



S.A.No.817 of 1998

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.04.2024

CORAM

THE HONOURABLE Mr. JUSTICE C.KUMARAPPAN

S.A.No.817 of 1998
and C.M.P.No.7897 of 1998

1.Chinnappa Gounder(deceased)
2.Angamuthu
(2nd Appellant brought on record as LR's
of the deceased sold Appellant vide as per
order of Court dated 04.03.2022 made in
C.M.P.Nos.10339 to 10341 of 2001)
... Appellants/1st respondent/1st defendant

vs.

1.Nanjammal (died)
2.Karupayee
3.Ayyavu @ Ayyar
4.Thangaraju
5.Nataraj
6.Minor Venkidu
7.Shanthi
8.Pavayee
9.Mangalagiri
10.Chellammal
11.Peramayammal
12.Rasathi
13.Palaniammal
14.Pappathiammal
15.Ayyammal



S.A.No.817 of 1998

16.K.P.Natarajan
17.Kamatchiammal
18.Shanmugam
19.Vellayammal
20.Krishnaveni
21.Nallathambi
22.Rangasamy

...Respondents

(R1 died, RR2 to 20 and A2 are the LR's of deceased R1 viz.,
Nanjammal vide order of Court dated 07.02.2020
made in C.M.P.No.26392 of 2019 in S.A.No.817 of 1998)

(RR21 & 22 are brought on record as LR's of R1
vide order of Court dated 07.02.2020 made in
C.M.P.No.26392 of 2019 in S.A.No.817 of 1998)

Prayer:- Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 02.12.1997 in A.S.No.32 of 1997 passed by the Sub-Judge, Bhavani, Erode District, modified the judgment and decree dated 21.02.1997 in O.S.No.359 of 1988 passed by the Principal District Munsif, Bhavani, Erode District.

For appellants : Mr.P.Valliappan,
Senior Counsel
for Mr.SMS.Shriram Narayan

For R5 & R16 : Mr.N.Manokaran

RR1 to 3, 6,8,11,12,18,
19, 21 and 22

: Died

RR4,7,9,10,17 & 20

: No appearance

For R13 & R15

: M/s.S.Kaithmalai Kumaran

For R14

: M/s.Ezhilarasan



S.A.No.817 of 1998

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J U D G M E N T

The first defendant is the appellant herein. The plaintiff has figured as the first respondent in this appeal. The other defendants are arrayed as the respondents in this appeal.

2. For the sake of convenience, the parties will be referred to as according to their litigative status as before the Trial Court.

3. The brief facts which give rise to the instant second appeal is that the suit property originally belongs to one Mangalagiri Gounder. His wife name is Sellayammal. The plaintiff and the defendants 11 to 15 are the children of Mangalagiri Gounder and Sellayammal. Apart from the above children, they also got two more sons, one is Varadhan another is Perumal. Varadhan died leaving behind his legal heirs, who have arrayed as D2 to D7. Similarly, another son Perumal died, leaving behind his legal heirs D8 to D10.



S.A.No.817 of 1998

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4. According to the plaintiff, the suit 'A' Schedule property is the ancestral property. The suit property was also purchased by the plaintiff's mother Sellayammal vide registered sale deed dated 02.01.1940 and 07.11.1943. It is the case of the plaintiff that the suit 'A' Schedule property is the ancestral property. The plaintiff and D1 to D5 are jointly entitled to have 1/4 shares derived in notional partition of Mangalagiri Gounder. D1 and the Legal heirs of his brothers deceased Varadhan and Perumal are entitled to have remaining 3/4 shares. It is further contention of the plaintiff that since 'B' schedule property is the absolute property of her mother, the plaintiff and his brother and sister are equally entitled to have 1/9 shares. Therefore, the plaintiff has come forward with a suit for partition and for vacant possession.

5. The said suit was resisted by the first defendant by contending that the entire 'A' and 'B' schedule properties are the joint family properties of Mangalagiri Gounder and he died during 1967. It is also the case of the defendants that, though the property stands in the name of Sellayammal, the same was purchased by Mangalagiri Gounder from the joint family income. Therefore, notwithstanding the fact that 'B' schedule



S.A.No.817 of 1998

property stands in the name of Sellayammal, it must also to be construed as the joint family property. It is also the contention of the defendants that the plaintiff and the defendants 1 to 5 did not claim any right over the 'B' Schedule property for the last so many years, till notice issued on 08.06.1988. It was also pleaded that the 12th defendant had purchased the house as per the registered sale deed dated 20.05.1963 from the first defendant. The same could manifests the division of property and individual enjoyment over the suit property.

6. It is also contented by the defendants that as early as on 15.07.1963, all the joint family properties were divided between Mangalagiri Gounder and three sons, and that Mangalagiri Gounder was allotted only Rs.500/- by cash, and the suit schedule of properties were allotted to the shares of the first defendant and the other two brothers viz., Varadhan and Perumal. Therefore, the plaintiff and her mother and sister cannot have any rights in the suit property as Mangalagiri Gounder allotted only cash towards his share. It is also contented by the first defendant that 'B' schedule property is also joint family property. Even if the plaintiff has got any right, it has been ousted as the first defendant



S.A.No.817 of 1998

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and other female legal heirs have no possession and enjoyment of the property, since 1963 and those properties have seen in exclusively possession of the defendant. Hence, prayed to dismiss the suit.

7. Before the trial Court, both the plaintiff and the defendants examined each two witnesses as P.W.1 and P.W.2 and D.W.1 and D.W.2. On behalf of the plaintiff, 14 documents were marked as EXs.A1 to A4 and on behalf of the defendants 41 documents were marked as Exs. B1 to B41.

8. The trial Court after having considered oral and documentary evidence, has arrived at a conclusion that the suit property was the ancestral property, and that, Mangalagiri Gounder was allotted only Rs.500/- by cash in the ancestral property, and that the plaintiffs have not come forward to claim the share over the property since 1963, has found that the plaintiff cannot maintain the suit and ultimately dismissed the same. When the plaintiff preferred the first appeal, the First Appellate Court has partly reversed the decree and granted partition only in respect of 'B' schedule property.



S.A.No.817 of 1998

WEB COPY

9. Not satisfying with the judgment of the First Appellate Court, the first defendant has approached this Court by way of this second appeal.

10. The learned Senior Counsel appearing on behalf of the appellants/defendant would submit that the defendant have not come forward with any appeal in respect of 'A' schedule property. As such the issue in respect of 'A' schedule property has reached finality. Therefore, the only issue involve in the present appeal is in respect of 'B' Schedule property. It is also the contention of the learned Senior Counsel that the First Appellate Court did not consider Section 23 of the Hindu Succession Act and, also would contend that the First Appellate Court has wrongly considered the Benami Transactions (Prohibition) Act, 1988. It is also the contention of the learned Senior Counsel that since 1963, the defendants and his brother have been in possession and enjoyment of the property. Therefore, filing of the suit at belated stage would disentitle the plaintiff on the ground of ouster. Therefore, the learned Senior Counsel would submit that the order of the First Appellate Court needs Interference. Hence, prayed to allow the appeal.



S.A.No.817 of 1998

WEB COPY

11. However, the learned counsel appearing for the respondents would submit that the findings recorded by the First Appellate Court is based on evidence. There are no semblance of material to consider 'B' Schedule property was also dealt in the partition deed. It is also contented by the learned counsel for the respondent that, even if there was partition in respect of 'B' Schedule property, the same will not bind upon the plaintiff as they were not parties to any division. It is also contented by the learned counsel for the respondents/plaintiffs that the possession of one Co-owner amounts to possession of another co-owner. Therefore, the defence put forth by the respondents on the ground of ouster will in no way helpful to the defendant. Hence, prayed to dismiss the second appeal.

12. I have given my anxious consideration to either side submissions.

13. As rightly contended by the learned Senior Counsel, the issue involved in the instant appeal is only against 'B' schedule property. Both



S.A.No.817 of 1998

the Courts below concurrently found that in respect of 'A' schedule property, the plaintiff is not entitled to have any shares, and that such findings has not at all been challenged by the plaintiff. Therefore the findings of the both Courts below that the plaintiff is not entitled to have shares in respect of 'A' schedule property has reached finality.

14. As stated supra, now, the suit is only for 'B' schedule property. It is the contention of the defendants that though 'B' schedule property stands in the name of Sellayammal, who is none other than the mother of the plaintiff, for the purchase of 'B' schedule property, the sale proceeds have been paid from the joint family income. Therefore, the 'B' schedule property also must be construed as the joint family property. It is pertinent to mention here that, the First Appellate Court has held that, apart from oral evidence, there are no proof available to prove the use of ancestral income (or) nucleus for the purchase of 'B' schedule property. As a matter of fact, the 'B' schedule property consist of three items of property. The first and second items are the house property, and the third item is the landed property.



S.A.No.817 of 1998

WEB COPY

15. It is the contention of the defendants that the item 3 has been divided among brothers of the first defendant since 1963 through partition deed. This Court has pursued Ex.B4, where this Court could not find any materials to show that the entire extent of 91.3/4 cents have been divided among brothers of the plaintiff. The description of the property of Ex.B4 also could not be correlated with item 3 of the suit property. Therefore, this Court is of the firm view that the findings recorded by the First Appellate Court that, the first defendant has not established the use of ancestral nucleus for the purchase of 'B' schedule property is perfectly in order and such finding arrived on the basis of available evidence.

16. To put it in other words, the entire 'B' schedule property stands in the name of the plaintiff's mother, though it had been contented by the first defendant that the 'B' schedule property is also the ancestral property, the First Appellate Court could not find any materials to substantiate the contention of the first defendant. Therefore, when the property belongs to the plaintiff's mother, the mere long possession of the defendant Will in no way considered as ouster against the plaintiff as it is the settled principle of law that the possession of one co-owner amounts



S.A.No.817 of 1998

to possession of all the co-owners.

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17. In respect of items 1 and 2 of the 'B' schedule property, the same are the house property. It is contented by the learned Senior Counsel that under Section 23 of the Hindu Succession Act, the property being the house properties, are exempted from the purview of the partition among female heir. It is pertinent to mention here that Section 23 of the Hindu Succession Act has been repealed retroactively with effect from 09.09.2005. In this regard, it is useful to refer the cases of *Shashi Bahadur and Ors. vs. Malka Bahadur* reported in 248(2018) DLT 277 and *Prabhudayal (Dead) through his LRs vs. Ramsiya and Another* reported in 2009 (2) MPLJ 247 and also *G.Sekar vs. Geetha and Others* reported in (2009) 6 SCC 99. Besides there is no proof that only in these two houses, brother is residing. In this context, the First Appellate Court has found that in respect of 'B' schedule property, the plaintiff and other defendants are entitled to have 1/9 shares each. Thus, this Court is of the firm view that the findings recorded by the First Appellate Court is well merited. Whereas the Trial Court did not consider



S.A.No.817 of 1998

WEB COPY

all these materials aspects and wrongly concluded based upon the revenue records. Therefore, this Court is of the firm view that the findings recorded by the First Appellate Court is liable to be confirmed.

18. Thus, from the submission of the learned counsel for the appellant, this Court could not find any substantial questions of law. Hence, this Second Appeal is liable to be dismissed.

19. In the result, this Second Appeal is dismissed. Consequently, connected miscellaneous petition is closed. There shall be no order as to costs.

17.04.2024

Internet : Yes
Index : Yes/No
Speaking order/Non-speaking order
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S.A.No.817 of 1998

C.KUMARAPPAN, J.

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To

- 1.The Sub-Judge, Bhavani, Erode District.
- 2.The Principal District Munsif, Bhavani, Erode District.
- 3.The Section Officer, V.R.Section, High Court, Madras.

S.A.No.817 of 1998
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