

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 29-06-2012

CORAM

THE HONOURABLE MR.JUSTICE R.S.RAMANATHAN

S.A.No.603 of 2009

and

M.P.Nos.1 of 2009, 1 of 2011 & 2 of 2011

Murugesan

: Appellant/1st Defendant

vs.

1.Poongavanam

2.Angammal

3.Subramani

4.Kuppu

5.Jagadhambal

:R1 to R3/Plaintiffs

:4th Respondent

:5th Respondent/2nd Defendant

[R4 impleaded as party
respondent and 2nd appellant
transposed as R5 made in
M.P.No.1 of 2010 and 3/2010,
dated 22.07.2010]

Prayer: This second appeal is filed under section 100 of the Civil Procedure Code against the judgment and decree passed in A.S.No.47 of 2005 on the file of the Additional Subordinate Judge, Tindivanam, dated 11.02.2009 confirming the decree and judgment passed in O.S.No.140 of 2001 on the file of the Principal District Munsif, Tindivanam, dated 04.03.2005.

For Appellant

: Mr.N.Suresh

For R1 to R3

: Mr.M.Arumugam

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J U D G M E N T

The 1st defendant in O.S.No.140 of 2001 is the appellant. The above said suit was filed by the respondents 1 to 3 for partition of their 3/4th share in the suit properties.

2.The case of the respondents 1 to 3 is that the respondents 1 and 2 are sisters and the appellant and the 3rd respondent are brothers and they are the children of Manicka Gounder. The items 1

to 3 of the properties mentioned in the schedule of O.S.No.140 of 2001 originally belonged to the brother of Narayani Ammal, namely Arunachala Gounder and he gave those properties as 'Sridhana' to his sister Narayani Ammal, the mother of the appellant and the respondents 1 and 3 and she was enjoying the property and she died on 13.07.1973 intestate and even during her life time, the properties were mortgaged by the appellant, who happens to be the elder son in the family and he had no independent income and out of the income from items 1 to 3, he purchased the 4th item of the suit property and therefore, the 4th item also belongs to the family of Narayani Ammal. Therefore, the respondents 1 to 3 and the appellant are each entitled to 1/4th share and the respondents 1 to 3 together entitled to 3/4th share and filed the suit for 3/4th share in the suit properties.

3.The appellant admitted that items 1 to 3 originally belonged to the maternal Uncle, Arunachala Gounder and he had no issues and the appellant was brought up by him and was helping him in all his activities and considering that the appellant was residing with him and helping him, he orally gifted the 1st item of the property 40 years back to the appellant and the appellant was enjoying the property as absolute owner, paying kists and this was also known to the respondents 1 to 3 and the appellant also prescribed his right over his property over the statutory period and therefore, the respondents 1 to 3 have no title in respect of the 1st item of the suit property and the appellant further admitted that as the owner of the 1st item, he has got every right to sell the property and also sold the 1st item to the 5th respondent herein, who was the 2nd defendant and therefore, the respondents 1 to 3 cannot claim any right in the 1st item of the property. He further contended that the 2nd and 3rd items were given to his mother Narayani Ammal by Arunachala Gounder and Narayani Ammal died in the year 1982 and not on 13.07.1973 as contended by the respondents 1 to 3 and she executed a Will, dated 12.01.1978, by which she bequeathed 2nd and 3rd items of the suit property in favour of the appellant and therefore, under the Will executed by Narayani Ammal, he became the owner of the 2nd and 3rd items and the 4th item was purchased by him out of his self-earnings and it was his separate property and it was not purchased out of the income from the items 1 to 3 and therefore, the plaintiffs/respondents 1 to 3 are not entitled to any share in the property.

4.The trial court held that the items 1 to 3 were given as 'Sridhana' to the mother of the appellant and the respondents 1 to 3 and their mother Narayani Ammal died only in the year 1973 as contended by the respondents 1 to 3 and she did not die in the year 1982 as contended by the appellant and the appellant also did not prove the Will alleged to have executed by Narayani Ammal in the year 1975 and Narayani Ammal would not have also executed the Will

in the year 1975 as she died in the year 1973 and Ex.A4 also confirms that Narayani Ammal died in the year 1973 as contended by the respondents 1 to 3 and the 4th item of the property was purchased only out of the income from the items 1 to 3 and therefore, it is also the joint property of the appellant and the respondents 1 to 3 and the appellant cannot claim any exclusive or independent title in respect of items 1 to 4 and after the death of Narayani Ammal, the properties are enjoyed in common by all the children and therefore, they are entitled to equal shares in the property and decreed the suit.

5.The lower appellate court also independently analyzed the oral and documentary evidence and framed points for consideration and confirmed the decree and judgment of the trial court and dismissed the appeal. Hence, this second appeal.

6.The following substantial questions of law were framed at the time of admission:-

"1.Whether the judgment of the courts below is wrong in not following the settled principles as to the considerations in disposal of applications under Order 41 Rule 27.

2.Whether the courts below has wrongly placed the burden of the proof upon these appellants?

3.Whether the courts below have erred in decreeing the suit by ignoring the material evidence and admission of third plaintiff?"

7.Mr.N.Suresh, the learned counsel appearing for the appellant has submitted that three more substantial questions of law also arise for consideration and prayed that those three substantial questions of law may also be considered and advanced arguments on all those substantial questions of law.

8.According to me, three additional substantial questions of law are to be framed and they are as follows:-

"01.Whether both the courts below have erred in decreeing the suit by wrongly assuming that the suit properties are joint family suit properties as admittedly the suit items 1 to 3 are the properties of Narayani Ammal?

02.Whether the courts below have erred in decreeing the suit when the suit is barred by limitation as per Article 65 Explanation (b) of the Limitation Act 1963 as the suit has not been filed within 12 years from the date

of death of Narayani Ammal on 13.07.1973?

03.Whether the courts below have erred in decreeing the suit in respect of 4th item of the suit property also, when there is no joint family property or nucleus and more so when the same is admittedly purchased by the 1st defendant exclusively?"

9.The learned counsel appearing for the appellant submitted that both the courts below erred in holding that the properties were the joint family properties of the appellant and the respondents 1 to 3, when admittedly according to the respondents 1 to 3, the properties were inherited from their mother Narayani Ammal and when any property is inherited from the family member, it will not be the joint family properties in the hands of the legal heirs and relied upon the judgment reported in 1996(1) MLJ 320 in the case of Kandasami and another vs. Andi Narayanan and others in support of his contention. He also relied upon the judgment reported in 1975(2) MLJ 184 in the case of Kandaswami Chettiar and others vs. Gopal Chettiar and others in support of the said contention. He further submitted that admittedly the appellant is in possession of the property for more than 35 years and Exs.B3 to B84 would also prove that the appellant is in possession of the property from the year 1963 and therefore, the appellant had also perfected title by adverse possession and under Article 65 Explanation (b) of the Limitation Act, the suit ought to have been filed within 12 years from the death of Narayani Ammal and according to the respondents 1 to 3, Narayani Ammal died on 13.07.1973 and the suit was not filed within 12 years and therefore, the suit was also barred by time. He further submitted that when the properties are not the joint family properties, and even according to the respondents 1 to 3, they inherited the properties from their mother, the purchase of 4th item of the property in the name of the appellant cannot be stated on behalf of the other owners, namely the respondents 1 to 3 and the respondents 1 and 2 are residing in the same village and they have not raised any objection for transferring the patta in respect of items 1 to 4 in the name of the appellant and therefore, they are estopped from claiming title and relied upon the judgment reported in 2010(4)CTC 640, in the case of 1.Venkataramana and 6 another vs. N.Munuswamy Naidu and 4 others in support of his contention. He also relied upon the judgment reported in 1975(11) MLJ 184, in the case of Kandaswami Chettiar and others vs. Gopal Chettiar and others to contend that the suit is barred under Article 65 Explanation (b) of the Limitation Act. He, therefore, submitted that having regard to the fact that the properties were inherited by the parties from the mother, that properties cannot be described as 'joint family properties' and therefore, the courts below erred in holding that the properties are joint family properties and the appellant, being

the elder member of the family purchased the 4th item out of the income from the items 1 to 3 and the 4th item was also available for partition and therefore, the findings of the courts below are liable to be set aside and the second appeal has to be allowed.

10.The learned counsel appearing for the appellant further contended that in the first appellate court, the appellant has filed two documents and also filed application under Order 41 Rule 27 to receive those two documents and that application was numbered as I.A.No.275 of 2005 and while dismissing the first appeal, the lower appellate court has not adverted to those documents, which are relevant to dispose of the case and in the judgment also, there was no mention about I.A.No.275 of 2005 filed by the appellant under Order 41 Rule 27 CPC and the judgment is also vitiated for non-consideration of the application to receive the additional documents.

11.Though, while admitting the second appeal, three substantial questions of law were framed by this court, according to me, the substantial questions of law 2 and 3 framed by this court cannot be considered as substantial questions of law, having regard to the law laid down by the Hon'ble Supreme Court in that respect. The additional substantial questions of law are numbered as substantial questions of law 4 to 6.

12.Admittedly, items 1 to 3 belonged to Arunachala Gounder, the maternal Uncle of the appellant and the respondents 1 to 3. It is the case of the appellant that the 1st item was orally gifted to him by the maternal Uncle Arunachala Gounder, as the appellant was brought up by him in his house and helped him in his various activities. Though, it was argued by the appellant before the courts below that he was given in adoption to the maternal Uncle, there was no plea regarding the adoption in the written statement and no evidence was also let in by the appellant to prove the adoption. Therefore, the plea of adoption is rightly negatived by the courts below. Therefore, we will have to see whether the appellant is entitled to claim exclusive title to the 1st item by reason of the oral gift by Arunachala Gounder.

13.As rightly held by the courts below, except the oral testimony of the appellant, no evidence was produced to prove the oral gift in favour of the appellant. Admittedly, the properties in items 1 to 3 belonged to Arunachala Gounder, the maternal Uncle and the appellant also admitted that items 2 and 3 were given as 'Sridhana' to his mother Narayani Ammal and Narayani Ammal was the owner of items 2 and 3.

14.The case of the respondents 1 to 3 was that the items 1 to 3 were given as 'Sridhana' to Narayani Ammal and in the absence of

any proof of oral gift by Arunachala Gounder in favour of the appellant and having regard to the admission of the appellant that the items 2 and 3 were given as 'Sridhana' to Narayani Ammal by Arunachala Gounder, the case of the respondents 1 to 3 that the items 1 to 3 were given as 'Sridhana' by Arunachala Gounder to Narayani Ammal appears to be more probable and therefore, the courts below rightly held that the items 1 to 3 were given as Sridhana to Narayani Ammal.

15. According to the appellant, Narayani Ammal died in the year 1982 and she executed a Will in the year 1975 and the Will was marked as Ex.B2. Admittedly, the Will was rejected by the courts below on the ground that no attesting witnesses were examined and the scribe cannot be the identifying witness, as he has not stated in the Will that he also attested the Will and no proof was adduced by the appellant to prove that the attesting witnesses also died. Therefore, the courts below rightly held that Narayani Ammal died intestate. Once, it is held that Narayani Ammal died intestate, then the appellant and the respondents 1 to 3 are entitled to each 1/4th share in the properties and they inherited the properties, after the death of Narayani Ammal as co-owners.

16. Admittedly, the appellant is the elder male member and was looking after the family and the respondents 1 and 2 are females and are given in marriage and therefore, the possession of one co-owner is the possession of other co-owners and when one co-owner pleads adverse possession, he has to plead and prove ouster and in this case, that was not done and therefore, the case of the appellant that he is the absolute owner of the property, as he is in possession of the property from the year 1963 cannot be accepted and even according to the appellant, Narayani Ammal died in the year 1982 and therefore, his possession can be traced only from 1982 and there is no pleading to the effect that from the year 1982, he is enjoying the property to the exclusion of the respondents 1 to 3 and the respondents 1 to 3 were ousted from enjoying the property. सत्यमेव जयते

17. Further, the contention of the learned counsel appearing for the appellant is that as per the Explanation (b) of Article 65 of the Limitation Act, the suit ought to have been filed within 12 years from the date of death of the female member and Narayani Ammal died in the year 1982 and the suit was filed only in the year 2001 and therefore, the suit is barred by time cannot also be accepted. According to me, Article 65 Explanation (b) of the Limitation Act will not be applicable to the facts of this case. It is made clear in the judgment reported in 1977(1)MLJ 371, in the case of Munusamy Achari vs. Rajambal Ammal and others that Article 65 Explanation (b) of the Limitation Act will come into operation, when a female member was in possession of the property, either as a

limited estate-holder or a life estate-holder and in this case, Narayani Ammal did not enjoy the property as a limited estate-holder or a life estate-holder and Narayani Ammal was enjoying the property as a full owner and after her death, the property devolved upon her heirs, namely the respondents 1 to 3 and the appellant and therefore, all of them inherited the property as co-owners and as stated supra, there cannot be any adverse possession against one co-owner, unless a person, who claims adverse possession pleads and proves ouster and in this case, there is no such plea. Therefore, I hold that Article 65 Explanation (b) of the Limitation Act cannot be applicable to the facts of this case.

18. Further, though the contention of the learned counsel appearing for the appellant is right in holding that the property cannot be termed as joint family properties, the properties can be termed as joint properties in the hands of the appellant and the respondents 1 to 3 and they are co-owners and when out of the income from the joint properties, another property is purchased by one co-owner, the property purchased would also be available for partition among other co-owners.

19. Further, the learned counsel appearing for the appellant is right in arguing that the learned trial court has committed a mistake in not considering the application filed in I.A.No.275 of 2005 under Order 41 Rule 27 CPC to receive the additional evidence. While disposing of the appeal, when an application is filed under Order 41 Rule 27, a duty is cast upon the court to give a finding either allowing or disallowing the application filed under Order 41 Rule 27 to receive the additional document. Admittedly, that was not done by the lower appellate court and according to me, that will not vitiate the judgment and on that ground, the first appellate court judgment need not be set aside and remand back for fresh disposal. According to me, as per Order 41 Rule 27, the court is bound to consider the additional evidence, if they are relevant for the disposal of the case. Having regard to two documents filed as additional documents, in my opinion, those two documents are not relevant and thus, two documents will not help the court to decide the issue. Therefore, even though the lower appellate court has committed an error in not disposing of the application filed under Order 41 Rule 27, that will not vitiate the judgment of the lower appellate court as those documents are not relevant.

20. In the result, the substantial question of law No.1 is answered in favour of the appellant and I hold that though the lower appellate court was wrong in not following the principles, in not deciding the application under Order 41 Rule 27, that will not vitiate the judgment as the documents filed as additional documents

will not help the court to decide the issue.

21.The substantial question of law Nos.2 and 3 originally framed are answered against the appellant and the court below have rightly placed the burden upon the appellant, as the appellant contended that 1st item is a separate property and 4th item was also purchased out of his self-earnings and therefore, the appellant has to prove that those properties are his separate properties and he miserably failed to prove the same and the burden of proof was rightly placed on the appellant. Accordingly, the substantial question of law No.2 is answered against the appellant.

22.The substantial question of law No.3 is very vague and as stated supra, it cannot be construed as substantial question of law.

23.The additional substantial questions of law Nos.1 and 3 are renumbered as substantial questions of law Nos.4 to 6 and those substantial questions of law are answered against the appellant and I hold that though the courts below were wrong in holding that the properties are joint family properties, that will not vitiate the judgment as the properties are the joint properties of the appellant and the respondents 1 to 3 and all of them are co-owners and each one is entitled to 1/4th share in the properties. Further any property purchased from the income of the joint properties will also become the common property and the petitioner in management cannot claim any exclusive title over that property. In this case, admittedly the appellant has not proved any independent income for him.

24.The substantial question of law No.5 is also answered against the appellant and I hold that Article 65 Explanation (b) of the Limitation Act will not be applicable to the facts of this case, as Narayani Ammal was in possession of the property as absolute owner and the appellant and the respondents 1 to 3 inherited the property from Narayani Ammal, after her death and the appellant and one co-owner cannot claim exclusive title or plead adverse possession in the absence of any plea regarding ouster.

25.Hence, both the courts below have rightly decreed the suit and I do not find any infirmity in the order of the courts below.

26.M.P.No.2 of 2011 is filed to receive the certified copy of the sale deed. This document is dated 07.12.2009 and it is the sale executed by the 5th respondent along with her son in favour of K.Kuppu and the learned counsel appearing for the petitioner/appellant submitted that PW2 Thandavarayan was one of the executants and he has stated in the document that the properties were inherited from his ancestors and therefore, that would falsify the case of the respondents. Having regard to the

finding rendered that the items 1 to 3 are the properties of Narayani Ammal and having regard to the fact that the document dated 07.12.2009 came in existence after the dismissal of the first appeal, in my opinion, the document will not help the court to decide the issue. Hence, M.P.No.2 of 2011 is dismissed.

27.In the result, the second appeal is dismissed. Consequently, connected Miscellaneous Petition Nos.1 of 2009 and 1 of 2011 are closed. No costs.

Sd/
Deputy Registrar(G)

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Sub Asst.Registrar

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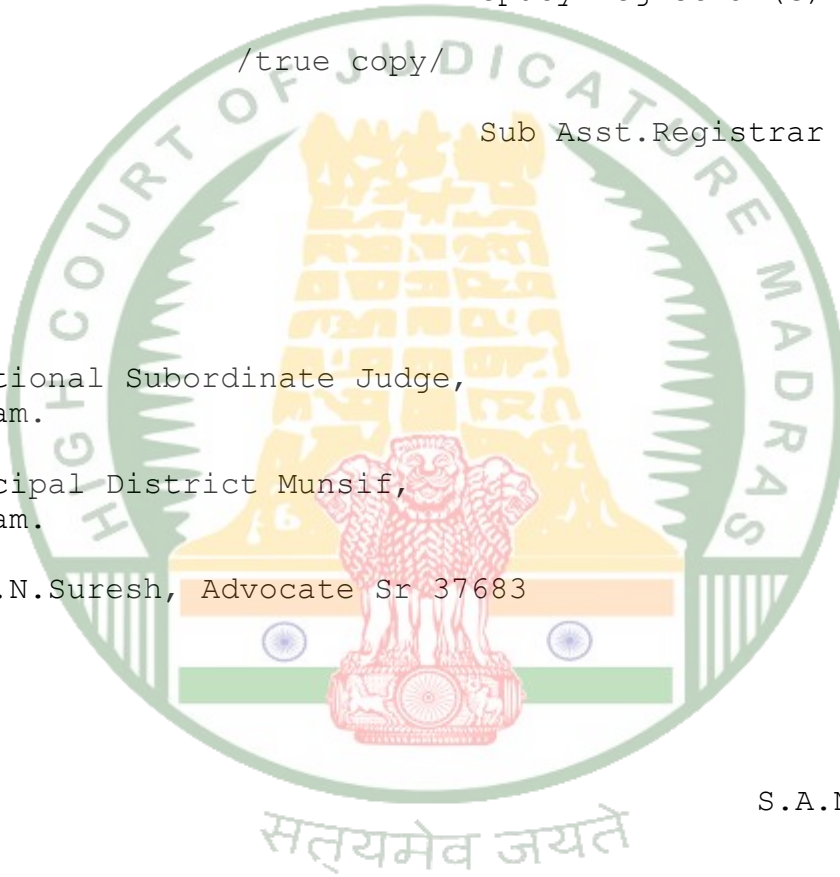
To

1.The Additional Subordinate Judge,
Tindivanam.

2.The Principal District Munsif,
Tindivanam.

+1cc to Mr.N.Suresh, Advocate Sr 37683

KGK(CO)
km/23.8.



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