

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON:26.10.2016
DECISION DATED:03.03.2017

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

A.S.No.711 of 1994

Manicka Ammal

... Appellant

Vs

- 1.Samiappa Nadar (Died)
Recorded the sole appellant,
second respondent and fourth
respondent as LRs of the deceased
first respondent vide Order of
Court dated 20.08.2008 made
in Memo No.4181/2008 dated 08.08.2008
- 2.Jayaprakash Ramalingam (Deceased)
RR 8 & 9 brought on record as
LRs of deceased R2 vide Order of
Court dt.02.11.2009 made in
CMP.No.1436/2008
- 3.Gomathi
- 4.Suppulakshmi
- 5.Jamuna Rani
- 6.Ganesan
- 7.The Official Receiver,
Coimbatore.
- 8.Bhuvaneswari
Appeal restored as against the
8th respondent vide order of
the Court dated 24.08.2016
made in CMP.No.13758/2016
- 9.Senthil @ Arunkumar

... Respondents

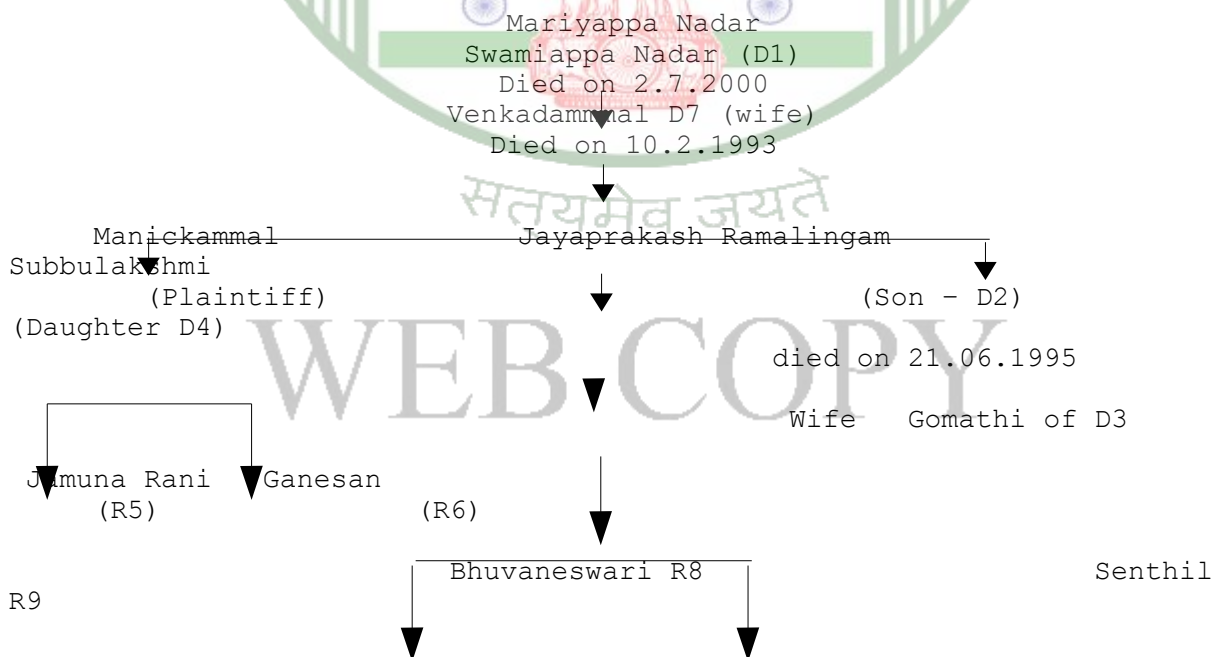
This appeal is filed under Section 96 of the Civil Procedure Code against the judgement and decree dated 15.03.1994 made in O.S.No.99 of 1986 (O.P.No.15 of 1984) on the file of the III Additional Subordinate Judge, Coimbatore.

For Appellant : Mr.V.Raghavachari
for Mr.PR.M.Arunachalam
For Respondents : Mrs.Hema Sampath
Senior Counsel
Assisted by J.Hariharan
for Mr.V.Nicholas for RR 4 to 6
Mr.K.Sivasubramanian for R8
Mr.T.M.Hari Haran for RR 3 & 9

J U D G E M E N T

The unsuccessful plaintiff is the appellant in this appeal. The suit in O.S.No.99 of 1986 (O.P.No.15 of 1984) on the file of the III Additional Subordinate Judge, Coimbatore was actually initiated on 3.12.1983, wherein, the plaintiff has sought for partition of the suit properties into four equal shares and delivery of possession of one such share to her pursuant to the alleged family settlement dated 24.07.1983.

2. The plaintiff had sought for partition claiming that the suit properties belonged to the family of one Mariyappa Nadar, her paternal grand father and that pursuant to the pious wishes expressed by the said Mariyappa Nadar, there was a family arrangement on 24.07.1983, in the presence of Panchayatdars, wherein, it was decided that the 2nd defendant, namely her brother, would get half share and herself and the 4th defendant being daughters of the 1st defendant Samiyappa Nadar, would get $\frac{1}{4}$ share each. A mosaic industry functioning in the 1st item of the suit schedule was allotted to the defendants 1 and 7 namely, father and mother. The genealogy of the family is as follows:



3.The sum and substance of the plaintiff's case is as follows:

Mariyappa Nadar the grand father of the plaintiff and defendants 2 and 4 died at Perur Chettipalayam leaving behind the 1st defendant (son), defendants 2, 4 and the plaintiff being the grand children and the 7th defendant, the daughter-in-law. According to the plaintiff, he died possessed of first item of schedule-1 and other properties. There was no partition in the family. The 1st item of schedule-1 and other properties are ancestral properties.

4. The plaintiff would further claim that at the time of death of said Mariappa Nadar, he had expressed his wish and desire that his grand daughters namely, the plaintiff and 4th defendant should be given shares in the properties left by him. The plaintiff would further claim that after the death of said Mariappa Nadar, with aid and assistance of joint labour of the other members of the family, the properties described in the suit II-schedule were purchased in the name of 1st defendant being Kartha and Manager of the family. The plaintiff would also claim that she was living in Item No.1 of the suit property and she had contributed her own money and funds received from her husband towards the purchase of the suit II-Schedule property. It was further claimed that the 2nd item in the 1st schedule was purchased out of the funds earned by the joint labour of the plaintiff and other family members.

5. According to the plaintiff in pursuance of the wish expressed by late Mariappa Nadar there was a panchayat held at the instance of several elders of the village and the decisions reached in the said panchayat were recorded as family arrangement dated 24.07.1983. The said family arrangement is marked as Ex.A1. The plaintiff would claim that inasmuch as the 4th defendant obtained certain fraudulent documents in the form of settlement deeds in favour of her children namely, defendants 5 and 6/respondents 5 and 6, dispute arose in the family, which necessitated the filing of the suit. On the above said contentions, the plaintiff would seek a preliminary decree declaring $\frac{1}{4}$ th share in the suit properties.

6. The 1st defendant filed her written statement contending that the properties are all self acquired properties of the 1st defendant and that the plaintiff and the other children have no right over the same. The 1st defendant also denied the claim of the plaintiff that the properties were purchased with the aid and assistance of the plaintiff and her husband and other members of the family. The 1st defendant would further claim that even during the life time of Mariyappa Nadar,

there was a partition between him and his father on 23.02.1956. The said registered partition deed was marked as Ex.A4. According to the 1st defendant after the said partition, he became the absolute owner of the properties that were allotted to him and he had also sold some of the properties that were allotted to him under the said partition deed.

7. The 1st defendant would further claim that his father Mariyappa Nadar had executed the Will on 17.12.1964 (marked as Ex.B1) bequeathing his entire property to the 1st defendant. The 1st defendant would also claim that the 2nd item of the 1st-schedule and the 2nd schedule properties, were purchased by him out of his own money and that they are his self acquired properties. The claim of the plaintiff that the deceased Mariappa Nadar had expressed his wish and desire to give shares to the plaintiff was also denied. The family arrangement said to have entered into at the instance of the Panchayatdars on 24.7.1983 is also categorically disputed by the 1st defendant.

8. The 1st defendant also confirmed that he had executed certain documents in favour of defendants 5 and 6 and that there was no fraud or undue influence in the execution of the said documents. The defendants 4,5 and 6 filed a memo adopting the written statement filed by the 1st defendant. The 2nd defendant namely, the son of the 1st defendant remained exparte. The defendants 2,3 and 8 have also remained exparte. The 7th defendant, wife of the 1st defendant had died.

9. The plaintiff apart from examining herself, examined two more witnesses as PWs. 2 and 3. Exs.A1 to A10 were marked on the side of the plaintiff. The 1st defendant examined himself as DW1 and Ex.B1 was marked on the side of the defendants.

10. Based on the pleadings and the oral evidence, learned III Additional Subordinate Judge, Coimbatore framed the following issues:

- 1) whether the plaintiff is entitled to her share in the suit schedule properties?
- 2) Whether the plaintiff is entitled to mesne profits? If so, what is the amount?
- 3) To what other reliefs, is the plaintiff entitled to?

11. On consideration of both oral and documentary evidence, the learned III Additional Subordinate Judge, Coimbatore, came to the conclusion that the plaintiff has not established the truth and validity of Ex.A1 namely, the alleged Panchayat Muchalika dated 24.7.1983. The III Additional Subordinate Judge, Coimbatore referring to the evidence of PW1, held that the plaintiff is seeking partition only on the basis of Panchayat Muchalika and

the said document has not been proved. On the above said findings, learned Subordinate Judge, Coimbatore dismissed the suit.

12. Aggrieved by the same, the plaintiff has come forward with the above appeal. Pending appeal, it is seen that the 1st respondent namely, the father of the plaintiff had died and the plaintiff herself, the 2nd and 4th respondents have been recorded as legal representatives of the deceased 1st respondent, by the order of this Court dated 20.08.2008. It is also seen that the 2nd respondent, namely, brother of the plaintiff had also died and respondents 8 and 9 were brought on record as legal representatives of the deceased 2nd respondent by order in CM.P.No.1436/2008 dated 02.11.2009. Though the appeal was originally dismissed as against the 8th respondent, the same was restored by order dated 24.08.2016 in CMP.No.13758 of 2016.

13. I have heard Mr.V.Ragavachari, learned counsel appearing for Mr.AR.M.Arunachalam for the appellant and Mrs.Hema sampath, learned Senior counsel for Mr.V.Nicholas, learned counsel for respondents 4 to 6, Mr.K.Sivasubramaniam for R8 and Mr.T.M.Hariharan for respondents 3 and 9.

14. The following points arise for determination in this appeal:

1.Whether the plaintiff has established the truth and validity of the Panchayat Muchalika (Ex.A1) dated 24.07.1983?

2.Whether the plaintiff is entitled to $\frac{1}{4}$ share as claimed by her?

3.Whether the alleged gift deed said to have been executed by the 1st defendant in favour of the defendants 5 and 6 would be valid in law?

15. At the out set, I am constrained to point out that the case on hand is a classic example of unbroken coconut in the hands of monkey. Though, Mr.V.Raghavachari, learned counsel appearing for the appellant and Mr.T.M.Hariharan, learned counsel appearing for the legal representatives of the second respondent, namely respondents 3 and 9 would invoke all their legal acumen to convince me and make out certain pleadings that were never thought of by the parties during the trial and invite me to answer the same. I am afraid that I will be transgressing the limits of my jurisdiction in an appeal under Section 96 of Code of Civil Procedure, If I am to succumb to their invitation. Though in the plaint it is claimed that the suit properties are ancestral, the plaintiff during trial does not proceed on the footing that the properties being ancestral, the plaintiff would be entitled to a share as legal heir of the 1st defendant. Probably, she and her counsel were aware of the fact that such

claim cannot be made by the plaintiff being a daughter, married prior to 1989 and the suit itself having been filed in 1983 before the advent of the Hindu Succession Amendment Act 1/1990.

16. It is also seen from the records, the father of the plaintiff namely, the 1st respondent in the appeal died on 02.07.2000. i.e. prior to coming into force the Hindu Succession Amendment Act 39/2005. Therefore, the plaintiff being a daughter, married prior to 1989 and her father having died prior to 9.9.2005 cannot invoke either the Tamil Nadu Amendment namely, Hindu Succession Amendment Act 1 of 1990 or Central Act namely, Hindu Succession Amendment Act 39 of 2005. Therefore, the entitlement of the plaintiff will have to be decided only based on the provisions of old Section 6 and 8 of the Hindu Succession Act 1956.

17. Both Mr.V.Raghavachari, learned counsel appearing for the appellant and Mr.T.M.Hariharan, learned counsel appearing for respondents 3 and 9 are alive to the situation. They would, however, contend that taking note of the death of 1st defendant/1st respondent, Samiappa Nadar, the allegation that the properties are the ancestral properties in the hands of Samiappa Nadar and the deceased Samiappa Nadar, being the kartha of the family, appears to have executed the settlement deeds with reference to ancestral properties, all those questions should be gone into in this appeal itself, without driving the parties to another round of fresh litigation.

18. On the other hand Mrs. Hema Sampath, learned Senior counsel appearing for the respondents 4 to 6 would vehemently contend that there was no pleadings to the effect that the 1st defendant had acquired the property in the capacity as a Kartha of the family and that the plaintiff, who had no rights over the suit properties, even assuming that they are ancestral properties on the date of the suit, cannot question the validity of the settlement deeds executed by the 1st defendant/1st respondent.

19. The learned senior counsel would further contend that the allegations of fraud or undue influence made in the plaint have not been established by cogent and convincing evidence. The learned Senior counsel would further contend that the 2nd defendant namely, the son, having been remained exparte and having not filed written statement, cannot be allowed to raise the issue relating to the validity or otherwise the settlement deeds and the nature of the property in the hands of the 1st defendant/1st respondent.

20. The learned counsel would also invite my attention to the absence of any issue regarding the nature of the properties, the validity of the settlement deeds executed by the 1st defendant/1st respondent before the Trial Court and submit that in the absence of pleadings and evidence, those issues cannot be gone into or taken up for consideration in the appeal.

21. I have gone through the evidence on record and documents produced. As already stated, whether the property is held to be ancestral or self acquired in the hands of the 1st defendant, the plaintiff had no right to seek partition during the life time of 1st defendant/1st respondent on the basis of Ex.A1. Truth and validity of Ex.A1 has been stoutly denied by the 1st defendant and the learned Subordinate Judge on a consideration of the materials has come to the conclusion that Ex.A1 cannot be held to be valid instrument of partition.

22. I have gone through the oral evidence on the side of the plaintiff as well as the 1st defendant. I am unable to find any ground to justify interference with the findings of the trial court with reference to the validity of Ex.A1. Of course, the learned counsel appearing for the appellant and respondents 3,8 and 9 would rely upon various decisions, which deal with the nature of the properties acquired by Kartha of a joint family and the standard of proof that is required to justify the claim of kartha that those properties are his self acquisitions. I am afraid, I will not be justified in going into those issues which are neither supported by pleadings nor evidence.

23. The learned counsel would invite my attention to various documents produced by the plaintiff namely, partition deed dated 23.2.1956, between the 1st defendant/1st respondent and his father and various sale deeds and attempt to establish the fact that the properties that were purchased in the name of the 1st defendant/1st respondent under sale deeds dated 23.3.1960, 01.02.1967 and 25.07.1968 are all ancestral properties and they were purchased by the 1st defendant/1st respondent with the help of ancestral nucleus. He would further contend that in the absence of any evidence of separate income that was available with the 1st defendant to enable him to purchase the properties, the properties purchased by the 1st defendant should be held to be ancestral properties and the gift deeds executed by 1st defendant in respect of the ancestral properties, cannot be held to be valid.

24. Mr.T.M.Hariharan, learned counsel appearing for respondents 3 and 9 would rely upon the decision of the Hon'ble Supreme Court in M.Venkataramana Hebbar v. Rajagopal Hebbar and

others reported in (2007) 6 SCC 401 and draw my attention to the following observations of the Hon'ble Supreme Court:

" But there cannot be any doubt whatsoever that before the court rejects a claim of partition of joint family property, at the instance of all the co-owners, it must be established that there had been a partition by metes and bounds. By reason of the family settlement, a complete partition of the joint family property by metes and bounds purported to have taken place."

I am unable to agree with the learned counsel inasmuch as the case on hand is totally different and the plaint came to be filed on the strength of Ex.A1 by the plaintiff, who otherwise did not have any right over the property either self acquired or ancestral in the hands of the 1st defendant. It is true that the Court should also take note of the subsequent events and mould the relief in appropriate cases. Unfortunately, I am unable to invoke the said doctrine also because of the peculiar circumstance in this case which leads me to believe that, I will not be justified in going into the various issues that are now sought to be raised in this appeal without there being a factual foundation by way of pleadings and evidence. Even in the grounds of appeal, the appellant/plaintiff has sought to justify the Panchayat Muchalika marked as Ex.A1. Ex.A1 has been held to be invalid and not acted upon, the claim of the plaintiff based on Ex.A1 would stand automatically rejected. However, I am not pressing any opinion on the questions relating to 1) nature of the property either self acquired or ancestral, 2) validity of the settlement deeds said to have been executed by the 1st defendant/1st respondent and 3) the share that the plaintiff would be entitled to on the death of the 1st defendant/1st respondent.

सतयमेव जयते
25. The points framed for determination are answered against the plaintiff and the appeal is dismissed confirming the judgement and decree of the Trial Court. I make it clear that by dismissing the above appeal, I have not decided the issues which were raised on devolution of the property on the death of the 1st defendant. I am alive to the fact that this litigation commenced in 1983 and the parties are unable to find either amicable or judicial solution to the dispute. The answer is, the parties will have to blame themselves for this unfortunate situation, which has arisen only because of their own conduct.

26. In fine, the appeal is dismissed confirming the judgement and decree of the Trial Court in O.S.No.99 of 1986 dated 15.03.1994 on the file of the III Additional Subordinate Judge, Coimbatore, leaving open the issues that may arise on the death of the 1st defendant/1st respondent. It is for the parties to work out their rights if so they advised. Consequently the connected miscellaneous petitions are closed. No costs

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To

III Additional Subordinate Judge, Coimbatore.

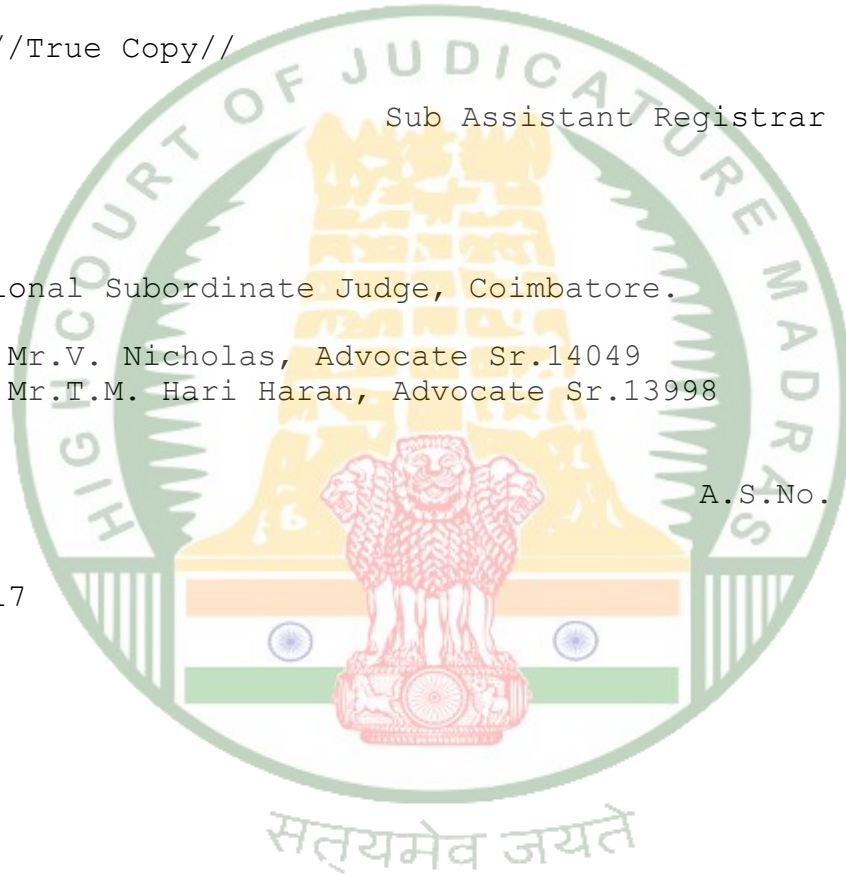
+ 1 cc to Mr.V. Nicholas, Advocate Sr.14049

+ 1 cc to Mr.T.M. Hari Haran, Advocate Sr.13998

A.S.No. 711 of 1994

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