

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.07.2015

CORAM

THE HON'BLE MS. JUSTICE R. MALA

S.A.No.1516 of 2004

|                                              |                                                |
|----------------------------------------------|------------------------------------------------|
| Date of Reserving the Judgment<br>08.07.2015 | Date of Pronouncing the Judgment<br>13.07.2015 |
|----------------------------------------------|------------------------------------------------|

1. Shanmugam

2. Parvathi

... Appellants/Respondents 1 & 2/  
Defendants 1 & 2

-Vs-

1. Banumathi

... Respondent/Appellant/Plaintiff

2. Jalal Bagh

... Respondent/3<sup>rd</sup> Respondent/  
3<sup>rd</sup> Defendant

(R1 declared as major and her mother discharged from the guardianship vide order of the Court dated 18.06.2015 made in C.M.P.Nos.333 & 334 of 2015 in S.A.No.1516 of 2004)

Prayer:

Second appeal filed under Section 100 of CPC against the judgment and decree of the Subordinate Judge, Kallakurichi in A.S.No.57 of 2001, dated 30.07.2003 reversing the judgment and decree of the 1<sup>st</sup> Additional District Munsif, Kallakurichi in O.S.No.450 of 1995, dated 08.03.2001.

For Appellant : Mr.V.Raghavachari

For Respondent : Mrs.Mythili Suresh,  
for M/s.Sarvabhauman Associates  
for R1.

R2 - No Appearance

## J U D G M E N T

The second appeal arises out of the judgment and decree dated 30.07.2003 made in A.S.No.57 of 2001 on the file of the Subordinate Judge, Kallakurichi, reversing the judgment and decree dated 08.03.2001 passed in O.S.No.450 of 1995 on the file of the 1<sup>st</sup> Additional District Munsif, Kallakurichi.

2. The averments made in the plaint are as follows:-

The first respondent herein as plaintiff has filed the suit for partition and separate possession of  $\frac{1}{2}$  share in the suit property stating that the suit property belong to the 1<sup>st</sup> defendant who is the father of the 1<sup>st</sup> respondent/plaintiff. Though maintenance has been ordered, the 1<sup>st</sup> defendant has not paid any maintenance for his wife and child. Moreover, the 1<sup>st</sup> defendant has not attempted to alienate the property in favour of the defendants 2 and 3. Hence, the first respondent/plaintiff is constrained to file a suit for partition and separate possession.

3. The gist and essence of the written statement filed by the 1<sup>st</sup> defendant is as follows:

The first appellant herein who is the first defendant in the suit had filed the written statement stating that the first respondent/plaintiff is his daughter through his first wife Mallika. It is further stated that maintenance was ordered in C.M.P.No.17 of 1994 on the file of the Judicial Magistrate Court, Kallakurichi. The plaintiff is not entitled to claim maintenance as well as share in the suit properties. Since Mallika deserted him, he married one Lakshmi as his second wife and through her, he has got two daughters, viz., Minor Bairavi and Minor Revathi. So, they are also entitled to share in the suit properties. Further, it was stated that he has incurred heavy debts for his family expenses and so he had sold the suit properties in item nos.1 to 28 to the 2<sup>nd</sup> defendant and the sale deed is binding on the plaintiff. So, he prayed for dismissal of the suit for non-joinder of necessary parties.

4. The 1<sup>st</sup> defendant has also filed the additional written statement wherein it was stated that the plaintiff is not entitled to half share in item no.29 also.

5. The gist and essence of the written statement filed by the 2<sup>nd</sup> defendant is as follows:

The mother of the plaintiff one Mallika is the first wife of the 1<sup>st</sup> defendant. Because the said Mallika deserted the 1<sup>st</sup> defendant, the 1<sup>st</sup> defendant married one Lakshmi as his second wife and the 1<sup>st</sup> defendant has got two daughters through his second wife. The 1<sup>st</sup> defendant for his marriage expenses and other family expenses incurred heavy debts and so, the 1<sup>st</sup> defendant sold the suit properties to her on behalf of his minor daughters also. From the

date of purchase on 31.12.1990, she is in possession and enjoyment of the suit properties till she sold some of the suit items to the third defendant on 17.08.1992. So, the suit is not maintainable for non-joinder of necessary parties. Thus, she prayed for dismissal of the suit.

6. The Learned Trial Judge after considering the averments made in the plaint, written statement and additional written statement and arguments on either side counsel, has framed necessary issues and on perusing the oral and documentary evidences viz., P.W.1, D.W.1, D.W.2 and Ex.A.1 and Exs.B.1 to B.3, dismissed the suit in respect of Item Nos.1 to 28 and decreed the suit in respect of Item No.29. Aggrieved against the judgment and decree passed by the trial court, the plaintiff preferred an appeal in A.S.No.57 of 2001 on the file of the Subordinate Court, Kallakurichi.

7. The learned First Appellate Court has considered the arguments advanced on either side and framed necessary point for consideration and reversed the Judgment and Decree passed by the Trial Court and allowed the appeal. Against the Decree and Judgment passed by the first Appellate Court, the present second appeal has been preferred by the defendants 1 & 2/appellants.

8. At the time of the admission, the following question of law has been framed.

"1. Whether the lower appellate court is right in decreeing the suit for partition as against defendant No.1, particularly, when the plaintiff had admitted the suit property to the self-acquisition of the first defendant?

2. Whether the lower appellate Court is right in decreeing the suit for partition as prayed for ignoring that the other children of the first defendant is entitled to equal rights along with the plaintiff, assuming that the plaintiff had established a right?"

9. The learned counsel appearing for the appellant would submit that the suit properties are the self acquired properties of the first defendant/first appellant and they are not the ancestral properties. Hence, the first respondent/plaintiff is not entitled to any share in the suit properties as she is not a coparcener. If the first respondent/plaintiff is entitled to share in the suit properties, then equally the other two daughters are also entitled to share in the suit properties. The said aspect was not properly considered by the first appellate Court and hence, the learned counsel for the appellant prayed for allowing of the appeal.

10. Resisting the same, the learned counsel appearing for the first respondent would submit that as per the evidence of D.W.1/Shanmugam and D.W.2/Parvathy, the suit properties are the

ancestral properties and not the self-acquired properties. During the course of oral partition between the 1<sup>st</sup> appellant and his brothers, the suit properties were allotted to the 1<sup>st</sup> appellant/1<sup>st</sup> defendant. While so, the 1<sup>st</sup> appellant/1<sup>st</sup> defendant had executed a sale deed in favour of the 2<sup>nd</sup> appellant/2<sup>nd</sup> defendant under Ex.B.1 dated 23.12.1990, wherein the 1<sup>st</sup> respondent/plaintiff is a party to the sale as she was born in the year 1989. Thereafter, the 1<sup>st</sup> appellant/1<sup>st</sup> defendant deserted his wife and daughter and they had filed an application for maintenance and maintenance was also ordered. Now to defeat the share of the plaintiff, the 1<sup>st</sup> respondent had sold the property to his sister. The Trial Court without considering those aspects had dismissed the suit in respect of Item Nos.1 to 28. Whereas the first appellate Court has considered all the points in proper perspective and came to the correct conclusion. The learned counsel would further contend that when the first marriage is still subsisting the second marriage is non-est in the eye of law and so, the children born through the alleged second wife is not entitled to any share in the suit properties as coparcener and if at all, they are entitled to share only in the father's property. Thus, the learned counsel for the first respondent prayed for dismissal of the appeal.

11. Considered the rival submissions made by both sides and perused the material records, oral and documentary evidences.

12. Now this Court has to decide whether the suit properties are the ancestral properties or the self-acquired properties of the 1<sup>st</sup> appellant/1<sup>st</sup> defendant?

At this juncture, it is appropriate to consider the evidence of D.W.1/Shanmugam and D.W.2/Parvathi, who is none other than the sister of D.W.1/1<sup>st</sup> appellant/1<sup>st</sup> defendant. D.W.2/Parvathi in her evidence has categorically stated that the suit properties are the ancestral properties and after the death of her father, the properties were partitioned between her brothers viz., Rajendran, Shanmugam/1<sup>st</sup> appellant and Sakthivel. Further, in the cross-examination, D.W.2/Parvathi has fairly conceded that her father had three sons and three daughters and after the death of her father, the suit properties were allotted in favour of the 1<sup>st</sup> appellant/1<sup>st</sup> defendant during the oral partition, 15 years ago. D.W.1/Shanmugam in his evidence has also categorically admitted that the suit properties are the ancestral properties. In his cross-examination, he has fairly conceded that 11 years ago, the properties were orally divided among the his brothers.

“தாவா சொத்துக்கள் என் பாகத்துக்கு வந்தது. தாவா சொத்துக்கள் ப  
ஸ்ரீவீக சொத்துக்களாகும்.”

13. Considering the above evidence, I am of the view that the suit properties are not the self acquired properties. That factum was

rightly considered by the first appellate Court. Since the properties are the ancestral properties, the female child born in the year 1989, prior to the execution of Ex.B.1/Sale deed is a coparcener and she is entitled to share in the suit properties. So, the substantial question of law 1 is answered accordingly.

Substantial Question of Law 2 :

14. Since the suit properties are held to be the ancestral properties allotted to the share of the 1<sup>st</sup> appellant/1<sup>st</sup> defendant and it was stated in the Ex.B.1/Sale Deed that the properties were sold on behalf of the minor child also, I am of the view that the plaintiff/1<sup>st</sup> respondent is entitled to share in the suit properties. Further, the children born to the alleged second wife is not entitled to any share. Even though a plea of non-joinder of necessary parties were raised, the 1<sup>st</sup> appellant/1<sup>st</sup> defendant has not taken any steps to implead the daughters born through his second wife. If at all the children born through the second wife are entitled to any share, it could only be in the self-acquired properties of their father, after his lifetime and not in the ancestral properties. Those properties were already sold out and furthermore, on the date of execution of Ex.B.1/Sale Deed, they were not born and so, they are not entitled to any share in the suit properties. Thus, the substantial question of law 2 is answered accordingly.

15. In view of the answers given to the substantial question of law 1 & 2, I am of the view that the first appellate Court has considered all the aspects in proper perspective and came to the correct conclusion that the 1<sup>st</sup> respondent/plaintiff is a coparcener and she is entitled to  $\frac{1}{2}$  share in the suit properties. Hence, the judgment and decree passed by the first appellate Court is well reasoned and the same does not warrant interference by this Court.

16. In fine,

- (a) The Second Appeal is dismissed. No costs.
- (b) The judgment and decree passed by the first appellate Court is hereby confirmed.

Sd/-  
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

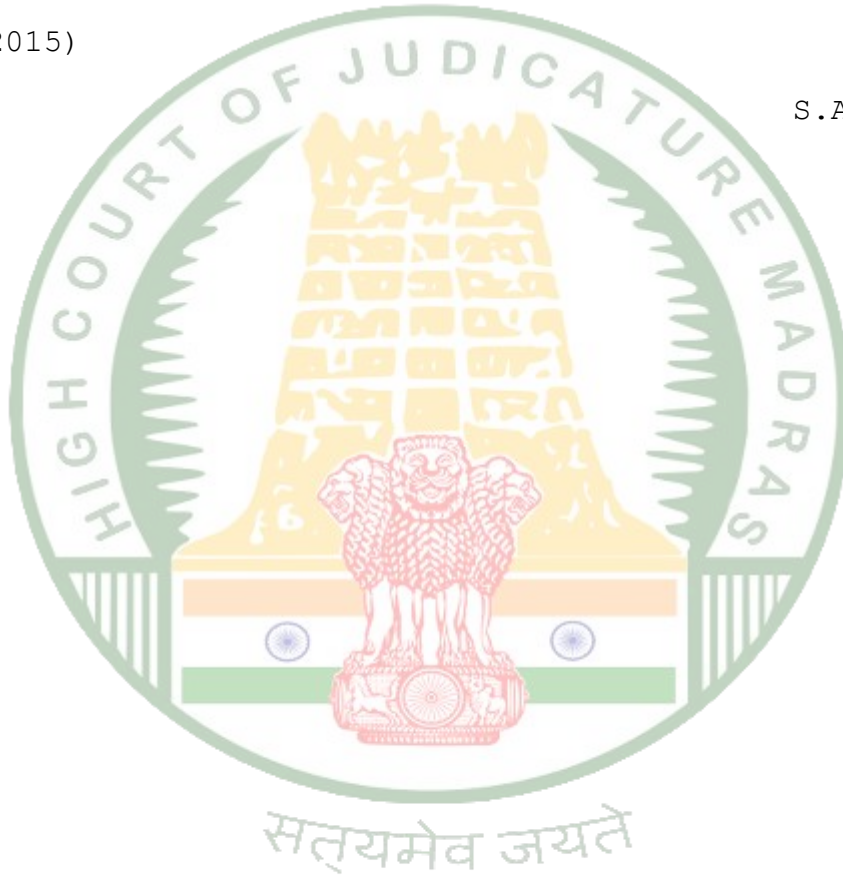
- 1.The Subordinate Judge, Kallakurichi
- 2.The I Additional District Munsif, Kallakurichi
- 3.The Section Officer, V.R.Section, High Court, Chennai.

+1cc to Mr.V.Raghavachari, Advocate, S.R.No.35075

+1cc to M/s. Sarvabhauman Associates, Advocate, S.R.No.35199

JSV(CO)  
EU(05/08/2015)

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