

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 19.06.2017

PRONOUNCED ON : 02.11.2017

CORAM:

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

S.A.No.510 of 2001

1.Muthukumara Swamy
2.Ranganathan
3.Guresekaran
4.Kumar
5.Swamynathan
6.Ramesh
7.Mahalakshmi
8.Kannagi
9.Madhavi
10.Saraswathi

(Cause title accepted vide order
dated 20/03/2001 made in CMP.2716/01)

Vs

Valliammal ... Respondent / Respondent / Plaintiff

PRAYER: Appeal is filed under Section 100 of the Civil Procedure Code against the judgment and decree in A.S.No.85 of 2000, dated 26.9.2000 on the file of Addl.District Judge, Perambaloor in confirming the judgment and decree in O.S.No.50 of 1995, dated 29.7.99 on the file of Subordinate Judge, Ariyalaur.

For Appellants : Mr.V.Raghavachari
For Respondent : No appearance

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J U D G M E N T

The legal heirs of the deceased second defendant is the appellant herein.

2. The respondent herein Valliammal, W/o.Thangavel Pillai filed a suit in O.S.No.50 of 1995 against her husband Thangavel Pillai as first defendant and his elder brother Govindasamy Pillai arrayed as a second defendant sought for relief of

partition of the suit property herein Item Nos.1 to 17 and seeking the share of 2/3rd share in the suit property.

3. The plaint proceeds on the basis that the marriage between the plaintiff and the first defendant Thangavel Pillai was solemnized 45 years before the institution of the suit and they were no issues and after 20 years of their marriage, she gave birth to her son by name Sivasubramanian and the said child died, when he was 1 ½ years old. Thereafter, he was living with first defendant and due to the misunderstanding arose between the plaintiff and first defendant, she moved back to her parents home and she filed a suit for partition on the ground that the suit properties are ancestral property in nature having devolved upon the first defendant in the oral partition between the defendants, the suit properties were allotted to the share of the first defendant-husband and son was born and dead and hence, the plaintiff and the predeceased son and the first defendant, are entitled to one share each and accordingly, sought for the decree of 2/3rd share in the suit property.

4. The said claim of partition was resisted by the first defendant who had admitted the relationship of the first defendant with that of the plaintiff and also admitted the birth of the son sivasubramanian and his death at 1 ½ years of age and further stated that Item Nos.2,8,9,10,11,12,13 are alone joint family property. While, Item Nos.3,4,5 and 17 are exclusive property of the second defendant having purchased by him by doing a separate business. While, Item Nos.1,6,7,14,15 and 16 are self-acquired properties purchased in the joint name of the defendant 1 and 2 and hence, contended that these properties are not available for partition.

5. The plaintiff examined herself as P.W.1 and marked Ex.A1, death certificate of the son Sivasubramanian and the legal notice issued and the returned cover marked as Ex.A2 and Ex.A3. Patta are marked as Ex.A4,A5,A6. On the contrary, the defendant examined themselves as D.W.1 and D.W.2 and marked as Ex.B1 to B12 which are sale deeds in their favour to substantiate their stand.

6.The trial Court has formulated 5 issues and based upon the oral and documentary evidence has held that the properties are ancestral property in nature and plaintiff is entitled for 2/3rd share in the property and the final decree proceeding is as to take place in accordance with Civil Procedure Code.

7.Aggrieved against the said judgment and decree, the defeated defendants have preferred A.S.No.85 of 2000 before the Additional District Court, Perambalur and after framing necessary points for determination and also on re-appreciation of the evidence, the Additional District Judge, Perambalur gave

a categorical finding that the suit properties 2,8,9,10,11,12,13 are ancestral properties. In respect of other item of the suit property, though the sale deeds are in the name of the defendants 1 and 2, they have no independent source of income and accordingly, held that all the suit properties are ancestral properties in nature and relying upon a decision of the Division Bench of this Court has held that the plaintiff is entitled for 2/3rd share. Accordingly, dismissed the appeal and hence, the Second Appeal.

8.The above Second Appeal has admitted on the following substantial question of law:-

Whether the Courts below have not erred in law in holding that the plaintiff is entitled to 2/3rd right in the suit property?

9.Substantial question of law I:-

The sum and substance of the plaintiff's case is that all the suit properties are ancestral properties. The plaintiff as P.W.1 has categorically stated that Item Nos.2,8,10,11,12,13 are all ancestral properties are in the hands of the defendants 1 and 2 who are brothers. While, the first appellant is the husband of the respondent/plaintiff. The P.W.1 has specifically stated that from and out of the income of joint family properties which is sufficient enough to generate more funds and out of the said funds derived from the joint family properties, the defendant have acquired subsequent properties and though it has been purchased their individual name, they have no independent source of income other than from the joint family properties and hence, all the suit properties are joint family properties in character.

10.Per contra, D.W.1 and 2 have taken a stand that they have been doing paddy and the chilli business and earned the income with which they have purchased the properties in their name other than the admitted joint family properties as stated above.

11.Both the Courts below on proper appreciation of the oral evidence of the P.W.1 and the documentary evidence of patta, a joint patta standing in the name of D.W.1 and D.W.2 and version of the first defendant 1 and 2 have categorically come to the conclusion that the plaintiff has discharged the initial burden of proof to substantiate that the admitted family properties are yielding sufficient income and from and out of income derived from the JFP, only they (D1+D2) have purchased other properties in their name and accordingly, the onus of proof now stand shifted to the defendant/appellant. On analyzing of the evidence of the D.W.1 and D.W.2, the lower Appellate Court has specifically rendered a finding that there is a material contradiction between the nature and character of the business

said to have been carried on by the second defendant and the version of the first defendant with regard to the nature of the business as not pleaded in the written statement. It also observed that there is no plea regarding the income either in favour of the D.W.1 or in D.W.2 in the written statement and in the absence of any plea regarding the nature of the business and source of the income from which, they alleged to have been acquired, properties in their name, the lower Appellate Court has rendered a categorical finding after elaborate discussion that the defendant has not discharged the burden to prove that they have carried on any independent business as deposed in the chief-examination and in view of the admission made by the D.W.1 in the cross-examination, the Courts below has held that defendant has miserably failed to discharge the burden of proof that their properties purchased from the independent income and accordingly, the trial Court as well as the lower Appellate Court has held that all the properties are purchased from and out of the income derived from joint family property only.

12. Further, Courts below taking note of contents of the Ex.A4,A5,A6 documentary evidence has held that these documentary evidence falsify the oral evidence of D.W.2 and further observed that in the joint patta issue by Revenue Authority for the property standing in the name of 2nd defendant along Ref.No.1 as disbelieved the theory of oral partition projected by the defendant. Yet, another point is that though P.W.1 admitted that there was a koor-chit evidencing the oral partition between the first defendant and second defendant, but the same was not filed before the Court to substantiate the said plea. The lower Appellate Court has also drawn an adverse inference to that fact and concluded that in view of the withholding of the admitted koor-chit, an adverse inference has been drawn against the defendants 1 and 2 and also held that all the suit properties are joint family properties and accordingly, negatived the claim of the defendants 1 and 2 with regard to the properties said to have been standing in their name are all self-acquired property and hence, the finding of fact that suit properties are joint fairly proper is highly confirmed.

13. The learned counsel for the appellant contended that the trial Court erred in granting the 2/3rd share to the plaintiff. The suit was filed on 27.02.1995. Admittedly, the marriage between the plaintiff and the first defendant was said to be solemnized 45 years before the Institution of the suit i.e., around the year 1950 and also they were no issues for 20 years and a son by name Subramanian was born after 20 years of marriage and he died at the age of 1 ½ years. As per Ex.A1, the date of death is mentioned is 18.08.1969 thus during the year

1969, the only child born to the plaintiff and first defendant died. Thereafter, for 20 years, the plaintiff lived with first defendant subsequently due to the misunderstanding arose between them she left for her mother's place who is none other than the elder sister of the first defendant. On the date of filing of the suit and on the date of the birth of the child, the Hindu Succession Act 1954 has been came into force and hence, as on the date of the birth of the son and on the date of the filing of the suit, only the codified Hindu Succession Act will apply and not contextual law will apply has held by the both the Courts below.

14. As per the codified law in respect of the joint family property of the defendant which is admittedly devolved upon him through his father and hence, the plaintiff being the wife of the first defendant cannot claim partition of the property of the first defendant which is admittedly ancestral property in nature and therefore, this Court is of the considered view that substantial question of law is to be answered in affirmative in favour of the appellant and more than one reason. Both the Courts below have erroneously taken into consideration the date of the marriage between the parties. Admittedly, on the date of filing of the suit, the first defendant is alive and there is no child either male or female were alive, when that being the case, the cause of action for the suit arose as per the Ex.A2, legal notice and hence only codified Hindu Succession Act 1956 is applicable under which the wife cannot seek partition from husband of property which is ancestral in nature.

15. In the decision reported in AIR 2014 Bom 119 (Uday Narendra Shah Vs. Narendra Amritlal Shah), has held that:-

"The claim by wife during life time of husband in share and interest which he had coparcener in his HUF was wholly premature and completely misconceived".

In view of the finding in the presiding paragraph that all the suit properties are joint family property of the husband having devolved from his father. The plaintiff is not entitled for any share in the suit property. In view of the matter, the finding rendered by both the Courts below is hereby stands vacated as they have applied pre-codified Hindu Succession Act by law to the facts and circumstances and further the judgment of the both the Courts below is erroneous and substantial question of law is answered in affirmative in favour of the appellant and the judgment and decree of the both the Court below are set aside.

16. In the result,
i) this Second Appeal is allowed without costs.
ii) judgment and decree in A.S.No.85 of 2000, dated 26.9.2000 on the file of Addl.District Judge, Perambaloor in confirming the judgment and decree in O.S.No.50 of 1995, dated 29.7.99 on the file of Subordinate Judge, Ariyalaur shall stand dismissed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To:

1. The Addl.District Judge, Perambaloor

2. The Subordinate Judge, Ariyalaur

copy to

The Section Officer

VR Section High Court, Madras(+2 copies)

+1 cc to Mr.V.Raghavachari Advocate sr 77602

S.A.No.510 of 2001

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