

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 29.08.2019

PRONOUNCED ON : 27.09.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

A.S.No.711 of 2009

1.M.Rangasamy
2.T.N.Subramaniam
3.Mani @ Sakthivel
4.Vijayan
5.Manohar
6.P.M.Subramaniam
7.Devakumar
8.V.C.Vijayakumar

...Appellants/Defendants 1 to 8

Vs.

1.Valarmathi
2.Minor Kousalya ... 1st & 2 Respondents/Plaintiffs

(Rep.by her mother and next
Natural guardian Valarmathi
1st respondent)

3.Maheswaran ... 3rd Respondent/9th Defendants

Prayer :- First Appeal has been filed under Section 96 of Civil Procedure Code r/w Order 41 Rule 1 C.P.C against the Judgement and Decree dated 30.01.2009 passed in O.S.No.43 of 2007 on the file of the Additional District Court - cum - Fast Track Court No.I, Erode.

For Appellants : Mr.A.K.Kumarasamy
(Senior Counsel)
for Mr.P.Parthikannan

For Respondent : Mr.S.Sounthar
Nos.1 & 2

Respondent No.3 : No appearance
set exparte vide order dt.29.08.2019

JUDGMENT

Aggrieved over the judgment and decree dated 30.01.2009 passed in O.S.No.43 of 2007 on the file of the Additional District Court - cum - Fast Track Court No.I, Erode, the

defendants 1 to 8 have come forward with the first appeal.

2.For the sake of convenience, the parties are referred to as per their rankings in the Court below.

3.Suit for partition.

4.The case of the plaintiffs in brief is that the plaintiffs are the mother and daughter and the first defendant is the husband of the first plaintiff and the father of the second plaintiff. The marriage between the first plaintiff and the first defendant was solemnised on 10.04.1989 and out of the said wedlock, a son by name Dhamodara Prasad was born on 19.05.1990 and the second plaintiff was born on 29.12.1993 and the plaintiff and the first defendant were living a happy married life till the demise of their son. The first defendant's father Murugappa Gounder was owning ancestral properties in the suit village and he died long ago and after his demise, the first defendant has been in the possession and enjoyment of the ancestral properties and on 26.08.1987, the first defendant, his grandfather and his paternal uncles had divided the ancestral properties by virtue of the registered partition deed dated 26.08.1987, by way of which, the first defendant, his mother and his grandfather Ramasamy Gounder were allotted a sum of Rs.40,000/- out of the joint family funds as their share and the landed properties were allotted to the first defendant's paternal uncles vide "B" and "C" schedule in the partition deed and out of the abovesaid ancestral nucleus, the first defendant has purchased the suit properties in his name and the suit properties are not the self acquired properties of the first defendant alone and the suit properties belonged to the Hindu Joint Family consisting with the plaintiffs and the first defendant. The first plaintiff's son Dhamodara Prasad died intestate on 29.04.2002 leaving behind him the first plaintiff alone as his legal heir. As such the first plaintiff is entitled to 1/3 share in the suit properties as per Hindu Succession Tamil Nadu Amendment Act. The plaintiffs and the first defendant have been in the joint possession and enjoyment of the suit properties. Following the demise of their son, misunderstanding arose between the first plaintiff and the first defendant. The first defendant, his mother and his sister have compelled the first plaintiff to give consent for the first defendant's second marriage, which was refused by the first plaintiff and thereupon, the first defendant had been insisting for the first plaintiff's consent for the second marriage and on 01.09.2004 the first defendant had married one Baby @ Mohanambal as his second wife and in this connection, complaint has been lodged and the same had been taken on file in C.C.No.15 of 2005 and the plaintiffs were not in a position to enjoy the suit properties in common with the first defendant and hence, demanding

partition, the plaintiffs issued a notice on 03.02.2005 and the first defendant sent a reply containing false allegations and hence, the suit.

5. The first defendant resisted the plaintiffs' suit and admitted the relationship between the parties and also admitted the birth of his son and daughter and he denied the existence of the ancestral properties in the hands of his father Murugappa Gounder and admitted that on 26.08.1987, the first defendant and others had divided the landed properties by way of the registered partition deed and denied that a sum of Rs.40,000/- was given out of the joint family funds in favour of the first defendant, his mother and grandfather in lieu of the landed properties and also denied that out of the ancestral nucleus, he had purchased the suit properties in his name and denied that the suit properties are not the self acquired properties of the first defendant and that the same belong to the Hindu joint Family consisting of the plaintiffs and the first defendant, the first defendant also denied the claim of share in the suit properties on the part of the plaintiffs as put forth in the plaint, he also denied that misunderstanding arose between the first plaintiff and him following the demise of his son and also denied that they had been demanding the consent of the first plaintiff for the second marriage of the first defendant and according to him, complaint given by the first plaintiff with reference to the alleged second marriage is a false one. According to the first defendant, he has no ancestral lands and he was working at the work shop managed by M.N.Karuppana Gounder from his boyhood and thereafter, started a small workshop on his own and by way of the same, he was able to save money from the salary received by him and by way of his savings, he had purchased the properties as detailed in the written statement and also put up shops and accordingly, it is put forth that the suit properties are the self acquired properties of the first defendant and the first defendant was maintaining his mother and grandfather and in the partition effected on 26.08.1987, though the cash of Rs.40,000/- was shown as given to the first defendant, his mother and grandfather, in fact no amount had been paid to them as there was no joint family amount available at that point of time and the ancestral property was not yielding any income and therefore, the question of the first defendant acquiring the suit properties out of ancestral nucleus is false. The suit properties are not in the joint possession and enjoyment of the plaintiff and the first defendant and the plaintiffs are not entitled to any share in the suit properties and there is no cause of action for the suit and therefore, the suit is liable to be dismissed.

6. The 9th defendant resisted the plaintiffs' suit contending that it is false to state that the item 6 of the suit properties

belong to the joint family consisting of the plaintiffs and the first defendant. According to the 9th defendant, he had purchased item 6 of the suit properties and denied that he had purchased the same without the consent and knowledge of the plaintiffs and according to him, item 6 is the self acquired property of the first defendant and he had purchased the same for a valid consideration and the consideration for the same was used for the benefit of the joint family and the sale deed in favour of the 9th defendant is valid and binding upon the plaintiffs and therefore, there is no cause of action for the suit and the suit is liable to be dismissed.

7. On the basis of the abovesaid pleas, the following issues were framed by the trial Court for consideration:

"1. Whether it is true that the suit properties had been purchased by the first defendant out of the income of the ancestral properties?

2. Whether it is true that the suit properties are not the self acquired properties of the first defendant?

3. Whether it is true that the suit properties are not in the possession and enjoyment of the plaintiffs?

4. Whether the plaintiffs are entitled to preliminary decree as prayed for in the plaint?

5. Whether there is no cause of action for the suit?

6. To what relief?"

8. In support of the plaintiffs' case, PWs 1 & 2 were examined and Exs. A1 to A32 were marked. On the side of the defendants, DWS1 to 2 were examined and Exs. B1 to B5 were marked.

9. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to declare that the plaintiffs are each entitled to 1/3 share in the plaint schedule properties and accordingly, granted preliminary decree in their favour. Impugning the same, the defendants 1 to 8 have preferred the first appeal.

10. The following points arise for determination in the

first appeal:

"1. Whether the plaintiffs are entitled to obtain partition and separate possession of their share in the suit properties as claimed in the plaint?

2. To what relief the plaintiffs are entitled to?

3. To what relief the defendants 1 to 8 / the appellants are entitled to?"

11. Point No. 1

The first plaintiff is the wife and the second plaintiff is the daughter of the first defendant. It is not in dispute that out of the wedlock between the first plaintiff and the first defendant, a son by name Damodara Prasad was born and that he had died intestate on 29.04.2002 leaving behind him the first plaintiff alone as his legal heir. It is found that the relationship between the first plaintiff and the first defendant is not smooth and cordial. Claiming that the suit properties are the ancestral properties belonging to the joint family consisting of the plaintiffs and the first defendant and that the suit properties had been acquired with the aid of the ancestral nucleus, according to the plaintiffs, they are entitled to obtain 1/3 share each in the plaint schedule properties and inasmuch as the first defendant, in particular, refused to accede to their demand of partition, according to them, they had been necessitated to lay the suit against the defendants for partition.

12. The first defendant mainly contested the plaintiffs' suit contending that the suit properties are the self acquired properties of the first defendant and the plaintiffs are not entitled to claim any share in the same and disputed the case of the plaintiffs that the suit properties had been acquired with the aid of the ancestral nucleus and according to him, there is no ancestral nucleus as put forth by the plaintiffs and therefore, according to the first defendant, the plaintiffs are not entitled to claim any share in the suit properties as put forth by them.

13. Considering the materials placed on record, it is found that the relationship between the parties is not in dispute. It is put forth by the plaintiffs that the suit properties are the ancestral properties. Per contra, it is put forth by the first defendant that the suit properties are his self acquired properties. From the materials placed on record, it is found that the first defendant, his mother, grandfather and his

paternal uncles had divided their ancestral properties by way of a registered partition deed dated 26.06.1987, which document has been marked as Ex.A1. On a perusal of the same, it is found that as determined by the trial Court, the family of the first defendant was found to be owning ancestral properties and accordingly, had chosen to divide the same by way of Ex.A1 partition deed. It is further seen that as per the recitals contained in Ex.A1 partition deed, in lieu of the landed properties, the first defendant, his mother and grandfather Ramasamy Gounder had been allotted a sum of Rs.40,000/-, whereas, the paternal uncles of the first defendant were allotted the landed properties described as "B" and "C" schedules in the partition deed. Furthermore, the materials placed on record, particularly, the Adangal Extracts projected in the matter, go to show that the ancestral properties in the hands of the first defendant's family were capable of yielding cash crops and accordingly, it is found that as determined by the trial Court, the plaintiffs have not only established the existence of the ancestral nucleus and also further established that the ancestral nucleus available in the family of the first defendant was capable of yielding adequate and considerable income.

14. Though the argument has been put forth by the first defendant that his father owned separate properties measuring an extent of 2 acres alone acquired out of his own, however, considering the recitals of the partition deed marked as Ex.B5 as well as the recitals contained in Ex.A1 partition deed, altogether it is found that the first defendant's family was possessed of adequate nucleus capable of yielding adequate and considerable income and therefore, the case of the first defendant that he has no ancestral nucleus available with the family for the acquisition of the suit properties, as such, cannot be believed and accepted.

15. As could be seen from the materials placed on record, it is found that the first defendant examined as DW1 has admitted that it was he, who was managing the family. Therefore, when it is found that during the relevant point of time, it was only the first defendant, who was managing the family and as abovenoted, when the family of the first defendant was found to be owning and possessed of adequate ancestral properties and the said properties are capable of yielding income, in the light of the abovesaid factors, the first defendant, claiming that the suit properties had been acquired out of his self income, the burden is upon the first defendant to establish the abovesaid case. In this connection, the plaintiffs' counsel placed reliance upon the decision of the apex Court reported in (1961) 3 SCR 779 (Mallesappa Bandeppa Desai and Another Vs. Desai Mallappa Alias Mallesappa and Another), wherein, it has been held that where a

manager claims that any immovable property has been acquired by him with his own separate funds and not with the help of the joint family funds of which he was in possession and charge, it is for him to prove by clear and satisfactory evidence his plea that the purchase money proceeded from his separate funds and the onus of proof must in such a case be placed on the manager and not on his coparceners. Therefore, when at the relevant point of time, admittedly the first defendant was managing the family and the family of the first defendant was found to be owning considerable ancestral properties and accordingly, the parties had also proceeded to effect partition of their ancestral properties by way of Ex.A1 partition deed, in such view of the matter, it is for the first defendant to establish that de hors the existence of the ancestral properties, he had acquired the suit properties out of his own independent funds.

16.The recitals of Ex.A1 partition deed go to disclose that by way of the said partition, the first defendant, his mother and grandfather were allotted a sum of Rs.40,000/- in lieu of the landed properties. The first defendant would put forth the case that though such recitals are found to be incorporated in Ex.A1 partition deed, in fact, they had not received any sum as recited therein. However, as rightly held by the trial Court and also contended by the plaintiffs' counsel, when the factum of partition by way of Ex.A1 deed has not been controverted by the first defendant and the same has been accepted in toto, the first defendant cannot be allowed to adduce evidence contrary to the recitals found in the said partition deed and therefore, his case that the recitals contained in Ex.A1 partition deed that they had been given a sum of Rs.40,000/- towards their share had not been actually given effect to, as such, cannot be believed and accepted.

17.With reference to his case of acquisition of the suit properties out of his own funds, according to the first defendant, he has been working in a workshop and thereafter, started his own workshop and by way of the same, had been earning considerable income and therefore, the said income earned from the workshop formed the source for the acquisition of the suit properties. No doubt, the materials placed on record go to show that the first defendant has been running a workshop and the same could be gathered from the documents marked as Ex.B1 to B4 as well as the evidence adduced by the first plaintiff examined as PW1. However, as regards the claim of the first defendant that he had been earning considerable income out of the said workshop business, absolutely there is no proof placed on the part of the first defendant. The documents marked as Exs.B1 to B4 do not advance the case of the first defendant that he had been earning income out of the said workshop. In this connection, the first defendant, during the

course of his evidence, has claimed that there are accounts maintained by him with reference to the running of the work shop and that he had entrusted the accounts of the work shop with his auditor and that he could produce the same in the Court and therefore, when according to the first defendant, he has been earning sufficient income out of the workshop run by him and there are accounts and other materials pointing to the earning of income from the same, as rightly contended by the plaintiff's counsel, nothing prevented the first defendant from producing the said materials to sustain his case of acquisition of own income out of the said workshop. On the other hand, the first defendant has not placed any reliable material evidencing his acquisition of income independently out of the workshop said to be run by him and that the same constituted the source for the acquisition of the suit property. On the other hand, when with reference to his claim of income out of the work shop is not buttressed by any material worth acceptance and on the other hand, when it is placed on record that the first defendant had received considerable nucleus from the ancestral properties by way of Ex.A1 partition deed and when the amount received by him by way of the same cannot be described as inadequate for the acquisition of the suit properties and as above noted, at the relevant point of time, it was only the first defendant, who was managing the family, in all, it is found that as held by the trial Court, the first defendant had failed to establish that the suit properties had been acquired out of his own earned income and on the other hand, the only conclusion that could be arrived at with the available materials, is that the suit properties had been acquired out of the aid of the ancestral nucleus available in the hands of the first defendant and in such view of the matter, it is found that the plaintiffs, as put forth by them, would be entitled to claim share in the suit properties as prayed for.

18. In support of his contentions, the first defendant's counsel placed reliance upon the decisions reported in 2004-3-L.W.49 (D.S.Lakshmaiah & Anr. Vs. L.Balasubramanyam & Anr.), (2007) 3 MLJ 834 (SC) (Makhan Singh (D) by LRs. Vs. Kulwant Singh), 1999 - 2 - L.W.713 (Amirthalingam Vs. Uthayathamma and 15 others) and (2002) 1 M.L.J.708 (D.Krishnamurthy Vs. A.Subramania Mudaliar and another). The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the case at hand.

19. In the light of the abovesaid discussions, the plaintiffs are entitled to obtain the partition and separate possession of their share in the suit properties as claimed in the plaint and as determined by the Court below and accordingly, the point No.1 is answered.

20.Point Nos.2 & 3.

In the light of the abovesaid discussions, the Judgement and Decree dated 30.01.2009 passed in O.S.No.43 of 2007 on the file of the Additional District Court - cum - Fast Track Court No.I, Erode, are confirmed and resultantly, the first appeal is dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

sms

To

The Additional District Judge
- cum - Fast Track Court No.I, Erode.

Copy to

The Section Officer,
V.R.Section, High Court,
Madras.

+1cc to Mr.S.Sounthar, Advocate, S.R.No. 82982
+1cc to Mr.A.K.Kumarasamy, Advocate, S.R.No. 82950

A.S.No.711 of 2009

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