

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.02.2017

CORAM

THE HONOURABLE MR.JUSTICE R. SUBRAMANIAN

A.S.No.229 of 2010

and

MP.No.1 of 2010

1. M.Ponmalai
 2. P.Maniyammal
 3. P.Vadivel
- ...Appellants/Defendants

..Vs..

Minor Divyadarshini
Rep. by its Mother / Guardian
Poongodi

...Respondent/Plaintiff

Prayer: Appeal filed under Section 96 CPC, against the judgment and decree dated 30.11.2009 made in O.S.No.169 of 2007 on the file of the Additional District Court - Fast Track Court No.1, Salem.

For Appellants : Mr.T.Murugamanickam

For Respondent : Mr.M.Devaraj

JUDGMENT

The defendants who suffered a decree for partition and separate possession, are the appellants herein. The plaintiff, who is the daughter of the 3rd defendant in the suit, sought for partition of separate possession of her 1/3 share contending that the suit 1st item which consist of 17 sub items, was allotted to the 1st defendant in a family partition that took place on 16.09.1986 among Muthu Gounder, his wife Chellammal, (parents of the 1st defendant) the 1st defendant and his brother Chellappan. The plaintiff would further add that the suit 2nd item, which consists of 19 sub items, was purchased by the 1st defendant in the name of the 3rd defendant from and out of the income from the joint family properties. The 3rd defendant who is the son of the 1st defendant, had married Poongodi, the mother of the plaintiff and it turns out that they are living apart due to certain misunderstanding. According to the plaintiff, the suit properties are of ancestral properties in

the hands of the 1st and 3rd defendants, therefore she would be entitled to 1/3rd share in the said properties as the daughter of the 3rd defendant.

2. The suit was resisted by the defendants contending that none of the properties are ancestral properties, and the existence of the joint of the family was denied. It was further contended that the 1st defendant was doing a transport business and his brother Chellappan was an officer in a nationalised bank. From and out of their separate income, the brothers acquired various properties in their joint names, then they decided to have a partition of the properties which were acquired by from their own income, the properties of Muthu Gounder were also included and divided in the partition deed dated 16.09.1986. According to the defendants, the said act of division would amount to a family arrangement and the same would not result in the properties having been treated as ancestral properties in the hands of the 1st defendant. On the aforesaid pleas, the defendants sought for dismissal of the suit. The 3rd defendant who is the absolute owner of the 2nd item of the suit property, has executed a settlement deed dated 13.09.2005 in favour of his mother, the 2nd defendant. The 2nd defendant is the absolute owner of the 2nd item of the suit property.

3. The learned Additional District Judge, FTC No.1, Salem, on the above pleadings, framed the following issues :

- "1) Whether the suit properties are ancestral properties of the 1st and 3rd defendants?
- 2) Whether the Settlement Deed dated 13.09.2005 is valid?
- 3) Whether the plaintiff is entitled to a share in the suit properties? and
- 4) To what other relief, the plaintiff is entitled to?"

4. On the side of the plaintiff, her mother Poongodi was examined as PW1 and Exhibits A1 to A9 were marked. On the side of the defendants, the 1st defendant was examined as DW1 and the 3rd defendant was examined as DW2 and Exhibits B1 to B20 were marked.

5. On a consideration of the oral and documentary evidence, the learned trial Judge concluded that the suit properties are ancestral properties in the hands of the 3rd defendant. The learned trial Judge took note of the recitals in the partition deed dated 16.09.1986, which described the suit properties as family properties that had devolved on them through their paternal ancestors. The learned Judge also considered the

pleadings of the parties in the proceedings before the Family Court and came to the conclusion that the suit properties are joint family properties. The learned trial Judge had decreed the suit granting 1/3rd share to the plaintiff. Aggrieved by the said decree, the defendants have preferred the above appeal.

6. Heard Mr.T.Muruga Manickam, the learned counsel appearing for the appellants and Mr.M.Devaraj, the learned counsel appearing for the respondent.

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

- "1) Whether the trial Court was justified in concluding that the suit properties are ancestral properties, in the absence of any proof regarding availability of the nucleus in the hands of Muthu Gounder, namely the father of the 1st defendant?
- 2) Whether the 2nd item of the suit schedule properties, could be termed as joint family properties? and
- 3) What is the share that the plaintiff is entitled to? "

8. The learned counsel appearing for the appellants contended that it is for the plaintiff to establish the availability of the nucleus in the hands of Muthu Gounder in order to claim that the 1st item of the suit properties are ancestral properties in the hands of the 1st defendant. According to him, in the absence of such evidence, the Court cannot conclude that the 1st item of the suit properties are ancestral properties. He also pointed out that from the oral evidence of the 1st defendant, it is clear the 1st defendant was doing transport business and his brother Chellappan was employed in a bank and they purchased the properties jointly under various sale deeds namely Ex.B5 and Ex.B6 dated 03.08.1976 and 12.06.1977.

9. Per contra, the learned counsel appearing for the respondent/ plaintiff would submit that the partition deed dated 16.09.1986 specifically recites that Muthu Gounder and his sons constituted a joint family and the properties belonged to the joint family having been inherited from the paternal ancestors. The recitals in the said document reads as follows:-

"நாம் ஒரே இந்து அபிபக்த குடும்பத்தைச் சார்ந்தவர்கள் ஆகிறோம். அடியிற்கண்ட சொத்துக்கள் நமக்கு பிதூராஜிதமாயம் நமக்குப் பொதுவானதுமான குடும்ப பொது சொத்துக்களாகும். இவைகளை நாம், இதுவரையில் பொதுவாகவே அனுபவித்துக் கொண்டு ஒற்றுமையுடன் இருந்து வந்தோம்."

10. The learned counsel appearing for the respondent further contended that the above recitals would show that the properties belonged to the joint family and they were divided between the father and two sons. Therefore, they should only be treated as joint family properties. He also pointed out that, under the said document the parents namely Muthu Gounder and his wife have not taken any property and the properties which were standing in the name of Muthu Gounder also were treated as joint family properties and divided between his sons. The learned counsel appearing for the respondent would further submit that having conceded that the properties are joint family properties in the partition deed, Ex.A1, the defendants cannot be allowed to take a new stand that the properties are self-acquisition of the 1st defendant and his brother Chellappan.

11. I find that there is no explanation whatsoever on the side of the defendants about the said recitals in the partition deed marked as Ex.A1. In my considered opinion, the defendants are estopped from contending that the properties are not joint family properties. Therefore, I answer Point No.1 against the appellants and conclude that the properties mentioned as item 1 of the suit schedule are ancestral properties in the hands of the 1st & 3rd defendants.

12. Insofar as the properties described as 2nd item is concerned, it is claimed that the 3rd defendant worked as Mechanic in Hatsun Agro Product Limited between the years 1992 and 2002 and out of his salary, he has purchased the properties described as 2nd item in the suit schedule. Ex.B14 is relied upon as the proof of his employment. Ex.B14 shows that the 3rd defendant had worked as Mechanic in the said company for the period from 01.02.1992 to 27.07.2002. The said document does not disclose the details of his income. While resisting the suit for maintenance filed by the mother of the plaintiff, the 3rd defendant has contended that he has no income and the lands which he owned are rain fed lands. There are 19 sub-items of the 2nd item in the suit. Sub Items 1 to 17 are covered by Ex.A2, which is a sale deed executed by his paternal uncle in favour of the 3rd defendant on 27.02.1995. The properties conveyed under Ex.A2 were allotted to Chellappan, in the partition deed dated 16.09.1986 namely Ex.A1. The sale consideration therein is Rs.75,000/-. The fact that the family was in possession of ancestral properties, has not been denied. The said item 1 is measuring about 5 acres and there are two Wells along with electricity service connections. Therefore, it can be reasonably presumed that the family had surplus income, which has been the source for purchase of the properties shown in item 2.

13. The 3rd defendant, who is junior member of the family cannot claim absolute title to the properties that stand in the name, unless he is able to show that he had sufficient separate income which would have formed the consideration of the purchase. In my considered opinion, the 3rd defendant had not discharged the said Onus. Though, initially burden to show existence of the nucleus is upon the plaintiff in a case, where existence of the nucleus is found, then the burden shifts to the member in whose name the properties stand to show that he had enough separate income to purchase the properties. In the absence of such evidence on the side of the 3rd defendant, I am constrained to uphold the conclusion of the learned trial Judge that the 2nd item of the suit properties would also be joint family properties, having been purchased out of the income from the 1st item. It is not the case of the defendants that the family was large and there was no surplus income. Admittedly, the 3rd defendant is the only son of the 1st & 2nd defendants. An attempt was made to screen away the properties from the plaintiff by executing a settlement deed dated 13.09.2005. This expresses the intention of the first defendant to some how deny a share to the the plaintiff in the suit. In view of the above discussion, the 2nd point is answered against the appellants / defendants.

14. The learned counsel appearing for the appellants would contend that the trial Court erred in granting 1/3rd share to the plaintiff. He would contend that the plaintiff, if at all would be entitled to $\frac{1}{4}$ share that is 1/2 share in the share of the 3rd defendant. I am inclined to agree with the counsel for the appellant on this legal issue. Though Act 19 of 2005 as well as Act 1 of 1990 make daughters coparceners in the family, they are made made coparceners along with their father only and not along with their grand-fathers. Therefore, once properties are held to be joint family properties, the 1st defendant and the 3rd defendant would be entitled to 1/2 share each. The 1/2 share of the 1st defendant would devolve only under Section 8 on his Class I heirs. During the lifetime of the 3rd defendant, the plaintiff cannot be treated as a Class I heir of the 1st defendant.

15. Therefore, the plaintiff cannot claim share in the 1/2 share of the 1st defendant and if at all she could claim it can be only in the share of the 3rd defendant. The 1st defendant and the 3rd defendant being coparceners, are entitled to 1/2 share each and the plaintiff would become coparceners of the 3rd defendant only in respect of his 1/2 share and therefore the plaintiff would be entitled to only 1/4 share and not 1/3rd share as found by the Learned trial Judge.

16. In fine, this appeal is partly allowed and the conclusion of the trial Court with respect to the nature of properties, is upheld and the trial Court's decree in favour of the plaintiff for 1/3rd share is modified as 1/4th share in the suit properties. There will be a preliminary decree declaring that the plaintiff is entitled to $\frac{1}{4}$ share in the suit properties. Considering the close relationship between the parties, I make no order as to costs. Consequently, connection miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

mk
To

The Additional District Judge,
Fast Track Court No.I,
Salem.

+lcc to Mr.T.Murugamanickam, Advocate Sr.7067
+lcc to Mr.M.Devaraj, Advocate Sr.6756

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