



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 18.08.2021

CORAM

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THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)No.189 of 2012

and

M.P. (MD)No.1 of 2012

1.Sadayappan

2.Periyasamy

... Appellants/Respondents 1 & 2/Plaintiffs

Vs.

1.Kandasamy (Died)

2.Kali

3.Chandrasekaran

4.Kalarani (Died)

5.Shoba @ Nageshwari

6.Nallamal

7.Mohan

8.Keerthana

9.Sharmila

... Respondents/Appellants

(R7 to R9 are brought on record as LRs of the deceased fourth respondent vide order dated 11.08.2021 made in C.M.P. (MD)No.6446 of 2021 in S.A. (MD)No.189 of 2012 by GRSJ)

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree of the learned Additional District Judge (Fast Track Court), Dindigul passed in A.S.No.13 of 2011 dated 03.12.2011 reversing the judgment and decree of the learned Additional Subordinate Judge, Dindigul passed in O.S.No.272 of 2008 dated 10.12.2010.

For Appellants : Mr.M.Rajaraman

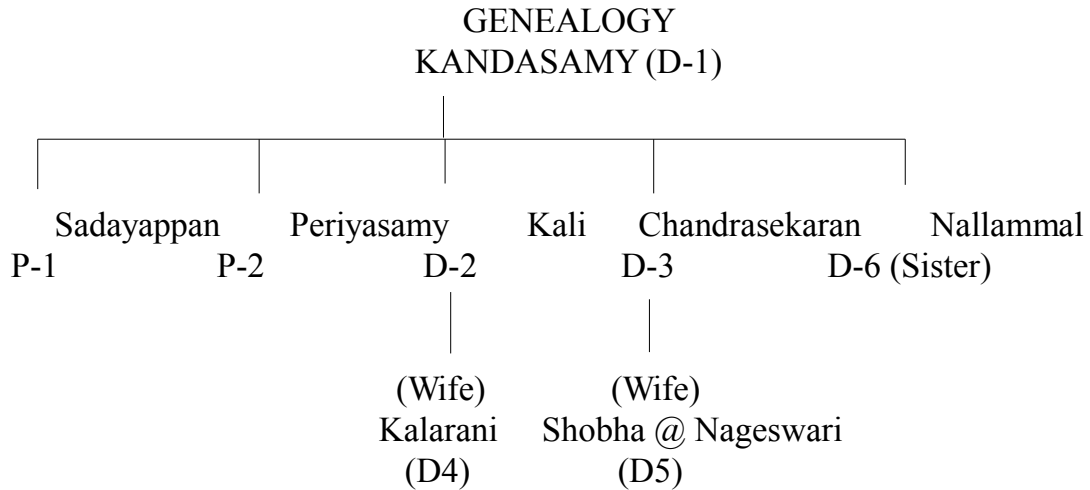
For Respondents : Mr.H.Lakshmi Shankar
for R1 to R3, R5 & R7 to R9

Mr.D.Selvaraj for R6



JUDGEMENT

This second appeal arises out of a partition suit. The plaintiffs are the appellants. The case of the plaintiffs is that the suit items numbering six are either ancestral properties or were purchased out of ancestral nucleus. The genealogy is under:-



2.The plaintiffs and the defendants 2 and 3 are the sons born to the first defendant/Kandasamy. Their sister/Nallammal was shown as sixth defendant. Wife of the second defendant and the wife of the third defendant were shown as defendants 4 and 5. According to the plaintiffs, suit items 5 and 6 were purchased by the first defendant out of ancestral nucleus in the names of the defendants 5 and 6. The plaintiffs' specific contention is that they are entitled to 2/5th share in each of the suit items. Since the pre-suit notice issued to them did not elicit a favourable response, they were constrained to file the aforesaid suit. Based on the divergent pleadings, the trial Court framed necessary issues.

3.The first plaintiff examined himself as P.W.1 and Narayanasamy and Rajkumar were examined as P.W.2 and P.W.3. Ex.A1 is the genealogy. Exs.A2 to A8 were marked on the side of the plaintiffs. The first defendant examined himself as D.W.1, the fourth defendant examined herself as D.W.2 and the fifth defendant examined herself as D.W.3. Exs.B1 to B19 were marked on the side of the defendants.

4.After a consideration of the evidence on record, by judgment and decree dated 10.12.2010, the trial Court granted preliminary decree allotting 2/5th share in favour of the plaintiffs. Aggrieved by the same, the defendants filed A.S.No.13 of 2011 before the Additional District Court, Fast Track Court, Dindigul. By the impugned judgment and decree dated 03.12.2011, the first appellate



Court set aside the judgment and decree passed by the trial Court and allowed the appeal. Challenging the same, this second appeal came to be filed.

5.The second appeal was admitted on the following substantial question of law:-

"Whether the lower appellate Court is correct in law in rejecting the admissions in Ex.B9 regarding the existence of ancestral property?"

6.The relationship between the parties is not in dispute. The plaintiffs had come out with a specific case that the suit items are ancestral properties. Admittedly suit items 5 and 6 stand in the name of the fourth and fifth defendants. The plaintiffs would claim that suit items 1 to 4 are ancestral properties and out of the income generated therefrom suit items 5 and 6 were purchased by the first defendant in the names of his two daughters-in-law. The learned counsel for the appellants would point out that the defendants themselves have conceded that suit item 2 is an ancestral property. Of course, in the reply notice sent by the defendants, the expression "ancestral property" had been used in respect of suit item 2 but it is obvious from the records that the suit item 2 was inherited by the first defendant/Kandasamy from his mother. This is conceded by the plaintiffs in their plaint as well as in Paragraph No.5 of the proof affidavit. When the property was inherited by the first defendant from his mother, it is obviously his separate property and it cannot be amenable to partition at the instance of the plaintiffs, when the father is very much alive. Regarding suit item 1, the learned counsel for the plaintiffs would point that it was settled in favour of the third defendant vide Ex.B9 on 28.05.2007. In the said settlement deed, the first defendant/Kandasamy had admitted that the said property was belonged to him ancestrally. On the basis of this recital found in Ex.B9, the substantial question of law has been framed in this second appeal. But as rightly pointed out by the learned counsel for the respondents, this recital appears to have been a causal incorporation. It is because, the very same document categorically refers to the parent sale deed dated 13.09.1991, which was marked as Ex.B7. Suit item 1 was purchased by the first defendant/Kandasamy from one Rajammal. In view of Ex.B7, one can easily conclude that suit item 1 was purchased by the first defendant/Kandasamy. It is futile to argue that it is an ancestral property merely on the strength of a recital found in Ex.B9. I have no hesitation to answer the substantial question of law against the appellants. Regarding suit items 3 and 4, the appellants have not adduced any evidence to show that they were purchased out of ancestral nucleus. The first appellate Court after a careful consideration of the evidence on record had come to a conclusion that the plaintiffs have failed to discharge the burden of proof cast on them. In exercise of jurisdiction under Section 100 of CPC, I do not propose to interfere with such a finding of fact.



7. Be that as it may, I have to take note of certain subsequent developments. During the pendency of this second appeal, the father of the plaintiffs namely, Kandasamy passed away. Their mother/Rajammal had also passed away. The father/Kandasamy had executed a Will dated 02.03.2012 in respect of the suit item 3 and some other items that have not been included in the suit schedule. He had also executed a joint Will dated 21.03.2012 along with wife in respect of suit items 2 and 4. The suit item 4 was jointly purchased by the first defendant/Kandasamy and his wife/Rajammal. Under these Wills only undivided shares have been bequeathed in favour of the grandsons born through the four sons. The bequeath details are as follows:-

"(a) 1st Appellant Sadaiappan's sons S. Balamurugam (1) and S.Ramar(2) are entitled to $\frac{1}{4}$ share in item 2 and 4 of the suit properties

(b) 2nd Appellant K.Periyasamy's son Naryanan is entitled to $\frac{1}{4}^{th}$ share in item 2 and 4 of the suit properties.

(c) 2nd respondent Kali's son K.Mohan (7th respondent in this second appeal) is entitled to $\frac{1}{4}^{th}$ share in items 2 and 4 of the suit properties

(d) 3rd respondent K.Chandrasekaran's son Minor Deeparaj and any male children of 3rd respondent who may be born in future are jointly entitled to $\frac{1}{4}^{th}$ share in items 2 and 4 of the suit properties."

8. Taking note of these subsequent developments, even though I answer the substantial question of law against the appellants, in order to effectuate the noble intention of the deceased first defendant and his wife, the judgment and decree of the first appellate Court is set aside and a preliminary decree is passed as follows:-

"It is open to the legatees under the aforesaid Wills to file final decree proceedings and take their shares by metes and bounds."

9. The second appeal is disposed of on these terms. No costs. Consequently, connected miscellaneous petition is closed.

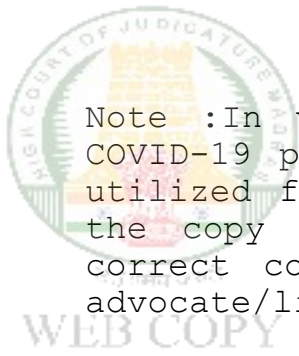
Sd/-

Assistant Registrar (CS I)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)



Note :In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

1.The Additional District Court,
Fast Track Court,
Dindigul.

2.The Additional Sub Court,
Dindigul.

Copy to:

The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.H.LAKSHMI SHANKAR, Advocate (SR-26837[F] dated 19/08/2021)

+1 CC to M/s.M.RAJARAMAN, Advocate (SR-26971[F] dated 23/08/2021)
S.A.(MD)No.189 of 2012
18.08.2021

MGJ(01.10.2021) 5P 7C