

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 3.01.2017

CORAM

THE HON'BLE DR.JUSTICE G.JAYACHANDRAN

S.A.No.1307 of 2000

1.Murugasamy ... 1st Appellant/1st Defendant
2.Palaniammal (Deceased) ... 2nd Appellant/3rd Defendant
3.Saraswathy
4.Vallliammal 3rd & 4th Appellants

(Appellants 3 and 4 are brought on record as legal representatives of the deceased second appellant vide order dated 09.10.2013 made in C.M.P.Nos.734 to 736 of 2012 in S.A.No.1307 of 2000)

Vs.

1.Poomathi ... 1st Respondent/Plaintiff
2.Muthusamy ... 2nd Respondent/2nd Defendant

Prayer: Second Appeal is filed under Section 100 of Code of Civil Procedure against the Judgment and Decree dated 22.03.2000 passed in A.S.No.121 of 1999 by the learned II Additional District Judge, Erode, modifying the judgment and decree dated 19.07.1995 passed in O.S.No.78 of 1992 on the file of the Subordinate Judge, Dharapuram.

For Appellants : Mr.A.K.Sridharan

For 1st Respondent : Mr.S.Saravanan

For 2nd Respondent : Mr.B.Easwaran

JUDGMENT

This second appeal has been filed against the Judgment and Decree dated 22.03.2000 passed in A.S.No.121 of 1999 by the learned II Additional District Judge, Erode, modifying the

judgment and decree dated 19.07.1995 passed in O.S.No.78 of 1992 on the file of the learned Subordinate Judge, Dharapuram.

2.The appellants are first and third defendants in the suit. Pending appeal, the second appellant died. Hence, the legal representatives of the deceased second appellant are brought on record as third and fourth appellants.

3.The brief facts, which led to the filing of this second appeal, are as follows:

(i)The suit is for partition filed by the first respondent herein alleging that the suit properties are her ancestral properties. The first defendant, who is the father of the plaintiff, was the kartha of the family. He became addict to drink and driven away his wife and daughter from the matrimonial home on 10.01.1991. Therefore, the mother of the plaintiff, on her behalf and on behalf of her minor daughter filed O.S.No.198 of 1991 against the first defendant for maintenance and the said suit was compromised out of Court. Hence, the plaintiff's mother withdrew the suit. After some time, again, the first defendant driven away the plaintiff and her mother. The plaintiff came to know that her father, who is the first defendant, in order to cheat her, created documents alienating the ancestral properties and further found that he had entered into an agreement with one Muthusamy, who was impleaded as second defendant in the suit, in respect of two acres of land in Survey No.273. The said Muthusamy filed a suit for specific performance in O.S.No.129 of 1991. Due to amendment of the Hindu Succession Act, the plaintiff is also entitled to a share in the ancestral property. Therefore, she sought for partition. The first defendant refused to give her share. Hence, she filed a suit for partition by metes and bounds of the suit schedule property.

(ii)The first defendant filed his written statement wherein, it is stated that in the suit schedule properties, item Nos.1, 2, 3, 4 and 7 are the ancestral properties and he denied the nature of the properties, which are shown as item Nos.5 and 6 of the suit properties. According to the first defendant, item Nos.5 and 6 of the suit properties are his self acquired properties and no one else has the right over the property. Item Nos.1, 2, 3, 4 and 7 of the suit properties were divided among the children of Angamuthu Gounder, who died 27 years ago. In the said division, the first defendant got 5/8 share in those properties and his mother and two sisters got 1/8 share each. On 18.07.1990, the sister of the first plaintiff relinquished her respective share in favour of the first defendant and her mother Palaniammal. By virtue of the release deed, the first defendant has 6/8 share and his mother Palaniammal has 2/8 share in the suit item Nos.1 to 4 and 7. Therefore, in respect of

these items of the properties, Palaniammal is a necessary party who hold 2/8 share. Therefore, the suit is bad for non-joinder of Palaniammal.

(iii) In respect of item Nos.5 and 6 of the suit properties, which were purchased from the independent income of the first defendant. The mother of the plaintiff already initiated a partition suit in O.S.No.140 of 1991 on behalf of the plaintiff and the same was dismissed. Therefore for the very same relief, the plaintiff cannot file subsequent suit to claim ratio of the share and the same is not sustainable. Therefore, the suit has to be dismissed.

(iv) The second defendant, in his written statement, contended that the plaintiff and the first defendant are colluding together and filed the present suit to defeat his right. Insofar as the suit filed for specific performance is concerned, an agreement was entered into by the first defendant with him in respect of two acres out of 5.88 acres in Survey No.273. The Court has already decreed the suit filed for specific performance by him in O.S.No.129 of 1991 vide judgment dated 08.04.1992. Hence, the present suit is liable to be dismissed for res judicata and non joinder of necessary party. The third defendant, who is the mother of the first defendant, got herself impleaded in the suit and filed written statement subsequently to support the case of the first defendant, sought for dismissal of the suit.

(v) The trial Court, after considering the deposition of the respective parties and Exs.A.1 to A.3 and Exs.B.1 to B.5, has restricted the claim of the plaintiff to 2.5/8 share instead of 1/2 share and in respect of two acres of land sold to the second defendant, the trial Court has held that in the light of the decree passed in the suit for specific performance filed by the second defendant, his right need not be disturbed.

(vi) Aggrieved by the judgment of the trial Court, the plaintiff preferred an appeal in A.S.No.121 of 1999 restricting the share of the plaintiff to 2.5/8 share is erroneous. The first appellate Court after reappreciating the evidence, held that all the seven items of the suit schedule properties are ancestral properties and devolved from one Angamuthu and there is no evidence to show that item Nos.5 and 6 are self acquired properties of the first defendant. Having held so, the first appellate Court, while considering the apportionment of shares has held that the suit schedule properties being ancestral property in nature, the first defendant and his father have to share the property equally by notional partition and the 1/2 share of the deceased has to be divided between his wife, son and two daughters. Thus, each one of them will get 1/8 share.

Since the daughters have released their 1/8 share each in favour of first and third defendant through Ex.B.5, the first defendant is entitled to 6/8 share and the third defendant, being wife of Angamuthu, will get 2/8 share. From her father/the first defendant, has to get 3/8 share. The first appellate Court, accordingly modified the judgment and decree of the trial Court to the effect that the plaintiff is entitled to 3/8 share in the suit schedule properties.

(vii) Aggrieved by the judgment and decree of the Courts below, the first and third defendants preferred the second appeal on the ground that, non exclusion of item Nos.5 and 6 of the suit properties is incorrect in the light of Exs.B.3 and B.4, and alienation of 3/8 share of the plaintiff's share to plaintiff including the 2/8 share he got through release deed Ex.B.5 is erroneous. Further, the dismissal of the earlier partition suit as withdrawn and have been taken as res judicata for the present suit.

4. At the time of admission, this Court has formulated the following substantial question of law for consideration:

"Is the lower appellate Court correct in fixing 6/8 share for the appellant herein and allowed 3/8 share to the first respondent herein and thereby neglecting the release deed dated 18.07.1990 under Ex.B.5?".

5. It is an admitted fact that except item Nos.5 and 6 of the properties, all other properties were the properties of Angamuthu Gounder. At the time of death of Angamuthu Gounder, the first defendant was only six years old and his mother, who is the third defendant herein had taken care of the family and the income from the ancestral properties. Item Nos.5 and 6 of the properties have been purchased in the name of the first defendant. Ex.B.5, release deed executed by the sisters of the first defendant in respect of item Nos.1 to 4, and 7 proved that the release was made for consideration on receipt of Rs.20,000/- only and the said money was also given from the income of the ancestral property. Therefore, the apportionment made by the first appellate Court modifying the judgment and decree of the trial Court is perfectly right and there is no illegality or irregularity in fixing the share of the appellant on the proportion 6/8 and allowing 1/2 of it to the plaintiff. Therefore, there is no reason to interfere with the judgment passed by the first appellate Court. The substantial question of law is answered accordingly.

6.In the result, the Second Appeal is dismissed and the judgment and decree of the first appellate Court passed in A.S.No.121 of 1999, dated 22.03.2000, is confirmed. There is no order as to costs.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

cla

To

1.The II Additional District Judge,
Erode.

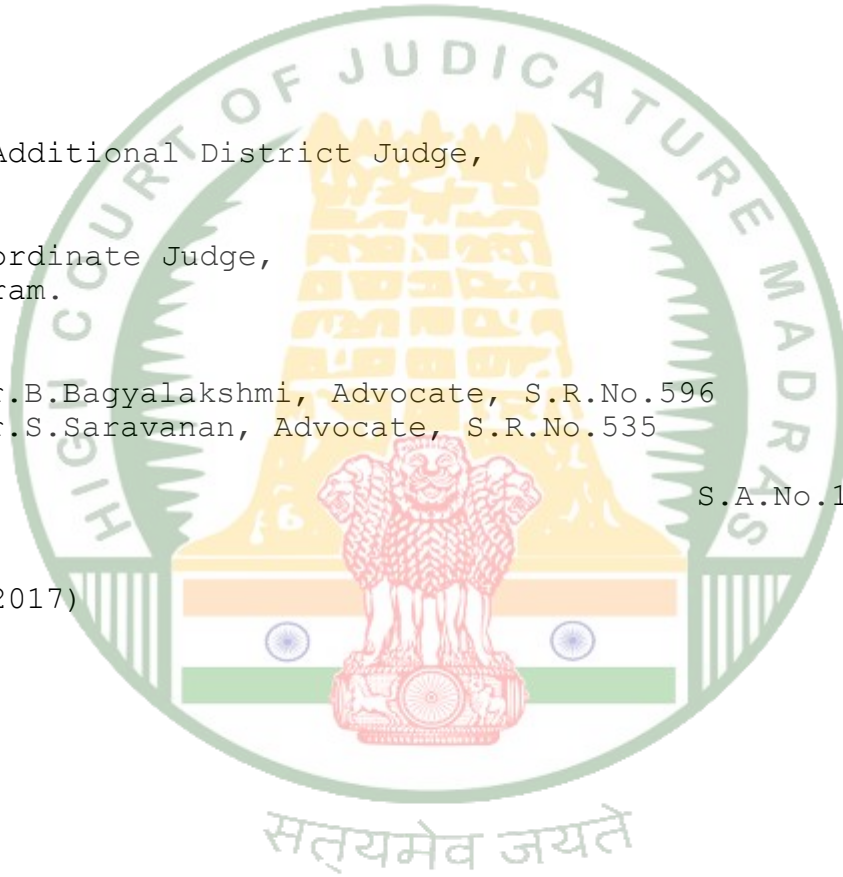
2.The Subordinate Judge,
Dharapuram.

+1cc to Mr.B.Bagyalakshmi, Advocate, S.R.No.596

+1cc to Mr.S.Saravanan, Advocate, S.R.No.535

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