
(2010) 09 MAD CK 0260

In the Madras High Court

Case No : A.S. No. 596 of 1997, Cross Objection No. 126 of 1997 and C.M.P. No. 580 of 1998

Baskaran and Vijayabasker

APPELLANT

Vs

R. Nandagopal (Died) and Others
R. Nandagopal
(Died) and Others Vs Baskaran and Vijayabasker

RESPONDENT

Date of Decision : 16-09-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 9

Citation : (2010) 09 MAD CK 0260

Hon'ble Judges : M. Venugopal, J

Bench : Single Bench

Advocate : S. Sounthar, in A.S. No. 596 of 1997, A. Muthukumar, for Cross Objectors 2 to 6 and M. Kamalanathan, for Cross Objectors 7 in Cross Objection No. 126 of 1997, for the Appellant; A. Muthukumar, for RR 2 to 6 and M. Kamalanathan, for RR 7 in A.S. No. 596 of 1997 and S. Sounthar in Cross Objection No. 126 of 1997, for the Respondent

Final Decision : Dismissed

Judgement

M. Venugopal, J.—The Appellants/Plaintiffs have filed the present Appeal as against the Judgment and Decree dated 08.04.1996 in O.S. No. 74 of 1992 on the file of the Learned Additional Sub Judge, Mailaduthurai.

2. The trial Court, while passing the Judgment in the main suit, in respect of Issue No. 5 has, among other things, observed that "the partition suit filed by the Appellants/Plaintiffs is not affected by the principles of res judicata and further that the suit is not barred as per Order 9 Rule 9 of the Code of Civil Procedure; that in respect of Issue Nos. 1 and 2 it is observed that even though the 4th Item of A schedule has been purchased through sale in the name of 1st Respondent/1st Defendant, the said property is the joint family property of the Appellants/Plaintiffs and the Respondents/Defendants and further in respect of B schedule Printing Press and machineries it is held that they are not the self-acquired property of the 1st Respondent/1st Defendant and the Printing Press

and machineries are held to be the joint family properties belonging to that of the Appellants/Plaintiffs and Respondents/Defendants." Further, in respect of 13th Item in plaint D schedule, the trial Court has held that it is not the properties of the joint family; that in respect of plaint C schedule leaving Item 6-Steel Almirah, other 3 to 13 Items, brass vessels and ever silver articles and gold articles do not belong to the joint family; that in respect of D schedule 13th Item-Land, it is held that it does not belong to the joint family and in respect of other items mentioned in the suit properties they are held to be properties belonging to the joint family and therefore, in those properties, the Appellants/Plaintiffs are entitled to half share.

3. Moreover, in respect of Issue No. 4 the trial Court has held that the Appellants/Plaintiffs are not entitled to receive past profits three years before filing of the suit in respect of the suit items and only from the date of filing of the suit in respect of the joint family properties, the Appellants/Plaintiffs are entitled to claim income from the Respondents/Defendants; that in respect of Issue No. 6 other than Steel Almirah mentioned in C schedule the Appellants/Plaintiffs are not entitled to seek partition in respect of Item 3 to 13 and in respect of brass vessels and ever silver articles and also the gold articles and in this regard, the suit of the Plaintiffs is dismissed and leaving the aforesaid suit items in respect of other items mentioned in the plaint, the Appellants/Plaintiffs are entitled to the relief of preliminary decree and further directed the Appellants/Plaintiffs to initiate separate proceedings in respect of mense profits.

4. Before the trial Court, six issues have been framed for determination in the main case. On behalf of the Appellants/Plaintiffs, witness P.W.1 has been examined and Ex.A.1 has been marked. On the side of Respondents/Defendants, witness D.W.1 has been examined and Exs.B.1 to B.8 have been marked.

5. Being dissatisfied with the Judgment and Decree of the trial Court dated 08.04.1996 in O.S. No. 74 of 1992, the Appellants/Plaintiffs, as an aggrieved person, have projected this Appeal before this Court.

6. The Point that arises for consideration in this Appeal is:

Whether the Judgment and Preliminary Decree of the trial Court dated 08.04.1996 passed in O.S. No. 74 of 1994 is sustainable in the eye of law?

Contentions, Discussions and Findings on Point:

7. The Learned Counsel for the Appellants/Plaintiffs submits that the Appellants/Plaintiffs have projected this Appeal in respect of the disallowed portion of some of the items of the plaint C schedule properties viz., brass vessels, ever silver articles and gold articles and in fact, the trial Court ought to have accepted the case of Appellants/Plaintiffs filed for partition and decreed the suit in toto and indeed, the omission of certain items of the schedule mentioned properties from the purview of partition is against the principles of law, but these aspects of the matter have not been taken into account by the trial Court, which has resulted in

an erroneous Judgment being passed against the Appellants/Plaintiffs.

8. It is the contention of the Learned Counsel for the Appellants that the trial Court after satisfying itself about the joint family status of the parties in the suit and also after having found that the 1st Respondent/1st Defendant (since deceased) as Kartha of joint family has been in full enjoyment and control of the joint family properties in respect of movables and immovables should have granted a decree for partition as prayed for by the Plaintiffs. But surprisingly the trial Court has disallowed Item 13 of immovable property in D schedule since it stands in the name of 2nd Defendant and purchased by his father, the 1st Defendant, when admittedly the entire assistance of movables and immovables are in the control of the 1st Respondent/1st Defendant and in short, the trial Court has not appreciated the oral and documentary evidence available on record in a proper perspective and therefore, prays for allowing the Appeal in the interest of justice.

9. The Learned Counsel for the Respondents 2 to 7 and the Learned Counsel for the 7th Respondent contend that the trial Court, on an appreciation of oral and documentary evidence available on record, has taken into account all the relevant totality of circumstances in an integral fashion and has arrived at a just conclusion and disallowed certain portions of the Appellants/Plaintiffs case as set out in the plaint and passed a preliminary decree thereto, and at this distance of time it may not be interfered with by this Court.

10. It is the evidence of P.W.1 (1st Appellant/1st Plaintiff) that the 2nd Plaintiff is the son and that the 1st Respondent/1st Defendant is his brother and Defendants 2 and 3 are the sons of the 1st Defendant and that after filing of the suit, the 3rd Defendant has expired and Defendants 4 to 6 are heirs of the 3rd Defendant and that the suit properties belonged to his father and he does not know whether his father had ancestral properties.

11. P.W.1 in his evidence goes on to add that his father at Myiladuthurai has been running Vasantha Printing Press by publishing the Tamil Books and the income received by the father in the suit properties and also from the income received through running the Printing Press, his father has purchased the properties and his father expired in the year 1942 and at that time is aged 8 years and 1st Defendant's age has been 14 years and after the death of his father, the Press has been running by his brother and his maternal uncle and for two years his uncle has been managed the affairs of the Press and later the 1st Defendant has been managing the Press.

12. The evidence of P.W.1 is to the effect that he got marry to in the year 1969 and at that time his mother has been alive and after his marriage their arose misunderstanding between him and the 1st Respondent/1st Defendant and before the Sub Court, Mayavaram as against the 1st Respondent/1st Defendant a partition suit has been filed in the year 1971 in respect of the properties and the said suit has been dismissed for default and that he has been residing in the 3rd

item of A schedule and earlier it has remained as an tilted house and after demolition only a small portion remains.

13. It is the evidence of P.W.1 that from the year 1975 till 1989 he has been cultivating the lands for which the expenditure has been made by the 1st Respondent/1st Defendant and he used to hand over the paddy to his brother and his brother used to give small portion of paddy to him and after the year 1982 his brother has not given him the cultivation expenses and therefore, he has handed over the land to him and subsequently, he has been doing the cultivation work and after the year 1982 he is not giving the paddy for his food purpose and his mother has expired in the year 1988 and since he has demanded partition of the properties and since no action has been taken he has filed the present suit.

14. The evidence of P.W.1 is to the effect that A schedule item 4 has been purchased in the year 1947, in the name of 1st Respondent/1st Defendant and the said property has been purchased through the income received from running the Printing Press, from the income received from the land, and also from the rental income and in B schedule in item 1, 3 shops have been let out by the 1st Respondent/1st Defendant and he is in receipt of rent of Rs. 5,000/-and even the 4th item in A schedule let out for rent through which an income of Rs. 1500/-has been received and it is not correct to state that A schedule 4th item belongs to the 1st Respondent/1st Defendant. Furthermore, the Nanja lands of 3 acres in D schedule has been purchased in the name of 1st Respondent/1st Defendant and his son and even these lands belong to the joint family and in D schedule Punja land 1st item 6 persons are residing and in this regard, a case is pending before Munsif Court and further, in the Printing Press there are 5 machines, cutting machine and other machineries are there and these machineries are in existence during the time of his father and in the house, pumpset, 5 Almirahs, sofa set, iron box, two cots, 3 patayams, motor cycle, car have been there, 20 sovereigns double chain, one single chain, 4 bangles of 12 sovereigns, one sovereign of ring and these properties are kept by his mother and his mother till her death has been residing in his brother's house.

15. That apart, it is the evidence of P.W.1 on 10.10.1992 in respect of Nanja lands, an agreement has been entered into between him and the 1st Respondent/1st Defendant and the 1st Respondent/1st Defendant without his consent has sold the two acres of land and he has not given his share of money and even he promised to give 5 acres and 41 cents of land for the purpose of cultivation and that also he has not handed over the same and moreover, he has not executed a power deed as promised by him. Therefore, the said agreement has not come into force and it is incorrect to state that the 3 acres Punja land has been purchased by the 1st Respondent/1st Defendant out of his own income and it is not correct to state that the 1st Respondent/1st Defendant has spent heavily and improved the Press.

16. D.W.1 (1st Defendant) in his evidence has deposed that his father died in the

year 1938 and it is not correct to state that his father expired in the year 1942 and at the time of his father's death is aged 10 years and the Nanja land in D schedule viz., 13th item does not belong to his family and that he has not purchased the same in his name and the D schedule 1st item has been sold and therefore, it is not liable for partition and the Nanja lands have been looked after by his mother and the 1st Appellant/1st Plaintiff and 5 or 6 years before filing of the suit 5 1/2 acres land has been given to him and the lands given to the Plaintiff is kept uncultivated and for sometime only he cultivated and the suit Punja lands are in occupation of the tenants and a case is pending against them.

17. Proceeding further, it is the evidence of D.W.1 that he has been doing the business of car and motorcycle broker and apart from that he used to let out the car for hire and through the income obtained from brokerage he purchased a house at Chinnakandara Street and he has not purchased the house from the family income and in respect of that property an agreement Ex.B.4 has been entered into and the sale deed is presently in the Bank and the house tax receipts are Ex.A.6 and the Plaintiff filed a suit in the year 1971 in respect of the house at Chinnakandara Street. But the Plaintiff has not prosecuted the said suit.

18. Added further, it is the evidence of D.W.1 that his father two years before his death because of his sickness has not been looked after the Press and the during the time of his father, the Press has been closed and later after the death of his father his uncle has been looking after the Press and he has not been in a position to look after the same continuously and he has informed him that since the machines have been old and he has not been in a position to look after the Press and he purchased the machineries through his income and has been running the Press and that the machineries in the Press belonged to him and he does not belong to his family.

19. D.W.1 in his evidence has clearly stated that item 1, 2, 6 of C schedule are old and therefore, it is not in usable condition and other family articles are not with him and even the brass and ever silver articles are not with him and it is incorrect to state that he is in possession of 38 sovereigns of jewel belonging to his father and in the earlier suit, no mention has been made about the jewel and that he has renewed the Chinnakandara Street house after incurring heavy expenditures and he has been receiving the monthly rent of Rs. 400/ from that property and in the Press building one Sabari, Electrician is paying the rent of Rs. 800/-. The covering shop is running monthly of Rs. 300/-, photo studio is paying monthly rent of Rs. 150/-and his mother till her death has been in receipt of the monthly rent. Thereafter, he has given the Plaintiff a sum of Rs. 400/-and that he has not cultivated the land at any point of time and even after the land has been given in partition to him he has not cultivated and he has given the land to another person for lease.

20. Continuing further, it is the evidence of D.W.1 that the education expense, marriage expense of the 1st Plaintiff has been met by them and since the 1st Appellant/ 1st Plaintiff's wife died in the fire accident his son has took a loan of

Rs. 20,000/-for the medical expense of the 1st Appellant/ 1st Plaintiff's wife and at that time he has been under the medical treatment at K.S. Hospital in Chennai.

21.D.W.1 (in his cross examination) has stated that from the year 1938 till 1958 for 20 years the Press has not been running and in other year his uncle has been running the Press and at the time of his father's death, there have been two Press machines and one cutting machine and he has purchased three treadle machine for Rs. 10,000/- in the year 1965-66 and he is continuously running the Vasantha Press in his name, earlier conducted by his father and that the Accounts Return pertaining to the Press has to be submitted to the Collector, but he is not sending the same but he will mention Nil while sending the same and that he has been in a position of the accounts and from the broker business, he received the income of Rs. 2,000/-to Rs. 3000/- per month.

22. Also, D.W.1 has deposed that he has purchased the house at Chinnakandara Street at the age of 18 for a sum of Rs. 6,300/-and at that time the 1st Appellant /1st Plaintiff has been aged 8 years and other houses and lands whether has been purchased from the income of the Press, he does not know and he does not know whether there have been ancestral properties and that his father has the avocation of Press only and he does not know about the lands being purchased after starting the Press and his wife died of cancer in the year 1971-72 etc.

23. The case of the Appellants/Plaintiffs is that the 1st Appellant/1st Plaintiff earlier has projected O.S. No. 55 of 1971 for partition of the suit properties and to get separate possession of the half share of the properties and income therefrom and later the said suit has been allowed to be dismissed for default and thereafter, the 1st Respondent/1st Defendant (since deceased) permitted the 1st Appellant/ 1st Plaintiff to participate in the management of the suit lands along with him till about 1982 and the 1st Respondent/ 1st Defendant (since deceased) has not been providing money to meet the expenses for cultivating the suit lands in time and the seasons have also been not normal and that the 1st Appellant/1st Plaintiff has not been able to carry on the cultivation of the suit lands satisfactorily etc.

24. The further stand of the Appellants/Plaintiffs is that from February 1990 onwards the 1st Respondent/1st Defendant (since deceased) has not paid any amount to the 1st Appellant/1st Plaintiff inspite of several demands made on him from time to time and that the 1st Appellant/1st Plaintiff asked the 1st Respondent/1st Defendant in June 1991 to effect a partition and put the Appellants/Plaintiffs in separate possession of the properties.

25. Inasmuch as the Appellants/Plaintiffs found it no longer convenient to enjoy the suit properties in common, they have filed the suit for partition. During the pendency of the suit, the 3rd Defendant Balasundaram expired on 15.05.1992 and therefore, his Legal Representatives Defendants 4 to 6 have been impleaded as parties before the trial Court as per order in I.A. No. 75 of 1995 dated

28.4.1995.

26. In the written statement filed by the 1st Respondent/1st Defendant and adopted by the other Defendants, it is averred that the Appellants/Plaintiffs have purposely included some of the properties not in existence and some of them which do not the family at all and that the 4th Item of A schedule is his self-acquired property and even in the earlier suit the 1st Appellant/1st Plaintiff has claimed that the said property belongs to the family property and therefore, he is estopped to claim the very same property in the present suit and Item 1 and 2 of C schedule are not in working condition for the past several years and only one Steel Almirah available which is embedded in the wall and the rest of the items in C schedule are not in existence and the family has not owned them also.

27. In the written statement the Defendants have taken a plea that there are no household brass or ever silver vessels and much less worth Rs. 5000/-and that the family has not owned any of the gold articles mentioned in C schedule and the mother of the 1st Appellant/1st Plaintiff even during a life time had sold and spent some of the gold articles belonging to her for the purpose of 1st Appellant/1st Plaintiff's Education and marriage etc. and there is no such item of 13 of D schedule.

28. That apart, the Defendants have averred in the written statement that the building described in B schedule belongs to the family. The Printing Press, machineries with all accessories and equipments and treadles are the exclusive and separate property of the 1st Respondent/1st Defendant and the Press etc., are old and they have been purchased by him and the business run exclusive belonging to him and in short, item 4 in A schedule, the Press etc. mentioned in B schedule items 3 to 13, except one Steel Almirah, household vessels, gold articles in C schedule, items 1 and 13 in D schedule are not available for partition and item 1 of D schedule was with the tenant and it was sold and the same has been accepted by the Appellants/Plaintiffs.

29. In the written statement, the 1st Respondent/1st Defendant has stated that the 1st Appellant/1st Plaintiff was given to costly education and he was paid large sum out of his own earnings and he was given about Rs. 400/-per month till recently and that the 1st Appellant/1st Plaintiff's wife died out of fire accident and he also sustained burn injury in that accident etc. Moreover, it is the stand of the 1st Respondent/1st Defendant that he has been doing car and motor cycle brokerage business for the past many years and he used to purchase the car and sell the same and thereby derived good income and he used to save money and from his savings, he purchased item 4 of A schedule and started the Press business long after the death of his father who had abandoned the business and further the entire machineries have modernised by him out of his self earnings.

30. The Appellants/Plaintiffs have filed the present Appeal only for the disallowed portion of the suit items.

31. Though an eadeavour has been made on behalf of the Appellants/Plaintiffs

that the trial Court has committed an error in omitting certain items of schedule mentioned properties from the purview of partition and all the movables mentioned for the partition in the plaint are available at the time of filing of the suit, yet, the trial Court has disallowed certain items as not in existence at the time of trial is not correct, this Court is of the considered view that the Appellants/Plaintiffs have not proved to the subjective satisfaction of this Court that the disallowed certain items have been made available at the time of filing of the suit and hence, this Court is left with no other option but to come to an inevitable conclusion that the trial Court is correct in coming to the conclusion while disallowing certain items as not in existence at the time of the trial. Also it is for the Appellants/Plaintiffs to prove that all the movables mentioned for partition in the plaint are available at the time of filing of the suit. In this respect, the Appellants /Plaintiffs have not discharged the burden of proof as required under the Evidence Act.

32. In regard to the Cross Objection filed by the 1st Respondent/1st Defendant (since deceased), it is to be pointed out that though a plea has been taken on his behalf that out of car and motor cycle borkerage business for many years, he has purchased the item No. 4 of A schedule viz., the house property inasmuch as he has said to have derived good income and save money and even though Ex.B.5 sale deed stands in his name in respect of item 4 of A schedule and notwithstanding the fact that a plea has been taken on behalf of the 1st Respondent/1st Defendant (Cross Objector) that no recitals in Exs.B.4 and B.5 Sale Deeds are found to show that the said properties have been purchased of the family etc., it is to be pointed out that since the 1st Respondent/1st Defendant (since deceased) after the death of the father has been said to be in Management of the family properties, the presumption in law is that he is the Kartha of the family and he has purchased the said property for the benefit of the joint family and therefore, the finding of the trial Court, that item 4 of the A schedule property is a property belonging to the joint family and not that of the 1st Respondent/1st Defendant as a self-acquired one, is a fair, reasonable and just conclusion based on oral and documentary evidence on record and the same does not require to be interfered with by this Court in Appeal.

33. In the light of qualitative and quantitative discussions mentioned supra and also taking note of all the attendant facts and circumstances of the case in a cumulative fashion, this Court comes to an inescapable conclusion that the Judgment of the trial Court, in passing the preliminary decree omitting certain items viz., brass vessels, ever silver articles and gold articles, the plaint schedule properties outside the purview of items available for partition and holding that in respect of the other items the Appellants/Plaintiffs are entitled to half share, do not suffer from any error both on factual aspects and on legal plane and viewed in that perspective, the Appeal as well as the Cross Objection fail.

34. In the result, the Appeal and the Cross Objection are dismissed, leaving the parties to bear their own costs. Connected C.M.P. is also dismissed.