counsel for the appellants and Mr.A.Sundaravadhanan, learned counsel for the respondents. This Court also carefully went through the materials available on record and the findings rendered by both the Courts below.

10. There is no dispute with regard to the relationship between the parties and also the nature of properties insofar as Survey Nos.11/6 to 11/9 and 11/11 is concerned. Both the sides agree that these properties are in the nature of joint family properties to which Vaithi and his two sons were entitled to 1/3rd share each. KolandaiGounder, who is the husband of the 1st plaintiff had settled his 1/3rd share in Survey Nos. 11/6 to 11/9 and 11/11 in favour of the 1st plaintiff. The only issue that requires the consideration of this Court is as to whether at the time of executing the settlement deed, the properties were already divided among the father and his sons or what was settled in favour of the 1st plaintiff was only the undivided 1/3rd share of Kolandai Gounder.

11. Both the Courts below on appreciation of oral and documentary evidence concurrently held that what was settled in favour of the 1st plaintiff was the undivided 1/3rd share of Kolandai Gounder. Both the Courts have assigned sufficient reasons to come to such a conclusion. This Court does not find any perversity in those findings. Hence, the preliminary Decree passed in favour of the plaintiffs with regard to the properties situated at Survey Nos:11/6 to 11/9 and 11/11 is hereby sustained and there is no ground to interfere with the same.

12. The second issue which is really in controversy in this Second Appeal is with regard to the properties in Survey Nos:10/5D, 10/5F 10/5H, 10/5 I, 10/5C,10/5E and 10/5G. Admittedly, these properties stood in the individual name of the



husband of the 1st defendant. A careful reading of the plaint shows that there is not even a single pleading available to justify as to how the plaintiffs are claiming for a share in these properties. Surprisingly, the Trial Court frames an issue in this regard. The Trial Court misdirected itself in framing an issue with regard to the nature of the property in Survey Nos: 10/5D, 10/5F 10/5H, 10/5 I, 10/5C,10/5E and 10/5G without understanding the scope of Order XIV Rule 1 of CPC. An issue can be framed when a material proposition of fact is affirmed by one party and denied by the other. The plaintiffs have not even uttered a single word as to how they are claiming for a share with regard to the properties in Survey Nos: 10/5D, 10/5F 10/5H, 10/5 I, 10/5C,10/5E and 10/5G. While so, there was no occasion for the Trial Court to frame an issue even without a pleading.

13. A careful reading of the findings of both the Courts below shows that the plaintiffs have developed their case in the course of trial and started projecting a case as if the husband of the 1st defendant had purchased the property in Survey Nos: 10/5D, 10/5F 10/5H, 10/5 I, 10/5C,10/5E and 10/5G only out of the income of the joint family property in Survey Nos: 11/6 to 11/9 and 11/11. Both the Courts below give their findings only based on assumptions and by relying upon the evidence of DW-1.

14. The learned counsel for the respondents submitted that admission of a fact is the best form of proof and once DW-1 has admitted in the witness box about the non-availability of sufficient income for the husband of the 1st defendant to purchase the properties in Survey Nos:10/5D, 10/5F 10/5H, 10/5 I, 10/5C,10/5E and 10/5G, the natural consequence must be that it was purchased only from the joint family income. To substantiate his submission, the learned counsel for the respondents relied upon the judgment of the Hon'ble Supreme Court in [Vathsala Manickavasagam and Others Vs. N.Ganesan and Another] reported in (2013) 9 SCC 152.

15. It is now a settled law that where the plaintiffs are claiming that certain properties standing in the name of the husband of the 1st defendant must be treated as joint family properties, they must establish the following:

- a) That there was a joint family nucleus.
- b) The same yielded income.
- c) The income derived from the joint family properties was used towards incurring the family expenses.
- d) There was surplus income after meeting the family expenses sufficient enough to purchase the properties in the individual name of the husband of the 1st defendant and ;



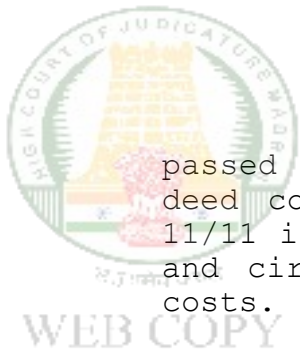
e) That the husband of the 1st defendant did not have sufficient independent income to purchase the properties in his individual name.

16. The burden of proof lies on the plaintiffs to establish the above ingredients. In the present case, the plaintiffs have not even pleaded as to why the properties in Survey Nos: 10/5D, 10/5F 10/5H, 10/5 I, 10/5C,10/5E and 10/5G should be treated as joint family properties. They have attempted to build up a case in the course of evidence and both the Courts below held that the properties in Survey Nos:10/5D, 10/5F 10/5H, 10/5 I, 10/5C,10/5E and 10/5G were purchased by the husband of the 1st defendant from the joint family nucleus, on mere surmises and assumptions. These findings rendered by both the Courts below goes against the settled law and it suffers from perversity. Hence the same requires the interference of this Court.

17. Both the Courts below found that all the suit properties are in the nature of joint family properties and hence, passed the preliminary Decree. The Lower Appellate Court allotted 21/48th share in favour of the 1st plaintiff and 3/48th share in favour of the 2nd plaintiff. The Appellate Court only modified the shares allotted to the 1st and 2nd plaintiffs after taking into consideration the status of the 1st plaintiff and the 1st defendant qua their respective husbands and mother.

18. In view of the above findings, both the Courts below interfered with the partition deed that was executed on 23.4.2007 between the 1st and 2nd defendants and held it to be null and void. The partition deed is liable to be interfered only insofar as it deals with Survey Nos:11/6 to 11/9 and 11/11 and there is no ground to interfere with the same insofar as the properties in Survey Nos:10/5D, 10/5F 10/5H, 10/5 I, 10/5C,10/5E and 10/5G are concerned. To that extent, the Judgement and Decree passed by both the Courts below requires modification. The substantial question of law framed by this Court is answered accordingly.

19. In the result, the Second Appeal is partly allowed. The Judgement and Decree of the Trial Court insofar as granting a preliminary Decree in favour of the plaintiffs for properties in Survey Nos:10/5D, 10/5F 10/5H, 10/5 I, 10/5C,10/5E and 10/5G is concerned, the same is set aside. The preliminary Decree passed in favour of the plaintiffs is confirmed insofar as the properties situated in 11/6 to 11/9 and 11/11. Similarly, the partition deed dated 23.4.2007 executed between the defendants, is upheld insofar as it dealt with Survey Nos: 10/5D, 10/5F 10/5H, 10/5 I, 10/5C,10/5E and 10/5G. The declaratory Decree



passed by both the Courts below with respect to the partition deed covering the properties in Survey Nos: 11/6 to 11/9 and 11/11 is concerned, the same is sustained. Considering the facts and circumstances of the case, there shall be no order as to costs.

Sd/-
Assistant Registrar (CS-II)

//True Copy//

Sub Assistant Registrar

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To

1. The Sub Judge, Mettur,
2. The District Munsif's, Mettur

Copy To:-

The Section Officer
VR Section, High Court
Madras.

+1cc to Mr.C.Prabakaran, Advocate, S.R.No.26291

SA.No.624 of 2012

PM(CO)
SB(16/05/2022)