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S.A.No.481 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 30 / 08 / 2024

JUDGMENT PRONOUNCED ON : 29 / 11 / 2024

CORAM

THE HONOURABLE MR. JUSTICE R.SAKTHIVEL

S.A.NO.481 OF 2021

1.Alamelu

2.Gomathi

... Appellants 1 & 2 / Appellants 1&2 /
Plaintiffs 1 & 2

versus

Palanisamy Gounder (Died)

1.Ramasamy

2.Lakshmi

3.Karuppana Gounder

4.Rajamanickam

5.Subbathal

6.Saraswathi

... Respondents 1-6 / Respondents 2-7 /
Defendants 2-7

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, 1908, praying to set aside the Judgment and Decree dated October 12, 2020 made in A.S.No.45 of 2018 on the file of the learned I Additional District Judge, Tiruppur confirming the Judgment and Decree dated February 27, 2017 made in O.S.No.130 of 2016 on the file of the learned Sub Court, Avinashi.

For Appellants	:	Mr.V.Anandhamoorthy
For Respondents 1,5 & 6:		Mr.C.R.Prasanan
For Respondents 2 to 4	:	Served – No appearance



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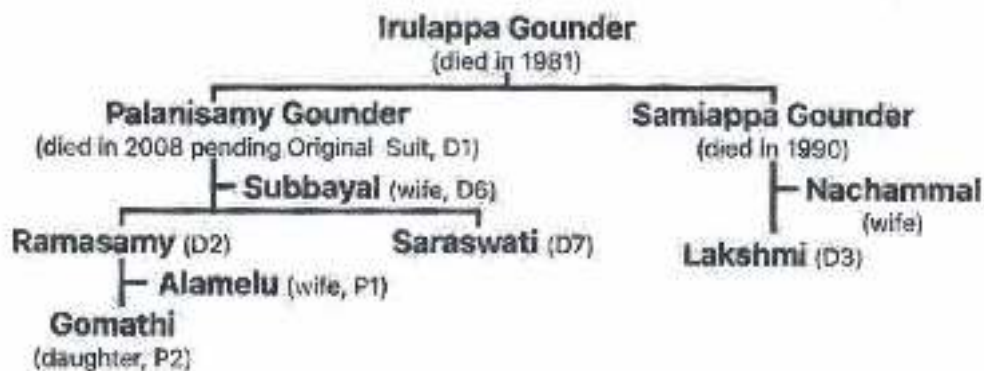
J U D G M E N T

This Second Appeal is directed by the unsuccessful plaintiffs.

Challenge is to the Judgment and Decree dated October 12, 2020 passed in A.S.No.45 of 2018 by the 'I Additional District Court, Tiruppur' [henceforth 'First Appellate Court'], whereby the Judgment and Decree dated February 27, 2017 passed in O.S.No.130 of 2016 by the 'Sub Court, Avinashi' [henceforth 'Trial Court'] was confirmed.

2. For the sake of convenience, hereinafter, the parties will be referred to as per their array in the Original Suit.

3. It is fruitful to refer to the following genealogy chart for better understanding:





TRAJECTORY OF THE PLAINT TO THE TRIAL COURT

4. The plaint in the present Suit was initially filed before the Subordinate Court, Erode on September 22, 1999 and numbered as O.S.No.608 of 1999 and thereafter, transferred to II Additional District Judge, Erode and renumbered as O.S.No.36 of 2003 and thereafter, again transferred to Subordinate Court, Perundurai and renumbered as O.S.No.39 of 2014 and thereafter, once again transferred to Subordinate Court, Tiruppur and renumbered as O.S.No.161 of 2014 and thereafter, finally transferred to the newly constituted Subordinate Court, Avinashi and renumbered as O.S.No.130 of 2016

PLAINTIFFS' CASE:

5. The first plaintiff [wife] married the second defendant [husband] in 1984 and in their wedlock, the second plaintiff was born to them in 1986. Thereafter, in 1997 the second defendant drove the first plaintiff out of her matrimonial house and since then they have been living estrange and separately. The second defendant is liable to maintain the first plaintiff, who has no income, as she is his legally wedded wife. Hence, the first plaintiff filed the present Original Suit praying for future maintenance of Rs.500/- per month and creating a charge on the Suit



Properties as well for regular payment of maintenance.

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5.1. The second plaintiff, who was a minor at the time of filing the Suit, represented by her mother / first plaintiff, filed the Original Suit seeking partition of Suit Properties. During the pendency of the Original Suit, fifth defendant informed that he purchased Item No. 1 of the Suit Properties including the share of the second plaintiff and therefore, he is ready to pay the share value of 1st plaintiff. Thereafter, he paid the market value of the 1st item of Suit Property to the second plaintiff. Hence, the plaintiffs filed an Interlocutory Application in I.A.No.808 of 2001 on the file of Trial Court praying to exonerate the fifth defendant and delete Item No.1 from the plaint description of property. The said Interlocutory Application was allowed on October 29, 2001. Thus, the plaintiffs restricted their claim to Item Nos. 2-A and 2-B alone.

5.2. The case of the plaintiffs is that the common ancestor - Irulappa Gounder owned ancestral garden land in his 1/6th share in an extent of Acre 3.46 Cents in Survey Nos.315, as well as an extent of Acre 0.15 Cents in Survey No.314-A of Santhipalayam Village, Gopichettipalayam Taluk. Irulappa Gounder sold the same on November



28, 1939 to one Chinna Palani Gounder under a registered Sale Deed and from and out of the sale proceeds and using joint family funds, Irulappa Gounder purchased the Item No.2-A of the Suit Properties under a registered Sale Deed dated December 12, 1939.

5.3. Further from the ancestral nucleus, the first defendant, as *Karta* of the joint family, along with the fourth defendant purchased the Item No.1 of Suit Properties under a registered Sale Deed dated February 1, 1972 (To be noted, as stated *supra*, Item No.1 has been deleted and hence, need not be dilated further).

5.4. Irulappa Gounder died in or about 1981. His son – Samiyappa Gounder died in 1990 leaving behind his daughter / third defendant and wife – Nachammal. Subsequent to the death of Samiyappa Gounder, the Defendant Nos.1, 3 and Nachammal partitioned the joint family properties under registered Partition Deed dated March 15, 1995, whereby the Item No.2 (*sic* Item No.2-B) of Suit Properties, described as “A” Schedule properties therein, was allotted to first defendant. Thereafter, in an arrangement between first defendant and second defendant, in the 1st week of January 1996, the first defendant orally relinquished his entire



share in Suit Properties in favour of the second defendant. Hence the Suit Properties are ancestral properties in which the second plaintiff as a coparcener is entitled to $\frac{1}{2}$ share in the Suit Properties.

FIRST AND SECOND DEFENDANTS' CASE

6. The 1st and 2nd defendants filed written statement on October 29, 2001 denying the plaint averments. The sum and substance of the Written Statement is that the first defendant is entitled to $\frac{1}{4}$ share and second defendant is entitled to $\frac{1}{8}$ share and second plaintiff is entitled to $\frac{1}{8}$ share in the Item No.1 of Suit Properties as per Hindu Succession Act, 1956 ['H.S.Act' for short]. As regards Item No.2, first defendant is entitled to $\frac{1}{2}$, the second defendant is entitled to $\frac{1}{4}$ share and the second plaintiff is entitled to $\frac{1}{4}$ as per H.S.Act. There was no oral relinquishment as alleged by the plaintiffs. The quantum of maintenance claimed by the first plaintiff is excessive and the second defendant has no means to pay such huge amount. Hence, the first plaintiff is not entitled to maintenance.

6.1. First defendant died in 2008 pending the Original Suit and defendants 6 and 7 were impleaded as his legal heirs / representatives. Then second defendant filed additional written statement which was



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adopted by defendants 6 and 7, wherein it has been stated that the Suit

Properties are self-acquired properties of Irulappa Gounder and no right has accrued on the second plaintiff to claim partition.

6.2. Further, in the additional written statement, it has been stated that Irulappa Gounder purchased some properties in his name along with one Vellappa Gounder under a registered Sale Deed dated May 4, 1933 and then Irulappa Gounder, first defendant and Samiyappa Gounder sold the said properties under registered Sale Deed dated November 28, 1939. The properties covered under Sale Deed dated May 4, 1933 are self-acquired properties of Irulappa Gounder. Further, there is no ancestral properties in Santhipalayam as alleged by the plaintiffs.

6.3. Further, the properties covered under Sale Deed dated December 12, 1939 *i.e.*, Item No.2-A are self-acquired properties of Irulappa Gounder in which the second plaintiff has no right to claim partition.

6.4. After the demise of Irulappa Gounder, his son – Palanisamy Gounder @ Palani Gounder and another son - Samiyappa Gounder's wife & daughter entered into a registered Partition Deed dated



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March 15, 1995, whereby Item No.2 -B of Suit Properties, described as “A” Schedule properties therein, was allotted to first defendant. Hence, Item No.2-B are also separate properties of first defendant in which the second plaintiff has no right to seek partition.

6.5. After the demise of first defendant - Palani Gounder pending the Original Suit in 2008, his son – second defendant, daughter – seventh defendant and wife – sixth defendant succeeded his estate as per Section 8 of the H.S.Act. Therefore, the second plaintiff who is not a legal heir of Palani Gounder under Section 8 of the H.S.Act is not entitled to seek partition over the Suit Properties. The Suit is not maintainable and hence liable to be dismissed.

PLAINTIFFS' REPLY STATEMENT:

7. In the Reply Statement the plaintiffs reiterated some of the plaint averments and further contended that only from and out of the ancestral nucleus, Item No.2-A of the Suit Properties were purchased. Further, it is not right to assert that the properties allotted to first defendant under Partition Deed dated March 15, 1995 are his separate properties. Defendant Nos.1 and 2 in their earlier Written Statement dated October



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29, 2001, have specifically admitted the right of the second plaintiff to claim share over the Suit Properties. Now the Defendant Nos.2, 6 and 7 are estopped from contending otherwise. Accordingly, the plaintiffs prayed to decree the Suit.

TRIAL COURT:

8. At trial, first plaintiff – Alamelu was examined as P.W.1 and three other witnesses were examined as P.W.2 to P.W.4 and Ex-A.1 to Ex-A.13 were marked on the side of the plaintiffs. On the side of the defendants, the first defendant – Palanisamy Gounder was examined as D.W.1 and seventh defendant - Saraswathi was examined as D.W.2 and Ex-B.1 to Ex-B.10 were marked.

9. After full-fledged trial, the Trial Court concluded that Item No.2 of Suit Properties are not coparcenary properties on the date of Ex-A.4 Partition Deed viz., March 15, 1995 and therefore, it becomes separate properties in the hands of first defendant after allotment. After his demise, it devolves upon his legal heirs under Section 8 of H.S.Act as separate properties. Hence the second plaintiff is not entitled to claim partition over the Suit Properties. *Qua* admission made by the Defendant Nos.1 and 2 in



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their earlier written statement, the Trial Court held that when legal issues are involved in deciding the shares, mere admission by the party will not cloth any legal right over the grant of shares. Accordingly, the Trial Court dismissed the Suit *qua* partition and decreed the Suit *qua* maintenance.

FIRST APPELLATE COURT:

10. Feeling aggrieved by the Trial Court's Judgment and Decree, the defendants preferred an appeal in A.S.No.45 of 2018 before the First Appellate Court. After hearing both sides and perusing the documents available on record, First Appellate Court *qua* admission made by the Defendant Nos.1 and 2 in their earlier written statement, concluded that it is not an admission of fact but one in respect of question of law and hence, they are explainable and not conclusive proofs. The Defendant Nos.2, 6 and 7, by way of additional written statement and through oral evidence, have explained the said admissions and hence, they do not attract estoppel. Further concluded that the reason assigned by the Trial Court that the second plaintiff has no *locus standi* to institute the Suit is incorrect. At the same time, Ex-A.4 – registered Partition Deed has been executed between first & third defendants and third defendant's mother on



March 15, 1995 and hence, it is saved by Sub-section 5 of Section 6 of the H.S.Act as amended by 'the Hindu Succession (Amendment) Act, 2005 (Act No.39 of 2005)' (henceforth '2005 H.S. Amendment Act'). In view of Ex-A.4 – Partition Deed, second plaintiff is not entitled to claim partition. Accordingly, First Appellate Court dismissed the Appeal Suit and confirmed the Judgment and Decree of the Trial Court.

11. This Court deems it appropriate to extract relevant portion from the First Appellate Court's Judgment hereunder:

'39...In the present case, the reason given by the Trial Court that the 2nd plaintiff has filed Suit for partition even during the life time of grand-father and father is not sustainable, since it has been otherwise held by the Hon'ble Supreme Court in the above said judgment. Hence this Court is of the considered view that the reasoning given by the Trial Court that the 2nd plaintiff has no locus-standi to institute the suit is not correct.

40)At the same time in the present suit admittedly on 15.03.1995 under Ex-A4 a Registered Deed of Partition has been executed in between the defendants in respect of the suit property. The document a registered partition deed of the year 1995. As held by the Hon'ble Supreme Court that any document especially a deed of partition which has duly registered according to law, prior to 20.12.2004 is coming



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under the exception as per Sec.6(5) of Amendment Act 39 of 2005.

41) Though the 2nd plaintiff has right of suit to ask for partition in view of the exception contained in Sec.6(5) of Act 39 of 2005, since there is a registered deed of partition executed prior to the cutoff-date namely 20.12.2004, this Court comes to the conclusion that the 2nd plaintiff is not entitled to claim partition on that ground.

In the result, this appeal is dismissed by confirming the Decree and Judgment of the Trial Court dated 27.02.2017 passed in O.S.No.130/2016 in respect of the relief of partition and in the circumstances of the appeal there is no order as to costs.'

12. Further, this Court would like to observe here that the First Appellate Court has actually deviated from the finding of the Trial Court that the Suit Properties are separate properties and arrived at the conclusion that they are ancestral properties. However, referring to Ex-A.4 – Partition Deed held between the first defendant, third defendant and third defendant's mother, the First Appellate Court went on to dismiss the Suit *qua* partition.



SECOND APPEAL:

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13. Feeling aggrieved by the Judgment and Decree passed by the First Appellate Court, the plaintiffs have preferred this Second Appeal, which was admitted on August 4, 2021 on the following substantial questions of law:

- “(a) Whether the findings of the lower appellate Court is correct in holding that the 2nd plaintiff is not entitled to share over the Suit Property as the grandfather and father are alive at the time of Suit and succession was not opened?*
- (b) Whether the findings of the Court below are correct in holding that the properties devolved to the 1st defendant on partition among his family can be treated as self acquired property of the 1st defendant and thereby the 2nd plaintiff being a grand-daughter is not entitled for the said share in the property in view of Sections 6 and 8 of Hindu Succession Act?*
- (c) Whether the Courts below are correct in holding that admitted pleadings filed by the 2nd defendant in the form of written statement stood as estoppel and the same can be denied by subsequent pleadings?”*

ARGUMENTS:

14. Mr.V.Anandhamoorthy, learned Counsel for the appellants / plaintiffs would argue that the common ancestor – Irulappa



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Gounder and one Vellappa Gounder purchased an extent of nearly 1 Acre 30 Cents in Nichampalayam Village under Ex-A.1 – Sale Deed dated May 4, 1933, bare reading of which would show that the Irulappa Gounder had some interest therein even before the purchase. This shows the existence of ancestral properties prior to 1933.

14.1. He would further argue that Irulappa Gounder's family owned ancestral properties in Santhipalayam Village and the same was sold vide Ex-A.11 – Sale Deed dated November 28, 1939. In the said Sale Deed it has been recited that the properties covered thereunder are properties inherited from father's side (எனக்கு பிதுராஜித வகையில் பாத்தியப்பட்ட) and that consideration had already been received for the purpose of purchasing some other properties. Further, agriculture is the only avocation of Irulappa Gounder's family and they had no other source of income. From and out of the joint family nucleus and properties, Irulappa Gounder purchased Item No.2-A of Suit Properties vide Ex-A.12 – Sale Deed dated December 12, 1939. Hence, the properties covered under Ex-A.12 *i.e.*, Item No.2-A are ancestral and joint family properties.



14.2. He would further argue that after the demise of Irulappa Gounder, the first defendant along with his late brother – Samiappa Gounder's wife and daughter [third defendant] partitioned Item No.2-A of Suit Properties vide Ex-A.4–Partition Deed, wherein it has been specifically recited that the Suit Properties are undivided hindu joint family properties. In Ex-A.4 – Partition Deed, the first defendant represented the larger coparcenary consisting of first defendant, second defendant and second plaintiff. Hence, the second plaintiff is entitled to $\frac{1}{4}$ share by birth in the properties allotted to first defendant under Ex-A.4.

14.3. He would further argue that first defendant and second defendant in their written statement have admitted the rights of the second plaintiff over the Suit Properties. Said admission can be explained but cannot be withdrawn. Referring to the evidence of first defendant as D.W.1, he would argue that the first defendant has again unequivocally and unambiguously admitted that the Suit Properties are joint family properties and that the second plaintiff has right over the same and even went on to depose that he is ready to partition the same with her. The Trial



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Court failed to consider the evidence of D.W.1 and erroneously held that the said admissions are not valid and the Suit Properties are separate properties of Irulappa Gounder.

14.4. The First Appellate Court did not render a clear finding with respect to the character of the Suit Properties. The First Appellate Court held that Ex-A.4 - Partition Deed is saved by Sub-Section 5 of Section 6 of the H.S.Act as amended by 2005 H.S. Amendment Act and hence, the plaintiff has no right to claim partition. The same is an erroneous approach demonstrating non-application of mind. Accordingly, he would pray that the Second Appeal be allowed, the Judgment and Decree of Trial Court as well as First Appellate Court *qua* Suit for partition be set aside and the Suit for partition be decreed.

14.5. Further, as regards maintenance to first plaintiff, he would submit that as a deserted wife, first plaintiff is entitled to receive maintenance from second defendant and for due payment of maintenance, she entitled to create a charge over second defendant's share in the Suit Properties. Moreover, second defendant has not preferred any appeal over the Decree passed in the Suit *qua* maintenance in favour of first plaintiff



and hence, the same has reached finality. Accordingly, he prays to confirm the maintenance Decree passed by the Trial Court.

14.6. He would rely on the following decisions in support of his contentions:

- (i) ***Payal Vision's Case*** – Judgment of Hon'ble Supreme Court in *Payal Vision Limited – vs – Radhika Choudhary*, reported in (2012) 11 SCC 405
- (ii) ***Jupudy Pardha Sarathy's Case*** - Judgment of Hon'ble Supreme Court in *Jupudy Pardha Sarathy – vs – Pentapati Rama Krishna and Others*, reported in (2016) 2 SCC 56
- (iii) ***Shyam Narayan Prasad's Case*** - Judgment of Hon'ble Supreme Court in *Shyam Narayan Prasad – vs – Krishna Prasad and Others*, reported in (2018) 7 SCC 646
- (iv) ***Arshnoor Singh's Case*** - Judgment of Hon'ble Supreme Court in *Arshnoor Singh – vs – Harpal Kaur and Others*, reported in (2020) 14 SCC 436

15. Mr.C.R.Prasanan, learned Counsel for Respondent Nos. 1,5 & 6 / Defendant Nos. 2, 6 & 7 would argue that the burden of proof to



prove that the Suit Properties are joint family properties is upon the plaintiffs. Mere existence of joint family is not sufficient to prove that the properties are joint family properties; the plaintiff has to prove the existence of joint family nucleus, properties and surplus income therefrom. In the absence of proof to the contrary, the Suit Properties, which were purchased by Irulappa Gounder vide Ex-A.12, are his self-acquired properties and cannot be construed as joint family properties.

15.1. He would further argue that the vendor under Ex-A.12 had mortgaged the properties covered thereunder for Rs.1000/-. After purchasing, Irulappa Gounder on the date of Ex-A.12 – Sale Deed itself, redeemed the said mortgage on the properties covered thereunder by paying Rs.700/- in cash and by re-mortgaging the same properties again under Ex-B.1 with the same mortgagor for the remaining Rs.300/-. This is indicative of the fact that the properties covered thereunder *viz.*, Item No.2-A of the Suit Properties were purchased by Irulappa Gounder's own exertion and physical labour.

15.2. He would further argue that the Court alone has to decide the character of Suit Properties. The parties making admissions



under some wrong notion cannot be termed as conclusive proof in respect of character of Suit Properties. Further, the defendants 2, 6 and 7 have explained their admission by way of additional written statement. Hence, the rule of estoppel does not come into picture.

15.3. He would further argue that the properties allotted to the first defendant in Ex-A.4 – Partition Deed are his separate properties in which the plaintiff as a granddaughter has no right. The law in this regard is well settled. Accordingly, he would pray that the Second Appeal is liable to be dismissed and that the concurrent findings of the Trial Court and the First Appellate Court be confirmed.

15.4. He would rely on the following decisions in support of his contentions:

- (i) ***Rengasami Reddiar's Case*** – Judgment of this Court in *Rengasami Reddiar (died) and Others – vs – M.K.Mummachi Reddiar (died) and Others*, reported in (2002) 1 M.L.J. 760
- (ii) ***Sri Chandru's Case*** – Judgment of this Court in *Sri Chandru and Another – vs – K.Nagarajan and Others*, reported in



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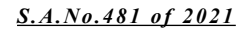
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- (iii) **Arunagiri's Case** – Judgment of this Court in *Arunagiri – vs – Ayyar Muthuraja and Others*, reported in 2014 (1) CTC 73
- (iv) **Uttam's Case** – Judgment of the Hon'ble Supreme in *Uttam – vs – Saubhag Singh and Others*, reported in (2016) 4 SCC 68
- (v) **Radha Bai's Case** - Judgment of the Hon'ble Supreme in *Radha Bai – vs – Ram Narayan and Others*, reported in (2020) 19 SCC 513
- (vi) **Vineeta Sharma's Case** – Judgment of the Hon'ble Supreme Court in *Vineeta Sharma – vs – Rakesh Sharma and Others*, reported in (2020) 9 SCC 1
- (vii) **Pooja Kanmani's Case** – Judgment of this Court in *R.Pooja Kanmani – vs – K.Rajendrakumar and Another*, reported in 2024 SCC Online Mad 1794

DISCUSSION:

16. This Court has heard on either side and perused the materials available on record in light of the Substantial Questions of Law.



கிரையத்துக்கு வாங்குகிற வேலப்ப
கவுண்டனுக்கு இந்த பூமியின் பேரில் பட்டயம்
இருக்கிறது. இருளப்ப கவுண்டனுக்கு பட்டயம்.
கிரையத்துக்கு குடுக்கிற மாரப்ப கவுண்டனுக்கு
மேல்படி காலை களில் பங்கு இல்லை. . . .
... !

19. Further, Irulappa Gounder for himself and on behalf of his then minor sons – Samiyappa Gounder and Palani Gounder as their guardian, executed Ex-A.11 – Sale Deed in favour of Chinna Palani Gounder in 1939 in respect of an extent of 52 Cents in Survey No.315 and



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an extent of 2 ½ Cents in Survey No.314A of Santhipalayam Village. Ex-

A.11 recites that the properties covered thereunder are properties inherited from father's side (எனக்கு பிதுராஜித வகையில் பாத்தியப்பட்ட). It further recites that consideration for the said Sale was obtained in advance for the purchase of some other properties. This recital has to be seen along with Ex-A.12.

20. On December 12, 1939 under Ex-A.12, Irulappa Gounder purchased Item No.2- A of Suit Properties. The properties under Ex-A.12 were later partitioned after demise of Irulappa Gounder under Ex-A.4 – registered Partition Deed, wherein it has been recited that the properties covered thereunder are undivided hindu joint family properties. Moreover, the defendants 1 and 2 in their earlier written statement dated October 29, 2001, in Paragraph No.5, has admitted as hereunder:

'5.This defendants 1 and 2 submits that the first defendant is entitled to 1/4th share and the 2nd defendant is entitled to 1/8th share and the 2nd plaintiff is entitled to 1/8th share in the item 1 of the Suit property. The first defendant is entitled to ½ share and the 2nd defendant is entitled to 1/4th share and the 2nd plaintiff is entitled to 1/4th share in the item 2 of the suit properties as per Hindu Succession Act. The 2nd plaintiff and the defendants 1 and 2 have been in joint



possession and enjoyment of the suit properties accordingly to their shares as stated supra. There was no oral relinquishment had taken place as alleged in the plaint. ...'

21. Further the first defendant / D.W.1 in clear and unambiguous terms have admitted that the Suit Properties are ancestral properties and that the second plaintiff is entitled to share therein. Relevant extract is hereunder:

'என் தகப்பனார் பெயர் இருளப்ப கவுண்டர். எங்களுக்கு பூர்வீகம் இச்சாம்பாளையம், குளத்துப்பாளையம் கிராமம். என் தகப்பனாரின் கூடப் பிறந்த தம்பி பெயர் காளியப்ப கவுண்டர். என் தகப்பனார் கொளத்துப்பாளையம் கிராமத்தில் இருந்த பூர்வீகச் சொத்துக்களை விற்றுவிட்டு இந்த தாவாச்சொத்துக்களை கிரையம் வாங்கனார். தாவாச்சொத்துக்கள் முழுவதுமே பூர்வீகச் சொத்துக்கள்தான். என் தகப்பனார் உயிருடன் இருந்த வரை அவர் தான் குடும்பத்தலைவராக இருந்தார். என் தகப்பனார் இறந்த பின்னர் என் சித்தப்பாவும், நானும் இருந்து வந்தோம். பின்னிட்டு சித்தப்பாவுக்கும், எனக்கும் பிரிவினை ஆகிவிட்டது. அதன் பிறகு என்னுடைய குடும்பத்திற்கும் நான்தான் தலைவர். 1, 2 வாதிகள் மற்றும் 1, 2 பிரதிவாதிகள் அடங்கிய கூட்டுக்குடும்பத்திற்கு நான்தான் தலைவர். எனக்கு தற்போது வயது 85.



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2ம் வாதிக்கு தாவாச்சொத்துக்களில் உள்ள
பாகத்தைக் கொடுப்பதில் எனக்கு ஆட்சேபனை
இல்லை.

.

என் மகனுக்குரிய பாகத்தில் பாதியை என்
பேத்திக்கு கொடுப்பதில் ஆட்சேபனை இல்லை.. . .

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22. Section 17 of Indian Evidence Act, 1872 deals with admissions made by parties out of Court before Suit. Admission made by parties during trial at or before the hearing falls within the scope of Section 58 of Indian Evidence Act, 1872, as per which, proof of such a fact is dispensed with for the simple reason that admitted facts constitute a judicial admission and serve as a substitute for evidence. Hence, the said admissions cannot be brushed aside easily, especially when D.W.1 have admitted in such vivid, unequivocal and unambiguous terms. Further, the defendants 2, 6 and 7 have not really explained their admission but have completely withdrawn it in their additional written statement, which is not permissible.



23. In this case, the admissions made in the written statement coupled with the oral evidence of first defendant as D.W.1 on oath as well as the recitals contained in Ex-A.4 and Ex-A.11, would clearly prove that the Suit Properties were purchased by Irulappa Gounder with the aid and support of joint family nucleus and properties, and therefore, they were ancestral and joint family properties in the hands of Irulappa Gounder.

24. Thus, in Ex-A.4 – Partition Deed, ancestral properties have been partitioned between the first defendant's branch and his brother – Samiappa's branch. To be noted, the 2nd plaintiff was born in 1986 and on the date of partition she was also a coparcener entitled to equal share by birth in view of Tamil Nadu Act No.1 of 1990 viz., The Hindu Succession (Tamil Nadu Amendment) Act, 1990 (1 of 1990) with effect from March 25, 1989.

25. Hence, on the date of Ex-A.4, the first defendant represented his branch consisting of the larger coparcenary which includes himself, second defendant, and second plaintiff. Therefore, the properties allotted to first defendant as 'A' Schedule properties thereunder were in favour of his branch of larger coparcenary. It is settled law that *qua* the



first defendant's branch and Samiyappa Gounder's branch, the properties allotted to them are separate properties. Whereas, *qua* their respective branch, the properties are ancestral. In other words, *qua* their issues, the properties are ancestral properties. [*See. Shyam Narayan Prasad's Case - Judgment of Hon'ble Supreme Court in Shyam Narayan Prasad – vs – Krishna Prasad and Others, reported in (2018) 7 SCC 646 and Arshnoor Singh's Case - Judgment of Hon'ble Supreme Court in Arshnoor Singh – vs – Harpal Kaur and Others, reported in (2020) 14 SCC 436* Hence, the second plaintiff as a coparcener by birth is entitled to share therein. That is to say, in the properties allotted to first defendant under Ex-A.4, first defendant is entitled to 1/3 share, the seventh defendant is entitled to 1/3 share and second defendant and second plaintiff are together entitled to 1/3 *i.e.*, 1/6 share each under Section 6 of the H.S.Act as amended by 2005 H.S. Amendment Act.

26. To be noted, the seventh defendant did not file any separate written statement. She was examined as D.W.2. Even in her evidence she has not claimed any right under Tamilnadu Act No.1 of 1990. As per her deposition, she was 55 years old in 2016, which means



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she would have been 28 years old as in 1989. She would have most probably been married before March 25, 1989 *i.e.*, before the Tamil Nadu Act No.1 of 1990 came into force. Hence, she would probably be not entitled to the benefit of Tamil Nadu Act No.1 of 1990. But in view of Section 6 of the H.S.Act as amended by 2005 H.S. Amendment Act, the seventh defendant would be entitled to equal share as a daughter. (*See. Phoolchand and Another Vs. Gopal Lal* reported in *AIR 1967 SC 1470*)

27. Post the demise of first defendant, his share *viz.*, 1/3 share, devolved upon Defendant Nos.2, 6 and 7 under Section 8 of the H.S.Act as separate properties, each of them inheriting 1/9 share. To be noted, the second plaintiff is not entitled to claim any share left by first defendant because it is his separate properties and because she is not a Class I – Legal Heir under Section 8 of the H.S.Act. She has equal right only over the 1/3 share allotted to the second defendant under Ex-A.4.

28. To sum up, the second plaintiff is entitled to 3/18 share (1/6), second defendant is entitled to 5/18 share [1/6 + 1/9], the third defendant is entitled to 8/18 share [1/3 + 1/9] and sixth defendant is entitled to 2/18 share.



29. There is quarrel with the law laid down in the case laws cited by either sides. The Trial Court erred in concluding that the Suit Properties are sperate properties despite the unambiguous, unequivocal and vivid admission made by the first defendant in his pleadings as well as his oral evidence. The Trial Court failed to note that the documentary evidence adduced on the plaintiff's side, especially Ex-A.1, Ex-A.4, Ex-A.11 and Ex-A.12 coupled with aforesaid admissions prove that the Suit Properties are ancestral and joint family properties in a crystal clear manner. The First Appellate Court failed to render a clear and express finding as to the character of the Suit Properties. It can only be inferred from its Judgment that the First Appellate Court found the character to be ancestral properties. But then, the First Appellate Court has strangely went on to dismiss the Original Suit based on its finding that Ex-A.4 – Partition Deed is saved by Section 6 (5) of the H.S.Act as amended by 2005 H.S. Amendment Act.

29.1.Further, it failed to consider the fact that the first defendant represented his entire branch of coparcenary which included the second plaintiff also in view of Tamil Nadu Act No.1 of 1990. The properties allotted under Ex-A.4 retains the character of joint family



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properties *qua* his issues *viz.*, second defendant and seventh defendant.

Both the Courts failed to note that as the 2005 H.S. Amendment Act came into force, the seventh defendant also became a coparcener by birth and thus was entitled to right in coparcenary properties on the date of Trial Court's Judgment. It also failed to understand that only when any other registered Partition or any oral partition had taken place between first defendant and second defendant before December 20, 2004 *i.e.*, the cut-off date mentioned under Section 6 (5) of the H.S.Act as amended by 2005 H.S. Amendment Act, only such things would be saved by Section 6 (5) [See. *Vineeta Sharma Vs. Rakesh Sharma and others* reported in (2020) 9 SCC 1].

30. Substantial Questions of Law are answered accordingly.

31. Further, second defendant as husband is obliged to maintain his wife / first plaintiff. Meagre amount of Rs.500/- has been sought for as maintenance. She is entitled to seek enhanced amount also subject to change of circumstances, if any. For regular payment of maintenance, the first plaintiff is entitled to create charge over Item No.2 of Suit Properties.



32. In the Suit Properties Item No. 1 was deleted as stated *supra*. Item No. 2 –A was entirely purchased under Ex-A.12. Only the properties covered under Ex-A.12 were partitioned under Ex-A.4 and allotted to defendant 2 and 3 as ‘A’ and ‘C’ Schedule properties respectively. The ‘A’ Schedule properties have been described as Item No.2-B. Thus, the second plaintiff and defendants 2, 6 and 7 are entitled to share in Item No.2-B only.

CONCLUSION:

33. Resultantly, the Second Appeal is allowed, the Judgment and Decree of the Trial Court as well as the First Appellate Court *qua* the Suit for partition are hereby set aside and the Suit is decreed in the following terms:

- (a) The second plaintiff is entitled to 3/18 share in Item No.2-B of the Suit Properties and to that extent a Preliminary Decree is passed.
- (b) The Defendants Nos. 2, 6 and 7 are hereby restrained by an Order of permanent injunction from alienating or



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encumbering Item No. 2-B of the Suit Properties till the final partition is effected.

- (c) The maintenance Decree passed by Trial Court granting maintenance amount of Rs.500/- per month in favour of the first plaintiff from the date of plaint is hereby confirmed
- (d) Charge is hereby created over the second defendant's 5/18 share in Item No.2-B of the Suit Properties for the due payment maintenance amount by the second defendant in favour of the first plaintiff.
- (e) The second defendant is liable to pay cost of this Second Appeal to the plaintiffs.

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Index : Yes
Speaking Order : Yes
Neutral Citation : Yes
TK

To



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1.The I Additional District Judge
Tiruppur.

2.The Sub Court
Avinashi.

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R. SAKTHIVEL, J.

TK

PRE-DELIVERY JUDGMENT MADE IN

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