

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 05.01.2017

Judgment pronounced on : 12.01.2017

CORAM

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

S.A.No. 407 of 1999

1 Thandavan
2 Thadhappan
3 Muthammal
4 Ellammal
5 Sendhiyammal ...Appellants/ Appellants 1 to 4 & 6
Defendants 1 to 4 & 6

Vs.

Ramasamy (Deceased) ...Plaintiff/Respondent

1 Rani ...1st Respondent/5th Appellant/5th defendant
2 Muthammal
3 Ellammal
4 Kuppusamy
5 Rukkumani ...Respondents 2 to 5 /
LR's of Deceased Plaintiff

Respondents 2 to 5 are L.R.'s of deceased plaintiff

Prayer:- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 14.10.1996 in A.S.No.15 of 1995 on the file of the II Additional District Judge cum-Additional Chief Judicial Magistrate, Krishnagiri, partly confirming the judgment and decree dated 26.10.1994 in O.S.No.178 of 1985 on the file of the District Munsif, Krishnagiri.

For Appellant : Mr.V.Sekar
for Mr.C.R.Muralidharan

For Respondent : Mr.J.Hariharan
RR 2 to 5 for V.Nicholas

1st Respondent : No Appearance

JUDGMENT

The appeal is filed by defendants 1 to 4 & 6 in the suit filed for partition. The case of the plaintiff is that one Thanappa Gounder had three sons by name Periya Ramasamy, Ellappan and Chinna Ramasamy, they divided the family property in the year 1945 and were living separately. The plaintiff is the son of Periya Ramasamy, through his first wife Muniayamma. After the death of Muniamma, Periya Ramasamy married one Chinna Muniamma and through her, he had five sons and three grand daughters born to his predeceased-Ramasamy son.

2. Chinnathambi and Thanappan, who were sons of Periya Ramasamy born through his second wife predeceased their father. Periya Ramasamy died leaving behind his second wife Chinna Muniamma, the plaintiff, (first wife son) and defendants 1 to 6 (who are the two sons born through the second wife/7th defendant, Muthammal-wife of predeceased son and her three daughters). Till 1983 the plaintiff was getting the share from the family property but thereafter the defendants stopped paying his share and therefore, suit for partition by metes and bounds claiming half share in the suit schedule property.

3. The defendants contested the plaint on the ground that the plaintiff is not the son of Periya Ramasamy. Plaintiff is a stranger to the property and even otherwise, the properties shown in the suit schedule are not properly described. Further, item Nos.2 and 4 of the 'A' schedule property are self-acquired properties of 7th defendant purchased through Ex.B.1 and item Nos.2 and 3 of 'B' schedule property are self-acquired properties of 7th defendant purchased through Ex. B3. Therefore, the plaintiff can have no claim over those properties. If at all the plaintiff has any claim as a legal heir of Periya Ramasamy, he is entitled for only 6/35 shares in the rest of the properties.

4. The trial Court, considering the rival plea has framed five issues, examined P.Ws.1 to P.W.3, D.W.1 and D.W.2 and marked Exhibits Ex.A1 and B1 to B4 and held that the entire suit schedule properties are liable to be divided among the plaintiff and the defendants and the plaintiff is entitled for 9/35 shares.

5. Aggrieved by that, the defendants preferred appeal suit wherein the First Appellate Court excluded the properties covered under Ex.B3 sale deed which are item Nos.2 and 3 of the 'B' schedule, holding that it is the property of the 7th defendant and it is not a joint family property for division among the plaintiff and defendants. Not satisfying with the judgment and decree, the present Appeal is filed by the

defendant. At the time of admission the following substantial question of law as framed:-

Whether the Courts below are correct in treating the properties of the 7th defendant as joint family properties in the absence of any pleadings to that effect?

6. The learned counsel for the appellants submitted that under Ex.B1, sale deed the 7th defendant purchased item Nos.2 and 4 of the 'A' schedule property from one Chinna Ramasamy and enjoying it as her absolute property since it's purchase. The Courts below has erroneously concluded that the property should be considered as Joint family property, since patta is in the name of Chinna Ramasamy and had not been transferred in the name of Chinna Muniamma, even after it was purchased. For the said purpose the learned counsel for the appellants submitted that patta cannot be treated as a title document and when there is a sale deed duly executed and registered, the Courts below ought not to have included the property covered under the sale deed marked as Ex.B1. Referring to the judgment of our High Court in Ranganayaki v S.R.Srinivasan and others reported in [1978 (1) MLJ 56] the learned counsel for the appellants submitted that when the property stands in the name of a female member, unless there is a clinching evidence to the contrary, the property should be treated as the absolute property of the female member and cannot be presumed to be the property of the joint family members held on their behalf by the female member.

7. Per contra, the learned counsel for the respondents submitted that in so far as Ex.B1 is concerned, the First Appellate Court after going through the document, has found that the properties covered under Ex.B1 are not the properties which are arrayed as item Nos.2 and 4 in the 'A' schedule in the suit, as the village name, extent and the predecessor in title differs and does not tally with the description of the suit property enumerated as item Nos. 2 and 4 in the 'A' schedule.

8. Perusal of Ex.B1 shows that it was purchased on 10.06.1957 by one Muniamma from one Chinna Ramasamy. This property is situated at Kotukolai village is of an extent of 4 acres, the survey numbers are shown as 101/3 and 103/1 whereas the perusal of the suit schedule indicates that 2nd and 4th item properties are located to Kangalari Village. Pointing out these discrepancies, the First Appellate Court has rejected the plea of the 7th defendant that item Nos.2 and 4 of the 'A' schedule property has to be excluded from partition.

9. In a suit for partition, it is the primary duty of the plaintiff to show that the properties sought for partition are

available either with the plaintiff or with the defendant. A prima facie material should be placed by the parties to indicate that it is their family property held jointly and available for partition. Mere acceptance or denial of the contesting parties may not be sufficient to decide the claim unless there is prima facie material to show the contesting parties are owners of the properties in question. In this case the applicant/defendants have relied upon Ex.B1 and Ex.B2. Since the properties stand in the name of 7th defendant they claim it the absolute and exclusive property of 7th defendant and it is not amenable for partition as it is not a joint family property. Plaintiff has not produced any documents either to show these properties are available for partition or to show that these properties were inherited by his ancestor. Despite want of evidence, the defendants themselves concede to some extent that the plaintiff has share in the properties of Periya Ramasamy except suit properties shows as item Nos. 2 and 4 in 'A' schedule property, item Nos.3 and 4 in the 'B' schedule property covered under Ex.B1 and B3.

10. While the First Appellate Court has accepted Ex.B2 and excluded item Nos.2 and 3 of 'B' schedule holding that property held by a female members cannot be treated as a joint family property except contrary to prove the same, the same yardstick ought on to have been applied to Ex.B1 also, which the First Appellate Court has filed to adopt. Therefore, except pointing out the error and exempting item Nos. 2 and 4 in A schedule property for partition, the other observations of the trial Court as confirmed by the First Appellate Court is held to be legally correct. The Courts below ought to have accepted Ex.B1 and should not have included item Nos.2 and 4 of 'A' Schedule property in the list of properties available for partition, when there is no proof to show that the properties were held by the 7th defendant on behalf of other family members and the property was purchased in her name from out of the joint family income.

11. Regarding apportionment of the shares, it is admitted fact that Periya Ramasamy had two wives. Through his first wife Muniamma, he had a son by name Ramasamy who is the plaintiff and through the second wife Chinna Muniamma who is the 7th defendant, he had five sons. Two of them predeceased Periya Ramasamy and one son died after the death of his father leaving behind his wife and 3 daughters. As per the Hindu Law of Succession, on the day Periya Ramasamy died, the succession opened with plaintiff and five other sons. Applying the Principle of notional partition, Periya Ramasamy has to share the property with his sole son through his first wife Muniamma and five sons through his second wife Chinna Muniamma. Thus each of six sons along with their father are entitled for 1/7 shares each. The

share of Periya Ramasamy has to be divided among his three sons and wife and daughters of the predeceased son, who will be getting the share of their deceased father. Thus the 1/7th share of Periya Ramasamy has to be divided between his wife and his sons, at the ratio of 1/35 shares each.

12. Accordingly, the plaintiff is entitled for 6/35 shares the defendants 1 and 2 will each get 6/35 shares whereas the defendants 3 to 6 being the LR's of the deceased son of Periya Ramasamy will together get 6/35 shares. Chinna Muniamma is entitled for 11/35 shares (2/7 of her pre deceased sons Chinnathambi and Thanappan and 1/35 through her husband). Pending appeal the 7th defendant died and her LR's are already on record. The share of 7th defendant shall be taken by her legal heirs per capita as per law.

13. With these findings and observations the appeal is partly allowed. No order as to costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

jv

To

1 The II Additional District Judge cum-
Additional Chief Judicial Magistrate,
Krishnagiri

2 The District Munsif,
Krishnagiri.

+1cc to Mr.Shiva Kumaran, Advocate, S.R.No.3516

+1cc to Mr.Nicholas, Advocate, S.R.No.3465

NRJK(CO)

RS(03/03/2017)

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S.A.No. 407 of 1999