

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.03.2020

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A.NO.896 OF 2014

1.Selvi  
2.Kavitha  
3.Saravanan  
4.Dhanalakshmi

.. Appellants/  
Defendants 1, 4 to 6

Vs.

1.Santhamani  
2.Thangavel  
3.Minor Nandhakumar

..Respondents/  
Plaintiffs/Defendants 1 & 3

(Rep.by Guardian/Father Thangavel)

Prayer:

Second Appeal filed under Section. 100 of C.P.C. against the judgment and decree dated 31.07.2012 made in A.S.No. 96 of 2011 on the file of the learned Second Additional District Court, Erode partly modifying the judgment and decree dated 26.08.2011 made in O.S.No. 439 of 2008 on the file of the Second Additional Sub-Court, Erode.

For Appellants : Mr.N.Manokaran

For Respondents : Mr.A.K.Kumarasamy, Senior Counsel  
for Mr.S.Kaithamalai Kumaran  
for R1  
R2 & R3 - No Appearance

J U D G M E N T

The defendants 1 and 4 to 6 in O.S.No. 439 of 2008 who were successful in getting the suit for partition laid by the plaintiff dismissed by the Trial Court upon its partial reversal on appeal have come up with this second appeal.

2. The suit was laid by the plaintiff claiming 7/36<sup>th</sup> share in the suit properties, on the contention that the suit properties are ancestral properties belonging to Thangamuthu

father of the plaintiff and defendants 1,4 and 5. Thangamuthu died on 28.06.2008 leaving behind the wife, the 6<sup>th</sup> defendant, the plaintiff and defendnats 1,4 and 5, two daughters and one son. One of the daughters of Thangamuthu by name Santhosam died in the year 1994 and her husband and son are the defendants 2 and 3. The plaintiff sought for partition and separate possession of her 7/36 share on the ground that all the properties were ancestral properties of Thangamuthu in which she would be entitled to share as a coparcener after the enactment of the Hindu Succession Act 19 of 2005.

3. The suit was resisted by the defendants 1, 4 to 6 contending that the suit properties were self-acquired properties of Thangamuthu and Thangamuthu did not die intestate. It was claimed that Thangamuthu had left Will dated 24.07.2007 bequeathing the properties in favour of his only son, the 5<sup>th</sup> defendant. The second and third defendants also adopted the pleadings of the other defendants. At trial, the plaintiff examined herself as P.W.1 and one Raman was examined as P.W.2. Exs. A1 to A11 were marked. On the side of the defendants, the 5<sup>th</sup> defendant was examined as D.W.1, the elder brother of Thangamuthu namely, Subbanna Nadar examined as D.W.2. The defendants 1 and 4 who also happened to be the attesting witnesses of the Will dated 24.07.2007 were examined D.W.3 and D.W.4. Upon a consideration of the evidence on record, the learned Trial Judge concluded that the plaintiff has not established her case that the properties are ancestral properties belonging to Thangamuthu in which the plaintiff would get a right by birth.

4. Relying upon the evidence of D.W.3 and D.W.4, the attesting witnesses, the learned Trial Judge upheld the Will. As a result of the said findings, the Trial Judge concluded that the plaintiff is not entitled to any share in the suit properties and dismissed the suit. Aggrieved, the plaintiff preferred an appeal in A.S.No. 96 of 2011 on the file of the Additional District Court, Erode. The Additional District Judge, who heard the appeal on a re-appreciation of the evidence concluded that the first and second items of properties measuring about 2 acres 52 cents situated in Survey Nos. 629/4, 656/3 on Avalpoondurai Village are ancestral properties in the hands of Thangamuthu and the plaintiff would have a right over said properties by birth as a coparcener. As regards the extent of 1.91cents situated in Survey No.634/6, 632/1, the learned Additional District Judge concluded that those properties having been purchased by Thangamuthu in the year 1975 cannot be classified as ancestral properties in his hands, since it is not shown that those properties were purchased with aid of the ancestral nucleues or from the surplus income derived from the

ancestral properties. The learned Additional District Judge also upheld the Will executed by Thangamuthu. The learned Additional District Judge however, committed a minor error while determining the shares of the parties. Having upheld the Will and having found that the 1/6<sup>th</sup> share of Thangamuthu in the ancestral properties would go to the son, Saravanan, D.5 as per the Will, the learned Additional District Judge should have granted 1/6<sup>th</sup> share to the plaintiff, since the 1/6<sup>th</sup> share of Thangamuthu would devolve on Saravanan, the 5<sup>th</sup> defendant under the Will. Instead of doing that, the learned Additional District Judge found that the plaintiff would be entitled to 1/6<sup>th</sup> share in the remaining 5/6<sup>th</sup> share after excluding the 1/6<sup>th</sup> share of Thangamuthu. On the finding that properties situated at 634/6 and 632/1 are the self-acquisitions of Thangamuthu and they would devolve on the 5<sup>th</sup> defendant, Saravanan as per the Will marked as Ex.B6, the learned Additional District Judge dismissed the suit in respect of those 2 items of properties measuring about 1 acre 91 cents. Aggrieved by the said judgment and decree, the defendants 1,4 to 6 have come up with this second appeal. The following substantial questions of law were framed at the time of admission:-

"i) Whether the first respondent/plaintiff is entitled to get the decree for partition when she failed to plead and prove the existence of the ancestral properties which provided the consideration for the purchase of the suit properties ?

ii) Whether the first Appellate Court has rightly placed the burden of proof for arriving at a conclusion that the subject matter properties are ancestral properties especially when there is no presumption of a property being joint family property only on account of existence of a joint family ?

iii) Whether the first Appellate Court is legally right in reversing the well considered findings of the Trial Court with regard to the genuineness of the Will dated 24.07.2007 (Ex.B6)?"

5. The first respondent/plaintiff has filed a cross-objection in Cross-objection No.69/2018 wherein she had questioned the dismissal of the suit in respect of the properties situated in Survey No.634/6, 634/1. The following questions of law were framed in the cross objections:-

"i) Whether the lower Appellate Court was right in concluding that the properties purchased by Thangamuthu in the year 1975 shown to be located in Survey No.634/6 and 632/1 are the self-acquisitions of Thangamuthu.

ii) Whether the lower Appellate Court was right in upholding the will executed by Thangamuthu?"

6. I have heard Mr.N. Manokaran, the learned counsel appearing for the appellants and Sri. A.K.Kumarasamy, learned Senior Counsel appearing for Mr.S.Kaithamalai Kumaran for the first respondent. The respondents 2 and 3 though served are not appearing either in person or through counsel duly instructed.

7. Mr. N.Manokaran, learned counsel appearing for the appellants, elaborating on the questions of law, would contend that it is incumbent on the plaintiff to plead and prove the nature and character of the properties when she seeks partition. Drawing my attention to the averments in the plaint, Mr.N.Manokaran would submit that there is no pleading regarding the mode of acquisition of the properties in question except the general submission that all the properties are ancestral properties of Thangamuthu. He also contends that the lower Appellate Court was not right in concluding that the suit properties measuring about 3.52 acres shown in the first paragraph of the description of properties in the plaint are ancestral properties at the hands of Thangamuthu. He would also point out that there is neither pleading nor evidence on part of the plaintiff to show that the properties described in the second paragraph namely, the properties bearing Survey No.634/6 and 632/1 could be termed as ancestral properties on the ground that they were purchased out of the surplus income from the ancestral properties. He would also point out that the lower Appellate Court had consciously decided that those two items of properties cannot be said to be joint family properties and had dismissed the suit. Therefore, the cross-objections will have to be rejected. On the proof of the Will, Mr.N.Manokaran would contend that two of the daughters of Thangamuthu are attesting witnesses to the Will and they have been examined as D.W.3 and D.W.4. Once the Will is found to be true and genuine, the plaintiff suit must have been dismissed in its entirety.

8. Contending contra, Mr.A.K.Kumarasamy, learned Senior counsel appearing for the first respondent/plaintiff would submit that in the absence of any evidence to show that Thangamuthu was doing some other business or that he had some other occupation from which he earned substantial money and he could have purchased the property shown in the second paragraph of the schedule to the plaint with the said income, it should be presumed that the properties were purchased within the income from the ancestral properties and therefore, according to him, the lower Appellate Court was not right in concluding that the property described in the second paragraph of the suit schedule properties are the self-acquisitions of Thangamuthu. Mr.A.K.Kumarasamy, learned Senior Counsel would also contend that once it is admitted that the family was possessed of 3.52

acres of ancestral land, a presumption would arise that the acquisitions were made from and out of the income from the ancestral property. He would also point out that there is no evidence strong enough to destroy the presumption and therefore, according to him, the lower Appellate Court was not right in concluding that the properties described in the second paragraph of the schedule to the plaint are self-acquisitions of Thangamuthu. I have considered the rival submissions.

9. As regards the validity of the Will dated 24.07.2007, it is seen that the Will has been attested by the first defendant and 4<sup>th</sup> defendant who are daughters of Thangamuthu. They have been examined as D.W.3 and D.W.4. Both the Courts have considered their evidence and have found that their evidence is acceptable in order to establish the execution of the Will executed by Thangamuthu marked as Ex.B6. Despite his best efforts, the learned senior counsel for the first respondent/plaintiff is unable to point out any material that would discredit the testimony of D.W.3 and D.W.4. In fact, the Courts below were perfectly justified in relying upon the evidence of D.W.3 and D.W.4 as they are the most disinterested witnesses as far as the validity of the Will is concerned. But for the Will D.W.3 and D.W.4 would definitely get a share in the properties. Therefore, I do not have any hesitation in confirming the finding of the Trial Court and the Appellate Court with reference to the truth and genuineness of the Will dated 24.07.2007 marked as Ex.B6.

10. Coming to the first and second questions of law framed at the time of admission, no doubt, the burden to prove the existence of ancestral properties is on the plaintiff. Here, the plaintiff has pleaded that all the properties are ancestral properties and had deposed to that effect. It is seen from the evidence of D.W.1, the 5<sup>th</sup> defendant that he had tacitly admitted the possession of ancestral property by Thangamuthu. In his evidence, during cross-examination he has stated that the extent of 3.52 acres in Survey No.629/4, 656/3 are the ancestral properties of Thangamuthu. Apart from the evidence of D.W.1, son of Thangamuthu, D.W.2, elder brother of Thangamuthu has categorically admitted that he and his brother Thangamuthu got 3.52 acres of land at a partition between them. This admission on the part of the defendants would definitely help the plaintiff in proving that the 3.52 acres of land situated in Survey No./629/4, 656/3 of Avalpoondurai Village are the ancestral properties in the hands of Thangamuthu. No doubt, the plaintiff has come with the blanket plea that all the properties are ancestral properties. The plaintiff, who is only 43 years of age in the year 2011 when she was examined cannot be expected to provide minute details of properties, date of acquisition of

properties by the father which happened either before her birth or immediately after her birth. While considering the preponderance of probabilities, Courts can also take note of the admissions of D.W.1 and D.W.2 and conclude on the nature of the properties. In the case on hand, we have not only the admission of D.W.1 but also the evidence of D.W.2, the elder brother of Thangamuthu who has categorically deposed that he and his brother got about 3.50 acres of land as ancestral property. It is that 3.50 acres is the property referred to in the first paragraph of the schedule to the plaint. Therefore, I do not see any error in the finding of the lower Appellate Court and when it came to the conclusion that extent of 3.52 acres shown in the paragraph 1 of the plaint schedule was in fact, ancestral property belonging to the family of Thangamuthu in which the plaintiff would get a right by birth. The next question that would arise is; what is the share that the plaintiff would be entitled to. Thangamuthu died in the year 2008, after the introduction of the Hindu Succession (Amendment) Act 39 and 2005, therefore, the plaintiff would get a  $1/6^{\text{th}}$  share as a coparcener. As far as the  $1/6^{\text{th}}$  share of Thangamuthu is concerned, Section 30 of the Hindu Succession Act enables a coparcener to make a testamentary disposition of his share in his ancestral property also. Therefore, the Will is executed by the Thangamuthu in respect of the properties situate in SNos: 629/4 and 656/3 would be valid to the extent of his  $1/6^{\text{th}}$  share and that  $1/6^{\text{th}}$  share would devolve on the  $5^{\text{th}}$  defendant, Saravanan, son of Thangamuthu as per the Will.

11. In view of the above, the lower Appellate Court was not right in granting  $7/36^{\text{th}}$  share in the remaining  $5/6^{\text{th}}$  share after excluding the  $1/6^{\text{th}}$  share of Thangamuthu in the ancestral properties. Hence, the decree of the lower Appellate Court requires modification in respect of that portion and the plaintiff would be entitled to only  $1/6^{\text{th}}$  share in the entirety of the properties, which have been found to be ancestral namely, properties in Survey No.629/4 and 656/3.

12. Adverting to the cross objections, it is fundamental principal of Hindu law that a coparcener who claims that a property which stands in the name of another coparcener is joint family property as to not only to plead and prove that the property was purchased out of the surplus income from the coparcener property. Mere possession of coparcenary property would not lead to a interference that the properties that were acquired in the names of the other coparceners should also be treated as coparcenary property. In order to prove such claim, the plaintiff will have to necessarily show that there was coparcenary property. The coparcenary property was yeilding sufficient income and there was surplus left after taking into

account the needs of the family and it was that surplus which aided the purchase of the other properties by the coparcener. Unless the above four requirements are proved the property standing in the name of one of the coparceners cannot be characterised as coparcenary property in which other coparceners would get a right by birth.

13. As rightly pointed out by Mr.N.Manokaran, the learned counsel for the appellants, there is absolutely no pleading in the plaint regarding the acquisition of the property shown in the second paragraph of the schedule to the plaint by Thangamuthu. A Division Bench of this Court in R.Deivanai Ammal (Died and another Vs. G.Meenakshi Ammal and others reported in 2005-1-L.W.343 had dealt with the nature of the burden on the coparcener who pleads that property standing in the name of the one of the coparceners is also coparcenary property. The Division Bench had held as follows:-

13. Under the Hindu Law it is only when a person alleging that the property is ancestral property proves that there was a nucleus by means of which other property may have been acquired, that the burden is shifted on the party alleging self-acquisitions to prove that the property was acquired without any aid from the family estate. In other words the mere existence of a nucleus however small or insignificant is not enoughy. It should be shown to be of such a character as could reasonably be expected to lead to the acquisition of the property alleged to be part of the joint family property. Where the doctrine of blending is invoked against a person having income at his disposal and acquiring property, the reasonable presumption to make is that he had the incme at his absolute disposal unless there is evidence to the contrary. If a coparcener desires to establish that a property in the name of a female member of the family or in the name of the manager himself has to be accepted and treated as property acquired from the joint family nucleus, it is absolutely essential that such a coparcener should not only barely plead the same, but also establish the existence of such a joint family fund or nucleus. Even if the joint family nucleus is so established, the prescriptionthat the accretions made by the manager or the purchases made by him should be deemed to be from and out of such a nucleus does not arise, if there is no proof that such nucleus of the joint family is not an income-yielding

apparatus

15. It is a well-established principle of law that where a party claims that any particular item of property is joint family property, the burden of proving that it is so rests on the party asserting it. Where it is established or admitted that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the presumption arises that it was joint property and the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family. But no such presumption would arise if the nucleus is such that with its help the property claimed to be joint could not have been acquired. In order to give rise to the presumption, the nucleus should be such that with its help the property claimed to be joint could have been acquired. A family house in the occupation of the members and yielding no income could not be nucleus out of which acquisitions could be made even though it might be of considerable value.

14. The above being requirement of law, if we are to examine the evidence available in this case in the backdrop of above requirement of law, it is clear to my mind that the plaintiff has miserably failed to discharge the burden that rests on her to show that the suit properties described in the second paragraph of the schedule to the plaint are also coparcenary properties. Once it is held that the plaintiff has failed to establish the nexus between the income from the ancestral property and the source of purchase money, it has to be definitely concluded that the properties mentioned in the second paragraph of the schedule to the plaint, which have been purchased by Thangamuthu, are his self-acquisitions. Once that conclusion is reached, the Will executed by Thangamuthu will automatically come into force and the plaintiff would be disentitled to claim a share in those properties. Therefore, the substantial questions of law framed in the cross-objections have to be necessarily answered as against the cross-objector. As a result of the answers to questions of law, the appeal has to be partly allowed, modifying the judgment and decree of the lower Appellate Court and the suit in O.S.No.429 of 2008 will stand decreed declaring 1/6<sup>th</sup> share of the plaintiff in the properties described in paragraph one of the plaint schedule

namely an extent of 0.90.05 hectares in Survey No.629/4 and an extent of 0.52.0 hectares in Survey No.656/3 in all an extent of 1.42.5 hectares. The suit will stand dismissed in another respects. Consequently, connected miscellaneous petitions, if any are closed. Considering the relationship between the parties, there will be no order as to costs.

Sd/-  
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

kkn

To:-

1. The Second Additional District Judge, Erode.
2. The Second Additional Sub-Judge, Erode.

Copy To

The Section Officer,  
VR Section, High Court,  
Madras-104.

+1cc to Mr.N.Manokaran, Advocate, S.R.No.23311

+1cc to Mr.S.Kaithamalai Kumaran, Advocate, S.R.No.22614

S.A.No.896 of 2014

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