



WEB COPY



AS NO.835 OF 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.04.2024

CORAM:

**THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR. JUSTICE R.SAKTHIVEL**

**APPEAL SUIT NO.835 OF 2019
AND
CMP NOS.27584 OF 2019 AND 28198 OF 2023**

1.Sankar
2.Sivaraman
3.Sathish

... Appellants /
Defendants 2,5 and 6

Vs.

1.Madivanan
2.Elamurusu
3.Thangaraj Padayachi
4.Arasu
5.Thamaraiselvan
6.Dhanalakshmi
7.Panchamurthy

... Respondents /
Plaintiffs 1 and 2 /
Defendants 1, 3, 7 to 9

PRAYER: First Appeal filed under Section 96 read with Order 41 Rule 1 of Code of Civil Procedure, praying to set aside the decree and judgment with respect to the property of the appellants 2 and 3 with respect to suit items 3, 9 and 10 passed in O.S.No.143 of 2009 by the learned Principal District Judge, Cuddalore District, Cuddalore dated 31.07.2018.



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For Appellants : Mr.S.Vijayanand
For Respondents 1&2 : Mr.R.Gururaj
For Respondents 4&5 : Mr.N.Manimaran
(No appearance)
For Respondent 6 : No appearance
For Respondent 7 : Mr.T.S.Baskaran

J U D G M E N T

(Judgment of the Court was made by R.SUBRAMANIAN, J.)

The defendants 2, 5 and 6 are on appeal aggrieved by a decree for partition that has been granted by the Trial Court with reference to Item Nos.1 to 6 and 9 to 11 of the Suit B Schedule properties.

2.For the sake of convenience, henceforth, the parties will be referred to as per their rank in the Suit.

3.The plaintiffs 1 and 2 sued for partition contending that the Suit properties which are shown as items 1 to 11 in Schedule B belonged to the joint family of Thangaraj Padayachi, the first defendant and his sons namely, the plaintiffs, the second and third defendants. Wife of Thangaraj



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Padayachi, Ranganayaki was added as the fourth defendant in the Suit and it was claimed that certain properties that stood in her name also belonged to the family. The plaintiffs had also contended that while they were illiterates, the defendants 2 and 3, who are also sons of Thangaraj Padayachi, went to school and therefore, they were worldly wise.

4.The basis of the Suit was that item 1 measures about 0.0222 Square Metres is an ancestral property and it was yielding very good income. The parties to the Suit have their houses in Suit item 1. From and out of the income that this property measuring a vast extent of 0.0222 Square Meters yielded, the other properties were purchased by the family. It was also contended that the other items are agricultural lands and grows where there are residential houses in between. It was the further contention of the plaintiffs that the properties were purchased in the names of defendants 2 and 4 and some of them were transferred in the names of the defendants 5 to 7. Claiming that the defendants 1 and 4 namely the parents were dancing to the tunes of the defendants 2 and 3, the plaintiffs sought for partition and separate possession of their 2/6 shares in the Suit properties.



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5.The first defendant filed a written statement which is adopted by the fourth and eighth defendants wherein it was contended that he had purchased item 2, an extent of 0.29 cents under a Sale Deed dated 06.09.1979 from Jainu Nachiyar for a sum of Rs.3,500/- and he had sold an extent of 3174 square feet in favour of one P.Gomathi wife of Shanmugam. Therefore, he is entitled only remaining 0.22 cents and he is in possession of the same. He contended that it is his self acquisition and not a joint family property. It was further contended that the fourth defendant filed a Suit in O.S.No.226 of 2009 on the file of the Additional District Munsif, Cuddalore and obtained injunction in respect of items 9 to 11 claiming that she is the exclusive owner. The first defendant contended that the fourth defendant is the exclusive owner of items 9 to 11 of the Suit properties which were purchased by her in her name. It was also claimed that the description of the property is vague.

6.The third defendant filed a written statement which is adopted by the second defendant contending that Suit items 9 and 10 were purchased under a Sale Deed dated 27.04.2009 for a consideration of Rs.2,00,000/- by the fifth and sixth defendants from the fourth defendant.



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It was his further contention that he had purchased properties in S.No.214/2 which is shown as item No.4 in the Suit B Schedule properties from one Dhanam Ammal and he is entitled to the said property. It was his further contention that item No.3 was purchased by the fifth and sixth defendants when they were minors through their mother Sivakami Ammal under a Sale Deed dated 28.05.2007 from one A.R.Hasan Ali and therefore, those properties cannot be treated as joint family properties and as such, they are not available for partition.

7.The ninth defendant filed a separate written statement claiming that he is entitled to item Nos.7 and 8 in the Suit B Schedule properties.

8.On the above pleadings, the learned Trial Judge framed the following issues:

“1.Whether the suit properties are joint family properties?

2.Whether the plaintiffs are entitled to 2/6 shares in the suit properties?



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3. Whether the description of property is incomplete and erroneous?

4. Whether the portion of the property covered under the sale deed dated 06.09.1979 has to be deleted from the suit?

5. To what relief the plaintiffs are entitle to?

Additional issues framed on 13.07.2012

1. Whether the registered sale deed dated 17.11.2009 made in favour of 9th defendant is binding upon the plaintiffs?

2. Whether the item Nos.7 and 8 in the B schedule have to be deleted from the suit? ”

9. At trial, first plaintiff was examined as P.W.1 and two other witnesses were examined as P.W.2 and P.W.3. First defendant was examined as D.W.1, ninth defendant was examined as D.W.3 and two other witnesses were examined as D.W.2 and D.W.4.

10. Though the third defendant filed a written statement and that written statement was adopted by the defendants 2, 5 to 7, he did not choose to let in any evidence. The second defendant was living abroad and defendants 5 and 6, sons of the second defendant were minors, aged about 13 and 12 respectively at the time of filing of the Suit in the year 2009. On



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the evidence that was made available on record, the learned Trial Judge concluded that the defendants have not proved their contention that these properties were purchased from and out of the separate income of Ranganayaki, the fourth defendant. Accepted the evidence of P.W.1 to conclude that certain properties were available as a nucleus and there was some surplus income. Once it is found that there was some surplus income from the joint family properties and the acquisitions were made with the aid of the income, the learned Trial Judge concluded that the properties are joint family properties except item Nos.7 and 8. The learned Trial Judge, therefore, granted a decree for partition and separate possession of the 2/6 shares of the plaintiffs in the Suit items 1 to 6 and 9 to 11. Aggrieved, the defendants 2, 5 and 6 are on appeal, while the others have accepted the decree.

11. We have heard Mr.S.Vijayanand, learned counsel appearing for the appellants, Mr.R.Gururaj, learned counsel appearing for the respondents 1 and 2, the plaintiffs and Mr.T.S.Baskaran, learned counsel appearing for the seventh respondent. The other respondents though served are not appearing either in person or through counsel duly



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instructed. The third respondent died pending appeal and his legal heirs who were already on record have been declared as his legal representatives. The fourth defendant in the Suit Ranganayaki died even pending Suit.

12.An application in CMP No.28198 of 2023 has been taken out by the appellants seeking to let in additional evidence. The appellants had contended that they have relied upon the third defendant for the conduct of the Suit since the second defendant was employed in Kuwait and Saudi Arabia during the relevant time and defendants 5 and 6 were of tender age and they did not participate in the trial. However, only after the decree was passed, they came to know that the third defendant had colluded with the plaintiffs and a decree has been passed in respect of the properties that belonged to the defendants 5 and 6. In support of his contention that the second defendant was staying abroad, his passports have been filed as additional evidence and a perusal of the passports show that the second defendant has been living abroad for quite sometime and at the relevant point of time when the Suit was tried i.e., during the years 2012 and 2013, the second defendant was living abroad. The sons of the



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second defendant namely, defendants 5 and 6 who are aged about 13 and 12 years respectively at the time of filing of the Suit in the year 2009 were also Minors at the relevant point of time. The Sale Deeds that were executed by one A.R.Hasan Ali and by the fourth defendant in favour of the minor children of the second defendant, namely appellants 2 and 3 have also been produced. We find that these documents would be of great help to the Court in determining the actual dispute in the Suit. No doubt, the defendants 2, 5 and 6 should have produced these documents even during trial. They have now assigned proper reasons for non-production of these documents at the time of trial in the affidavit filed in support of the application under Order 41 Rule 27 of the Code of Civil Procedure.

13. We are therefore convinced that an opportunity should be given to them to establish their case as the appellants 2 and 3 at the relevant point of time were minors and they have attained majority only in the year 2017 just prior to the delivery of judgment in the Suit and the second defendant / first appellant their father was living abroad. We find that the documents that have been produced are very relevant for determination of the issues that have been raised in the Suit. If we are to



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reject these documents and proceed, we apprehend that it may lead to injustice. Hence, the application in CMP No.28198 of 2023 will stand allowed.

14. Since we find that these documents were not placed before the Trial Court, the Trial Court was in disadvantageous position and it has come to the conclusion that the properties belonged to a joint family on the basis of the evidence that was available. The effect that these documents will have on the conclusion of the Trial Court, impels us to set aside the judgment of the Trial Court only in so far as it relates items 3, 9 and 10 of the Suit properties and remit the Suit to the Trial Court only to decide the nature of the properties to which the appellants have made a claim, namely items 3, 9 and 10. The parties will be at liberty to let in evidence to prove the documents that have now been received by us by way of additional evidence and the Trial Court will decide on the nature of the properties based on the evidence that is to be let in. With reference to the other items, the decree of the Trial Court will stand confirmed.



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15. In fine, the Appeal Suit is allowed in part. CMP No.28198

of 2023 is allowed and CMP No.27584 of 2019 is closed. No costs.

[R.S.M., J.] [R.S.V., J.]

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Index : No
Internet : Yes
Neutral Citation : No
Speaking Order
TK

LIST OF ADDITIONAL DOCUMENTS MARKED ON THE SIDE OF THE APPELLANTS / PETITIONERS

<i>S.No.</i>	<i>Dated</i>	<i>Exhibits</i>	<i>Description of documents</i>
1	28.05.2007	Ex-B.9	Photostat copy of Sale Deed in favour of the 2 nd and 3 rd appellants
2	27.04.2009	Ex-B.10	Photostat copy of Sale Deed in favour of the 2 nd and 3 rd appellants
3	-	Ex-B.11	Passport of the 1 st appellant with seal and stamps (1)
4	-	Ex-B.12	Passport of the 1 st appellant with seal and stamps (2)
5	-	Ex-B.13	Bank pass book of the mother of the 2 nd and 3 rd appellants

[R.S.M., J.] [R.S.V., J.]

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R.SUBRAMANIAN, J.

AND

R.SAKTHIVEL, J.

TK

To

The Principal District Judge
Cuddalore District
Cuddalore.

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