

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.09.2019

CORAM:

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.87 of 2014

and

M.P.No.1 of 2014

Shanmugham

..Appellant/Appellant/6th Defendant

Vs.

1.G.Selvarani

..1st Respondent/1st Respondent/Plaintiff

2.Boopathy

3.Baggiyam

4.Deivayanai

..2 to 4 Respondents/2 to 4 Respondents/
3 to 5 Defendants

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree of the learned Principal District Judge of Krishnagiri, dated 02.02.2013 in A.S.No.49 of 2012 confirming the judgment and decree of the learned Principal Subordinate Judge of Krishnagiri dated 06.04.2011 in O.S.No.99 of 2004.

For Appellant : Mr.J.Hariharan
for Mr.V.Nicholas

For Respondents: Mr.P.M.Jeyachandran for R1
No appearance for R2 to R4

J U D G M E N T

The 6th defendant in O.S.No.99 of 2004 is the appellant. The said suit was filed by the 1st respondent herein seeking partition and separate possession of her 1/3rd share in the suit property.

2. According to the 1st respondent/ plaintiff, the suit properties form part of the estate of one Govindasamy as ancestral properties. It is the admitted case of the parties that Govindasamy died leaving behind the 1st defendant Chinnapappa and two sons Thanigachalam and Velugan. Thanigachalam is the 2nd defendant. The other son Velugan died in the year 2001 leaving behind the plaintiff, his wife, as his only surviving legal heir. Therefore, the plaintiff would claim that she is entitled to 1/3rd share in the suit properties.

3. Pending the suit, the defendants 1 and 2 died. The children of the 2nd defendant were impleaded as legal heirs, as defendants 3 to 6. The 6th defendant alone contested the suit. The claim of the 6th defendant was that the plaintiff is not entitled to 1/3rd share. According to the him, Velugan had left behind the plaintiff and his mother chinnapappa viz., 1st defendant.

Therefore, the estate of Velugan will devolve on the plaintiff and the 1st defendant in equal shares. It is his further contention that the 1st defendant Chinnapappa had executed a registered settlement deed dated 24.04.2003 in his favour bequeathing her share in the suit properties to him and the same was produced as Ex.B1.

4. It is the further contention of the 6th defendant that even during the life time of Velugan he suffered serious illness and huge amounts were spent on his treatment by borrowing. Therefore, Velugan had received Rs.25,000/- and relinquished his share in the suit properties. The courts below disbelieved the claim of the 6th defendant regarding oral relinquishment pleaded by him. It was found that Velugan was entitled to a share in the suit properties at the time of death. The courts below held that the Ex.B1 settlement deed is valid only to the extent of the share of Chinnapappa in Govindaswamy's estate. On the above conclusion the courts below granted a decree for 4/9th share in favour of the plaintiff. Aggrieved the 6th defendant is on appeal.

5. The following questions of law were framed at the time of admission :

1. When Velugan the husband of the plaintiff had already released and relinquished his rights in the suit properties by receiving Rs.1,25,000/- in the family arrangement of the year 1997 and consequently the plaintiff could not claim the share of her husband in the suit properties whether the courts below are correct in granting the decree for partition of the share of her husband Velugan?

2. When it was established that the plaintiff had deserted her husband Velugan even in the year 1994 and is residing with her parents and as such she could not be considered as in joint possession of the suit properties and therefore the suit has to be valued under Section 37(1) and not under Section 37(2) of the Tamil Nadu Court Fees

Act whether the courts below are correct in holding that the suit is valued correctly?

3. When the mother namely the first defendant is also entitled to a share of late Velugan along with the plaintiff who is his wife under Section 8 of the Hindu Succession Act and as such the first defendant is also entitled to half share in the share of deceased Velugan whether the courts below are correct in granting a decree for partition of the entire share of Velugan to the plaintiff?

6. I have heard Mr.J.Hariharan, learned counsel appearing for the appellant and Mr.P.M.Jeyachandran, learned counsel appearing for the 1st respondent.

7. Mr.J.Hariharan, learned counsel appearing for the appellant while elaborating on the question of law would contend that the courts below were not right in disbelieving the oral arrangement pleaded by the 6th defendant. I have perused the judgment of the courts below as well as the evidence on record. The plea of oral relinquishment by Velugan even during his life time, in my considered opinion has not been established by substantial evidence. That apart the theory of oral relinquishment itself cannot be accepted as it involves relinquishment of share in immovable property of value of more than Rs.100/- and the same has to be by way of registered instrument. Partition can be oral but relinquishment cannot be oral. Therefore the first question of law is answered against the appellant and in favour of the respondents concluding that the 6th defendant has not proved the oral relinquishment as claimed by him.

8. On the question of law No.2, it is the contention of the counsel for the appellant is that the 1st respondent/ plaintiff had deserted Velugan and she was not living with him. Therefore, she should have paid court fee under Section 37(1) of the Court Fees Act and not under Section 37(2) of the Court Fees Act.

9. The said question is raised in the Second Appeal for the first time. I don't find any issue framed relating to court fee in the courts below. Therefore, I don't think that the appellant could be allowed to raise this question first time in the Second Appeal. Hence, the second question is also answered against the appellant and in favour of the respondents.

10. On the third question of law, Mr.J.Hariharan, would contend that the courts below have found that Velugan was succeeded by the plaintiff as well as the 1st defendant. Both of

them are class-I heirs of Velugan under the Hindu Succession Act. Therefore, the 1st defendant Chinnapappa who is the mother of Velugan would be entitled to $\frac{1}{2}$ share in whatever share that Velugan would have inherited on the death of Govindasamy. Admittedly, Govindasamy died first. The nature of the property being ancestral property is also admitted. Therefore, we have to assume notional partition prior to the death of Govindasamy. In the said notional partition Govindasamy will get $\frac{1}{3}$ rd share, Thanigachalam, the 2nd defendant will get $\frac{1}{3}$ rd share and Velugan, husband of the plaintiff would have got $\frac{1}{3}$ rd share.

11. On the death of Govindasamy his $\frac{1}{3}$ rd share would again devolve on his wife Chinnapapa and his two sons Thanigachalam and Velugan under Section 8 of the Hindu Succession Act. Therefore, Velugan would have inherited $\frac{1}{3}$ rd share as coparcener under Section 6 of the Hindu Succession Act and $\frac{1}{9}$ th share as the heir of Govindasamy under Section 8 of the Hindu Succession Act. Thus, Velugan was entitled to $\frac{4}{9}$ th share. Admittedly, Velugan had no issues. He was the sole surviving coparcener. Therefore, the property in his hands will assume the character self acquired property. On his death, as per Section 8, the properties would devolve on his legal heirs who are his mother, the 1st defendant and his wife, plaintiff.

12. The courts below had fixed the share of Velugan as $\frac{4}{9}$ th rightly, but have omitted to include the mother as the successor or legal heir of Velugan. This has resulted in an erroneous decree being granted in favour of the plaintiff declaring her $\frac{4}{9}$ th share. She is actually entitled to only $\frac{2}{9}$ th share, the remaining $\frac{2}{9}$ th share will go to Chinnapapa who had in turn settled it on the 6th defendant. Therefore, I find that the third question of law has to be necessarily answered in favour of the appellant.

13. In view of the above, the Second Appeal is allowed in part and the judgment and decree of the courts below will stand modified granting a preliminary decree in favour of the plaintiff declaring her $\frac{2}{9}$ th share in the suit properties. In other aspects, the judgment and decree of the courts below will stand confirmed. However, there will be no order as to costs in this Second Appeal. Consequently, the connected Miscellaneous Petition is also closed.

-s/d-

Assistant Registrar

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Sub-Assistant Registrar

To

1. The learned Principal District Judge,
Krishnagiri.

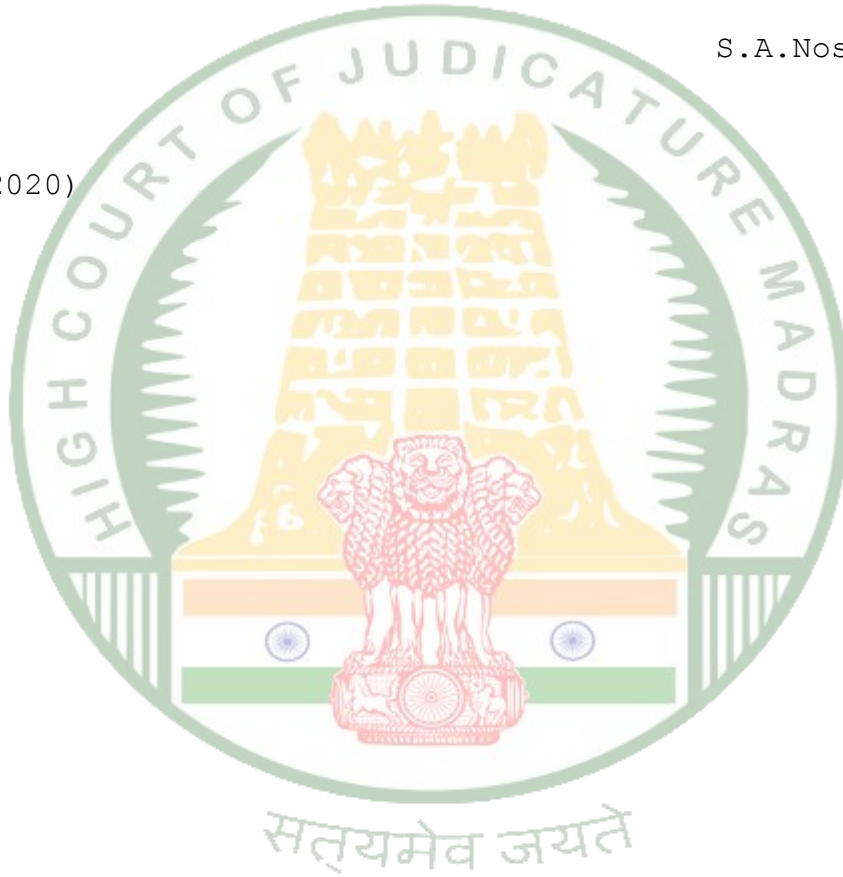
2. The learned Principal Subordinate Judge,
Krishnagiri.

+1 CC to Mr.V.Nicholas, Advocate sr 76829.

+1 CC to Mr.P.M.Jeyachandran, Advocate sr 76947.

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SSD(CO)
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