

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 01.09.2015

Delivered on : 26.10.2015

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

S.A.No.937 of 1999

and

C.M.P.No.5 of 2009

Vadivelan ..Appellant/Plaintiff
(Sole appellant declared as major and G.Jayakumar, Guardian discharged from guardianship vide order of Court dated 17/11/2000 made in CMP.15139/1999.)

-Vs-

- 1.Rajeswari
- 2.Minor Muthuvelan
Rep. by his mother & natural guardian Rajeswari
- 3.Southern Railways
Rep. by its General Manager
Madras - 3
- 4.The Life Insurance Corporation of India
Rep. by its Senior Divisional Manager
Thanjavur .. Respondents/Defendants 2 to 5

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree of the Principal District Judge, Nagapattinam dated 14.10.1997 made in A.S.No.231 of 1996 confirming the judgment and decree of the learned Additional Subordinate Judge, Nagapattinam dated 22.08.1996 made in O.S.No.207 of 1993.

For Appellant : Mr.K.Ramachandran

For Respondents : Mr.S.Subbiah for R1 and R2
Mr.V.G.Sureshkumar for R3
Mr.S.R.Sundaram for R4

J U D G M E N T

The plaintiff in the original suit is the appellant in the second appeal. The death-cum-terminal benefits lying in

the hands of Southern Railway, represented by its General Manager, Chennai (the third respondent herein/4th defendant in the original suit), the amount lying in the hands of the Life Insurance Corporation of India, represented by its Senior Divisional Manager, Thanjavur (4th respondent herein/5th defendant in the original suit) on two insurance policies taken on the life of late Thyagarajan, the father of the appellant herein/plaintiff and an extent of 0.29.0 hectares (equivalent to 72 cents) of wet land comprised in R.S.No.56/8 of Visalur Village, Nannilam Taluk are the subject matters of the suit regarding which, the appellant/plaintiff claimed the relief of partition. He claimed that he was entitled to half share in the amounts shown as item 1 to 3 in the description of properties and 1/3rd share in the landed property described in the plaint schedule.

2. The claim was made on the basis that the appellant herein/plaintiff was the only legitimate son born to late Thyagarajan; that the other legal heirs left by him was the first defendant, the mother of late Thyagarajan; that there was only an illicit intimacy between late Thyagarajan and Rajeswari, the first respondent herein/second defendant in the original suit; that no marriage took place between them and that the second respondent/third defendant was not the son of Thyagarajan born out of lawful wedlock or out of void/voidable marriage. On that basis alone, the appellant/plaintiff claimed that he and his grandmother, namely the first defendant in the original suit alone were entitled to half share each in the three amounts mentioned in items 1 to 3 of the description of properties. However it is the case of the appellant/plaintiff that the landed property described in the plaint schedule was purchased by late Thyagarajan with his own funds in the name of the second respondent herein/third defendant and that the appellant/plaintiff would be entitled to 1/3rd share in the landed property described in the plaint schedule. Thus the appellant/plaintiff laid the suit praying for the relief of partition claiming half share in the amounts lying with the respondents 3 and 4 herein/defendants 4 and 5 and 1/3rd share in the landed property described in the plaint schedule.

3. The suit was resisted by the respondents 1 and 2 herein/defendants 2 and 3 denying the plaint allegation that late Thyagarajan did not marry the first respondent/second defendant Rajeswari and that the second respondent herein/third defendant was not the son of Thyagarajan born out of lawful wedlock or out of void/voidable marriage. On the other hand, it was contended that after the death of the first wife of late Thyagarajan, he married the first respondent herein/second defendant whereupon, they lived together as husband and wife at a number of places in the Railway quarters provided to late Thyagarajan, as he was employed in the

Southern Railway as a Gate Keeper; that out of such lawful wedlock, the second respondent herein/third defendant was born to them and that thus the second respondent/third defendant was the legitimate son of late Thyagarajan. Thus the respondents 1 and 2/defendants 2 and 3 claim that they also became entitled to succeed to the properties of late Thyagarajan along with the appellant herein/plaintiff and the first defendant in the original suit, as the legal heirs of late Thyagarajan and thus the appellant herein/plaintiff, first defendant and the respondents 1 and 2 herein/defendants 1 to 3 were entitled to equal shares in the amounts lying in the hands of the third and fourth respondents herein/4th and 5th defendants, who were the employer and insurer of late Thyagarajan. However, they claimed that the landed property described in the plaint schedule was purchased by the first respondent herein/second defendant with her own funds provided by her mother; that hence the same was the absolute property of the second respondent herein/third defendant and that since late Thyagarajan did not provide any money for the purchase of the same, the claim made by the appellant herein/plaintiff in respect of the landed property should be negatived in toto. So far as the amounts lying in the hands of the third and fourth respondents herein/4th and 5th defendants are concerned, though the respondents 1 and 2/defendants 2 and 3 would have stated that all the four persons, namely the appellant/plaintiff, first defendant (mother of late Thyagarajan) and respondents 1 and 2 herein/defendants 2 and 3 became entitled to equal shares, they took a plea that the deceased had borrowed amounts to the tune of Rs.10841.55P and the said debts were discharged by the first respondent herein/second defendant and that therefore ratable deductions should be made from the shares of the appellant herein/plaintiff and the first defendant from their shares in the amounts lying in the hands of the third respondent herein/4th defendant.

4. The respondents 3 and 4 herein/defendants 4 and 5 filed written statements in a non-committal manner and in fact they contended that they would abide by the decision of the court, as they are the disinterested parties.

5. In the trial before the trial court, the maternal uncle and next friend of the plaintiff, namely G.Jayakumar, through whom the suit was filed since the plaintiff was a minor at the time of the filing of the suit, figured as the sole witness (PW1) and seven documents were marked as Exs.A1 to A7 on the side of the appellant herein/plaintiff. Four witnesses including Rajeswari, the first respondent herein/second defendant in the original suit, were examined as DWS 1 to 4 and 14 documents were marked as Exs.B1 to B14 on the side of the contesting defendants.

6. The learned trial judge, on appraising the evidence, rendered a finding that the first respondent herein/second defendant was the legally wedded wife of late Thyagarajan and that the second respondent herein/third defendant was the legitimate son of late Thyagarajan born through lawfully wedded second wife. However, the learned Trial Judge rendered a finding that the appellant herein/plaintiff and the second respondent herein/third defendant being the sons of late Thyagarajan and the first respondent herein/second defendant being the widow of late Thyagarajan alone were entitled to the death-cum-retirement gratuity and the insurance amount due from the 4th and 5th defendants respectively and that each one of them was entitled to 1/3rd share in the amounts lying with the respondents 3 and 4 herein/defendants 4 and 5. So far as the landed properties is concerned, the learned trial judge held that the appellant/plaintiff did not prove his case that the same was purchased by late Thyagarajan with his own funds in the name of the second respondent herein/third defendant; that on the other hand, on preponderance of probabilities, the case of the respondents 1 and 2 herein/defendants 2 and 3 regarding the acquisition of the landed property in the name of the second respondent/third defendant stood proved and that hence the appellant/plaintiff was not entitled to any share in it. Accordingly, the learned trial judge granted a preliminary decree holding the appellant herein/plaintiff, the first respondent herein/second defendant and the second respondent herein/third defendant entitled to 1/3rd share each in the amounts described in items 1 to 3 of the plaint schedule and directing division of the same and dismissed the suit in respect of the landed property and in all other respects, by a judgment and decree dated 22.08.1996 made in O.S.No.207 of 1993.

7. Aggrieved by the said decree insofar as the claim of the appellant herein/plaintiff was negatived in respect of the landed property and the grant of a lesser share in respect of the other items, the appellant herein/plaintiff preferred an appeal in A.S.No.231/1996 on the file of the Principal District Judge, Nagapattinam. The learned lower appellate Judge, by a judgment and decree dated 14.10.1997, confirmed the decree of the trial court and dismissed the appeal with cost. It is as against the said decree of the lower appellate court, the present second appeal came to be filed.

8. The second appeal was admitted on 07.11.2000 noticing the following questions to be the substantial questions of law involved in the second appeal.

"1. Whether the courts below were not correct or in not rejecting the claim of the 1st

and 2nd defendant to be the wife and son of the deceased Thyagarajan?

2. Whether the courts below have erred in failing to reject the claim of the 1st defendant in the absence of positive proof of marriage? and

3. Whether the courts below had not erred in any event in not rejecting the 1st defendant's claim for the rights in the property?"

9. By a misconception regarding the ranks of the parties who claimed to be the second wife and son born through the second wife of late Thyagarajan and not apprised of the fact that the first defendant is the mother of late Thyagarajan, the substantial questions of law came to be formulated erroneously describing the 1st and 2nd respondents herein as first and second defendants. Hence the substantial questions of law formulated at the time of admission of the second appeal were corrected and re-framed at the time of hearing of the second appeal. The corrected and re-cast substantial questions of law are as follows:

"1. Whether the courts below were not in error in not rejecting the claim of the respondents 1 and 2/defendants 2 and 3 to be the wife and son of deceased Thyagarajan?

2. Whether the courts below have erred in failing to reject the claim of the first respondent/second defendant in the absence of positive proof of marriage?

3. Whether the courts below have not erred in not rejecting the claim of the first respondent/second defendant for a right in the suit properties?"

10. After such re-framing of the substantial questions of law, further arguments were heard and the judgments of the courts below and the materials available on record were also perused and taken into consideration.

11. The plaintiff in the original suit is the appellant. When he was a minor, the suit came to be filed by him represented by his maternal uncle G.Jayakumar as his next friend. After the disposal of the suit and the appeal arising therefrom by the lower appellate Court and during the pendency of the second appeal, he attained majority. The cause title of

the second appeal came to be amended and accordingly he continued to prosecute the second appeal in his own name without being represented by any one.

12. The admitted facts are as follows:

The appellant herein/plaintiff Vadivelan is the son of Late Thyagarajan, who was employed as a Gate Keeper in Southern Railways. The said Thyagarajan died in harness while he was working as Gate Keeper in Visalur. The mother of the appellant by name Thenmozhi was the wife of Late Thyagarajan and the appellant/plaintiff is the legitimate son of Thyagarajan born through Thenmozhi. The Death-cum-Retirement gratuity of Thyagarajan is lying in the hands of the 3rd respondent/4th defendant. The same is shown as Item 1 in the plaint schedule. Thyagarajan had taken two insurance policies on him for assured sums of Rs.15,000/- and Rs.10,000/- respectively. The said amounts due under the insurance policies are shown as Items 2 and 3 in the plaint schedule. The said items 2 and 3 shown in the plaint schedule are lying in the hands of the 4th respondent herein/5th defendant. Chellammal, the mother of Thyagarajan had been arrayed as the first defendant in the original suit. During the pendency of the suit, Chellammal, the first defendant died. As the persons claiming to be her legal heirs, namely the plaintiff and the third defendant were already on record, the same was brought to the notice of the trial Court by a memo and the suit was proceeded with after recording the same.

13. It is the case of the first and second respondents/defendants 2 and 3 that Thyagarajan married the first respondent/second defendant at Swamimalai after the death of his first wife Thenmozhi and the second respondent/third defendant is also a legitimate son of Thyagarajan born out of lawful wedlock. In this regard, the contention of the appellant/plaintiff is that Thyagarajan never married the first respondent/second defendant; that Thyagarajan developed illicit intimacy with the first respondent/second defendant even during the life time of Thenmozhi and that the mental agony caused by the same to Thenmozhi was the reason for her death. In accordance with his contention, the appellant/plaintiff claimed that he and Chellammal, the deceased first defendant alone were the legal heirs of Late Thyagarajan entitled to receive the amounts mentioned in Items 1 to 3 of the plaint schedule and that each one of them was entitled to half share.

14. On the other hand, it was the contention of the respondents 1 and 2/defendants 2 and 3 that since Thyagarajan married the first respondent/second defendant after the death of his first wife Thenmozhi, the marriage was a legally valid one and the second respondent/3rd defendant was the legitimate

son of Thyagarajan, born out of lawful wedlock and that hence, respondents 1 and 2/defendants 2 and 3 were also the legal heirs of Late Thyagarajan in respect of the amounts shown as Items 1 to 3 in the plaint schedule. It was the contention of the respondents 1 and 2/defendants 2 and 3 that the benefit of family pension due to the death of Thiagarajan exclusively belonged to the first respondent/second defendant, being the wife of Thyagarajan. Though the same was a non-issue in the suit, the trial Court chose to incorporate a finding that the first respondent/second defendant was entitled to family pension. In addition to the said finding, the learned trial Judge, on the basis of appreciation of evidence, held that the marriage between Thyagarajan and the first respondent/second defendant, after the death of Thyagarajan's first wife Thenmozhi, had been substantiated and that the second respondent/third defendant was proved to be the legitimate son of Thyagarajan, born out of lawful wedlock between Thyagarajan and first respondent/second defendant. In line with the said finding, the learned trial Judge held that at the time of death of Thyagarajan, all the four persons, namely the plaintiff and defendants 1 to 3, being the son, mother, wife and another son respectively were the legal heirs of Late Thyagarajan entitled to the amounts shown in Items 1 to 3 in the plaint schedule. The said finding of the trial Court was confirmed by the learned lower appellate Judge. The said concurrent findings of the Courts below is challenged as perverse by the appellant in this second appeal and on the basis of the said challenge, the second substantial question of law came to be formulated.

15. On the side of the appellant herein/plaintiff, his minor uncle, who figured as next friend while he was a minor, alone was examined as PW1. The Birth Certificate of the appellant herein/plaintiff was produced as Ex.A1. The Death Certificate of his mother Thenmozhi was marked as Ex.A2. From Exs.A1 and A2, it is quite obvious that within one year after giving birth to the appellant/plaintiff, Thenmozhi died at Government Hospital, Mayiladuthurai. In this regard, Jayakumar, the maternal uncle of the appellant/plaintiff, who instituted the suit initially as his next friend when he was minor, alone figured as the sole witness on the side of the appellant/plaintiff. In accordance with the plaint averments, PW1 deposed to the effect that Thyagarajan had developed illicit intimacy with the first respondent/second defendant Rajeswari; that Thenmozhi, the wife of Late Thyagarajan who came to know the said intimacy between Thyagarajan and Rajeswari committed suicide by self immolation. However, during cross examination PW1 admitted that he did not have any direct knowledge as to the illicit intimacy between Thyagarajan and Rajeswari. It is also his admission that he was not an eye witness for the alleged occurrence in which Thenmozhi set herself on fire after dousing her with kerosene.

It was also his admission that he did not know what kind of altercation took place between Thyagarajan and Thenmozhi at the time of the occurrence of self immolation of Thenmozhi. Therefore the said evidence of PW1 alone shall not be enough to substantiate the case of the appellant/plaintiff that even during the life time of Thenmozhi her husband Thyagarajan had illicit intimacy with Rajeswari, the first respondent herein/second defendant and that the same was the cause for her committing suicide by self immolation. Even if it is assumed that late Thyagarajan did have some kind of illicit intimacy with Rajeswari and the same was the reason for his first wife Thenmoshi committing suicide, the same shall not be enough to hold that there could not have been any marriage between Thyagarajan and Rajeswari subsequent to the death of Thenmozhi.

16. It is the clear and categorical assertion of respondents 1 and 2/defendants 2 and 3 that late Thyagarajan married Rajeswari after the death of his first wife Thenmozhi and such marriage between late Thyagarajan and Rajeswari took place at Swamimalai Murugan Sannidhi in accordance with Hindu Rites and Custom and that only out of the lawful wedlock, the second respondent/third defendant was born to them. Clear evidence was adduced in this regard through Rajeswari, the first respondent/second defendant, who figured as DW1. Padmavathi (DW2), the mother of Rajeswari corroborated the evidence of DW1 by asserting that the marriage between Thyagarajan and Rajeswari was solemnised according to the Hindu Custom and Rites at Swamimalai and that the second respondent/third defendant was born out of the said lawful wedlock. The marriage invitation printed for the said marriage has also been produced and marked as Ex.B1. The said evidence of DW1 and DW2 has been supported and corroborated by the testimony of one Ramasamy (DW3), who was a co-worker employed as a Gate Keeper in Southern Railways. He asserted that the marriage between Late Thyagarajan and Rajeswari took place at Swamimalai and he attended the marriage. In addition to the said clear and categorical evidence adduced on the side of the respondents 1 and 2/defendants 2 and 3, the evidence of PW1 also lends some support to the evidence of DWs.1 to 3. It is his admission that when Thyagarajan died, the first respondent/second defendant Rajeswari was lamenting the death sitting by the side of the dead body. In addition, a clear admission was made by PW1 during his cross-examination that he heard about the marriage between Thyagarajan and Rajeswari that took place on 03.06.1982 at Swamimalai Murugan Sannidhi. The relevant portion in vernacular reads as follows:

"எனது சகோதரி இறந்த பிறகு தியாகராஜனுக்கும் 2ம் பிரதிவாதிக்கும் 3.6.82 ஆம் தேதி சுவாமிமலை முருகன் சன்னதியில் இந்து சம்பிரதாயப்படி திருமணம் நடந்தது என்று 2ம் பிரதிவாதி கூறினால் அது உண்மை என்று கேள்விப் பட்டேன்."

17. The appellant/plaintiff was able to get a certificate from the Executive Officer of Arulmigu Swaminatha Samy Thirukoil, Swamimalai to the effect that as per the Register maintained in the said temple, no marriage took place on 03.06.1982 between Thyagarajan and Rajeswari. The said certificate came to be marked as Ex.A4. However Ex.A5 letter itself shows that the first respondent/second defendant Rajeswari had been shown as wife and nominated as the appointee to receive the policy money in the event of death of Thyagarajan.

18. In this regard, besides producing Ex.B1-wedding invitation, Ex.B2-birth certificate of the second respondent/third defendant, Ex.B3-death certificate of Thyagarajan, Ex.B4-Legal heirship certificate issued by the Tahsildar, Ex.B5-family card and Ex.B6-invitation printed for the death ceremony (உத்திரகிரியை) of Thyagarajan, clear oral evidence has been adduced to the effect that the marriage of Rajeswari with Thyagarajan took place on 03.06.1982 at Swamimalai. Ex.B5-Ration card issued in the year 1993 makes it clear that Thyagarajan was living at the Railway Colony, Visalur. The first respondent/second defendant Rajeswari (wife), appellant/plaintiff Vadivelan (son), the second respondent/third defendant Muthuvelan (son) and the deceased first defendant Chellammal (mother) were shown as the other members of the family of which Thyagarajan was the Head. It is also reflected in Ex.B4 - legal heir certificate. Ex.B7 also evidences that a sum of Rs.350/- borrowed by one Thyagarajan from another person of the same name with a different initial (M.Thiyagarajan), was discharged by Rajeswari after the death of her husband Thyagarajan. Clear evidence has also been adduced to the effect that after the marriage of Rajeswari with late Thyagarajan, they lived under the same roof as husband and wife and they had their residence in the official quarters allotted to Thyagarajan by the Southern Railways at various places of his employment. Ex.B2 - Birth certificate also shows that the second respondent/third defendant was born on 23.12.1983 and the birth was registered on the same day showing Thyagarajan as the father and Rajeswari as the mother. All these aspects were considered by the courts below in proper perspective and as a result of such consideration, the courts below rendered a concurrent finding that the respondents 1 and 2/defendants 2 and 3 had proved that there was a valid marriage between Thyagarajan and Rajeswari and that the second respondent/third defendant Muthuvelan was the legitimate son born out of the lawful wedlock. Such a finding gets strengthened by the appellant's/plaintiff's own admission that the immovable property described in the plaint schedule was purchased by Thyagarajan with his own funds in the name of the second respondent/ third defendant Muthuvelan.

19. Not stopping with that, the appellant/plaintiff chose to further state that the landed property described in the plaint schedule was purchased by late Thyagarajan with his own funds in the name of Muthuvelan (3rd defendant). However, curiously the appellant/plaintiff chose to make a claim in respect of 1/3rd share alone in the landed property described in the plaint schedule. That itself will show that the appellant/plaintiff either admitted or was not sure of the marriage of Thyagarajan with Rajeswari and the legitimacy of Muthuvelan, the third defendant. When all these aspects are taken into consideration, it cannot be contended that the findings of the courts below to the effect that the first respondent/second defendant Rajeswari was the wife of late Thyagarajan and the second respondent/third defendant Muthuvelan was the legitimate son born to them cannot be termed either infirm or defective. In any event, such a finding of fact concurrently rendered by the courts below cannot be interfered with in the second appeal if it is not shown to be perverse. As this court pointed out supra that the said concurrent findings of the courts below cannot be even said to be incorrect, there is no scope for holding such a finding to be perverse, warranting interference by this court in exercise of its appellate power in the second appeal. Hence the first and second substantial questions of law are answered accordingly against the appellants and in favour of the respondents 1 and 2/defendants 2 and 3 holding that the findings of the courts below to the effect that the first respondent/second defendant Rajeswari was the legally wedded wife of late Thyagarajan and the second respondent/third defendant Muthuvelan was the legitimate son of Thyagarajan cannot be interfered with and the same has got to be confirmed.

20. Admittedly, the amounts described in items 1 to 3 in the plaint schedule are the amounts due to the legal heirs of deceased Thyagarajan. Item 1 is the death-cum-retirement gratuity of Thyagarajan. Items 2 and 3 are the amounts payable under two insurance policies taken on the life of late Thyagarajan. It is obvious from evidence that Rajeswari, the first respondent/second defendant was shown as the nominee. But that does not mean that she alone will take the entire amount. The nominee has the right to collect the amount on behalf of the legal heirs and give a valid discharge to the respondents 3 and 4/defendants 4 and 5. In all the three amounts, the appellant herein/plaintiff (son of Thyagarajan born through his first wife Thenmozhi), Chellammal (the mother of Thyagarajan), Rajeswari (the second wife of Thyagarajan) and Muthselvan (son of Thyagarajan born through Rajeswari), were the legal heirs of Thyagarajan, when succession to the properties of Thyagarajan opened, namely on the date of death of Thyagarajan. Hence all the four persons were entitled to

equally share the amounts and each one was entitled to 1/4th share.

21. Admittedly during the pendency of the suit, Chellammal, the mother of Thyagarajan died. Her 1/4th share in the suit amounts shall devolve upon her legal heirs in accordance with the Hindu Succession Act, 1956. As per Section 15 of the Hindu Succession Act, 1956, the sons of Thyagarajan, namely the appellant/plaintiff (Vadivelan) and the second respondent/third defendant (Muthuvelan) alone were her legal heirs, who fall under Class (a) of sub section (1) of Section 15 of the Hindu Succession Act, 1956. Sub section (2) is not attracted in this case, as the property was not inherited by her either from her father or mother or from her husband or father-in-law. As she got share in the property as a legal heir of her son. Sub clause (1) of Section 15 alone will be applicable. As per the order of succession and manner of distribution among the heirs provided in Section 16, the persons who are found in Class (a) will exclude the persons who are found in the subsequent clauses of sub-section 1 of Section 15. Therefore first respondent/second defendant, being the daughter-in-law of Chellammal stands excluded from succeeding to the share of Chellammal. Hence the appellant/plaintiff and the second respondent/third defendant alone would get share of Chellammal in equal moieties. The plaintiff as the legal heir of Thyagarajan was entitled to 1/4th share and as the legal heir of Chellammal he got 1/8th share. Thus the total share of plaintiff got increased to 3/8. The second respondent/third defendant will be entitled to 3/8 and the first respondent/second defendant will be entitled to 2/8 equivalent to 1/4. The learned trial judge and the learned lower appellate judge, without calculating the correct shares and without taking into account the above said aspects, erroneously held that the appellant/plaintiff was entitled to 1/3rd share in the amounts shown as items 1 to 3 in the plaint schedule. The said mistake committed by the courts below has got to be corrected by this court by holding that the share of the plaintiff in the said items after the death of Chellammal is 3/8 and not 3/9 equivalent to 1/3. Hence the preliminary decree of the trial court in respect of the amounts shown as items 1 to 3 in the plaint schedule is liable to be modified holding him to be entitled to 3/8 share instead of 3/9th equivalent to 1/3rd share.

22. So far as the landed property described in the plaint schedule is concerned, it is the admitted case of the appellant/plaintiff that the property was purchased in the name of the second respondent/third defendant. A vague allegation has been made that the property was purchased by late Thyagarajan with his own funds in the name of Muthuvelan, the second respondent/third defendant. It is not the case of the appellant/plaintiff that he along with Thyagarajan and the

second respondent/third defendant constituted as a joint family and the said property was purchased using the income from the already existing joint family nucleus and thus it acquired the character of a property owned by Hindu Undivided Family. There is absolutely no evidence to show that the family did have ancestral nucleus capable yielding income sufficient for the purchase of the property in question. Section 4 of the Benami Transactions (Prohibition) Act, 1988 contains an exception only in respect of purchases made in the name of a coparcener for the benefit of the joint family. It is not the case of the appellant/plaintiff that the said purchase was made for the benefit of the joint family in the name of a coparcener. Hence the exemption provided under Section 4 of the Benami Transactions (Prohibition) Act, 1988 cannot be applied to the case on hand. Then the transaction would become a prohibited benami transaction as found in Section 3 of the Benami Transactions (Prohibition) Act, 1988. It is not so exempted from such provision, as such exemptions is provided only in respect of purchases made in the name of the wife or unmarried daughter, as it shall be presumed to be a purchase made for the benefit of such wife or unmarried daughter, as the case may be, unless the contrary is provided. Hence the bar under section 4 applies to the claim of the appellant/plaintiff made in his suit.

23. Apart from the said legal position, factually also there is no proof that the consideration for the purchase of the landed property described in the plaint schedule, which is said to be an extent of 72 cents, was provided by late Thyagarajan. On the other hand, clear and categorical oral evidence has been adduced on the side of the respondents 1 and 2/defendants 2 and 3 that the said land was purchased from out of the money provided by the mother of the first respondent/2nd defendant. It was also clearly averred and evidence in respect of such averment, which cannot be rejected as unreliable, has also been adduced to the effect that the said purchase made in the name of the second respondent/third defendant was not a coparcenary property. Considering the preponderance of probabilities, based on the evidence adduced on both sides, both the courts below held that the landed property described in the plaint schedule was not the property of late Thyagarajan, in which the appellant/plaintiff could make a claim as a legal heir of Thyagarajan and that hence the prayer in respect of the landed property described in the plaint schedule deserves to be rejected. The said finding concurrently made by the courts below cannot be said to be either defective or infirm much less perverse to enable this court to interfere with the same in the second appeal. Hence the dismissal of the suit so far as the landed property described in the plaint schedule is concerned, does not warrant any interference and the same deserves to be

confirmed. The third substantial question of law is answered accordingly.

24. In view of the foregoing discussions, this court hereby holds that the second appeal deserves to be partly allowed in respect of the quantum of share of the appellant/plaintiff in respect of the amounts shown as items 1 to 3 in the plaint schedule alone by declaring the share of the appellant/plaintiff to be 3/8 instead of 1/3 and that in all other respects the decree of the trial court has got to be confirmed.

In the result, the second appeal is allowed in part and the preliminary decree of the trial court dated 22.08.1996 is modified declaring the share of the appellant/plaintiff in the amounts shown as items 1 to 3 in the plaint schedule to be 3/8 instead of 1/3. In all other respects, the decree of the trial court shall remain unaltered. However, there shall be no order as to cost in the second appeal. Consequently, the connected miscellaneous petition is closed.

sd/-

Assistant Registrar(Cs-III)

/TRUE COPY/

Sub-Assistant Registrar

asr

To

- 1) The Principal District Judge, Nagapattinam
- 2) The Additional Subordinate Judge, Nagapattinam

+1 CC to MR.S.R.Sundaram Advocate. SR.NO.57845

+1 CC to MR.K.Ramachandran Advocate. SR.NO. 57848

+1 CC to MR.S.Subbiah Advocate. SR.NO.57976

S.A.No.937 of 1999

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JD 12/01/2016

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