

IN THE HIGH COURT OF JUDICATURE AT MADRAS  
DATED : 20.02.2020

CORAM

THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM  
A.S.No.285 of 2018  
C.M.P.Nos.14940 & 6429 of 2018

K.Prabhakaran

..Appellant/2<sup>nd</sup> Defendant

Vs.

1.P.Sakunthala  
2.P.Kumarasamy  
3.Vijayakumari  
4.P.Balakrishnan

..1<sup>st</sup> respondent/Plaintiff

..Respondents2 to 4/ Defendants1,3&4

Prayer : First Appeal filed Under Section 96 of CPC against the Judgment & Decree dated 16.11.2017 passed in O.S.No.22 of 2016 on the file of the I Additional District and Sessions Judge's Court, Tiruppur.

For Petitioner : Mr.C.R.Prasanan

For Respondents : Mr.R.Sivaprakasan for R1  
Mr.K.B.Vivekanandan for R3  
No Appearance for RR 2 & 4

J U D G M E N T

The appeal suit is filed against the Judgment and decree dated 16.11.2017 passed in O.S.No.22/2016 on the file of the I Additional District and Sessions Judge, Tiruppur.

2. The second defendant/Mr.K.Prabhakaran is the appellant in the appeal suit. The first respondent/Ms.P.Sakunthala is the plaintiff, who instituted a suit for partition. The first defendant/Mr.P.Kumarasamy is the father of the plaintiff and the defendants 2 and 3 are the son and daughter of the first defendant. The fourth respondent is the third party, purchaser of a portion of the property.

3. The facts in brief set out in the plaint are as follows:

The plaintiff submits that the 1st defendant is the father, 2nd defendant is brother, 3rd defendant is sister of the plaintiff. The suit properties originally belonged to the ancestors of the plaintiff/defendants. On 19.03.1960, the 1st defendant's father and his brother had divided the properties among themselves and the 1st defendant's father had obtained title to the suit properties and other properties under 1st schedule in the deed. On 19.11.1974, the 1st defendant and his brother Thangamuthu gounder and their father Palanisamy Gounder had divided the properties among themselves by way of partition deed. In the said partition deed the suit properties and other properties were allotted to the 1st defendant under the schedule C. An exclusive right over a water tank was allotted to his father under the schedule A with a covenant that the same should go the 1st defendant, after his life time and other properties should pass on his wife Ponnammal and after her life time, the left over should go to his sons i.e., to the 1st defendant and his brother Thangamuthu Gounder. Whereas the left over properties of Palanisamy gounder were settled by his wife Ponnammal to and in favour of 2nd defendant. The plaintiff and the defendants 2 and 3 have inherited the properties by virtue of their birth. The plaintiff and the defendants 1 to 3 each are having common 1/4th share in the suit properties and they are in common possession and enjoyment of the same. The plaintiff is not willing to continue her common possession and enjoyment of the property with the defendants. The plaintiff requested the defendants 1 to 3 to effect a partition. They are refused for amicable partition. The plaintiff issued legal notice dated 17.08.2015 to the defendants. When the 4th defendant made an attempt to purchase a specific portion of the suit properties from the other defendants, the legal notice was caused to him not to deal with the properties separately from the other defendants. The defendants 1 to 3 have received the legal notice but not issued reply notice. Hence the suit.

4. The first defendant filed a written statement and the said written statement was adopted by the second defendant also. The defence set out in the written statement are as under:

The defendant denies all the allegations in the plaint and puts the plaintiff strict proof of the same. This defendant submit that the suit property originally belonged to Palaniswamy gounder and his brother Chinnaswamy gounder vide partition deed dated 14.03.1960. The said partition deed Palanisamy gounder

was allotted A schedule property. Later, on 19.11.1974, Palanisamy gounder and his sons Thangamuthu Gounder and Kumaraswamy Gounder have jointly partitioned their properties. The said partition deed Kumaraswamy gounder was allotted C schedule properties. Therefore, the properties allotted to Kumaraswamy gounder is self-acquired in nature and the plaintiff is not entitled to get any share from the suit properties. Palaniswamy gounder had entered partition with his brother as early as in the year 1960 and later it was divided between his two sons in the year 1974. Palaniswamy died in the year 1984. So the plaintiff is the daughter of this defendant is not entitled to get any share from the suit properties. The plaintiff is not in joint and common possession of the suit property and the suit value is not true and the court fee paid is not correct. Further this defendant submitted that this defendant had already executed a will in favour of his son 2nd defendant and thereby settled the entire properties. Hence the suit is liable to be dismissed with cost.

5. The third defendant filed a written statement stating that she is entitled for 1/4 share of the suit schedule property.

6. The Trial Court framed the issues as to whether the plaintiff is entitled for 1/4th share in the suit property? To what relief the plaintiff is entitled for?

7. The plaintiff was examined as P.W.1 and marked Ex.A1 to Ex.A5. On the side of the defendants, D.W.1 was examined and no documentary evidence was marked.

8. With reference to issue No.1, the Trial Court adjudicated the facts and circumstances as well as evidence produced by the respective parties in the original suit and arrived at a conclusion that the contention raised by the defendants is not sustainable and made an inference that the plaintiff is entitled for 1/4 share in the suit schedule property. The Trial Court, for arriving such a conclusion, considered the relationship between the parties, which are all admitted and with reference to the partition deed dated 19.03.1960, and another partition deed entered amongst Palanisamy gounder and his sons Thangamuthu gounder and Kumarasamy gounder on 19.11.1974, Ex.A2 document, the defendants had admitted that the suit property is the ancestral property of the first defendant and the first defendant acquired his share in the ancestral property through the partition deeds, which were marked as Ex.A1 and Ex.A2. However, the learned counsel for the appellant made a submission that the trial Court decided the issue No.1, based on the partition deed as well as the deposition made by the respective parties. The first defendant has stated that on

19.11.1974, the first defendant and his brother Thangamuthu Gounder and their father Palanisamy gounder had divided the properties among themselves by way of a partition deed under Ex.A2. Thus, the said property is a separate property of the first defendant and therefore, the plaintiff has no right to claim partition. The said contention by way of defence by the first defendant was rejected by the trial Court.

9. The trial Court relied on two judgments submitted on behalf of the plaintiff and the defendant, which are as under:

2013(4)CTC539

ROHIT CHAUHAN VS.SURINDER SINGH & OTHERS

Hindu Law: Ancestral property-Coparcener-Right over property-Co parcener has undivided interest in ancestral property and his interest enlarges by deaths and diminishes by births in his family-On partition of ancestral property, property in hands of single person to be treated as his separate property, however, after son is born, said property becomes a coparcenary property and son acquires interest in same-Any alienation done before birth of son, held not to be questioned by son-Alienation of ancestral property after birth of son for legal necessity as Karta of family, not void-sale deeds and Release deeds executed by father of plaintiff transferring ancestral property after birth of plaintiff not for any legal necessity, held, illegal null and void-Decree and judgment of trial Court decreeing suit filed by plaintiff, restored."

2017(4) CTC 867

Arukutty.Vs.Punithavathy and 11 others

Hindu Succession Act, 1965(30 of 1956), Section 6 [as amended by Central Act 19 of 2005], 8 & section 29-A [ as amended by Tamil Nadu Amendment Act 1 of 1990]-'R' owned Ancestral Properties-'R' died prior to 1956-'R' survived by wife, son and four daughter-Ancestral properties belonged to coparceners, 'R' and his son-on death of 'R' his son become sole owner-on birth of son to 'R's son, they constituted coparcenary-such coparcenary effected partition-No daughter remained unmarried in 1989-Tamil Nadu Amendment Act not applicable-property partitioned prior to 20.12.2004-Central Amendment 2005 not applicable-Daughter of 'R' had no right.

10. With reference to the present case, the father of the plaintiff got the property through partition in the year 1974 and the father is still alive. By virtue of Section 6 Hindu Succession (Amendment)Act, 2005, the plaintiff has become a co-parcener by birth. Thus, the plaintiff acquired interest in the property as co-parcener. D.W.1 admitted that they obtained the signature of daughters, at the time of execution of sale deed. D.W.1 stated that daughters had been given lucrative

stridhana, at the time of marriage and they are not entitled for share in the property. This apart, the defendants came forward even before the trial Court, stating that they are inclined to give two acres to each daughter. However, the Trial Court arrived at a conclusion that it is not a discretion of the parties in respect of birth right and the plaintiff is entitled for 1/4 share in the entire property, which are all admitted, as ancestral properties and accordingly, granted 1/4 share in favour of the plaintiff.

11. The learned counsel appearing on behalf of the appellant contended that Ex.A2, Partition deed dated 19.11.1974, states that the first defendant/Mr.Kumarasamy, had contributed a sum of Rs.10,000/- for allotment of land in C-Schedule property mentioned in the partition deed dated 19.11.1974. In view of the fact that the first defendant had contributed his self-earned money, the said portion is to be construed as a self-acquired property. In the said property, the daughters are not having any right and the said portion cannot be construed as an ancestral property.

12. The receipt of Rs.10,000/- is admitted by brother of the father of the first defendant and the partition deed dated 19.11.1974 speaks about the said fact. Under these circumstances, the Trial Court has committed an error in granting equal share in respect of the entire property. The learned counsel for the appellant reiterated that they are not denying the right of the first respondent/plaintiff and while admitting the rights of the first respondent/plaintiff, it is contended that she has got a right in respect of the ancestral property alone and not in respect of the property purchased by the first defendant from the other shareholder, while effecting the partition on 19.11.1974, Ex.A2 document. It is an admitted fact that the first defendant is alive till today. Thus, the said portion of the property is not liable for partition.

13. The learned counsel for the first respondent/plaintiff disputed the said contention by stating that once the entire property is admitted as ancestral property, then there cannot be any purchase by one shareholder from the other sharer. Once it is established that the property is an ancestral property, then birth right acquired by other coparcener cannot be denied.

14. The learned counsel for the first respondent/plaintiff raised a serious objection with regard to the pleading raised by the appellant as well as by the first defendant before the trial Court. He has solicited the attention of this Court that no such pleading made before the trial Court nor any issue has been framed before the Trial Court. In the absence of any such pleading in this regard, the appellant cannot raise a point regarding the payment of

Rs.10,000/- by the first defendant in favour of his brother, while partitioning the ancestral property, during the year 1974. It is further contended that the first respondent/plaintiff was a minor, during the year 1974 and she acquired the birth right in respect of ancestral property and such a right cannot be taken away nor be dealt with other sharers of the ancestral property including the father, who is the first defendant in the suit. The other contention raised by the learned counsel for the first respondent/plaintiff is that even in the first appeal grounds, the payment of Rs.10,000/- has not been pleaded. In the absence of any such specific pleadings, the appellant cannot raise this ground at this appellate stage.

15. Considering the arguments, this Court is of the opinion that the property in question, admittedly is an ancestral property. The partition took place between the first defendant as well as his brother and father, during the year 1974. The said partition deed Ex.A2, denotes that the first defendant/Mr.P.Kumarasamy, contributed a sum of Rs.10,000/- in lieu of excess of allotment of land made in his favour. However, the excess portion of the property allotted in favour of the first defendant is also an ancestral property as the partition took place between two brothers and father. However, the learned counsel for the appellant is of the opinion that the said portion belonged to other sharer, was sold in favour of the first defendant and therefore, the said portion should be treated as self-acquired property. In this regard, there is no specific pleading made in the written statement by any of the defendants. There was no complete adjudication of these facts before the trial Court. On perusal of the written statements filed by the defendants as well as the findings of the trial Court, this Court is unable to trace out any such complete adjudication of these facts by the trial Court. In the absence of any such specific pleading, with reference to the payment of his self-earned money, the doubt raised now goes in favour of the first respondent/plaintiff. Even as per the partition deed Ex.A2, the first defendant/father of the plaintiff paid a sum of Rs.10,000/- to the other sharer, who is none other than his brother. However, it was not established before the trial Court. The said amount of Rs.10,000/- was paid from and out of his own earned money or from and out of income derived from the joint family property is not known. The doubt can be raised because the entire property is admitted as an ancestral property and two brothers and their father, namely, Palanisamy gounder and his sons Thangamuthu Gounder and Kumarasamy gounder were jointly enjoying the ancestral property. Unless these factors are established through evidence, it may not be possible for this Court in the appeal stage to arrive at a conclusion that the said amount had been paid from self-earned money of the first defendant/Mr.P.Kumarasamy.

16. Undoubtedly, the document speaks about certain facts. However, those facts, if raised any doubt, regarding the mode of acquisition of the property and payment of money, either through self-earning or through family funds are to be established by providing opportunity to all the other parties who are all defending the suit. In the absence of any such specific pleading, this Court cannot arrive at a conclusion that Rs.10,000/- is contributed by the first defendant in favour of his brother in the year 1974 from his self-earned money.

17. The learned counsel for the appellant referred the written statement filed on behalf of the first defendant and said that there is a pleading that the properties allotted to Kumaraswamy gounder is self-acquired in nature. Such a general pleading is insufficient to arrive at a conclusion that the amount of Rs.10,000/- was paid by the first defendant from his self-earned money.

18. It is admitted by the trial Court that the property is an ancestral one and the rights of the parties are also admitted mutually. The portion of the property alone is claimed as a self-acquired property. In view of the fact that the appellant as well as the second respondent father has not established before the trial Court, the amount of Rs.10,000/- referred in the partition deed dated 19.11.1974 is a self-earned money, which was contributed for purchase of excess portion from the ancestral property, this Court cannot arrive at a conclusion that the trial Court has committed an error in granting 1/4 share in favour of the plaintiff. This being the factum established, this Court has no hesitation in arriving at a conclusion that the Trial Court has not committed any perversity or infirmity as such in respect of allotting 1/4 share in favour of the plaintiff, for which, she is entitled as per Section 6 of Hindu Succession (Amendment) Act.

19. The learned counsel for the appellant has rightly contended that the father, who is now aged about 90 years, is to be taken care of by all his legal heirs as he has preserved the ancestral property for the past many years and now suffering on account of old age. This Court has no second opinion in respect of said submission and the parties, to the appeal suit on hand, has to adopt their conscience and take care of their father till his lifetime. Accordingly, the judgment and decree dated 16.11.2017 in O.S.No.22 of 2016 is confirmed and consequently, the first appeal stands dismissed. No costs. Connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(CS III MDU)

//True Copy//

Sub Assistant Registrar

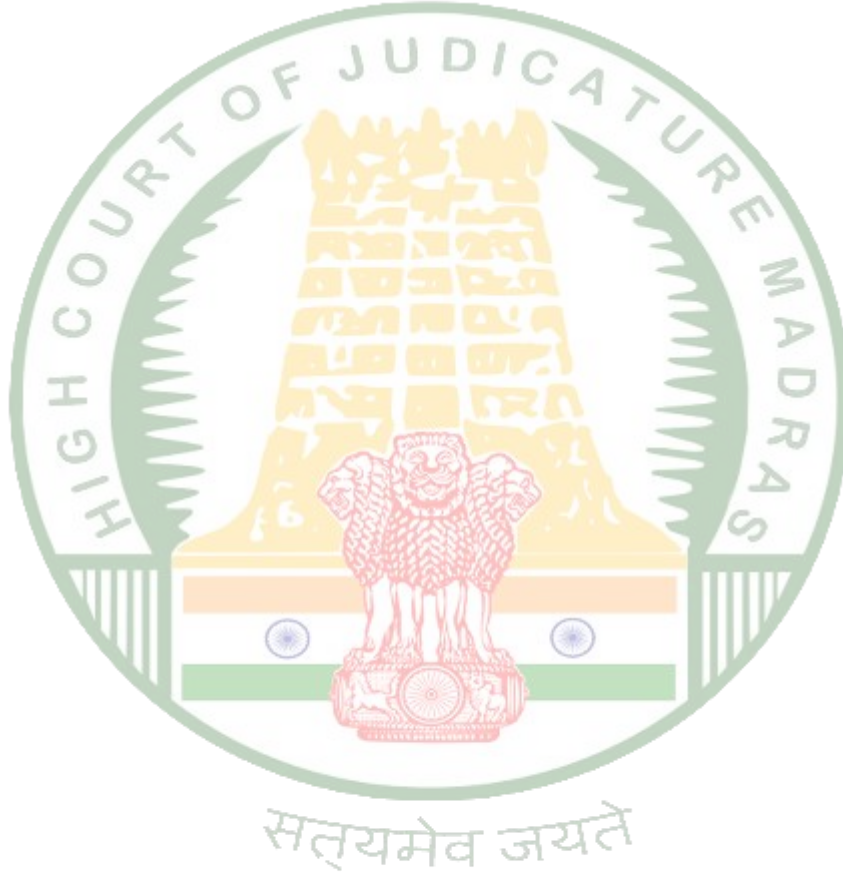
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To,  
The I Additional District and Sessions Judge,  
Tiruppur.

+1cc to Mr.C.R.Prasanan, Advocate SR.No. 14904  
+1cc to Mr.R.Sivaprakasan , Advocate SR.No. 14708  
+1cc to Mr.T.Ganesan , Advocate SR.No. 15354

A.S.No.285 of 2018  
C.M.P.Nos.14940 & 6429 of 2018

A.SK(05/10/2020)



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