



S.A.No.1717 of 2008

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 25.08.2023

Delivered on: 15.09.2023

CORAM:

THE HONOURABLE MR.JUSTICE P.B.BALAJI

S.A.No.1717 of 2008

1.Muthammal W/o. Muthukrishnan
2. Sasikala D/o. Muthukrishnan

... Appellants

Vs.

1. Badrachalam S/o. Perumal Gounder
2. Muthukrishnan S/o. Perumal Gounder
3. Kannammal W/o. Perumal Gounder

... Respondents

PRAYER: The Second Appeal has been filed under Section 100 of the Civil Procedure Code to set aside the decree and judgment in A.S.No.1 of 2005 passed by the District Judge, Tiruvannamalai dated 25.07.2008 reversing the judgment and decree in O.S.No.75 of 1996 dated 28.10.2004 on the file of the learned Additional Sub Judge, Tiruvannamalai.

For Appellant : Mr. T. Dhanasekaran

For Respondents : Ms. G. Sumithra [R1 & R3]
R2- No appearance.



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J U D G M E N T

1. The plaintiffs in a suit for partition are the appellants in the present second appeal.

2. The case of the appellants, as plaintiffs before the trial Court was that originally the subject suit property belong to an undivided family of one Perumal Gounder who inherited 'B' Schedule properties from his father, Muthu Gounder. According to the plaintiffs, Perumal Gounder and his sons, defendants 1 and 2, constituted the members of an undivided Hindu Joint family of which Perumal Gounder was the Kartha. According to the plaintiffs, each of them are entitled to 1/3rd share in 'B' schedule properties. The said Perumal Gounder executed a registered Will dated 14.02.1967, bequeathing the entire properties in favour of the defendants 1 and 2. According to the plaintiffs, even assuming the said Will is true and genuine, at best, it could only be in respect of 1/3rd share of Perumal Gounder and not for the remaining property. Subsequent to the demise of Perumal Gounder, the defendants 1 and 2 are entitled for 1/4th share in 'B' Schedule properties and out of the surplus income derived from the said properties, the defendants purchased items 4 to 9



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of 'B' Schedule properties and also constructed the terrace house in the Suit item No.10. According to the plaintiffs, the second plaintiff is entitled to the 1/4th share in all the items of the suit property. It is the further case of the plaintiffs that the 2nd defendant married the 1st plaintiff and in view of certain disputes, the 2nd defendant drove the plaintiffs out of the house and from July 1987, the plaintiffs have not been residing in the suit house. The 2nd defendant had not paid any maintenance to the plaintiffs and in view of all the above, the plaintiffs issued a Lawyer's notice on 30.10.2004 seeking partition and also maintenance. On receipt of the said notice, the defendants issued a reply notice on 15.11.2004 denying the entitlement and claim of the plaintiffs necessitating the plaintiffs to approach the Court seeking relief of partition and past maintenance and future maintenance.

3. The said suit was contested by the defendants by filing a detailed written statement where it was contended that Perumal Gounder inherited only one ½ of share in Items 1 to 3 of 'B' schedule property and another half was inherited by his brother, Kannusamy. The allegation that the defendants 1 and 2 constituted undivided family was denied, citing an oral partition between the defendants in the year 1980. It is also stated that the legal heirs of



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Kannusamy had sold their $\frac{1}{2}$ share in Items 1 and 2 of 'B' Schedule in and by a registered Sale deed wayback on 22.07.1974 and in respect of Item No.3, it was sold even during the life time of Perumal Gounder. The Will executed by Perumal Gounder was invalid. It is the case of the defendants that the 3rd defendant has been managing the properties and the 1st defendant never acted as Kartha. The further allegations that the items 4 to 9 were purchased out of surplus income that had accrued from Items 1 to 3 is also denied. The specific stand taken in the written statement was that there was no surplus income for the family available in order to purchase the same by the family and that only out of their own funds, the suit properties were purchased and the plaintiffs had no right over the same.

4. The 4th defendant, by filing his written statement claimed that the suit was not maintainable. The claim that Perumal Gounder had executed a Will has been denied and according to the 4th defendant, the said Will was not true but only a fabricated document and therefore the 4th defendant was also entitled to succeed to her father's estate as one of legal heirs, along with defendants 1 to 3.

5. Before the trial Court, the parties let in evidence, oral and



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documentary and on an over all consideration of the available oral and documentary evidence before the trial Court, the suit was decreed, declaring that the 2nd plaintiff is entitled to $\frac{1}{4}$ of the share in Items 1 and 2, 4 to 10 of the 'B' schedule properties and that the plaintiffs were entitled to future maintenance of Rs.400 p.m. and Rs.250/- per month respectively from the 2nd defendant. In so far as the past maintenance, the 2nd defendant was also held liable to pay a sum of Rs.14,400/- and Rs.9,000/- respectively to the plaintiffs, in respect of which, charge was also created over the 2nd defendant's share in the suit properties. In so far as the 3rd item of the suit property, the suit was dismissed. Aggrieved over the same, an appeal was preferred only by the 1st defendant. On appeal, the 1st defendant was able to reverse the findings of the trial Court and the appeal filed by him came to be allowed in respect of Items 4 to 10 of the suit property alone. The appellate Courts found that the said items 4 to 10 of the 'B' schedule properties were not available for partition and consequently the 2nd plaintiff was not entitled for any share in the said items.

6. I have heard Mr. T. Dhanasekaran, counsel for the appellants and Ms. G. Sumithra, counsel for the respondents 1 & 3. In spite of service of notice on the 2nd respondent, the 2nd respondent has not chosen to appear and



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defend the findings in his favour.

7. I have considered the rival submissions advanced by the counsel on either side. I have also perused the documents let in by the parties, both oral as well as documentary for the trial Court. I have also carefully examined the Judgments of the trial Court as well as the 1st appellate Court.

8. At the time of admission of this second appeal, the following substantial question of law have been framed:

a) When the first defendant was admittedly the Karta of the joint family, is the learned Appellate Judge right in reversing the Judgment and decree when the first defendant as Karta is burdened to prove that Items 4 to 10 were purchased only from his individual income especially when the first defendant neither owned lands nor proved his individual independent source of income?

b) When the plaintiffs have discharged the initial burden by proving that the properties in Item 1 & 2 are ancestral and that a surplus income is derived from the same, still is the learned Appellate Judge right in holding that the defendants



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need not prove their individual income?

c) Is the Lower Appellate Court right in holding that the plaintiffs have not proved their case, when PW1 in her evidence has categorically proved the surplus income of the joint family property?

d) Is not the Lower Appellate Court bound to take an adverse inference against the defendants for miserably failing to prove the nature, mode and source of individual income?

9. The 2nd defendant, who also suffered a decree for not only partition but also maintenance, has chosen to accept the decree of the trial Court and has not preferred an appeal challenging the decree against him. The 1st defendant has filed the 1st appeal before the District Court, Tiruvannamalai restricting the appeal to items 4 to 10 alone and it was fairly admitted by the counsel for the respondents that the respondents 1 and 3 would not have any quarrel with regard to the other items of the suit properties.

10. It is the specific case of the 1st defendant that he was neither Karta nor acted as a Manager of the alleged Hindu undivided family. In fact, according to the 1st defendant, there was no undivided family in place and there



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is no question of surplus income accruing from 1 to 3 items of the suit properties to enable the said undivided family to purchase items 4 to 10 from and out of the said surplus income.

11. The burden lies on the plaintiffs, who claimed that the said items 1 to 3 were ancestral in nature and that the said properties were yielding surplus income and that such surplus was utilized by the Hindu undivided family to acquire suit items 4 to 10. Only when this burden is discharged by the plaintiffs, they can be come entitled for a declaration of their share in the said Hindu undivided family.

12. So far as the relationship between the parties, there is no dispute. There is also no appeal in respect of the 3rd item of the suit property by either party. There is no challenge to the decree in so far as the maintenance ordered to be paid to the plaintiffs. Therefore the issue now boils down to whether items 4 to 10 of the suit properties were the properties that were acquired out of surplus income that accrued from items 1 to 3 of the suit properties or not.

13. When it was the specific case of the plaintiffs that the items 1 to 3 of the suit properties were ancestral joint family properties, yielding substantial income which resulted in the acquisition of the further items of



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properties namely Items 4 to 10, it is incumbent on the part of the plaintiffs to establish the said claims, especially when it was specifically denied by the defendants that there was no Hindu undivided family in the first place, leave alone, there being no surplus income as alleged by the plaintiffs. Even the trial Court has held that the 3rd item of the suit property is not amenable for partition and the suit was dismissed in so far as the item no.3 of the suit property is concerned. It is relevant, at this juncture to take note of the fact that it was the specific case of the plaintiffs that Items 1 to 3 were all ancestral joint family properties at the hands of the defendants 1 and 2. The trial Court also gave a finding that only an extent of 2.55 acres comprised in Items 1 and 2 were available for partition and declared 1/4th share of the 2nd plaintiff only in so far as the said 2.55 acres was concerned. Though the specific case of the plaintiffs was that the entire extent of 4.2 acres was available for partition, being ancestral joint family properties, the said adverse findings against the plaintiffs has also gone unchallenged.

14. On carefully scrutinizing the evidence, I am unable to find any substantial material or evidence adduced by the plaintiffs to establish that items 1 to 3 of suit properties were ancestral in nature and were held jointly by the



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defendants 1 and 2, after the demise of their father. The plaintiffs have also not been able to establish that there was surplus income from the said items 1 to 3 which facilitated the defendants to purchase items 4 to 10. The only available evidence of PW1 in chief examination is that in items 1 and 2 of the suit properties, there was a well and irrigation was being carried on by raising crops and after meeting all expenses of the joint family, there was a surplus income of approximately Rs.1 lakh every year. Except for the said statement of PW1 given in the witness box, no proof has been adduced to substantiate the same. In fact, on the contrary, when PW1 was cross examined, it is seen that she has admitted that she is not aware of her husband's family nor the properties, leave alone the income that accrued from the same. She has further conceded that the said amount of Rs. 1 lakh which was accruing every year according to her, included the share of Kannusamy. She has also specifically contended that she did not know as to what was the income that was derived from the extent of 2 acres belonging to her father in law. Though she claimed that she was having proof of the fact that there was an annual income of Rs.1 lakh from crops, no state of evidence has been produced before the trial Court to substantiate the said claim. Thus, it is seen that the plaintiffs have miserably failed to establish



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the said claims of the properties being ancestral and joint in nature, yielding substantial income, from and out of which items 4 to 10 of the suit properties have been purchased. The plaintiffs have been unable to discharge the heavy burden on them in this regard and they have also not been able to substantiate their case that the properties namely items 4 to 10 were impressed with a character of joint family and thereby, entitling them to the reliefs as prayed for in the suit. It is also the specific case of the defendants that the items 4 to 10 of the suit properties were all acquired between 1982 and 1984. The sale deeds have been exhibited by the defendants vide Ex.B6 and Ex.B8 before the trial Court. The properties have been purchased in the name of the 1st defendant and in the absence of any acceptable evidence forthcoming on the side of the plaintiffs there is no reason to disbelieve or doubt the version of the defendants that the items 4 to 10 are self acquired properties of the 1st defendant.

15. Even though the defendants have not chosen to challenge the findings in respect of the other items of the suit properties especially item nos.1 and 2, the findings of the trial court that an extent of 2.55 acres was ancestral joint family property and available for partition cannot be lightly brushed aside.



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At the same time, when it is the specific case of the plaintiffs that surplus income from items 1 to 3 were applied to acquire items 4 to 10 of the suit schedule properties, necessarily it is the bounden duty of the plaintiffs to establish that there was surplus income available and sufficient to acquire the said items 4 to 10 of the suit properties. It is the specific case of the defendants that even the income that was accruing from the ancestral properties was very minimal and just sufficient to meet the requirement of the family and that there was no surplus income. Merely because a family is joint, there cannot be a presumption that the family possessed ancestral property and in all such cases, the burden is only on the person who claims that the property to be a joint family property, to prove the same, before becoming entitled to a decree for partition. The 1st Appellate Court has rendered a clear and cogent finding in respect of the failure of the plaintiffs to discharge the burden of proof on them and has proceeded to reverse the findings of the Trial Court in this regard. I do not find any evidence or proof in so far as the substantial questions of law that have been framed at the time of admission to be held in favour of the appellants. In fact I am even unable to find any of those, to be actually substantial questions of law to be decided by this Court u/s.100 of Code of



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Civil Procedure. In any event, all the substantial questions of law that have been framed, have to necessarily be answered against the appellants and in favour of the respondents.

16. In fine, the second appeal stands dismissed. There shall be no order as to costs.

15.09.2023.

Internet:Yes
Index:Yes/No
mjs

To

1. The District Judge, Tiruvannamalai
2. The Additional Sub Judge, Tiruvannamalai.



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P.B.BALAJI,J

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