

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 05.02.2018

CORAM

THE HON'BLE Mr.JUSTICE A.SELVAM
and
THE HON'BLE Mr.JUSTICE P.KALAIYARASAN

A.S.No.887 of 2008 and
M.P.No.1 of 2008 and C.M.P.No.1977 of 2018
in A.S.No.887 of 2008

AND

A.No.889 of 2008 and
M.P.No.1 of 2008 in A.S.No.889 of 2008

Santha

.. Appellant in
AS.887/2008

Vs

1.Vijayalakshmi @ Chinnapillaiammal
2.Srinivasan
3.Malarvizhi
4.Saradha
5.Jayasudha
6.Annamalai
7.Muthulakshmi
8.Baskaran
9.Srinivasan
10.Venkatesan
11.Ravichandran

.. Respondents in
AS.887/2008

1.Annamalai
2.Muthulakshmi
3.Baskaran
4.Srinivasan

..Appellants in A.S.No.889 of 2008.

Vs

1.Vijayalakshmi @ Chinnapillaiammal
2.Srinivasan
3.Malarvizhi
4.Saradha
5.Jayasudha
6.Venkatesan
7.Ravichandran
8.Santha

.. Respondents in AS.889/08

Appeal Suits preferred under Section 96 of the Code of Civil Procedure, 1908, against the judgment and decree dated 26.06.2008 made in O.S.No.37 of 2005 by the Additional District Court, Krishnagiri.

For Appellant :Mr.Himavanth
in both AS

For Respondents
in AS.887/08 :Mr.A.K.Kumarasamy, Sr. Counsel
Assisted by Mr.J.Hariharan
for R1 to R5
: Mr.Lakshmi Narayanan for R6 to R9

For Respondents
in AS.889/08 : Mr.A.K.Kumarasamy, Sr. Counsel
Assisted by Mr.J.Hariharan for R1 to R5
: Mr.Lakshmi Narayanan for R8

COMMON JUDGMENT

[Judgment of the Court was delivered by A.SELVAM, J.]

These Appeal Suits are directed against the judgment and decree dated 26.06.2008 passed in Original Suit No.37 of 2005 by the Additional District Court, Krishnagiri.

2.The respondents 1 to 5 in A.S.No.887 of 2008, as plaintiffs, have instituted O.S.No.37 of 2005, on the file of trial Court, praying to pass a preliminary decree of partition in respect of their shares, wherein, the appellants in A.S.No.887 of 2008 and in A.S.No.889 of 2008 are arrayed as defendants.

3.It is averred in the plaint that one Pachaiyappa Nainar has passed away in the year 1985, leaving behind him, his two sons namely, Murugesan and Annamalai and one daughter, by name, Saratha, as his legal heirs. The suit properties are the joint family properties and some of the properties are purchased in the names of second defendant, who is none other than the wife of the first defendant and suit item No.4 of A-Schedule property has been gifted in favour of Alamelu alias Valliammal, who is none other than the wife of Pachaiyappa Nainar. The said Pachaiyappa Nainar has passed away in the year 1985 and his wife Alamelu alias Valliammal has also passed away. One of the sons of Pachaiyappa Nainar, viz. Murugesan, has also passed away, leaving behind the present plaintiffs as his legal heirs. Since all the suit properties are joint family properties and since the defendants are not amenable for having amicable partition, the present suit has been instituted for the relief sought

therein.

4. In the written statement filed by the first defendant and adopted by the other defendants, it is averred to the effect that all the suit properties are not joint family properties. The suit items No.1 to 3 of A-Schedule properties are the separate properties of the first defendant and item No.4 of A-Schedule properties as well as item No.15 of A-Schedule properties are self acquired properties of Alamelu Ammal and second defendant respectively. Item No.4 of B-Schedule properties are the separate properties of the first and second defendant and item Nos.2 and 3 of B-Schedule properties are the separate properties of defendants 1 and 2. The quantum of shares claimed by the plaintiffs is erroneous and there is no merit in the suit and the same deserves to be dismissed.

5. On the basis of the divergent pleadings raised on either side, the trial Court has framed necessary issues and after analysing both oral and documentary evidence, has passed a preliminary decree in respect of the suit properties except item No.15 of A-Schedule properties to an extent of 4/9th share of the plaintiff and the same is being agitated by the defendants 1 to 6 and also by the seventh defendant, by way of filing separate appeal suit.

6. The crux of the case of the plaintiffs is that some of the items of the suit properties are the joint family properties of erstwhile joint family consisted of Pachaiyappa Nainar and his two sons, namely, Murugesan and first defendant, viz. Annamalai and some items of suit properties have been purchased in the name of defendants 1 and 2, by utilising joint family funds and the same are also treated as joint family properties. Under such circumstances, the present suit has been instituted for the reliefs sought therein.

7. The main defence taken on the side of the defendants 1 to 7 are that the properties gifted in favour of Alamelu alias Valliammal are her separate properties and since she died, the plaintiffs together, first defendant and seventh defendant are having 1/3rd share. Likewise, the property which stands in the name of the second defendant is her separate property [item No.15 of A-Schedule].

8. As mentioned supra, except item No.15 of A-Schedule properties, the trial Court, has passed a preliminary decree to an extent of 4/9th share including the properties gifted in favour of Alamelu alias Valliammal.

9. The learned counsel for the respondents 1 to 5/plaintiffs has fairly conceded to the effect that the properties gifted in favour of Alamelu alias Valliammal are

mentioned in Ex.B3. The said Alamelu alias Valliammal has passed away leaving behind her, defendants 1,7 and legal heirs of other son by name Murugesan, who are the plaintiffs herein. Therefore, plaintiffs together are entitled to get 1/3rd share.

10.The learned counsel appearing for the appellants in both Appeal Suits has also fairly conceded the contentions put forth on the side of the plaintiffs.

11.Considering the fact that the properties mentioned in Ex.B3 are the separate properties of deceased Alamelu alias Valliammal and since she passed away leaving behind her, defendants 1, 7 and legal heirs of Murugesan, each branch is having 1/3rd share in the property mentioned in Ex.B3.

12.The trial Court, without considering the fact to the effect that the properties found in Ex.B3 are the separate properties of deceased Alamelu alias Valliammal, has erroneously passed a preliminary decree to an extent of 4/9th share in favour of the plaintiffs in the properties mentioned in Ex.B3 and to that extent, the judgment and decree passed by the trial Court are liable to be modified.

13.The learned counsel appearing for the appellant in A.S.No.889 of 2008 has contended to the effect that the first defendant by utilising his separate funds, has purchased suit items 1 to 3 and 7 of A-Schedule properties by virtue of Sale Deed dated 22.02.1975 and a registration copy of the same has been marked as Ex.B5. The properties mentioned in Ex.B5 are nothing, but his separate properties, since the same have been purchased without utilising joint family nucleus and further, the properties mentioned in Ex.A2 have been sold in the year 1990 and the same has had no connection whatsoever with the purchase made under Ex.B5. But the trial Court, without considering the documentary and also oral evidence adduced on the side of the defendants 1 to 6, has erroneously found that the suit items 1 to 3 and 7 of A-Schedule properties are the joint family properties and therefore, the judgment and decree passed by the trial Court in respect of said items of suit properties are liable to be interfered with.

14.The learned counsel appearing for the respondents 1 to 5/plaintiffs has contended to the effect that even though the first defendant has been examined as D.W.1 and given evidence to that effect, no document has been filed to show his independent income and since such kind of evidence is lacking on the side of the defendants 1 to 6, the trial Court, has rightly treated the suit items of A-Schedule properties are the joint family properties and therefore, the finding given by the trial Court is not liable to be set aside.

15. On the basis of rival submissions made on either side, the only point that comes up for consideration in A.S.No.889 of 2008 is as to whether the suit items 1 to 3 and 7 of A-Schedule properties are the joint family properties or separate properties of the first defendant.

16. It is an everlasting principle of law that in a suit for partition of joint family properties, if any party claims that particular items of suit properties are joint family properties, initial burden lies upon him to prove that the same has been acquired by utilising joint family nucleus. If it is proved, the burden shifts upon the person, who pleads that particular items of suit properties are separate properties and the same have been acquired without joint family nucleus.

17. The consistent case of the plaintiffs is that by way of selling the properties mentioned in Ex.A2, by the first defendant, the properties found in Ex.B5 are acquired.

18. As rightly pointed out on the side of the appellants in A.S.No.889 of 2008, Ex.A2 has come into existence in the year 1990. Whereas, Ex.B5 has come into existence in the year 1975 and therefore, the sale proceeds mentioned in Ex.A2 has had no connection whatsoever with the sale amount mentioned in Ex.B5.

19. At this juncture, it has become shunless to look into the properties found in Ex.B1.

20. It is an admitted fact that Ex.B1 has come into existence in the year 1972. Under Ex.B1, 2.61 acres of land has been acquired in the name of father of the defendants 1 and 7 and their brother Murugesan.

21. Considering the fact that even in the year 1972, properties mentioned in Ex.B1 have been acquired, the settled presumption is that the erstwhile Hindu joint family consisted of a father, two sons and a daughter has had sufficient nucleus to acquire properties in future.

22. The specific evidence given by the first defendant is that during the relevant period, he has done grain business and thereby earned surplus income and by utilising the same, he purchased the properties found in Ex.B5. Except ipse dixit of first defendant on his side, no document has been filed so as to prove that he has done grain business at the relevant period. Further positive evidence is available on the side of the plaintiffs, so as to draw the settled presumption of law in respect of suit items 1 to 3 and 7 of A-Schedule properties. Therefore, it is needless to say that the arguments advanced on the side of the appellant/defendants 1 to 6 in A.S.No.889 of 2008 cannot be accepted and altogether A.S.No.889 of 2008 is

liable to be dismissed.

In fine, Appeal Suit No.887 of 2008 is allowed without costs. The judgment and decree passed by the trial Court in O.S.No.37 of 2005 are modified as follows :

The appellant/seventh defendant is entitled to get 1/9th share out of the shares of her father and 1/3rd share in the properties of her mother (in Ex.B3 properties).

Appeal Suit No.889 of 2008 is dismissed without costs. Connected Miscellaneous Petitions are closed.

-s/d-

Assistant Registrar (CS-IV)

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Sub-Assistant Registrar

gya

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The Additional District Court,
Krishnagiri.

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VR Section, High Court, Madras (2 copies)

- +1 CC to Mr.Himavanth, Advocate sr 8320.
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- +1 CC to Mr.V. Nicholas, Advocate sr 8907. (31/05/2018)
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A.S.No.887 of 2008
and

A.S.No.889 of 2008

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