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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 22.12.2020

Judgment Pronounced on : 16.07.2021

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.Nos.1236 & 1237 of 2009  
and MP.Nos.1 & 1 of 2011

1. R.Muthulakshmi ... Appellant /1<sup>st</sup> Respondent /  
Plaintiff(in both the second appeal)

Vs

1.Valliammal  
2.Duraisamy  
3.Rathinasamy  
4.Shantha @ Saraswathy  
5.Velusamy (Deceased)

..... Respondents 1 to 5 / Appellants 1 to  
5 / Defendants 8 to 12

6.Nachammal  
7.P.T.Muthusamy  
8.Karunayammal  
9.T.Arumugam  
10.Saraswathy  
11.Kandathal  
12.Chitra @ Gomathi  
13.P.Ravichandran  
14.P.Balakrishnan

..... Respondents 6 to 14/  
Respondents 5 to 13/  
Defendants 4 to 7, 13 to 17

15.Lakshmi  
16.Poornima Devi  
17.Sathish Kumar  
18.Valliammal

... Respondents 15 to 18  
(in both the second appeal)

(Respondents 15 to 18 are brought on record as legal representatives of the deceased R5 vide Order of Court dated 15.06.2015 made in MP.No.1 & 1 of 2013 in SA.Nos.1236 & 1237 of 2009)

Common Prayer :- Second Appeal filed under Section 100 of CPC, against the common judgment and decree passed by the learned I Additional District Judge, Coimbatore, dated 18.04.2006, passed



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in A.S.Nos.156 of 2003, and the cross appeal therein partly reversing the judgment and decree of the learned Subordinate Judge, Tiruppur dated 24.04.2003 made in O.S.No.189 of 1986.

For Appellant : Mr.V.Raghavachari  
for Mr.P.K.Rajagopal

For Respondents: Mr.N.Sridhar  
for Mr.R.Bharath Kumar  
[RR1 to 4, 15 to 17]

#### COMMON JUDGMENT

These second appeals are preferred by the plaintiff. She has laid a suit for partition of three items of properties. The suit was partially decreed by the trial court, challenging which decree the first defendant's branch (defendants 8 to 12) preferred a first appeal in A.S.156 of 2003, in which the plaintiff had preferred her cross objection. The first appellate court allowed the appeal and dismissed the cross objection, which implied that the suit was dismissed in its entirety. Aggrieved by the said decrees of the first appellate court, the plaintiff has approached this court with these appeals. Parties would be referred to by their rank in the trial court.

The Pleadings:

##### 2.1 The Plaintiff's case:

- There are three items of suit properties and they were the self-acquired properties of a certain Chennimalai Gounder. He was married to Valliammal, and the couple had a son Appasamy (the first defendant) and a daughter Nachammal. Nachammal died in 1963. A decade later, on 26.06.1973, Chennimalai Gounder died and he died intestate, leaving him surviving his widow Valliammal, his only son Appasamy Gounder, the first defendant, and heirs of his predeceased daughter, the plaintiff and defendants 3 to 7. Nachammal's husband (father of the plaintiff) was the second defendant.
- Item 1 of the suit property was purchased by Chennimalai Gounder under sale deeds dated 17.04.1920, 11.08.1922, (marked Exts.A-1 and A-2). Items 2 and 3 were obtained by him under a partition deed dated 01.10.1942, marked A3.
- The 13<sup>th</sup> defendant is a purchaser of 3.50 acres in item 2 from the first defendant and his sons Vide a sale deed dated 12-12-1985.
- On the demise of Chennimalai gounder, the estate devolved equally on his widow, his son and the branch of Nachammal represented by the plaintiff and defendants 3 to 7.
- After the demise of Chennimalaigounder, the plaintiff has been in joint possession and enjoyment of the suit



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- properties along with Valliammal and the first defendant.
- While so, on 11-01-1986 Valliammal died and thereafter plaintiff continued her joint possession with the first defendant. Thus, the plaintiff is in actual physical possession and enjoyment of the suit properties along with her other siblings. She has been regularly visiting the suit properties and has been helping her siblings in cultivation of the properties.
  - Be that as it may, differences arose between the plaintiff and the first defendant, when the latter began taking steps to encumber the suit properties. Therefore, the plaintiff issued a suit notice dated 26.08.1985 [Ext.A8] on the defendants 1 to 4, 6 & 7 seeking partition of the suit properties. The first defendant issued a reply notice dated 03.09.1985 [Ext.A9], raising untenable contentions. Hence, the suit is laid.
  - While so, on 11.01.1986 Valliammal died. the plaintiff and the defendants 2 to 7 were entitled to 1/14 share in each of the suit properties, whereas the first defendant was entitled to 7/14 share.  
(But in the prayer coloumn of the suit, she claimed partition of 19/252 shares)

## 2.2 Case of the Defendants:

The first defendant was the sole contesting defendant. He died and his sons came to be impleaded as defendants 8 to 12. On their impleadment they too filed their written statement which was essentially along the lines of the written statement of their father. Their case in defence of the plaintiff's claim is as below:

- The suit properties were not the self-acquisition of Chennimalai Gounder, but were the ancestral properties in his hands, and were so treated by Chennimalai Gounder and the first defendant. At no point of time, Chennimalai Gounder was in exclusive possession of the properties.
- Item 2 has a total extent of 7.29 acres, and it is part of a larger extent in Sy.No:550. On 23.04.1966, Chennimalai Gounder settled his half share equalling 3.64½ acres to the first defendant under Ext.B1 settlement deed. Accordingly, this property is the exclusive property of the first defendant.
- Item No.1 property had an extent of 10.0 acres and it spreads over S.F.No.254/1, 257 and 258/1. On 19-01-1956, Chenniamalai gounder and the first defendant sold 2.00 acres in S.F.No.258/1. Another 40 cents in S.F.No.254/1 was acquired by the State Government. This apart in 1978, this defendant had sold an extent of 35 cents in S.F.No.258/1A1 to a certain Balakrishnan where he had put up a building. The portions so alienated or lost in acquisition, as the case may be, are not available for partition, and the



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plaintiff ought not to have included them.

● Be that as it may, the plaintiff is not entitled to any share in any of the properties. The allegations are:

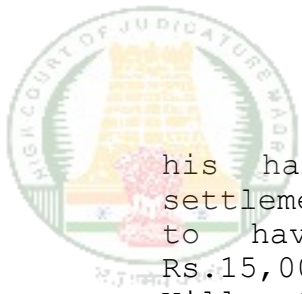
- On the demise of Chennimalai Gounder in 1973, and during his obsequies, an oral family arrangement took place in the presence of the Pachayatdars, in which the heirs of Nachammal were given Rs.15,000/- in lieu of their interest in the properties.
- So far as plaintiff's share in the share of Valliammal is concerned, on 19.9.1985 Valliammal had executed a registered Will (Ext.B-38) whereunder she bequeathed her entire share in the properties to the first defendant.
- Ever since the aforesaid family arrangement, this defendant alone has been in exclusive possession and enjoyment of the suit properties in assertion of the his exclusive right. In the course of his exclusive enjoyment of the property, the first defendant had expended about Rs.2.0 lakhs and had put up construction and had installed power looms, to run which he had also obtained electricity connection. All necessary licences for running the units too stand in the name of this defendant. He had also put up three shop buildings and has been receiving rents from the tenants. Besides, he has also leased out/mortgaged the vacant site for running a timber depot to various parties, and the last of the lessee was a certain Arunachalam.
- This defendant has been exercising acts of ownership to the exclusion of the plaintiff and her siblings, and if they ever had any right, they have been ousted of their right in the suit properties for well over the statutory period.
- There were family debts and only these defendants discharged them. It is not known how the plaintiff has arrived at 19/252 as her share.

### 2.3 Case of other defendants:

He is the brother of the plaintiff and in his written statement he has essentially sailed with the contention of the first defendant, and supported the latter's defence of the oral family arrangement and the receipt of Rs.15,000/- by the heirs of Nachammal during the obsequies of Chennimalai Gounder.

2.4 The 13<sup>th</sup> defendant in his written statement has contended that he is a bonafide purchaser for value as concerning the portion he had purchased in item 2.

3.1 The trial Court framed as many as nine issues. Critical among them are the first issue, which pertains to ascertaining the character of the suit properties - whether they are the self acquisitions of Chennimalai Gounder or ancestral properties in



his hands; the 6th issue relates to the alleged family settlement where under the children of the Nachammal had alleged to have relinquished their right in the property for Rs.15,000/-. The 5<sup>th</sup> issue relates to the genuineness of the Will of Valliammal dated 19-09-1985, marked Ext.B-38. The Additional second issue framed on 04-12-2001 relates to the need to implead the purchasers of item 1.

3.2 During trial the plaintiff was examined as P.W.1 and one Velusamy as P.W.2., and she had produced Exts.A1 to Ext.A9, some of which had already been referred to. On the side of the defendants, the 10th defendant was examined as D.W.1, and he marked as many as 38 documents (Ext.B1 to Ext.B38). Of the two independent witnesses examined D.W.2 is one of the attesting witnesses to Ext.B-38 Will of Valliammal. D.W.3, was examined to prove the oral family arrangement.

3.3 The trial Court partially decreed the suit, when it granted a decree for 1/14 share in Item No.1 and dismissed the suit as regarding Item 2 and 3. Its line of reasoning are:

- Properties are the self acquisition of Chennimalai Gounder.
- That Ext.B-1 under settlement deed, dated 23-04-1966 is valid and that item 2 is not available for partition.
- The alleged family arrangement, (whereunder the children of Nachammal were said to have been paid Rs.15,000/- in lieu of their share in the properties is not proved as it was not evidenced by any documentary evidence.
- That Ext.B-38 Will is not genuine, as it is ridden with unexplained suspicious circumstances. This apart, none of the attesting witnesses to the Will was examined (which was factually incorrect since D.W.2 has been examined. The other witness was the third defendant, and he was dead when the trial began and his signature in the Will was admitted by the plaintiff herself).
- The various sales as concerning portion of item 1 of suit properties would not bind the plaintiff.
- That the suit was not bad for non-impleadment of the purchasers of portions of item 1 since all the parties who are necessary for deciding the lis are before the Court.

4.1 Challenging the decree of the trial court, the defendants 8 to 12 filed A.S.No.156/2003, in which the plaintiff had preferred a cross appeal as against the decree of the trial Court dismissing her claim of partition over Item No.2 and 3.

4.2 Before the first appellate Court, the appellants produced certain additional documents and were received in evidence and were marked as Exts.B-39 to B-44. Of them Ext.B-39 is a sale deed dated 28-09-1908, whereunder Chennimalai Gounder's father,



also was known by the same name Chennimalai Gounder, had purchased item 2. Ext.B-40 is another sale deed dated 06-10-1911, under which Chennimalai Gounder Sr. had purchased item 3. Ext.B-2 is a partition deed dated 01-10-1942 under which Chennimalai Gounder, the father of the first defendant, and his brother had partitioned the family properties. The first appellate Court had recorded in its judgement that these additional documents were admitted by consent.

4.3 During the pendency of the appeal, the Hindu Succession Amendment Act (Central Act 39/2005) came into force and Sec.6 of the Act as originally stood was replaced by a new Sec.6. The plaintiff appeared to have argued before the first appellate court claiming advantage of Act 39/2005. On a reappraisal of evidence before it, the first appellate Court found:

- The first item property is the self acquisition of Chennimalai Gounder, under Ext.A-1 sale deed dated 11-08-1920 as this was excluded in Ext.B-2 = Ext.A-3 partition deed.
- That items 2 and 3 were ancestral properties, inasmuch as they were purchased by the paternal grandfather of both the first defendant and Nachammal under Ext.B-39 and B-40 respectively, and that they were specifically allotted to the share of Chennimalai Gounder under Ext.B-2 partition deed.
- Item 2 is not available for partition, and the finding of the trial court was confirmed. Ext.B-1 gift deed is valid as the property settled thereunder was but a reasonable portion of the total holdings of the coparcenary properties.
- That the family arrangement which the first defendant had pleaded was true, as it was proved by D.W.3 and supported by the fact that revenue records were mutated in the name of first defendant, that the licences and tax receipts were in his name, and that he exercised exclusive right over the property. That the first defendant had exercised exclusive right of ownership over the property to the exclusion and to the knowledge of Nachammal's branch, which implies that they have been ousted of their 1/3 share in item 1 and 1/6 share in item 3.
- So far as entitlement of the plaintiff to claim a share in the 1/3 share of Valliammal in item 1 and 1/6 share in item 3 is concerned, the same is not available, since under Ext.B-38 Will which she had executed in favour her son, the first defendant is genuine.
- That the plaintiff is not entitled to any benefit under the Hindu Succession (Amendment) Act, 2005.
- That the suit is bad for non-joinder of necessary parties, inasmuch as the plaintiff had failed to implead the various third-party purchasers of portion of item 1 despite the



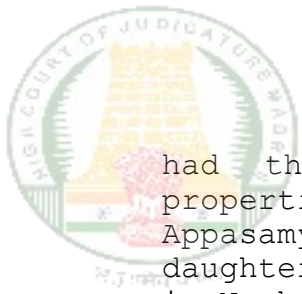
disclosure of the those sales in the written statements of the contesting defendants.

5. Challenging the decree allowing the first appeal in A.S.No.156/2003, the plaintiff has preferred S.A.No.1236 of 2009; and S.A.No.1237/2009 is preferred against the decree dismissing her cross appeal. Both the second appeals are admitted on the following substantial questions of law :

1. Whether in law, the appellate Court is right in accepting the oral family arrangement and holding that the one co-parcener's interest could be relinquished without a registered document transferring such a right in the absence of any occasion for effecting a family arrangement and circumstances for acting upon it, as held in the judgment reported in AIR 1965 SC 824?
2. Whether in law, the lower appellate Court right in upholding that the first defendant prescribed title by adverse possession, thus denying the share of the plaintiff in respect of the suit properties in the absence of any specific plea of ouster and proof of the same?
3. Whether in law, the lower appellate Court failed to take note of fact that on failure to prove the case of adverse possession or ouster especially in the absence of any specific plea in this regard, the plaintiff would be entitled to a share in the suit property?
4. Whether in law, the lower appellate Court is right in holding that Section 6 of the Hindu Succession Amendment Act, 2005 cannot be invoked by the branch represented by the pre-deceased daughter?
5. Whether in law, the Court below is right in holding that the plaintiff has no share in suit item No.2 on the ground that the settlement deed is valid in law?
6. Whether in law, the lower appellate Court erred in holding that the Will under Ext.B38 is genuine and valid in the absence of any proof about execution of the same as contemplated under Section 67 of Evidence Act, besides being fraudulent and untrue?

Arguments:

6. The plot is clean and does not trouble the anticipation of this court. A certain Chennimalai Gounder died in 1973. He



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had three direct heirs and left behind three items of properties. His heirs were his widow Valliammal, his son Appasamy Gounder, the first defendant, and children of his daughter Nachammal, who had predeceased him in 1963. Plaintiff is Nachammal's daughter.

7. Both the Courts have held that item 2 is not available for partition as they upheld the validity of Ext.B-1 settlement deed executed by Chenniamalai Gounder in favour of the first defendant. This now leaves only items 1 and 3 and the right of the plaintiff to claim partition in them for consideration of this court. However, if the finding on item 2 is kept aside, then it would imply that in the ordinary course of events, Nachammal's branch would be entitled to 1/3 share in item 1, and 1/6 share in items 2 and 3. But the plaintiff would contend that items 2 and 3 are self acquired property of Chennimalai Gounder.

8.1. (a) To resist plaintiff's claim to item 1 and 3, the first defendant had come out with two defenses: (a) An oral family arrangement took place during the obsequies of Chennimalai Gounder, in which heirs of Nachammal were paid Rs.15,000/- in lieu of their share. Alternatively they had been ousted of their right as the first defendant had been in exclusive enjoyment of the properties to the exclusion of Nachammal's heirs and to their knowledge about such exclusion.

8.1. (b) So far as the plaintiff's right to a share in the share of Valliammal is concerned, the first defendant would obstruct plaintiff's design with Ext.B-38 Will, said to have been executed by his mother Valliammal.

8.2. The plaintiff too has come up with an additional strategy, thanks to the arrival of the Hindu Succession (Amendment) Act, (Central Act 39/2005) during the pendency of the first appeal. She would now claim that they would be entitled to the advantage of Act 39/2005. It is however, not adequately clear if she herself claims right as a coparcener or seeks elevation of her mother Nachammal as a coparcener. In short she claims a share is 1/3 share in items 2 and 3 as a coparcener. Secondly, Ext.B-1 settlement is not binding on the heirs of Nachammal, since her consent was not obtained when the settlement deed was executed. This plea however, was negatived by the first appellate court.

9. If the list of substantial questions as framed are analysed, the first of the question relates to the family arrangement, questions 2 and 3 touches upon the plea of ouster, question 6 impugns the finding of the first appellate court on the genuineness of Ext.B-38 Will, question No: 4 relates to applicability of Central Act 35/2005 and question 5 pertains to validity of Ext.B-1 settlement deed.



10.1 This is the setting. Opening the arguments for the appellant, Thiru V. Raghavachari focused his argument on the finding of the first appellate court in denying any share to the plaintiff, and its finding upholding the family arrangement, as well as the denial of share in Valliammal's share in the properties by upholding the genuineness of Ext.B-38 Will.

10.2 Turning to the finding upholding the family arrangement, the learned counsel submitted that the first appellate Court has summoned its own knowledge or familiarity of family arrangements when it observed that family arrangement through Panchayatdars is common place in villages, and that it is not necessary that the same must be reduced to writing either by a registered or an unregistered document, (depending on the nature of the document) and has backed it with its satisfaction as to the believability of the testimony of DW3. This apart, the first appellate court has held that the family arrangement is found to have been probalised by the fact that revenue records are mutated in the name of the first defendant, licenses for construction and running of power loom were in favour of the first defendant, and it was he who had leased/mortgaged the same to the third parties, in assertion of his exclusive right of ownership, and that these acts of the first defendant were not only not interfered with by the heirs of Nachammal, but it had also taken place with their knowledge and consent. Besides, the third defendant, one of the brothers of the plaintiff, had in his written statement admitted the family arrangement, and the plaintiff during her cross examination as P.W.1 had admitted the signature of her brother / the third defendant, and also had deposed that she had no differences with him and that he would not lie. Arguing against the said findings, he submitted:

- When the Court is called upon to decide a particular fact, it ought not to have taken judicial notice of an alleged general practice of Panchayatdars organising family arrangements in villages. The court ought not to have substituted its personal knowledge about a certain practice, when it is neither pleaded, nor proved. And, at any rate it is irrelevant while the Court is looking for proof of a particular fact necessary to decide a specific issue on the family arrangement which according to the first defendant had taken place during the obsequies of Chennimalai Gounder.
- Secondly, by virtue of the alleged oral family arrangement one branch of the co-sharers was totally excluded. Any such family arrangement to be valid in law has to be in writing and must be registered. Reliance was placed on Thamma Venkata Subbamma (dead) by L.R. Vs. Thamma Rattamma [100 L.W.1125]



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- First appellate Court ought not to have relied on the testimony of D.W.3, a small time mechanic, who was barely 22 years at the time. It is not about the financial or social status of the witness that is critical, but the improbability that this witness might have known first hand about the details of a family arrangement alleged to have taken place in a wealthy family. Similarly, relying on the written statement of 3<sup>rd</sup> defendant wherein he had conceded to the family arrangement is of no consequence since, it neither constitutes a statement under Section 32 nor one under Section 33 of the Evidence Act. And, the fact that plaintiff had testified to her cordial relationship with her brother or her opinion that he might not lie are not adequate to dispense with the admissibility of the unilateral statement of the third defendant either as a conclusive proof of the fact it alleged, nor sufficient to corroborate a disputed fact: Was there a family arrangement?
- In relying on mutation in the revenue records in the name of the first defendant, the first appellate Court ignored the fact that such mutation had taken place long after the time of alleged family arrangement, and after the plaintiff had made her claim for partition, with the result it can hardly be termed as a consequence of a family arrangement as to constitute a circumstance in aid of its proof. Reliance was to the authority in Potti Lakshmi Perumallu Vs Potti Krishnavenamma [AIR 1965 SC 825]

10.3 The first appellate court was in egregious error in holding that both the alternate defences of the first defendant namely the family arrangement and the ouster had been proved. These pleas are alternate and inconsistent pleas, and that the first defendant, or on his demise his sons, (defendants 8 to 12), ought to have elected any one but not both. When the contesting defendants attempted to sustain both, these pleas internally neutralize each other.

10.4 Turning to the proof of ouster, the first appellate court significantly erred in ignoring the fact that mutation of revenue records had taken place only after the plaintiff has claimed partition. Here it overlooked the evidence of D.W.1 who in the course of cross examination has conceded that till the plaintiff made her claim for partition both the families were on cordial terms. Cumulatively this would imply that there is no evidence to indicate that plaintiff has been ousted of her right over the property to her knowledge. Reliance was to the authorities in Nagabhushanammal (Dead) Vs.C.Chandikeswaralingam [(2016) 4 SCC 434], P. Lakshmi Reddy Vs L. Lakshmi Reddy [(1994)2 SCC 14], Syed Shah Ghulam Ghouse Mohiuddin and Others Vs.Syed Shah Ahmed Mohiuddin Kamisul Quadri (Died) [(1971)1 SCC



597], Lakshmiammal and another Vs. C.P.Nanjappan and 2 others [2000 (III) CTC 29].

10.5 Shifting his focus to the finding of the first appellate court on the genuineness of Ext.B-38 Will of Valliammal, Thiru. Ragavachari contended that the first appellate Court had oversimplified its approach in entering a finding in favour of the genuineness of Ext.B-38 Will, with its solitary line of reasoning that the Court need not undertake a meticulous analysis of the evidence. The Court had over looked three aspects that emerged from the evidence of D.W.3, the attesting witness to Ext.B-38: First, he has admitted that some 10 days prior to the execution of Will, Valliammal was indisposed, that first defendant was by her side; secondly, the left hand thumb impression of Valliammal appear in two different colour which implies two different rubber stamp pad were used; and thirdly, D.W.3 and not Valliammal had applied to the Sub Registrar for a home-visit-registration of the Will. Cumulatively taken, three strong suspicious circumstances emanate from this evidence: First, first defendant had actively participated in the preparation of the Will; second, D.W.3 was first defendant's man; and three if Valliammal had fixed her hand on all the three pages of Ext.B-38 contemporaneously, then there is no need for using two different coloured stamp-pad. A Will demands highest standard of proof for establishing its genuineness, and when suspicious circumstances are brought before the Court, the first appellate Court ought to have ascertained if the propounder of the Will had explained the suspicious circumstances adequately to the satisfaction of the Court, rather than diluting their effect by treating them as some ordinary pieces of evidence not requiring any meticulous attention. Reliance was placed on Sridevi and others Vs. Jayaraja Shetty and others [ 2005 (1) CTC 443]

10.6 The first defendant had pleaded that all the items of properties were the ancestral properties in the hands of Chennimalai Gounder. If that is so, Chennimalai Gounder had no authority to execute Ext.B-1 gift deed as regards his half share in item 2. The first appellate court had erred in its approach in invoking the rule of 'power to gift a reasonable portion', without ascertaining if there is evidence to justify it.

10.7 For justifying its finding that items 2 and 3 are ancestral, the first appellate court had relied on Exts.B-39 to Ext.B-41, all of which it had admitted under Order 41 Rule 27 CPC. Indeed the Court had only aided the defendants to fill up the lacunae in their evidence, in admitting them. It also failed to note that none of the contents of these documents are formally proved. Reliance was placed on A.Andisamy Chettiar Vs. A.Subburaj Chettiar, [(2015) 17 SCC 713], Anandan (deceased) and



others Vs. Kannaiyan and others [(2018) 1 MLJ 846], Kamalammal Vs. Devagi and others [(2017) 2 MLJ 598]

Argument for the respondents 1 to 4 and 15 to 17

11. Thiru. Sridhar, the learned counsel for the contesting respondents argued:

- The first appellate Court is the final court of facts and this Court in Second Appeal cannot interfere with such findings, unless they are perverse. Any probability of a better view is hardly a ground for interference. Reliance was placed on Ganeshi (D) through Lrs and Others. Vs. Ashok and Anr [AIR 2011 SC 1340].
- The finding of the first appellate Court upholding the family arrangement is a finding on fact after a due appreciation of evidence. The first appellate Court has carefully and cumulatively evaluated the evidence of D.W.3, and also the attending circumstances that go to corroborate the family arrangement such as mutation of revenue records in the name of the first defendant, license obtained by him and he exercising right of ownership over the property by granting lease or mortgage to third parties. Indeed plaintiff's brother, the third defendant who had died by the time the case went to trial, too corroborated it in his written statement. Even though the written statement of the third defendant is only a pleading, yet, it is necessary not to overlook the testimony of P.W.1, who in her cross examination speaks about her cordial relationship with the third defendant and her conclusive view that he would not lie. Reliance was placed on Sahu Madho Das and others Vs. Mukand Ram and another [AIR 1955 SC 481] ; Tek Bahadur Bhujil Vs. Debi Singh Bhujil [AIR 1966 SC 292] ; Ram Charan Das Vs. Girija Nandini Devi and others [AIR 1966 SC 323] ; Maturi Pullaiah and another Vs. Maturi Narasimham and others [AIR 1966 SC 1836] ; Krishna Beharilal (dead) Vs. Gulabchand and others [AIR 1971 SC 1041] ; S.Shanmugam Pillai and others Vs. K.Shanmugam Pillai and others [AIR 1972 SC 2069] ; Hari Shankar Singhania and Ors Vs. Gaur Hari Singhania and Ors [AIR 2006 SC 2488].
- It is not given to the plaintiff to challenge the admissibility of Ext.B.39 to Ext.B.42 by the first appellate Court under Order 41 Rule 27 CPC as the same were admitted with her consent.
- The plaintiff is in confusion as to the character of the property, and as to the source of her right. In the plaint, she claims that all the three items of properties are self acquired properties of her maternal grandfather Chennimalai Gounder, yet she has chosen to invoke Section 6 of the Hindu Succession Act, as amended Vide Central Act 39/2005 .
- So far as item 2 is concerned, this has been proved to be a co-parcenary property in which only Chennimalai Gounder and



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the first defendant had right, and inasmuch as Nachammal was alien to the co-parcenary on the date of Ext.B.1, the plaintiff as her daughter does not have any locus standi to challenge Ext.B.1. This apart, nowhere in her pleading plaintiff has questioned Ext.B.1 and this is raised for the first time only in the Second Appeal.

- The finding of the first appellate Court as to the genuineness of Ext.B.38 Will of Valliammal is again a finding on fact and it too cannot be interfered with unless there is perversity. The appellant has three circumstances and claim that they cloud the genuineness of Ext.B.38 but, each of them either jointly or severally do not affect the factum of execution of the Will. The Will was attested by D.W.3 and as well as by the third defendant, who, to reiterate, is the brother of the plaintiff. And, she admits the signature of her brother in Ext.B.38.
- The first appellate Court has entered a categorical finding that the suit is bad for non-joinder of necessary parties. This was not challenged, nor any substantial question was raised by this Court. Under Ext.A1 and Ext.A.2 Chennimalai Gounder has purchased 10 acres and this is shown as Item 1. Both the Courts below have held that this item of property is the self acquisition of Chennimalai Gounder. Out of this, Chennimalai Gounder himself had sold 2 acres, which the plaintiff concedes that she knew it from her mother. She also concedes that Government has acquired some 40 cents in the same item. This apart, on 12.04.1978 first defendant and his sons (who are arrayed as defendants 8 to 12), had sold 35 cents to one Balakrishnan. During the pendency of the suit. Notwithstanding the fact that the first defendant had disclosed the pre-suit alienations, the plaintiff has not chosen to implead the purchasers thereof. Reliance was placed on the ratio in Kanakarathanammal Vs. V.S.Loganatha Mudaliar [AIR 1965 SC 271], 1973 Madras 133.
- The contention of the plaintiff that she is in joint possession of the property is belied by her own testimony when she concedes during her cross-examination that she has least idea about how the property is maintained or enjoyed.

## Discussion

12.1 As outlined earlier plaintiff can sustain her claim over item 2, only if she can sustain her contention that in terms of Sec.6 of the Hindu Succession Act as amended Vide Central Act 39/2005, her mother Nachammal ought to be considered a coparcener, her death in 1963 notwithstanding, in order she could impugn Ext.B-1 settlement deed in favour of the first defendant which Chennimalai Gounder had executed in 1966. This is because Act 39/2005, on its face does not elevate the children of a predeceased daughter as coparceners.



12.2 So far as plaintiff's claim to item 1 and 3 as a heir of Nachammal goes, her fortune depends largely on her ability to establish that the first appellate Court's finding upholding the plea of family arrangement, though one on fact, is still the most improbable conclusion. Similar is her claim to a share in the share of Valliammal. Here the plaintiff encounters an obstruction in the form of a finding of the first appellate court that Ext.B-38 Will of Valliammal is genuine.

13.1 Turning to the plaintiff's right to challenge Ext.B-1, she cannot succeed unless her mother Nachammal could be granted the status of a coparcener posthumously as on the date of Ext.B-1 by virtue of a legislation that was to arrive some 42 years later.

13.2(a) The argument on this point was heard only feebly, but since it was raised, it is necessary for this Court to consider if the plaintiff is entitled to any benefit under Sec.6 of the Hindu Succession Act, as amended by Hindu Succession (Amendment Act) (Central Act 39/2005). Sec.6 reads:

6. Devolution of interest in coparcenary property:

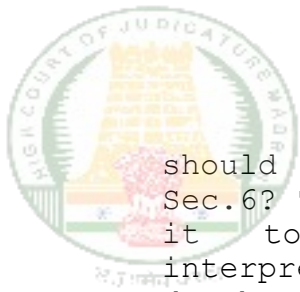
On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall -

(a) by birth become a coparcener in her own right in the same manner as the son;

(b) have the same rights in the coparcenary property as she would have had if she had been a son.

In Vineeta sharma Vs Rakesh Sharma [(2019)9 SCC 1], the Hon'ble Supreme Court, was required to resolve a conflict of views of the two other judgements of the Supreme Court on the point if the father of the daughter-to be-coparcener, who seeks an elevation of status as a coparcener, must be alive on the date of coming into force of amended Sec.6, and whether the Act applies to daughters born prior to it. The Court ultimately held the former in the negative and the latter in the affirmative. It held that succession by survivorship that ruled the devolution of coparcenary estate is only a mode of succession, and and it does not disturb the right to be a coparcener.

13.2(b) Here, the question is slightly different. The one who the plaintiff now requires this court to treat as a coparcener had died in 1963 (It is however not clear as was already indicated). Is there then anything in the text of Sec.6 to hold that a daughter who died prior to the commencement of its enactment should be fictionally considered as alive for the purpose of the granting benefit under it? In other words,



should a dead person be considered alive for the purpose of Sec.6? This Court does not find anything in Sec.6, that enables it to accommodate any such amazingly far-fetched interpretation. Consequently this Court holds that any daughter who seeks the benefit of Sec.6 of the Hindu Succession Act, 1956, must be alive as on the date when the amended Act came into force. Contextually, it is held Nachammal would not become a coparcener posthumously.

14.1 Plaintiff's right to challenge Ext.B-1 settlement deed has to be ascertained in this backdrop. As rightly contended by the learned counsel for the respondents, when Ext.B-1 was executed in 1966, there were only two coparceners, each of who were entitled to half share in item 2. Chennimalai Gounder, the karta, parted with his half share in item 2 to the other coparcener under the settlement deed. Nachammal, and her daughter, being alien to the coparcenery as on the date of Ext.B-1, they did not have any right to challenge Ext.B-1. Here, the first appellate Court seen to have strained itself overly in engaging itself in discussing law as if the coparcenery contained more members than two, and Nachammal herself was an eligible coparcener as on the date of Ext.B-1.

14.2 This apart, the proviso to Sec.6(1) would still disappoint the plaintiff even if her contention is presumed valid. The Proviso reads: "... nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004." This would imply that irrespective of the applicability of Sec.6 the plaintiff cannot benefit under Sec.6, since Ext.B-1 is covered by the proviso to Sec.6(1). This Court, accordingly confirms the finding of the first appellate court.

15.1 Another argument heard was to the effect that the first appellate court ought not to have admitted Ext.B-39 to B-42 under Order 41 Rule 27 CPC. Now based on Exts.B-39 to B-41, and reading it along with Ext.B-2 partition deed, the first appellate court had held that items 2 and 3 were ancestral properties. First, the said court has recorded in its judgement that these documents were admitted only on the consent of the plaintiff, which implies that the latter cannot challenge its admissibility before this Court; secondly, but for the finding of the court, the plaintiff cannot even entertain the possibility of claiming the advantage of Sec.6 of the Hindu Succession Act, for, if only item 2 were to be a self acquired property of Chennimalai Gounder, none can challenge Ext.B-1. Plaintiff here is seen caught oscillating between certain inconsistent positions.



15.2 A possible argument, however, was available to the plaintiff that she was not given any opportunity under Order 41 Rule 28 CPC to adduce rebuttal evidence. This point however, was not argued, in stead the focus was more on admitting the document without a formal proof. This literally begs the question since the documents were close to a century old documents and were stated to have been admitted by consent. Now, the contents of a document can be proved only by the production of the very document. Therefore, any insistence on formal proof of the contents is least likely to impeach the credibility of the documents admitted, or their content. But, production of rebuttal evidence is possible, and this is available to the plaintiff in law. This appeal was laid in 2009, and this Court has not heard anytime during the hearing that the plaintiff is in possession of any documentary evidence of substantial variety that could rebut the effect of the additional evidence admitted by the first appellate court. It needs to be emphasised that procedural law is a rule book of fairness with its well possessed character for pragmatism and flexibility. See: P.Suresh Vs R. Rangasamy & Others [2021(1) CTC 320]. Set in the context, the object behind Order 41 Rule 28 can be understood as a facet of rule of fairness, and for the reasons stated that this Court does not consider that this rule of fairness is seen breached in this case.

Plaintiff's claim to item 1 and 3:

16. This can be considered under two heads: (a) plaintiff's claim as the heir of Nachammal; and (b) Her claim in the share of her grandmother Valliammal. The resistance to the former is founded on the twin plea of family arrangement and ouster (both of which the first appellate court has upheld), and that of the latter is based on Ext.B-38 Will executed by Valliammal.

Family Arrangement & Ouster:

17. It is a combination plea of irreconcilables, which law understands as inconsistent pleadings. Both pleas of family arrangement and ouster pre-supposes that the heirs of Nachammal did have right in the suit properties, and if at all they have lost it, it may be in any one of the aforesaid modes, but not both. This would mean that, if there is a family arrangement under which a co-sharer is divested of his/her right in the property held in co-ownership, then there is no need for the other co-sharer to oust the former; alternatively, if there ought to be an ouster, then it is derivable that there could not have been an earlier divestiture of right of the co-sharer in a family arrangement.

18.1 Though law on pleadings does not prohibit inconsistent pleadings, still during trial, the party pleading them ought to



elect one among the various inconsistent pleadings. This was not done in this case, since the 10<sup>th</sup> defendant, who arrived on the scene following the demise of the first defendant, attempted to sustain both the pleas simultaneously. Stunningly the first appellate court had found merit in both these pleadings and had upheld both of them. And, before this Court, the respondents appear to have decided to elect their defence of family arrangement over the plea of ouster, a strategy which this Court considers as two stages too late.

18.2 On this aspect, the plaintiff starts with a procedural advantage. Since these pleas are mutually inconsistent, the defendant by their attempt to sustain both had only managed to kill the efficacy of both with their own efforts. It has brought the very defense of family arrangement under a huge cloud of suspicion, and it is their creation.

19. Turning to the factum of family arrangement per se, it has to be stated that the nature of dispute does not revolve around whether family arrangement is recognised in law or what the judicial pronouncement on it are, but about whether the alleged family arrangement, as a fact, is imponderable and improbable in evidence.

20. The indisputable basic premise in law of co-sharers is that the possession of the properties held in co-ownership by a co-sharer is possession for all. The family arrangement pleaded by the contesting defendants in this case, an undocumented in that, seeks to divest the branch of Nachammal of their vested right to a share in the immovable properties. Right to property is precious, and it should not be lightly handled, and proof of any fact by which it is sought to be deprived must be of the highest quality.

21.1 It is in this backdrop this Court needs to test the finding of the first appellate Court and the reasons behind that finding for its sustainability. This is now examined:

- The first appellate court had relied on the oral testimony of D.W.3 and considered that he was dependable. What it had overlooked was that he was a stranger to the family, a small time cycle-mechanic when he testified, and was barely 22 years at the relevant time when family arrangement was said to have taken place. Was there not a better witness connected to the family, who might have had personal knowledge about the alleged family arrangement to who such knowledge could be attributed naturally?
- Secondly, the first appellate has observed that the family arrangement facilitated by the Panchayatdars are common place in villages, but by the same token it can also be stated that they are also reduced to writing in most



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instances. Why the family arrangement arrived before the Panchayatdars was not reduced to writing?

- Thirdly, the third defendant, the brother of the plaintiff, had filed his written statement conceding to the family arrangement, and that plaintiff had certified that her brother would not lie and that her relationship with his was cordial. The first appellate court draws strength from it for its finding, but this court finds it unsustainable. It may have to be stated that pleadings can never be equated to proof of what is pleaded. Nor is it a kind of statement that falls within Sec.32 of the Evidence Act to be relevant to prove the fact in issue: The family arrangement. And, the opinion of a general kind by a sister as to the character of her brother cannot be equated to an admission of a particular fact. Whether the third defendant would lie is neither a fact in issue, nor is it relevant to the fact in issue.
- Next aspect which the first appellate court relied on was that patta was mutated in the name of the first defendant and license too were obtained in his name. This Court finds that the documents produced by the defendants are more proximate to the date of the suit or thereabouts, and there is hardly any documentary evidence which are proximate to the time of the alleged family arrangement, except Exts.B-9, B-10 and B-31, all of which are but only house-tax receipts.
- The first appellate court overlooked the point that any mutation of revenue records, or payment of taxes or rates payable on the properties, or even leasing or mortgaging the properties generally fall within the ordinary course of management of the properties by a male member. Therefore they by themselves cannot indicate that they are done in assertion of an exclusive right over the properties pursuant to the family arrangement. The standard of proof required is high, but, the defendants do not seem to have troubled either themselves, or this Court.

21.2 It is true that the finding of the first appellate court is one fact. But it ignored to weigh the mental element associated with the oscillating tendencies of the defendants in not electing the plea of family arrangement. All the evidence that the defendants had produced in aid of proof of family arrangement lose its sheen and appear inadequate. To conclude on this point, the plea of family arrangement fails and consequently, the branch of Nachammal is entitled to 1/3 share in item 1, and 1/6 share in item 3. And the plaintiff specifically is entitled to 1/18 share in item 1 (1/6 of 1/3) and 1/36 in item 3 (1/6 of 1/6).



Plaintiff's share in Valliammal's share & Ext.B-38

22. So far as plaintiff's claim to a share in the share of her grandmother Valliammal share, but for the finding that Ext.B-38 Will was genuine, she would have been entitled to a share in Valliammal's share. Here, the plaintiff relies on three circumstances as clouding the genuineness of the Will, and according to her that it continues to be so clouded. The grounds are : (i) Two different colour stamp pads were used for fixing the left hand thumb impression; (ii) D.W.2, one of the attesting witness had made arrangement for the home-visit of the Registering Authority, and not the testator; (iii) the first defendant was by the side of the testator when D.W.2 first met her; and (iv) In the matter of registration of the Will, Rule 66 of the Tamil Nadu Registration Rule was violated.

23. This Court does not find that there is merit in any of them. Firstly, nowhere in the cross examination of D.W.2, it was even suggested that (i) that left hand thumb impressions therein are not Valliammal's; or (ii) D.W.2 had not seen Valliammal executing the Will. Secondly, the perusal of Ext.B-38 Will shows that the testator had executed the Will using a blue colour stamp-pad whereas the registering authority had used a black coloured stamp-pad, in the reverse page of the first page of the Will (where registration endorsement etc. would be made). There is no need that both must be in the same colour. And during her cross examination D.W.2 was not probed on the number of stamp-pad available at the time of execution of Will or on facts associated there with. Thirdly, D.W.2 says that Valliammal was indisposed and was lying in the bed when she saw her. In a situation such as this, to expect a woman in her advanced age to personally arrange for the home-visit-registration by the authorities is far distanced from the ordinary course of living. Fourthly, so far as the presence of the first defendant on the bed side of the testator, D.W.2 says that the testator had directed all to leave the room when she confided to the former about her desire to execute the Will. When the mother lives with the son, obviously he would be available there. What is needed to be eschewed is that if he had actively participated in the preparation of the Will, or if there had been a denial of any legacy to any of the natural heirs of the testator consequent to his presence. Here in this case, Valliammal had her son, and also her grand children, including the plaintiff, born to her daughter who had died some 22 years ago. And these grand children were living in different places. Therefore, of her heirs, the most proximate heir was her son, and her decision to exclude the heirs of daughter does not appear unnatural under circumstances. And, lastly to the alleged violation of Rule 66. It was not explained how this rule, which prescribes that where registration is done in private



residences, the Register of Thumb-impressions should not be brought to the residence. Now even if there is any violation it per se does not render the execution of Ext.B-38 suspicious.

24. This Court therefore, confirms the finding of the first appellate Court and holds that Ext.B-38 is genuine. Accordingly, the plaintiff would not be entitled to any share in the share of Valliammal in item 1 and 3.

Is the suit bad for non-joinder of necessary parties:

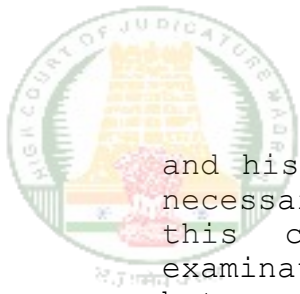
25. This Court does not find a specific pleading to that effect in the written statement, either of the first defendant or of his son, the 10<sup>th</sup> defendant. The trial Court though framed an issue that approximates an issue on need to implead the necessary parties, still it is not specific. Only the first appellate court says that the suit is bad on this ground. Here no substantial question is framed, but this Court anticipates and hence is anxious to avoid a controversy during the final decree proceedings when the plaintiff seeks metes and bounds partition of her share.

26. The plaintiff has described item 1 as a block of ten acres. This item, to reiterate, is the self-acquired property of Chennimalai Gounder. In this 40 cents was acquired by Government. On 19.01.1953 Chennimalai Gounder himself had sold 2.0 acres, and P.W.1 admits to this fact. Thereafter, in 1978, first defendant and his sons had sold 35 cents to Balakrishnan. The allegation is that the aforesaid purchasers have not been impleaded, and that this is contrary to the principle that in a suit for partition all the sharers should be parties.

27.1 It is true that all the co-sharers of an undivided property have to be impleaded in a suit for partition, and it is essentially intend to avoid multiplicity of suits leading to conflicting decisions. However, a co-sharer of a property is one who shares a right in every grain of soil along with other the sharers. Now, there is a time-line that characterise the ownership of item 1. Till his death it was the absolute property of Chennimalai Gounder, and only on his death in 1973, it became co-sharers' property, held jointly by his widow Valliammal, the first defendant, and the plaintiff and her siblings.

27.2 All that is required is that the 2.0 acres sold by Chennimalai Gounder should be deleted, and so is the 40 cents acquired. This does not affect the right of the plaintiff to claim a share in the balance extent available.

27.3. The only sale that may merit consideration in the context is the sale of 35 cents to Balakrishnan by the first defendant



and his sons in 1978. Here, the defendants did not consider it necessary to make available a copy of the said sale deed for this court to appreciate their point. And during cross examination of P.W.1, she concedes to Balakrishnan's possession but proceeds to say that she is not aware of his title to be in possession. Plaintiff could have investigated if Balakrishnan ought to be impleaded, but should it non-suit the plaintiff, especially when this Court does not have any material to satisfy itself that there indeed was a sale in favour of Balakrishnan.

27.4 Now, assuming that there was a sale in favour of Balakrishnan, with limitation overhanging the issue, this plot that is said to have been sold to him must be secured to him during final decree proceedings, and hence it must be allotted to the share of the contesting defendants. This can be done before the final decree is passed by the very Court that passes it. In other words, subject to proof of sale in favour of Balakrishnan, plaintiff's right to carve out her share in item 1 from and out of the plot said to have been sold to Balakrishnan should necessarily stand forfeited and foreclosed. This would preserve everyone's right. After all this litigation has commenced its journey some 36 years ago, and at this belated hour it may not befit this Court to plea helplessness when there is a duty on it to ensure that the right it has declared is not lost to the plaintiff on the solitary ground that a purchaser of a co-sharer is not impleaded.

Conclusion:

28. In the result, both these appeals are partially allowed and plaintiff/appellant's 1/18 share in item 1 and 1/36 share in item 3 is hereby declared. To that extent the judgement of the I Additional District Court, Coimbatore in A.S.Nos.156 of 2003 is modified, and as to the rest the said judgement shall stand confirmed. No costs. Consequently, the connected miscellaneous petitions are closed.

Note: The Judgement is delayed essentially due to Covid-19 situation initially. Secondly, I had Covid-19 infection and also had certain post Covid-19 issues from almost mid April, 2021 till mid July, 2021.

Sd/-  
Assistant Registrar

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Sub Assistant Registrar



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- 1.The I Additional District Court,  
Coimbatore.
- 2.The Subordinate Court,  
Tiruppur.
- 3.The Section Officer,  
VR Section,  
Madras High Court.

S.A.Nos.1236 and 1237 of 2009

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