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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 31.03.2021

PRONOUNCED ON:15.04.2021

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.NO.1236 OF 2008

AND

M.P.NO.1 OF 2008

1. P.Loganathan,
Son of Ponnusamy
2. C.Ponnusamy,
Son of Chenniappa Gounder
3. P.Rajamani
Wife of Ponnusamy

1 to 3 are residing at
Palankattuthottam,
Karumandampalayam,
60, Velampalayam Village,
Erode Taluk & District.

4. G.Sudha,
Wife of Gopal,
100, Madhavi Street,
Teacher's Colony,
Erode - 638 011.
5. Velusamy,
Ram Nagar,
Opp to Avinashi Gounder,
Thirumana Mandapam,
Kollampalayam,
Erode.
6. V.Rajeshwari,
Wife of Velusamy,
Ram Nagar,
Opp. To Avinashi Gounder,
Thirumana Mandapam,
Kollampalayam,
Erode.

... Appellants/
Respondents/Defendants



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Vs.

Arulshankar (Major)
Son of Loganathan,

[Respondent Arun Shankar
declared as Major and respondent's
friend and Mother discharged from
their Guardianship vide order of
court dated 25.02.2021 made in
C.M.P.Nos.3282 & 3284 of 2021
in S.A.No.1236 of 2008]

... Respondent/
Appellant/Plaintiff

Prayer:

Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 19.06.2006 made in A.S.No.88 of 2005 on the file of the Principal District Court, Erode modifying the judgment and decree dated 17.03.2005 made in O.S.No.718 of 1999 on the file of the II Additional Subordinate Court, Erode.

For Appellants : Mr.V.P.Sengottuvel

For Respondent: Mr.A.Sundaravadhanam

J U D G M E N T

Challenge in this second appeal is made against the judgment and decree dated 19.06.2006 passed in A.S.No.88 of 2005 on the file of the Principal District Court, Erode, modifying the judgment and decree dated 17.03.2005 passed in O.S.No.718 of 1999 on the file of the II Additional Subordinate Court, Erode.

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

3. The defendants in O.S.No.718 of 1999 are the appellants in this second appeal.

4. Suit for partition.

5. Shown of unnecessary details, the case of the plaintiff is that he is the son of the first defendant and the first defendant is the son of the second defendant and that the suit properties originally belonged to one Chinnappa Gounder, S/o



Palanimalai Gounder and he died intestate about 12 years ago and the second defendant is the son of the deceased Chinnappa Gounder and the first defendant is the only son of the second defendant and the suit properties had been inherited by the defendants as the ancestral properties and by birth, the plaintiff became the co-sharer of the suit properties and entitled to $\frac{1}{4}$ share and the plaintiff's mother had got married to the first defendant and out of the wedlock, the plaintiff was born to them and the first defendant developed bad habits and started to waste the family properties for his illegal and immoral purposes and accordingly the plaintiff being the co-sharer of the suit properties and as the defendants 1 and 2 are endeavoring to alienate the suit properties to the 5th defendant, the son-in-law of the first defendant and the abovesaid sale transaction is also invalid and not binding upon the plaintiff and not for family necessity, accordingly the plaintiff has been necessitated to lay the suit against the defendants for claiming $\frac{1}{4}$ share in the suit properties.

6. The defendants resisted the plaintiff's suit contending that the suit properties belonged to Chinnappa Gounder and putforth the case that the extent of 1.93 $\frac{1}{2}$ cents purchased by the second defendant had been wrongly included in the suit properties and according to them, Chinnappa Gounder executed a registered Will on 16.04.1974 in a sound disposing state of mind, bequeathing the undivided suit properties to the second defendant and the abovesaid Will is a registered document and therefore the first defendant has no right, title or interest over the property covered in the said Will and admitted the relationship between the parties and disputed that the suit properties are the ancestral properties and further putforth the case that the second defendant is entitled to the first item of the suit properties and also entitled to 1.72 acres in the item 2 of the suit properties and the abovesaid properties are the separate properties of the second defendant and further putforth the case that the second defendant divided the joint family properties vide the partition deed dated 17.05.1965 and an extent of 8 acres had been sold to Rajeswari on 11.03.1975 and through his first wife, he got a daughter by name Rajeswari and two sons Gopala Kirshnan, who died at the age of 9 years and the first defendant and married one Rajamani as the second wife and got two daughters by name Senthamil Selvi and Sudha (D4). The second defendant inherited the shares belonging to his deceased son Gopala Krishnan and the deceased daughter Senthamil Selvi and further contended that his daughter Sudha is also entitled to one share and accordingly putforth the case that the plaintiff is not entitled to obtain any share and pleaded that the suit is bad for non-jointer of necessary parties and accordingly prayed for the dismissal of the plaintiff's suit.



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7. Based on the abovesaid pleas, the parties went for trial and in support of the plaintiff's case, P.W.1 was examined. Ex.A1 has been marked. On the side of the defendants, D.Ws.1 to 6 were examined. Exs.B1 to B19 were marked.

8. On an appreciation of the materials placed on record and the submissions put forth by the respective parties, the trial court was pleased to declare that the plaintiff is entitled to 1/20 share in the item 1 of an extent of 1.92 acres excluding the properties belonging to the second defendant by way of the Will and purchase and excluding the properties alienated for family necessity in 0.25.5 hectares in S.No.245/8 and 0.26.0 hectares in S.No.250/1 of item 2 of the suit properties and accordingly granted the preliminary decree in favour of the plaintiff. Impugning the same, the first appeal has been laid by the plaintiff. The first appellate court on an appreciation of the materials available on record and the submissions put forth by the respective parties, was pleased to modify the judgment and decree of the trial court and held that the plaintiff is entitled for partition and separate possession of 1/8 share of the properties of the plaint schedule properties 1 and 2 and accordingly disposed of the appeal. Challenging the same, the present second appeal has been laid by the defendants.

9. At the time of admission of the second appeal the following substantial questions of law were formulated for consideration.

(a) Whether the lower appellate Court is right in holding that the fourth defendant is not entitled for a share in the joint family properties, when Section 6 of the Hindu Succession (Amendment) Act, 2005, Act 39 of 2005 confers right for a daughter of a coparcener in Joint Hindu Family properties.

(b) Whether the lower appellate court is right in holding that the Will in Ex.B8 has not been proved in accordance with the Indian Evidence Act, when the Will executed 30 years before production of the same before the Court was presumed to be genuine under Section 90 of the Indian Evidence Act.

10. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

11. The relationship between the parties is not in dispute. The defendants resisted the plaintiff's suit by projecting the Will dated 16.04.1974 marked as Ex.B8 said to have been executed by the second defendant's father and thereby it is the case of the defendants that the properties covered in Ex.B8 Will are the



absolute properties belonging to the second defendant and not available for partition. The abovesaid Will being challenged by the plaintiff, it is for the defendants to establish the truth and validity of Ex.B8 Will as per law. Ex.B8 Will is found to be a registered document. The trial court seems to have placed reliance upon Ex.B8 Will based on the presumption available under section 90 of the Indian Evidence Act. However, the abovesaid determination of the trial court for raising the presumption of the truth and validity of the Will in question under section 90 of the Indian Evidence Act cannot be sustained.

12. From the pleas putforth by the respective parties, it is found that the attesting witnesses to the abovesaid Will are no more and the same could also be gathered from the death certificates marked as Ex.B19 and B20. However, the defendants endeavored to prove the signatures of the attestors through the persons acquainted with their signatures as D.Ws.5 and 6. However considering the evidence of D.W.5 in toto, as adduced in the course of chief examination and cross examination, it is evident that as rightly held by the first appellate court, on the date of his proof affidavit filed by defendants, he had no opportunity to identify the signatures of the attestors in the disputed Will and during the course of cross examination D.W.5 has admitted that he has not seen the Will Ex.B8 in person and therefore admitted that he does not know as to who had all attested the abovesaid Will. Similarly is the evidence of D.W.6, in the cross examination, wherein he would also admit that he does not know as to who had scribed Ex.B8 Will, what are the contents contained in the said Will and also further admitted that the abovesaid Will had been attested by 4, 5 persons and he does not know who had attested the same. Therefore, when the evidence of D.Ws.5 and 6 being above, and when they had been summoned by the defendants only to identify the signatures of the attestors and when the defendants have not taken steps to produce the Will before D.Ws.5 and 6 for the purpose of identifying the attestors signatures by them as per law, in such view of the matter, the first appellate court is justified in holding that no safe reliance could be attached to the testimony of D.Ws.5 and 6 for upholding the truth and validity of Ex.B8 Will. Similarly, the evidence of the scribe also would not be sufficient to prove the authenticity of the Will as per law and in such view of the matter, the first appellate court has rightly concluded that the defendants have failed to establish the truth and validity of Ex.B8 Will in accordance with law and also rightly concluded that there is no question of raising the presumption under section 90 of the Indian Evidence Act to the disputed Will for upholding its validity and accordingly I do not find any valid reason to interfere with the findings of the first appellate court that



the defendants have miserably failed to establish the truth and validity of Ex.B8 Will.

13. The defendants would putforth the case that the second defendant had purchased certain items in the plaint 1 and 2 schedule properties by virtue of the sale deed dated 06.11.1969 and thereby contended that the abovesaid properties are the separate properties of the second defendant. By virtue of Ex.B9, the second defendant's mother had claimed to have alienated the suit properties comprised therein to the second defendant. The second defendant's mother is stated to have claimed title to the said properties by virtue of the sale deed dated 15.04.1943, however the abovesaid parent title deed had not been projected by the defendants for the reasons best know to them. In addition to that, there is no proof placed on the part of the defendants that the abovesaid properties had been enjoyed by the second defendant as the separate properties by obtaining patta etc., and on the other hand, from the evidence adduced in the matter, it is found that the all the suit properties are found to be in the common enjoyment of the co-sharers and therefore the claim of the defendants that the second defendant had acquired the abovesaid items independently out of his own income as such cannot be countenanced in any manner. Moreover, as rightly concluded by the first appellate court, when the defendants have failed to establish that the second defendant is having any independent income other than the agricultural income derived from the ancestral properties, in such view of the matter, and moreso, when the abovesaid properties are also found to be in the joint possession and enjoyment of the family members, all put together, the first appellate court is justified in holding that the abovesaid properties are also the joint family properties belonging to the parties concerned.

14. The defendants would also plead the factum of the earlier partition vide the partition deed dated 07.05.1965 marked as Ex.B10 for non-suiting the plaintiff. As rightly concluded by the first appellate court, there is no materials to hold that the properties allotted to the various sharers had been enjoyed by them independently and on the other hand, when the materials projected would only go to show that even after the alleged partition, the allotted properties had also been enjoyed in common, in such view of the matter, the first appellate court is found to be justified in holding that Ex.B10 partition deed is not binding upon the plaintiff.

15. In the light of the abovesaid discussions, as all the suit properties are found to be joint family properties



belonging to the parties and considering the genealogy projected in the matter, when it is found that following the decision of the Supreme Court in Vineeta Sharma case reported in 2019 (9) SCC 1, the daughters of Ponnusamy (D2) are also entitled to equal share in the joint family properties, in such view of the matter, it has to be held that the second defendant and his children namely the first defendant, his deceased son Gopala Krishnan, his daughter D6, his deceased daughter Senthamil Selvi and his daughter Sudha (D4) would be each entitled to 1/6 share in the suit properties and the plaintiff being the son of the first defendant, is found to be entitled to 1/12th share in D1's share and accordingly it has to be held that the first appellate court has erred in holding that the second defendant's daughters are not entitled to claim share in the joint family properties.

16. In support of his various contentions, the plaintiff's counsel placed reliance upon the decisions reported in

1.2003 (10) SCC 310 [D.S.Lakshmaiah & Another Vs. L.Balasubramanyam & Another]

2.2001(4) Civil LJ 840 [T.V.Angamuthu and Another Vs. The State Government of Tamil Nadu]

3.2018 (1) LW 221[M.Subramaniam @ M.S.Mani Vs. S.Ravichandran]

4.AIR 2000 SC 3522 [Kannian Vs. Sethurama]

17. In support of his various contentions, defendants' counsel placed reliance upon the decision reported in 2019 SCC Only Mad 9125 [K.Narayanasamy Vs. K.Thulasiraman and others]. The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the case at hand.

18. In view of the abovesaid position, the quantum of shares determined by the first appellate court is required to be modified and accordingly the plaintiff is declared to seek for partition and separate possession of 1/12 share in the plaint schedule properties 1 and 2 and accordingly the preliminary decree is passed in favour of the plaintiff. The substantial questions of law formulated in the second appeal are accordingly answered.

19. In conclusion, the the judgment and decree dated 19.06.2006 passed in A.S.No.88 of 2005 on the file of the Principal District Court, Erode are modified and the plaintiff is entitled for partition and separate possession of 1/12 share in the properties mentioned in the plaint schedules 1 and 2 and accordingly there shall be a preliminary decree in favour of the



plaintiff. Accordingly the second appeal is partly allowed. No costs. Consequently, connected miscellaneous petition, if any is closed.

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Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

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To

1. The Principal District Judge,
Principal District Court,
Erode.
2. The II Additional Subordinate Judge,
II Additional Subordinate Court,
Erode.

Copy to

The Section Officer,
VR Section,
High Court,
Chennai.

+1cc to Mr.V.P.Sengottuvel, Advocate, S.R.No.22759

S.A.No.1236 of 2008
and
M.P.No.1 of 2008

SR(CO)
PM/04/10/2021