

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 27.03.2023

CORAM

THE HONOURABLE MR. JUSTICE ABDUL QUDDHOSE

S.A.(MD).Nos.140 and 154 of 2021

and

C.M.P.(MD).No.2117 of 2021

S.A.(MD).No.140 of 2021

L.Unnamalai

... Appellant/Appellant/Defendant

Vs.

SM.Deivanai,
Through her power agent Husband
Somasundaram.

...Respondent/Respondent/Plaintiff

Prayer: Second Appeal is filed under Section 100 of CPC to call for the records relating to the Common Judgment and Decree dated 28.11.2019 made in A.S.No.24 of 2018 on the file of the learned Additional District and Sessions Judge, Sivagangai against confirming the Judgment and Decree dated 14.12.2017 made in O.S.No.82 of 2014 on the file of the Subordinate Judge, Devakottai and set aside the same and consequently allow this Second Appeal.

S.A.(MD).No.154 of 2021

Unnamalai

... Appellant/Appellant/
Counter Claim Petitioner -Defendant

Vs.

SM.Deivanai,
Through her power agent-Husband
Somasundaram.

...Respondent/Respondent/
Counter Claim Respondent- Plaintiff

Prayer: Second Appeal is filed under Section 100 of CPC to call for the records relating to the Common Judgment and Decree dated 28.11.2019 made in A.S.No.25 of 2018 on the file of the learned Additional District and Sessions Judge, Sivagangai against confirming the Judgment and Decree dated 14.12.2017 made in O.S.No.82 of 2014 on the file of the Subordinate Judge, Devakottai and set aside the same and consequently allow this Second Appeal.

For Appellant : Mr.J.Anandkumar

For Respondent : Mr.AN.Ramanathan

(In both cases)

COMMON JUDGMENT

These Second Appeals have been filed challenging the concurrent findings of the Courts below. The defendant in the suit is the appellant herein. The suit in O.S.No.82 of 2014 was filed by the respondent/plaintiff before the Sub Court, Devakottai seeking for partition in respect of her half share in the suit schedule property. The plaintiff had sought for partition based on two sale deeds executed in the name of the defendant as well as the plaintiff jointly and

the said sale deeds are dated 08.03.2001, which have been marked as Ex.A1 and Ex.A2.

2. In the forthcoming paragraphs, the parties are described as per their litigative status in the suit. The plaintiff is the wife of Somasundaram and the defendant is the wife of AN.Lakshmanan. Both AN.Lakshmanan and Somasundaram are brothers. According to the plaintiff, since the defendant did not come forward to partition the suit schedule property, she was constrained to file the suit for partition. However, the defendant in the written statement has pleaded that the suit schedule property was purchased out of the funds belonging to her husband's mother, who is the mother-in-law of both the plaintiff and the defendant. The defendant has also contended in the written statement that she had spent a sum of Rs.1,87,949.56/- for maintaining the suit schedule property out of which the plaintiff is bound to pay her half share amounting to Rs.93,974.25/- to the defendant. According to the defendant, without paying the half share of the expenses, i.e., Rs.93,974.25/-, the plaintiff is not entitled for partition. A counter claim was also made by the defendant in the suit for claiming the sum of Rs.93,974.25/- from the plaintiff.

3. Before the Trial Court, the plaintiff filed five documents, which were marked as exhibits A1 to A5 and one witness was examined on her side, namely, her husband Somasundaram, both as a power agent as well as her husband as P.W.1. On the side of the defendant, 34 documents were filed, which were marked as exhibits B1 to B34 and the defendant herself was examined as D.W.1. The Trial Court passed a preliminary decree for partition in favour of the plaintiff as prayed for in the plaint and rejected the counter claim filed by the defendant by dismissing the same. The following findings were given by the Trial Court while decreeing the suit in favour of the plaintiff and for rejecting the counter claim filed by the defendant.

a) The counter claim of the defendant was not proved.

b) The defendant has admitted in her cross-examination that the suit schedule property was purchased in the names of both the plaintiff and the defendant and the plaintiff is entitled for half share in the same.

4. As seen from the pleadings of the defendant through her written statement, it is clear that the defendant has claimed that the plaintiff is not entitled for partition only on the ground that the plaintiff has not reimbursed the expenses amounting to Rs.93,974.25/-, which the defendant had incurred to maintain the suit schedule property. It is only for the first time before this

Court in these Second Appeals, the defendant is claiming that the suit schedule property having been purchased out of the funds of the mother-in-law of the plaintiff and the defendant, the plaintiff is not entitled for half share in the suit schedule property as it is not the absolute property of both the plaintiff and the defendant and there are other legal heirs to inherit the suit schedule property. As seen from the oral and documentary evidence placed on record by the defendant before the Trial Court, the defendant has not let in any evidence with regard to the contentions made by her in these Second Appeals excepting for filing documents, namely, exhibits B1 to B34, all dealing with the alleged expenses said to have been incurred by the defendant for maintaining the suit schedule property. The defendant has not filed any other documentary evidence to show that the suit schedule property was purchased in the names of the plaintiff and the defendant out of the funds belonging to their mother-in-law, Namagiri. In fact, as seen from the cross-examination of D.W.1, the defendant in the suit, she herself has admitted that the plaintiff is having a half share in the suit schedule property based on the sale deeds dated 08.03.2001 marked as Ex.A1 and Ex.A2.

5. Though the learned counsel for the appellant may state that the Trial Court ought not to have relied upon a stray admission made by the defendant

during her cross-examination with regard to the entitlement of half share in the suit schedule property by the plaintiff, when there is no contra evidence produced by the defendant that the plaintiff is not entitled for half share as the suit schedule property was purchased from and out of the funds belonging to the mother-in-law of the plaintiff and the defendant, this Court is of the considered view that there is no infirmity in the findings of the Trial Court as only based on the documentary evidence, namely, Ex.A1 and Ex.A2 sale deeds as well as the admission made by the defendant during her cross-examination, the Trial Court has decreed the suit for partition and passed the preliminary decree granting half share in the suit schedule property to the plaintiff.

6. The exhibits B1 to B34 deal with the alleged expenses said to have been incurred by the defendant for maintaining the suit schedule property. This Court has perused and examined the same. As seen from the exhibits B1 to B34, in all the bills produced by the defendant, it is not disclosed in whose names the bills were raised and for which property the said expenses have been incurred by the defendant. The Trial Court only after giving due consideration to exhibits B1 to B34 has rightly dismissed the counter claim filed by the defendant as the counter claim is not supported by any evidence. When proper bills have not been produced by the defendant to substantiate her claim that she

had incurred expenses for maintaining the suit schedule property, this Court is of the considered view that the rejection of counter claim by the Trial Court is a correct decision. Therefore, the Trial Court has rightly decreed the suit for partition in favour of the plaintiff and has rightly rejected the counter claim of the defendant.

7. The Lower Appellate Court, namely, the Additional District and Sessions Court, Sivagangai in A.S.Nos.24 and 25 of 2018 by its common judgment and decree dated 28.11.2019 has also rightly confirmed the findings of the Trial Court by dismissing the first appeals filed by the defendant.

8. Before this Court, the learned counsel for the appellant has raised three other legal issues, namely,

a) As a power of attorney holder, the plaintiff's husband cannot depose on behalf of the plaintiff and therefore, the Trial Court ought to have dismissed the suit, since the plaintiff herself was not examined as a witness, but only a power of attorney holder had deposed on her behalf.

b) The procedure contemplated under Order 41 Rule 31 of CPC, namely, framing points for determination has not been fulfilled by the Lower Appellate Court.

c) Since the suit schedule property was purchased out of the funds belonging to the mother-in-law of the plaintiff and the defendant, the plaintiff is not entitled for half share in the suit schedule property as there are other legal heirs as well, who may be entitled for a share in the suit schedule property.

9. In support of the first submission, the learned counsel for the appellant drew the attention of this Court to the following authorities:

a) a judgment of the Madurai Bench of this Court in the case of ***Kumarasamy Vs. Rajkumar and others*** dated 24.11.2011 in ***S.A.(MD).No.209 of 2008*** rendered by a learned Single Judge of this Court.

b) a judgment of the Hon'ble Supreme Court in the case of ***S.Kesari Hanuman Goud Vs. Anjum Jehan and others*** dated 10.04.2013 rendered in ***Civil Appeal Nos.2885 to 2887 of 2005***.

c) a judgment of the Hon'ble Supreme Court in the case of ***Janki Vashdeo Bhojwani and another Vs. Indusind Bank Limited and others*** reported in ***(2005) 2 SCC 217***.

The aforesaid decisions were relied upon by the learned counsel for the appellant for the purpose of substantiating his claim that a power of attorney holder cannot depose on behalf of the plaintiff and having deposed in the present case, the suit is not maintainable.

10. Admittedly, Somasundaram is the husband of the plaintiff. Though he may have filed a power of attorney, which also discloses that he is the husband of the plaintiff, Section 120 of the Indian Evidence Act, 1872 makes it clear that in all civil proceedings, the parties to the suit and the husband or wife of any party to the suit shall be competent witnesses. It is immaterial whether a power of attorney is filed or not in the instant case. Even without a power of attorney, being the husband of the plaintiff, Mr.Somasundaram could have deposed as a witness on behalf of the plaintiff. Therefore, in all the decisions relied upon by the learned counsel for the appellant, Section 120 of the Indian Evidence Act, 1872 was not in issue and it was a case of a general power of attorney. As observed earlier, even without a power of attorney, the plaintiff's husband, who is a competent witness as per the provisions of Section 120 of the Indian Evidence Act, 1872, could have deposed on behalf of his wife, namely, the plaintiff. The decisions relied upon by the learned counsel for the appellant with regard to the power of attorney issue did not touch upon Section 120 of the Indian Evidence Act, which specifically empowers a husband or wife to depose on behalf of their respective spouses and they are deemed to be competent witnesses. Therefore, the decisions relied upon by the learned counsel for the appellant referred to supra has no bearing to the facts of the

instant case, when it is an admitted fact that Mr.Somasundaram (P.W.1) is the husband of the plaintiff.

11. The learned counsel for the appellant also relied upon a judgment of the learned Single Judge of this Court in the case of ***Don Bosco Matriculation Higher Secondary School Vs. R.Vijayakumar and others*** reported in ***2021-1-L.W.78*** to substantiate his contention that there is an obligation on the part of the Lower Appellate Court to frame points for determination before deciding the first appeal under Section 96 of the Code of Civil Procedure.

12. This Court has perused and examined the impugned judgment and decree of the Lower Appellate Court. The Lower Appellate Court has also framed the points for consideration in paragraph 9 of the said judgment, which reads as follows:

- "i) Whether the respondent/plaintiff is entitled to half share in both the items of the suit property as sought for?*
- ii) Whether the appellant/dependant is entitled to the counter claim of Rs.93,974.25/- made by her?"*

Though the learned counsel for the appellant may submit that independently the points for determination have not been framed and that the Lower Appellate

Court has reproduced the issues framed by the Trial Court, this Court is of the considered view that the said contention will have to be rejected for the following reason:

a) The Lower Appellate Court has not reversed the findings of the Trial Court, but has only confirmed the findings of the Trial Court.

13. Order 41 Rule 31 of Code of Civil Procedure requires the judgment of the Appellate Court to state

(a) the points for determination

(b) the decision thereon

(c) the reasons for the decision

(d) where the decree appealed from is reversed or varied and the relief to which the appellant is entitled.

14. As seen from the judgment and decree of the Lower Appellate Court, all the aforementioned requirements as specified under Order 41 Rule 31 of Code of Civil Procedure has been satisfied by the Lower Appellate Court. The points for determination, the decision thereon and the reasons for the decision are all contained in the impugned judgment and decree of the Lower Appellate Court. The Lower Appellate Court has framed the points for determination in

paragraph 9 of the impugned judgment and decree, as extracted supra, only based on the issues that arises for consideration and therefore, the learned counsel for the appellant cannot contend that Order 41 Rule 31 of CPC has not been satisfied by the Lower Appellate Court. The judgment of the learned Single Judge of this Court reported in **2021-1-L.W.78** referred to supra has only illustrated what are the requirements of Order 41 Rule 31 of CPC and since the Lower Appellate Court has satisfied all the requirements of Order 41 Rule 31 of CPC, the said decision has no bearing to the facts of the instant case.

15. The learned counsel for the appellant as part of his submissions also contended that since the suit schedule property was purchased out of the funds of the mother-in-law of the plaintiff and the defendant, the plaintiff is not entitled for half share in the suit schedule property. It is only for the first time in these Second Appeals, such a contention is made. Neither in the pleadings nor in the oral evidence of the defendant, the said contention was ever made. No evidence to that effect has also been placed on record by the defendant before the Trial Court. Therefore, the third contention raised by the learned counsel for the appellant that the suit for partition is not maintainable on the ground that only out of the funds belonging to the mother-in-law of the plaintiff and the defendant, the suit schedule property was purchased in the name of the

plaintiff and the defendant and there are other legal heirs, who are entitled for a share in the suit schedule property, has to be summarily rejected by this Court.

16. For the foregoing reasons, this Court is of the considered view that the substantial questions of law raised by the appellant in the grounds of these Second Appeals are all factual issues, which have been duly considered by the Courts below in accordance with law and they have rightly rejected the claim of the defendant. There are no substantial questions of law involved in these Second Appeals. Accordingly, these Second Appeals are dismissed. There shall be no order as to costs. Consequently, connected miscellaneous petition stands closed.

27.03.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes/ No
Lm

To

1.The Additional District and Sessions Court,
Sivagangai.

2.The Sub Court,
Devakottai.

3.The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court, Madurai.

S.A.(MD).Nos.140 and 154 of 2021

ABDUL QUDDHOSE, J.

Lm

S.A.(MD).Nos.140 and 154 of 2021

27.03.2023