

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.01.2020

CORAM

THE HONOURABLE MR. JUSTICE M.M. SUNDRESH
AND
THE HONOURABLE MR. JUSTICE KRISHNAN RAMASAMY

A.S.No. 460 of 2011

1.Kandasamy Gounder
2.Rangasamy Gounder ... Appellants/Defendants 1 & 2

Vs.

1.Palanathal
2.Andathal
3.Bakkyammal
4.Parvathi
5.Valliammal ... Respondents 1 to 5/Plaintiffs
6.Ramathal ... 6th Respondent/3rd Defendant

PRAYER : Appeal filed under Section 96 of C.P.C to set aside the judgment and decree dated 14.06.2011 passed by the Additional District and Sessions Judge, Fast Track Court No.II, Coimbatore in O.S.No.9 of 2009.

For Appellants : Mr.L.Mouli
for M/s.M.N.Balakrishnan

For Respondents : Mr.A.K.Kumarasamy,
Senior Counsel
for Mr.M.Parthasarathy

JUDGMENT

(Delivered by M.M.SUNDRESH.,J)

The appellants herein are defendants 1 and 2 in the suit. Respondents 1 to 4 and the sixth respondent are the sisters of the appellants. The fifth respondent is the wife of the deceased Komarasamy Gounder. The suit has been filed in O.S.No.9 of 2009 on the file of Principal District Judge, Coimbatore, seeking partition of the suit properties on the premise that the properties are self-acquired properties of the deceased Komarasamy Gounder.

2. The appellants and the sixth respondent filed written statement, inter alia, contending that the suit properties, namely part I of "A" and "B" Schedule properties are ancestral properties, whereas the other part of "A" Schedule property which is the subject matter of Ex.A2 is a joint family property, purchased by the father out of his income and that of the appellants.

3. Before the trial Court, the respondents/plaintiffs marked Exs.A1 to A14 and the appellants marked Exs.B1 to B14. While the second respondent/plaintiff examined herself as P.W.1, the first appellant examined himself as D.W.1 apart from examining two more witnesses.

4. The trial Court framed the following issues for consideration:-

- "1)Whether Proper Court fee paid?
- 2)Whether the plaintiffs have right of succession over the part of property in "A" schedule in S.No.133/2 - 12.92 acres of land at Valukkuparai Village and "B" Schedule?
- 3)Whether the plaintiff's have succession rights over the part of the property in "A" schedule in S.No.133/2B, 11.35 acres?
- 4)Whether the partition effected on 1/4/1987 through Ex.B-4 would be binding on the plaintiff or not?
- 5)Whether the plaintiff's are entitled to 1/8th share in the suit property?
- 6)To what relief?"

5. On the question of Part I of the suit property mentioned in "A" Schedule, which is the subject matter of Ex.A1 being the partition deed between the father of the appellants and his brothers dated 28.03.1957, the trial Court was pleased to hold that the plaintiffs are entitled for 1/24 share in and out of 1/3 share of the deceased father. Insofar as the Item 2 of the "A" Schedule property, which is the subject matter of Ex.A2, dated 04.09.1974, the trial Court, placing the onus on the appellants, was pleased to hold that these properties are also ancestral properties. Insofar as the "B" Schedule property is concerned, which is a dwelling house, the trial Court was pleased to grant 1/24 share in father's 1/3 share. Challenging the judgment and decree rendered by the trial Court, the present appeal has been filed.

6. The learned counsel appearing for the appellants submitted that the trial Court has wrongly construed Ex.A1. Insofar as Ex.A2 is concerned, in view of the fact that the

appellants were also residing along with the deceased father as against other defendants excluding the mother, the trial Court ought not to have granted the relief. The father of the appellant died in the year 1979. Thus, the succession opens. The recital in the document is also to the effect that the consideration is by way of the money payable by the sellers who are none other than the brothers of the deceased father of the appellants apart from the amount paid for the remaining consideration. There is also a recital to the effect that the father of the appellant has sold the land.

7. The learned counsel appearing for the appellants further submitted that at the relevant point of time, Section 23 of the Hindu Succession Act, 1956 was in force. The father of the appellants died in the year 1979. Thus, the succession opened. Therefore, notwithstanding the fact that the said provision has been removed from the statute, the law as on that date would prevail.

8. The learned Senior Counsel appearing for the respondents would submit that Ex.A1 itself would go against the contention raised by the appellants. Insofar as Item 2 of "A" Schedule is concerned, there is a clear admission by D.W.1 to the effect that the properties have been purchased by the father from his own income. Section 23 of the Act having been removed, the benefit will have to be conferred on the daughters which has been done rightly by the trial Court. In support of his contention, the learned Senior Counsel relied upon the judgment of the learned Single Judge in M.Revathi v. R.Alamelu and six others reported in [2009 (2) CTC 130].

9. Heard Mr.L.Mouli, learned counsel appearing for the appellants and Mr.A.K.Kumarasamy, learned Senior Counsel appearing for the respondents and perused the documents filed.

10. The point for consideration is as to whether the appeal will have to be allowed by answering the issues in favour of the appellants or not.

11. There are three properties which we are concerned with. The "A" Schedule consists of two properties. The first property is governed by Ex.A1, dated 28.03.1957. This is a partition deed between the father of the appellants and his brothers. The very document itself would clearly show that this property is an ancestral property. Though the property has been given in favour of the father of the appellants, after such partition, he along with the children would become a Hindu Undivided Family. Thus, the finding of the trial Court is required to be confirmed.

12. Insofar as the second property, which is Item 2 of the "A" Schedule property, it has been purchased by the father of the appellants under Ex.A2 dated 04.07.1974. It is contended by the learned counsel appearing for the appellants that this property is purchased by the father from the income derived from the ancestral properties and in any case the appellants also contributed towards the sale. However, in his evidence, he has admitted that this property has been purchased by his father on his own. An admission made is a relevant fact. Since the appellants themselves stated that under Ex.A2, father has purchased the property out of his own income, the finding of the trial Court in granting the decree in favour of the respondents cannot be found fault with. Thus, even Ex.B4 partition deed will not confer any right to the appellants.

13. The other issue is with respect to the "B" Schedule property, which is a dwelling house. Admittedly, this is an ancestral property. The trial Court has granted 1/24 share to the plaintiffs. As submitted by the learned counsel appearing for the appellants, Section 23 of the Hindu Succession Act, 1956 has been removed from the statute with effect from 09.09.2005. The father of the appellants died in the year 1979 which factum is not in dispute. Therefore, there is a notional partition which has taken place at the time of death of the father. Resultantly, the shares of the appellants can be enhanced. Therefore, there was notional partition. When there is a notional partition that has taken place way back in the year 1979, the plaintiffs cannot seek for partition of the dwelling house on the premise that Section 23 is no longer in the statute. What is relevant is the date of the death of the father of the appellants and not the date of omission of Section 23 of the Act or the filing of the suit. In such view of the matter, the decision relied on by the learned Senior Counsel appearing for the respondents M.Revathi(supra) does not have any application to the case on hand.

14. The appeal stands allowed insofar as "B" Schedule property is concerned with the right to reside to all the plaintiffs and the defendant no.3. In all other respects, the appeal stands dismissed. Thus, the issues are answered against the appellants except the issue pertaining to "B" Schedule property.

15. In view of the above, the appeal stands allowed in part. No costs.

Sd/-
Assistant Registrar(CCC)

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Sub Assistant Registrar

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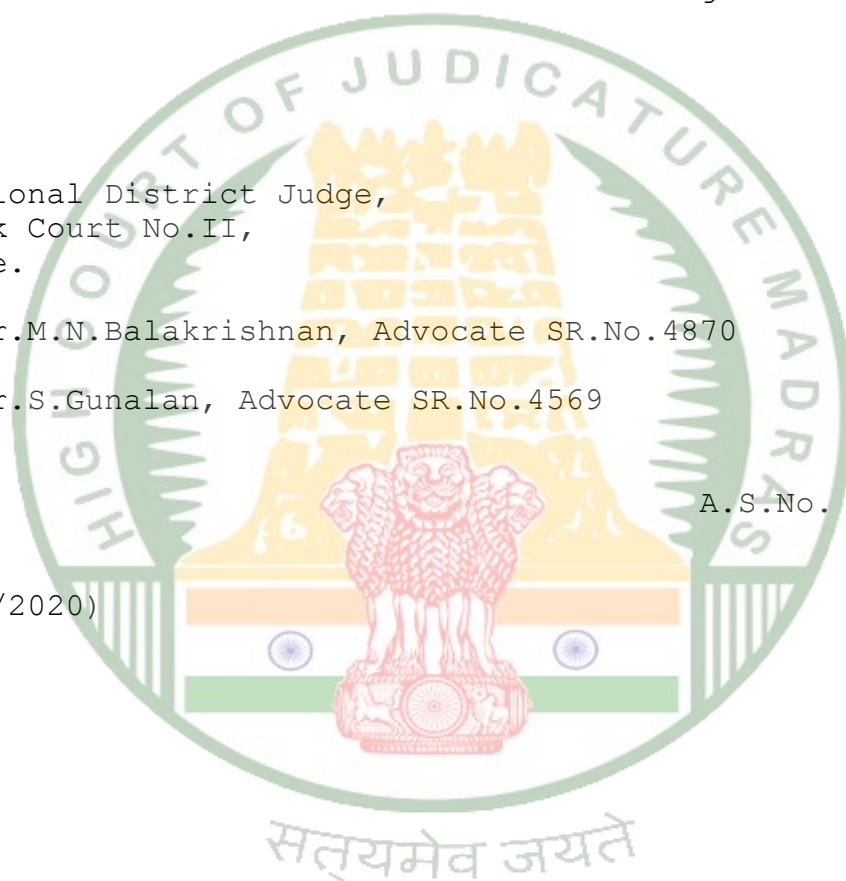
The Additional District Judge,
Fast Track Court No.II,
Coimbatore.

+1cc to Mr.M.N.Balakrishnan, Advocate SR.No.4870

+1cc to Mr.S.Gunalan, Advocate SR.No.4569

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GMV (17/03/2020)



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