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IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM

THE HONOURABLE MR. JUSTICE N. SATHISH KUMAR

A.S.No.851 of 2010

M.Prabakar		... Appellant/ defendant
	Vs.	
R.Sivakami		... Respondent/plaintiff

Prayer:- This Appeal suit has been filed under Section 96 of CPC read with Section, against the judgment and decree of the Additional District cum Fast Track Court No.1, Erode dated 09.12.2009 and made in O.S.No.199 of 2008.

For Appellant	: Mr.V.Lakshmi Narayanan For Mr.R.Marudhachalamurthy
For Respondent	: Mr. N.Thiagarajan

J U D G M E N T

Aggrieved over the preliminary decree passed by the Trial court dividing the suit property into three shares and allot 1/3 shares to the plaintiff, the present appeal came be filed by the defendant.

2. For the sake of convenience, the parties are referred to as per their ranking before the trial Court.

3. The brief facts of the case of the plaintiff are as follows:

(i) The plaintiff is the sister of the defendant. Pursuant to the partition that took place between the defendant and the father of the parties, by name, Mohan, on 27.3.1975, the suit "A" schedule properties was allotted to the said Mohan and "B" schedule property was allotted to the defendant herein. The said Mohan died intestate on 12.8.1987 leaving behind the plaintiff, the defendant and his wife Soundaram as his class I legal heirs. Therefore, the plaintiff is entitled to 1/3 share in the suit properties.

(ii) When the plaintiff and her husband were sick and were being hospitalized for a few weeks prior to 3.4.2008, the defendant, taking advantage of her absence from the suit property and her illness, was making attempt to demolish the existing structure in the suit properties and to reconstruct new structure thereon. Hence, the suit.

4. The brief averments made in the written statement filed by the defendant are as follows:

(i) Admitting the relationship and also the allotment made in the suit properties to Mohan, the father of the defendant, by way of partition on 27.3.1975, it is the contention of the defendant that the plaintiff is not entitled to 1/3 share in the suit properties. The alleged joint possession is also denied by the defendant. The allegation that the plaintiff used to come to Erode and often stay for a couple of days in the suit properties and again leaves to Chennai is also denied. The mesne profits and the damages claimed by the plaintiff is also denied.

(ii) It is the contention of the defendant that at the time of marriage of the plaintiff, she was presented with gold ornaments,

costly house hold articles and cash. Two months after marriage, the plaintiff had left to Chennai to lead a family life. At the time of leaving home, the plaintiff had voluntarily relinquished her share in the family property and surrendered her share to the defendant. After the death of the said Mohan, the father of the plaintiff and the defendant, the defendant and his mother were in joint possession and enjoyment of the suit properties in exclusion of the plaintiff. The plaintiff was residing at Chennai and she never visited the suit properties. The defendant's mother out of love and affection had executed Settlement Deed in favour of the defendant in respect of her separate property on 23.5.2007 and also executed registered Sale Deed for 1/3rd share in the suit properties on 08.6.2007 in favour of the defendant without anybody's inducement. The plaintiff was aware of the Settlement Deed and also Sale Deed executed by her mother in favour of the defendant. Only in the year 2008, when his mother came to Chennai to the plaintiff's house, the plaintiff poisoned her mind with ill advice and brought out an evil design to cause issuance of legal notice with an ulterior motive. There is no cause of action in the suit and the suit is barred by limitation. Hence, the

defendant prayed for dismissal of the suit.

5. Based on the above pleadings, the Trial court has framed the following issues:

1. Whether suit properties were in joint possession of the plaintiff and the defendant?

2. Whether the plaintiff has relinquished her share in favour of the defendant orally?

3. Whether the settlement deed executed in favor of the defendant by mother and sale deed in respect of 1/3 in favor of the defendant is true?

4. Whether the plaintiff is entitled 1/3 share in the suit property?

5. To what relief.

6. The Trial Court has also framed the following Additional Issue:

Whether the plaintiff is entitled to mesne profits?

7. On the side of the plaintiff, plaintiff examined herself as P.W.1 and one Selvaraj was examined as P.W.2 and Exs.A1 to A3 were marked. On the side of the defendant, the defendant examined himself as D.W.1 and no documents were marked.

8. On the basis of the evidence and materials available on record, the trial Court, while negating the mesne profits, passed a preliminary decree allotting 1/3rd share to the plaintiff. As against the same, the present appeal came to be filed.

9. The learned counsel appearing for the appellant/defendant would submit that the suit properties are the ancestral properties and that partition took place on 27.3.1975 between the defendant and his father, wherein "A" schedule was allotted to the father and "B" schedule was allotted to the 1st defendant. It is submitted that now the suit has been filed in

respect of "A" schedule properties. The learned counsel for the appellant/defendant would further submit that the father of the parties died on 12.8.1987, whereas the suit has been filed on 02.6.2008. Though the mother of the parties are also one of the legal heirs of late Mohan, she has not been arrayed as a party and on that score itself, the suit is not maintainable. According to the learned counsel, succession opened in the year 1987 and, therefore, the plaintiff, in the year 2008, cannot claim any share in the dwelling house. It is further stated by the learned counsel that the evidence of the parties would clearly show that the plaintiff is all along residing at Chennai and she never in possession of the suit properties and that the circumstances pleaded in the written statement clearly established the case of ouster against the plaintiff. Hence, the learned counsel submitted that the judgment of the Trial court granting decree in favour of the plaintiff is not maintainable.

10. In support of his arguments, the learned counsel for the appellant/defendant has placed reliance on the judgments reported in 100 L.W. 435 (**A.RAMACHANDRA PILLAI V.**

VALLIAMMAL) A.RAMACHANDRA PILLAI V. VALLIAMMAL);
 2014 (2) MWN (Civil) 168 **(L.SURESH AND ANOTHER V.**
YASOTHAMMAL AND OTHERS); 1993-3-LW 742
(D.V.JAGANATHAN AND 5 OTHERS V. P.R.SRINIVASA AND
5 OTHERS); AND (2009) 6 SCC 99 **(G.SEKAR V. GEETHA**
AND OTHERS) .

11. Countering the arguments advanced by the learned counsel for the appellant/defendant, the learned counsel appearing for the respondent/plaintiff submitted that once the properties are ancestral properties and that the same has been divided between the coparceners, the property became self acquired property of late Mohan, the father of the parties herein.

It is submitted by the learned counsel that since the said Mohan died leaving behind the plaintiff, the defendant and his wife, i.e. mother of the parties, who are all class – I Legal heirs, as per Section 8 of the Hindu Succession Act, all of them are entitled to get equal shares. It is the contention of the learned counsel that since mother's 1/3rd share has already been purchased by the appellant/defendant, the question of impleading mother as a

party to the suit does not arise at all. It is also the contention of the learned counsel that the defendant himself admitted about the share of the plaintiff. Therefore, the judgment of the Trial court is well balanced and it does not require any interference. In support of his argument, the learned counsel has placed reliance on the judgment reported in 2016 2 CTC 306 (**UTTAM V. SAUBHAG SINGH AND OTHERS**).

12. In the light of the above submission, the points that arise for consideration in this appeal are as follows:

(1) Whether the plaintiff is not entitled to 1/3 share in the suit properties?

(2) Whether the plaintiff is ousted from the suit properties and not entitled to any share in the suit properties? and

(3) What relief, the plaintiff is entitled to?

Point Nos. 1 to 3:

13. The relationship between the parties is not disputed. Originally the suit properties and other properties are the ancestral properties and since the defendant and his father

became coparceners in the ancestral properties, they divided the suit properties in the year 1975. These facts are not disputed. It is the admitted fact that in the partition effected between the 1st defendant and his father in the year 1975, the suit properties were allotted to the father and "B" schedule property in the partition deed was allotted to the defendant exclusively. Though partition Deed has not been exhibited before the Court by both sides, the respective pleadings of the parties would clearly prove the above facts. Further, there is no dispute with regard to the allotment of share. Once the ancestral properties have been divided among the coparceners, share allotted to late Mohan, the father of the parties, would be treated as his separate property. After the death of said Mohan, i.e., the father of the parties, the above properties would devolve upon class I legal heirs. Admittedly, the said Mohan died intestate leaving behind the plaintiff, the defendant and his wife as his legal heirs and hence, each of them are entitled to 1/3rd share in the suit properties. It is also not in dispute that 1/3rd share of Soundaram, mother of the parties, was also purchased by the defendant. Hence, this Court is of the view that non

joinder of the said Soundaram, mother of the parties, will not affect the case. Therefore, the contention of the learned counsel for the appellant /defendant that the suit is bad for non joinder of necessary parties cannot be sustained.

14. Even assuming that there was no partition in the year 1975, as father died in the year 1987, at the time also only the father and son were coparceners in the property, naturally, the interest of the father would devolve upon his legal heirs as per proviso to Section 6 of the Hindu Succession Act prior to Act 39 of 2005. Therefore, the plaintiff is, certainly, entitled to 1/3rd share in the suit properties. In this case, the ancestral properties were also divided separately and hence, the plaintiff is entitled to get share. In this context, it is useful to refer the judgment in the case of ***The Additional Commissioner of Income Tax, Madras-I vs. P.L. Karuppan Chettiar (AIR 1979 MADRAS 1)***, wherein the Full Bench of this Court has held as follows:

"In this case, "P" who along with his wife their son "K" and their daughter-in-law constituted a Hindu Undivided family. There was a partition in this family on 22.3.1954 by a

under which P was allotted certain properties and for his share and he got separated. This partition was recognized by the Income-tax Act 1922. Thereafter, K and his wife and their subsequently born sons and daughter constituted a Hindu undivided family which was the assessee and had been assessed in that status. P died on 9.9.1963, leaving behind his widow and K who was also the karta of the assessee Hindu undivided family as his legal heirs. These two persons succeeded to the properties left by P under S. 8 of the Hindu Succession Act and divided the same between themselves. In the assessments made on the assessee Hindu undivided family for assessment years 1966-67 to 1970-71, the Income-tax Officer included in the computation of the total income, the income received from the properties inherited by K from his father P."

" . . . The question is whether when succession opens under Section 8, Karuppan and his son will take the property in the same manner. Clearly, this is not so. When we search for the relatives mentioned in class I of the schedule

which is attracted by virtue of Section 8, we find no sorts are mentioned at all though the grandson of a deceased son is mentioned. What would be the effect when such a grandson comes into the picture need not be dealt with in this case. But where the son as well as his son are the persons concerned, by applying Section 8 we have to come to the conclusion that the father alone, namely, Karuppan in this case will inherit the property to the exclusion of the grandson. This being the effect of the statutory provision, no interest will accrue to the grandson in the property which belonged to Palaniappa. Even assuming Palaniappa's property is ancestral property in the hands of Karuppan, still because of the effect of the statute, Karuppan's son will not have an interest in the property. This is directly derogatory of the law established according to the principles of the Hindu Law and this provision in the statute must prevail in view of the unequivocal expression of the intention in the state itself which says that to the extent to which provisions had been made in the statute those

provisions shall override the established provisions in the texts of Hindu Law."

15. It is also one of the contention of the learned counsel for the appellant/defendant that since the plaintiff, after marriage, is permanently residing at Chennai and as she was never in possession of the suit properties, she was ousted from the suit properties. It is to be noted that father of the parties died only in the year 1987. Only after the death of the father, succession opened for partition among the class 1 legal heirs. Admittedly, the plaintiff and the defendant are class I legal heirs of the said Mohan. Merely because the plaintiff is residing in the matrimonial house that cannot be a ground to presume that she is totally excluded from the suit properties.

16. It is further to be noted that possession of one co-owner is deemed to be the possession of all others. Merely because one of the co-owner is residing in the house property, that cannot be a ground to presume that the plaintiff is ousted from the suit properties. When the entire written statement is

carefully perused, except taking a plea that the suit is barred by limitation, no other circumstances, whatsoever, pleaded even to infer the so called ouster as against the plaintiff. It is well settled that plea of ouster not only to be pleaded but also to be proved by the cogent and convincing evidence. When the entire evidence of D.W.1 is carefully read, no circumstances, whatsoever, available to infer the so called ouster as against the plaintiff. Further no circumstances, whatsoever brought out by the defendant to prove the contention that the defendant is totally excluded from the suit properties. Therefore, merely because the defendant is residing in the suit properties, which was allotted to his father in the partition, that cannot be a ground to deny the right of the plaintiff from claiming any share from the suit properties. Therefore, the contention of the learned counsel in that aspect is also unacceptable, as possession of one co-owner is deemed possession of others. Hence, this Court is of the view that the plaintiff is entitled to share in the suit properties.

17. Yet another contention of the learned counsel for the

appellant/defendant is that as per unamended Section 23 of the Hindu Succession Act, before Act 39 of 2005, the plaintiff cannot claim any right in the dwelling house. It is to be noted that in the partition between the defendant and his father, the suit properties, fell on the share of the father and hence, the same would be treated as separate property of the father. Though the father died in the year 1987, the suit has been filed only in the year 2008. As per amended Act, dwelling house, as originally contained in Section 23 of the Hindu Succession Act, has been omitted by the Act 39 of 2005. Therefore, the contention of the learned counsel that the plaintiff cannot claim any share in the dwelling house also not sustainable. In view of the aforesaid position, this Court hold that the judgment and decree of the Trial court does not require any interference. Accordingly, these points are answered.

In the result, the appeal is dismissed. The judgment and the decree dated 09.12.2009 made in O.S.No.199 of 2008 passed by the Additional District cum Fast Track Court No.1, Erode, dividing the suit properties into three shares and allot 1/3 shares

to the plaintiff is confirmed. However, there shall be no order as to costs. MP.No.1 of 2010 is closed.

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To

The Additional District Judge,

Fast Track Court No.1,

Erode.

N.SATHISH KUMAR, J.

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**Pre-delivery judgment in
A.S.No.851 of 2010**

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