

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.01.2017

Coram

The Hon'ble Mr. Justice M.M.SUNDRESH

Second Appeal No.687 of 2015  
and  
M.P.No.1 of 2015

1.Minor Ratchana Shree  
2.Minor Lathika Shree  
(minors repl by guardian, mother  
and next friend Usha Nandhini) .... Appellants/Plaintiffs

Vs

1.Thirunavukarasu  
2.Kesavan  
3.Sub Registrar,  
Sub Registrar Office,  
Pappireddipatti,  
Dharmapuri District. .... Respondents/Defendants

Second Appeal filed under Section 100 C.P.C. against the judgment and decree dated 23.12.2014 passed in A.S.No.10 of 2014 on the file of the Additional District Judge, Dharmapuri, reversing the judgment and decree dated 12.03.2014 made in O.S.No.22 of 2012 on the file of the Subordinate Judge, Harur.

For Appellants .. Mr.J.Hariharan  
for M/s.V.Nicholas

For Respondents .. Mr.I.Abrar Md.Abdullah  
for R1 & R2

JUDGMENT

The appellants are the minor children of the first defendant and they filed a suit through their mother seeking partition of 2/3<sup>rd</sup> share in the suit property.

2.It is the specific case of the appellants that there was a strained relationship between the first defendant/father and their mother. In order to defeat the rights of the appellants being the minor children of the first defendant, a sale deed has

been executed by the first defendant in favour of the second defendant and so is the case of the gift deed from the father of the first defendant to him earlier. The suit property is the ancestral/joint family property. The trial Court decreed the suit without making any reference to the issues concerned. The lower appellate Court allowed the appeal on the premise that it is for the appellants to establish a case that the suit property is the ancestral/joint family property. Aggrieved by the same, the appellants are before this Court with this second appeal.

3. At the time of admission, the following substantial questions of law were framed:

(a) The admission of the first defendant that the suit property was given to him under the settlement deed by way of partition and as such the suit property is joint family property whether the lower appellate Court is correct in dismissing the suit by holding the plaintiffs are not entitled to a share?

(b) When the first defendant admitted that his father did not have any separate income and he did not know what happened to the house owned by him and as such it should be presumed that the suit property was purchased by him from and out of the joint family income whether the lower appellate Court is correct in dismissing the suit?

4. After going through the submissions made, the following additional substantial question of law is framed:

"Has not the lower appellate Court committed an error of law in fixing the onus on the appellants to prove that the suit property is the ancestral/joint family property with the father of the first defendant being the Kartha of the family and therefore the matter is required to be remitted back to the trial Court for fresh consideration, especially, when even the said court has not considered the issue raised?"

5. On the above said additional substantial question of law, learned counsel for the parties were permitted to make submissions.

6. Learned counsel appearing for the appellants submits that though the judgment of the trial Court is not supported by reasons, the lower appellate Court has committed an error in fixing the onus on the appellants. Admittedly, the appellants are the minor children of the first defendant represented by their mother. It is not in dispute that she has also filed a

petition for divorce against the first defendant, which is still pending. She cannot depose to produce evidence, which she is not aware of.

7.Learned counsel for respondents 1 and 2 submits that the lower appellate Court has rightly dismissed the suit by placing reliance upon Exs.B2 and B3. Hence no interference is required.

8.The approach of the both the Courts, in the opinion of this Court, is totally unacceptable. The trial Court did not even advert to any materials available on record both oral and documentary. It merely recorded the statement of P.W.1 and decreed the suit. The lower appellate Court has fixed the onus on the plaintiffs to prove the case. Law is quite settled that when the property stands in the name of the Kartha of the family, the burden of proof shifts. Further, the lower appellate Court committed an error in relying upon Exs.B2 and B3. What is important is the character of the suit property - ancestral/joint family property or self-acquired. Therefore, the execution of Exs.B2 and B3 are irrelevant.

9.In such view of the matter, the additional substantial question of law is answered in the affirmative. Accordingly, the judgment and decree rendered by the Courts below are set aside. The matter stands remitted back to the trial Court for fresh consideration. The trial Court is directed to consider the evidence available both oral and documentary and give a specific finding as to whether the suit property is the ancestral/joint family property or self-acquired one. The trial Court is further directed to dispose of the suit within a period of four months from the date of receipt of a copy of the judgment.

10.In the result, the second appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS III)

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Sub Assistant Registrar

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To

1.The Additional District Judge,  
Dharmapuri.

2.The Subordinate Judge,  
Harur.

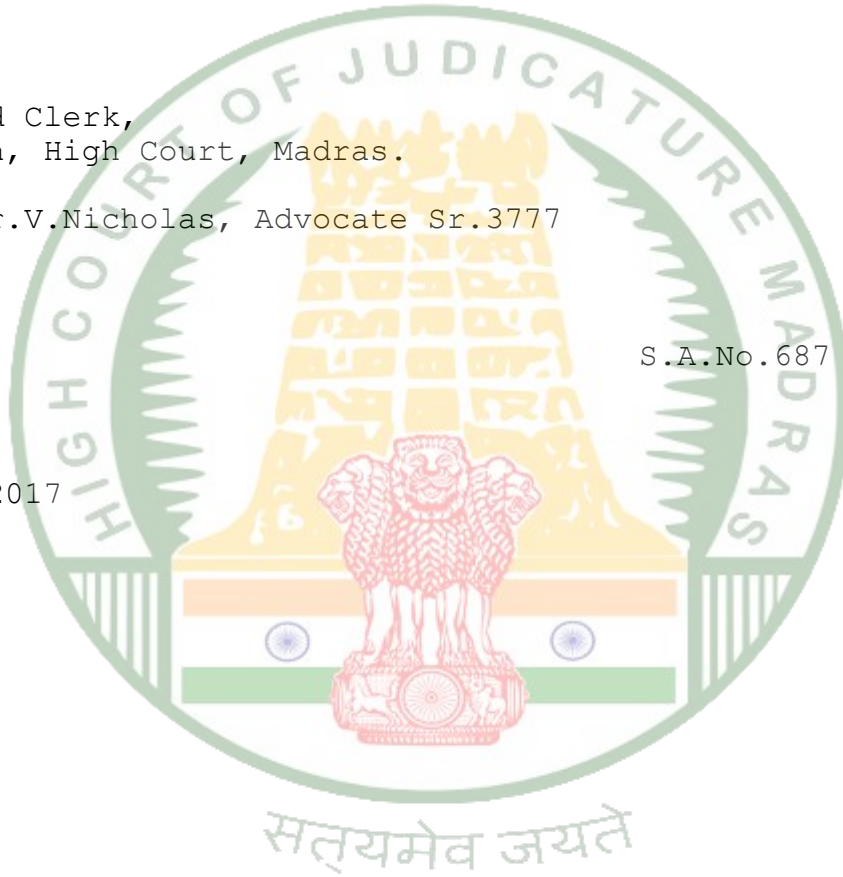
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The Record Clerk,  
VR Section, High Court, Madras.

+lcc to Mr.V.Nicholas, Advocate Sr.3777

S.A.No.687 of 2015

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