

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.08.2017

CORAM:

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

A.S.No.767 of 2008

K.Selvam

..Appellant/2<sup>nd</sup> Defendant

Vs.

1. Vasantha, .... R1/Plaintiff
2. K.Mukunthakumar (Deceased),
3. Chinnammal, .. RR 2 & 3/Defendant 1 & 3
4. Mohana,
5. Praveena,
6. Venkatesh (RR4 to 6 brought on record as LRS of the deceased 2<sup>nd</sup> respondent vide order of this Court dated 25/07/2017 made in MP.No.1/2010 in AS.767/2008.

Prayer:

Appeal filed under Section 96 and under Order 41 Rule 1 of C.P.C. Praying to set aside the Judgment and Decree dated 19.12.2007 in O.S.No.63 of 2006, on the file of the Additional District Judge (Fast Track Court No.1), Salem.

For appellant : Mr.D.Shivakumaran

For Respondents : Mr.R.Mahesh for  
Ms. R.Meenal

JUDGMENT

The second defendant, who is the appellant herein, has filed this appeal, challenging the decree for partition and separate possession of the plaintiff's 1/4<sup>th</sup> share in the suit properties in O.S.No.63 of 2006 on the file of the Additional District Judge ((Fast Track Court No.1), Salem.

2. The suit in O.S.No.63 of 2006 was filed by the daughter of one Krishna Gounder, who died in the year 1987, leaving behind the plaintiff, being the daughter, the defendants 1 and 2 being the sons and the 3<sup>rd</sup> defendant, being the widow.

3. The plaintiff would claim that the first item of the suit property was allotted to the said Krishna Gounder in a partition that took place between him and his brothers on 24.01.1957. The second item of the suit property was purchased by the Krishna Gounder by means of a registered sale deed dated 02.05.1974 and the third item of the suit property was purchased by the late Krishna Gounder on 22.10.1974. Contending that Krishna Gounder died intestate in the year 1987, the plaintiff sought for 1/4<sup>th</sup> share in all the properties.

4. The second defendant filed a written statement, which is adopted by the first and third defendants. The second defendant had inter alia contended that the allotment of the first item in the partition that took place on 24.01.1957 was true and the factum of purchase by Krishna Gounder on 02.05.1974 of the second item and 22.10.1974 of the third item were also admitted.

5. It is however contended that the plaintiff was paid a sum of Rs.4,40,000/- by way of three cheques dated 26.07.1995, 31.07.1995 and 03.08.1995. According to the defendants, these payments were in lieu of the share of the plaintiff in the suit property. Therefore, the defendant sought for dismissal of the suit.

6. On the side of the plaintiff, she herself was examined as PW1 and Exhibits A1 to A6 were marked. On the side of the defendants, Manager of the Canara Bank was examined as DW1 and the second defendant was examined as DW2. Exhibits B1 and B2 were marked on the side of the defendants.

7. The learned Trial Judge on the consideration of the above pleadings, framed the following issues:

1. Whether the plaintiff is entitled to 1/4<sup>th</sup> share in the suit property?
2. Whether the defendants are bound to account for the income from the suit properties?
3. Whether the plaintiff is entitled to a preliminary decree as prayed for?
4. To what other reliefs is the plaintiff entitled to?

8. Upon consideration of the evidence, both oral and documentary, the learned Trial Judge, concluded that, the relationship being admitted, the plaintiff will be entitled to a share in the properties of the Krishna Gounder. The defence that the payment of Rs.4,40,000/- was made by the second defendant to the plaintiff in lieu of her share in the suit property was rejected by the Trial Court. On the above findings, the learned Trial Judge granted 1/4<sup>th</sup> share as prayed

for by the plaintiff.

9. Aggrieved by the said grant of 1/4<sup>th</sup> share , the second defendant is on appeal.

10. I have heard Mr.D.Shivakumaran, learned counsel for the appellant and Mr.R.Mahesh, learned counsel appearing for Ms. R.Meenal, counsel for the first respondent/plaintiff.

11. The second respondent/first defendant died pending suit and his legal representatives have been impleaded as respondents 4 to 6. Though they have been served in the appeal, they have not entered appearance either in person or through their counsel and the notice sent to the mother was returned as "unclaimed". Therefore, she is deemed to have been served with the notice.

12. Mr.D.Shivakumaran, learned counsel for the appellant would submit that the Trial Court was wrong in concluding that the plaintiff would be entitled to equal 1/4<sup>th</sup> share along with the defendants 1 and 2, particularly, in the light of the admitted position that the suit item 1 was allotted to Krishna Gounder in the partition that took place between him and his brothers on 24.01.1957. He would further contend that the purchase of Items 2 and 3 in the name of Krishna Gounder in the year 1974 was with the aid of the funds that were available with him out of the income from the suit first item and therefore, the same should also be treated as ancestral property. In view of the fact the Krishna Gounder had died in the year 1987, i.e. prior to the coming into the force of the Hindu Succession Act 1 of 1990, the plaintiff being the daughter, will not get equal share as a co parcener. Therefore, the Trial Court was not right in decreeing the suit as prayed for by granting 1/4<sup>th</sup> share to the plaintiff. He would also contend that the payment of Rs. 4,40,000/- by way of three cheques has been established and therefore that should be taken as representing the share of the plaintiff in the suit property.

13. Per contra, Mr.R.Mahesh, learned counsel appearing for the first respondent/plaintiff would contend that the defendants had not pleaded that the properties were ancestral property and therefore the plaintiff would be entitled to equal share along with the sons. He would also contend that the receipt of a sum of Rs. 4,40,000/- had been denied by the plaintiff and in the absence of any written instrument, the payment even if assumed to be true, cannot be considered as release of the right of the plaintiff in the suit property.

14. From the above contentions, the following points arise for determination:-

1. Whether the Trial Court was right in granting equal 1/4<sup>th</sup> share to the plaintiff in view of the fact that the father Krishna Gounder had died prior to the commencement of the Hindu Succession (Tamil Nadu Amendment) Act 1990.
2. Whether the defendants can be allowed to contend that the payment of Rs.4,40,000/- was in lieu of the plaintiff's share in the suit property.

15. Point 1: No doubt true, the defendants had not raised the plea that item 1 of the suit property having been allotted to one Krishna Gounder, in the partition, which took place on 24.01.1957, as evidenced by Ex.A1 is a joint family property/ancestral property and therefore the plaintiff will not be entitled to a equal share as a co parcener. However, even in the plaint, it is admitted that the said property was allotted to the Krishna Gounder in the partition between him and his brothers that took place on 24.01.1957. The Trial Court was not right in considering it as a self acquired property of the Krishna Gounder and granting 1/4<sup>th</sup> share to the daughter. In The Additional Commissioner of Income Tax, Madras - 1. Vs. P.L. Karuppan Chettiar, reported in AIR 1979 Madras 1, a Full Bench of this Court had held that the property allotted to a co-parcener in a partition will be held by him in trust for the other co-parceners and it takes the colour of the co-parcenary property. Once the son is born he gets a right by birth in the properties that are allotted to the father in the partition between him and his brothers. Therefore, in so far as item 1 is concerned, even on the pleadings of the plaintiff, it is clear that it is ancestral property in which the defendant 1 and 2 being the sons would get right by birth. Therefore, the Trial Court was not right in granting 1/4<sup>th</sup> share to the plaintiff, who is a daughter. This Court had held that in order to invoke the provisions of the Hindu Succession (Tamil Nadu Amendment) Act 1990, it should be shown that the father of the plaintiff was alive as on 25.03.1989, that is the date on which the amendment Act came into force. (Sundarambal and others V. Deivanayagam and others (1991)-1 law weekly page 97). This view was also accepted by the Hon'ble Supreme Court in Sheela devi and others vs. Lal chand and others (2006) 8 SCC 581, while considering the provisions of the Hindu Succession (Amendment) Act 39/2005. Therefore, in so far as the suit item 1 is concerned, the Trial Court was not right in granting equal share to the plaintiff/daughter.

16. Though Mr. D.Shivakumaran, would contend that items 2 and 3 which were purchased in the year 1974 should also be treated as joint family property, I am unable to accept the said submission in view of the fact that there are neither pleadings nor evidence to that effect. Therefore, point no.1 is answered partly in favour of the appellant. In so far as suit item 1 is

concerned, the plaintiff is entitled to only 1/12<sup>th</sup> share i.e., 1/4<sup>th</sup> share in the 1/3<sup>rd</sup> share that would have been allotted to the Krishna Gounder, if the partition had taken place immediately prior to his death.

17. Point no.2: The claim of the second defendant is that he has paid a sum of Rs.4,40,000/- to the plaintiff during the year 1995 under three cheques and that amount was paid in lieu of the share of the plaintiff in the suit property. The plaintiff has denied the same. In order to claim that the plaintiff had released the right over the property, there should be a written instrument and therefore, in the absence of written instrument of release, I do not think that the defendants can be allowed to plead that the plaintiff had relinquished the share in the property receiving a sum of Rs.4,40,000/- by way of cheques in the year 1995. Therefore, the claim that the sum of Rs.4,40,000/- was paid in lieu of the share of the plaintiff in the suit property cannot be accepted. Point no.2 is answered against the appellant.

18. In the light of the above discussion, the appeal is partly allowed. The decree of the Trial Court is modified by granting 1/12<sup>th</sup> share to the plaintiff in the suit first item and 1/4<sup>th</sup> share in the suit item Nos.2 and 3. There will be a preliminary decree in O.S.No.63 of 2006 declaring that the plaintiff is entitled to 1/12<sup>th</sup> share in the suit first item and 1/4<sup>th</sup> share in the suit item 2 and 3. In other aspects, the judgment of Trial Court is confirmed. Considering the relationship between the parties, there shall be no order as to costs.

Sd/-  
Assistant Registrar(CO)

//True Copy//

सत्यमेव जयते Sub Assistant Registrar

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To

The Additional District Judge,  
Fast Track Court No.1, Salem.

+1cc to Mr.D.Shivakumaran, Advocate SR.No.60646  
+1cc to Mr.R.Meenal, Advocate SR.No.60617

A.S.No.767 of 2008

EV(CO)  
GN(13/10/2017)