



A.S.No.1007 of 2012

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.03.2023

CORAM :

THE HONOURABLE MR. JUSTICE S.S. SUNDAR

AND

THE HONOURABLE MR. JUSTICE P.B. BALAJI

A.S.No.1007 of 2012

Shanthi

... Appellant

Vs.

1.Konchi Naicker

2.Srinivasan

3.Ganthimathi

4.Saraswathi

... Respondents

[R4 brought on record as legal heir of the deceased 1st respondent vide order of this Court in C.M.P.Nos.11404 & 11405 of 2018 in A.S.No.1007 of 2012, dated 19.02.2019]

Prayer : Appeal Suit filed under Order 41 Rule 1 and 2 r/w. Section 96 of Code of Civil Procedure against the judgment and decree dated 01.02.2012 in O.S.No.66 of 2010 on the file of the District Court No.II, Kancheepuram.



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For Appellant : M/s.G.Devi
R1 : Died
For R2 & R3 : No appearance
R4 : Not ready in notice

J U D G M E N T

(Judgment was delivered by **S.S. SUNDAR, J.**)

The plaintiff in the suit in O.S.No.447 of 2007 on the file of District Court, Chengalpattu (converted to O.S.No.66 of 2010 on the file of the District Court No.II, Kancheepuram), is the appellant in the above appeal, against the judgment and decree, dated 01.02.2012, in O.S.No.66 of 2010, dismissing the suit for partition filed by the appellant for partition of her $\frac{1}{4}^{\text{th}}$ share in all the suit properties.

2.The appellant filed the suit for partition claiming her $\frac{1}{4}^{\text{th}}$ share in all the suit properties which are described as Item Nos.1 to 80 in Edaiyampudhur Village, Uthiramerur Taluk, Kancheepuram District and Item Nos.1 to 5 in Kurumbirai Village, Uthiramerur Taluk, Kancheepuram



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District. The appellant is the daughter of 1st defendant, who is the 1st respondent in the above appeal. The plaintiff is the elder daughter of 1st defendant and defendants 2 and 3 are the son and daughter of 1st defendant.

3.It is the case of the appellant that the suit property originally belonged to Sri Ellappa Naciker, the grandfather of the plaintiff. It is stated in the plaint that, after the lifetime of Sri Ellappa Naciker, his four sons, including the 1st defendant, divided the properties and the suit properties were allotted to the share of 1st defendant, the father of plaintiff. It is further contended that the properties stand in the name of Sri Ellappa Naciker. It is further contended that the 1st defendant, who got the properties by a oral partition, transferred the Revenue records in his name and is managing the properties as joint family Manager. Though the plaintiff admits that she was given in marriage in the year 1984, it is the case of the plaintiff that there was no partition in the family and the 1st defendant requested the plaintiff to wait for some more years for partition of joint family properties and that the plaintiff, believing the words of 1st defendant, did not claim partition. It is also claimed by the appellant that she is entitled to a share in the joint



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family properties by virtue of Hindu Succession (Amendment) Act, 2005 (Act 39 of 2005). Plaintiff filed the suit after issuing notice on 20.07.2007.

4.The suit was contested by the father/1st defendant. Para Nos.7 and 8 of his written statement read as follows :

“7.The defendant submit that this defendant and his brother partitioned the family property under registered partition on 16.07.1987 as per partition the 4,5,8,9,10,11,12,13,14,15,17,18,19,20,24 to 41 and 43 to 47,49,51,54,55,65,68,70 properties were allotted remaining property are self acquired property of this defendant the purchased from various owners in the years 1988 to 1990. This defendant also running the finance and paddy merchant he is self earning purchased the some property. Hence there is no question of partition in the item of 1 to 3, 6 to 7, 16, 21 to 23, 42, 48, 50, 52 to 53, 54 to 64, 66 to 67, 69, 71 to 80 items are self acquired property.

8.This defendant submit that due to family necessity he is received loan from Salavakkam Indian Bank in the year 2004, 2006, 2007, 2008 sum of Rs. 10 lakhs and Edayampudur Co-operative Society issued a loan sum of Rs. 1,00,000/- and also



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received sum of Rs. 5,00,000/- some personally. Hence totally the joint family, debt Rs. 16,00,000. This defendant submit that in the year 1991 this plaintiff and the 3rd defendant relinquished the joint family property and received a sum of Rs. 20,00,000/- from this defendant. After received the amount and relinquished the right of the plaintiff in the properties and filed this vexatious suit against this defendant and also totally estoppel. Hence there is no partition in the above properties.”

The 1st defendant filed an additional written statement and second additional written statement.

5.In all the three written statements, this Court finds that there is specific reference to the properties as joint family property or ancestral property and devolved on the 1st defendant under registered partition effected among the 1st defendant and his brothers in 1987. In the first written statement, the 1st defendant also referred to a sum of Rs.16 Lakhs as joint family debts. A specific plea is also raised in the written statement about the relinquishment of plaintiff/appellant's share upon receipt of a sum of Rs.20 Lakhs from the 1st defendant. Sum and substance, the specific pleading in the written statement would indicate that the 1st defendant has



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admitted the joint family character of the suit properties and pleaded
relinquishment of share by plaintiff for consideration.

6.The trial Court framed the following issues :

- 1.இவ்வழக்கு நிலைக்கத்தக்கதா ?
- 2.வாதி தாவாவில் கோரியபடி 1/4 பாகம் பெற உரிமையுடையவரா ?
- 3.இவ்வழக்கு வழக்கு மூலம் படி நிலைக்கத்தக்கதா ?
- 4.வாதி தாவாவில் கோரியபடி தீர்ப்பு மற்றும் தீர்ப்பாணை பெற தகுதியுடையவரா ?
- 5.வேறு என்ன பரிகாரம் ?

The trial Court also framed the following additional issues :

- 1.வாதி தாவாவில் கோரியபடி கூட்டு உரிமையாளர் என்ற முறையில் பாகம் பெற தகுதியுடையவரா ?
- 2.தாவா சொத்து 1வது பிரதிவாதி, அவருடைய தந்தை எல்லப்ப நாயக்கர், மற்றும் தாத்தா முருகப்ப நாயக்கருக்கு சுய சம்பாத்திய சொத்தா ?
- 3.இந்து வாரிசரிமை சட்டம் 1956 படி 1வது பிரதிவாதி உயிருடன் இருக்கும்போது உரிமையாளரா ?
- 4.வாதி அவருடைய தந்தை அதாவது 1வது பிரதிவாதி உயிருடன் இருக்கும்போது பாகம் பெற தகுதியுடையவரா ?

7.Quite contrary to the admission of 1st defendant in the written



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statement about the character of suit property as joint family, the trial Court entertained an argument that the suit property originally belonged to the grandfather of 1st defendant, by name Sri Murugappa Naicker, and the said Sri Murugappa Naicker died before coming into force of Hindu Succession Act, 1956. A further argument was also advanced by defendants that the plaintiff has not proved that 1st defendant's grandfather acquired the properties.

8.From the findings of the trial Court, this Court finds that the trial Court has gone contrary to the pleadings and admission of 1st defendant in the written statement and additional written statement as to the character of the suit properties. We have seen in number of cases where parties assume that properties inherited by their father from the grandfather are ancestral properties. It may be true that property inherited from an ancestor can be described as ancestral property. However, that does not mean the existence of coparcenary. Before commencement of Hindu Succession Act, 1956, if a male Hindu dies, the property devolves upon his son, grandson, great grandson. However, after the commencement of Hindu Succession Act,



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1956, when a male Hindu dies, only his self-acquired property will devolve under Section 8 of Hindu Succession Act. Section 6 of the Act deals with the devolution of undivided share of a coparcener on his death by survivorship in the absence of any female heir specified in Class 1.

9. Therefore, unless the existence of coparcenary is proved, the plaintiff is not entitled to claim any share in the property under Section 6 of the Hindu Succession Act. However, the parties have not properly understood the legal implication of a plea regarding the character of properties in the hands of 1st defendant father. Since the 1st defendant has admitted the character of suit properties as ancestral and taken a plea that the properties have been relinquished by the plaintiff upon receipt of a sum of Rs.20 Lakhs, we find considerable force in the argument of the learned counsel appearing for the appellant that an opportunity should be given to the appellant to prove the character of suit property in its real sense and the entitlement of plaintiff under the Hindu Succession (Amendment) Act, 2005.



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10. The trial Court proceeded on the basis that the suit properties are the properties of 1st defendant and that therefore, the plaintiff is not entitled to claim any share in the property during the lifetime of the father/1st defendant. This finding is contrary to the pleadings in the plaint as well as in the additional written statement. In such circumstances, this Court finds the judgment and decree of the trial Court, unsustainable. However, the matter has to be remitted back to the trial Court in view of the grey areas where the character of the property has been assumed on a wrong understanding of law both by the plaintiff as well as by the defendants. Since this is a suit for partition, the plaintiff, the legal heirs of plaintiff, and defendants will also have right by birth, if it is established that the suit properties are ancestral coparcenary properties. Therefore, this Court finds it necessary that the matter should be remanded to the trial Court for proper adjudication as to the character of the suit properties whether it is ancestral coparcenary or self-acquired property of 1st defendant, who got the property by virtue of Section 8 of Hindu Succession Act in the partition among the children of Ellappa Naicker. It is also open to the appellant to establish that the properties are ancestral and joint family properties of Ellappa Naicker



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and his sons and that therefore, the coparcenary did exist even when Ellappa Naicker was holding the property.

11. Accordingly, **the appeal is allowed** and the judgment and decree of the trial Court, dated 01.02.2012, in O.S.No.66 of 2010, is set aside and **the matter is remanded back to the trial Court for fresh disposal.** Both parties are permitted to lead additional evidence both oral and documentary. No costs.

12. Parties shall appear before the trial Court on 24.04.2023.

(S.S.S.R., J.) (P.B.B., J.)
16.03.2023

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1.The District Judge,
District Court No.II,
Kancheepuram

2.The Section Officer,
VR Section, High Court,
Chennai.

| *with a direction to return*
| *the records to the Court below,*
| *forthwith, if any received*

S.S. SUNDAR, J.



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and
P.B. BALAJI, J.

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