



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 28.07.2021

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD) .No.802 of 2014

and

M.P (MD) .No.1 of 2014

and

C.M.P. (MD) .No.5092 of 2021

Muthusamy ... Appellant/Appellant/3rd Defendant

Vs

1.Soliyammal (died)

2.Ramasamy ...1st Respondent/Respondent/Plaintiff

3.Kulandayee Ammal ...Respondents2&3/Respondents/Defendants 1&2

4.Nataraj @ Subramani

5.Logambal

6.Lakshmi

7.Nallusamy ... Respondents

(4 to 7 are Lrs of R1 as per order dated 05.07.2021 in CMP 5092/2021)

Prayer: Second Appeal is filed under Section 100 of Civil Procedure Code, against the Decree and Judgement dated 29.04.2014 passed in A.S.No.8 of 2013 on the file of the Principal District Court, Karur, by confirming the decree and judgment passed in O.S.No.118 of 2005 on the file of the Principal Subordinate Court, Karur, dated 12.10.2012.

For Appellant : Mr.E.K.Kumaresan

For R2 : No appearance

For R3 : Mr.D.Raj Kumar

For R4 & R7 : Batta with return due

For R5 & R6 : Mr.Senthil

**J U D G E M E N T**

The 3rd defendant in O.S.No.118 of 2005, on the file of the learned Principal Subordinate Judge, Karur, is the appellant in this second appeal. The following genealogy will help to understand the facts better.

Pasuvayee Gounder (Died)

Soliyammal (W1) (died)

Nallammal (w2) (Died)

Soliyammal (P)

Ramasamy

Kulandayee

Muthusamy

Ammal

(D1)

(D2)

(D3)

Admittedly, Soliyammal predeceased her husband. Only after the death of first wife Soliyammal, Pasuvayee Gounder married Nallammal.

2. The plaintiff Soliyammal is the daughter born to the Pasuvayee Gounder through his first wife, who was also known as Soliyammal. After the demise of Soliyammal, Pasuvayee Gounder married one Nallammal and through her the defendants (two sons and one daughter) were born. The suit properties are the self acquired properties of Pasuvayee Gounder. That is not in dispute. Pasuvayee Gounder appears to have died in the year 1985. Claiming her $\frac{1}{4}$ share in the suit property, the present suit was laid. The sons born through Nallammal are arrayed as D1 and D3. The daughter born through Nallammal was shown as the second defendant.

3. The sons of Nallammal filed their written statement contending that the plaintiff's rights have been extinguished on account of ouster. Based on the rival pleadings, the trial Court framed the necessary issues. By judgment and decree dated 12.10.2012, the trial Court granted preliminary decree in favour of the plaintiff granting her $\frac{1}{4}$ th share in the suit properties. Aggrieved by the same, the third defendant/appellant herein filed A.S.No.8 of 2013 before the learned Principal District Judge, Karur. By the impugned judgment dated 29.04.2014, the appeal was dismissed. Challenging the same, this second appeal came to be filed.

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

"Whether the Courts below misapplied the law relating to succession to the properties of the mother of the plaintiff by holding that the entire property should go to the plaintiff, when the deceased was survived not only by the



plaintiff but also by the husband of the deceased?"

5. During the pendency of this second appeal, the plaintiff Soliyammal passed away and her legal heirs have been brought on record as respondents 4 to 7.

6. The learned counsel appearing for the appellant primarily contended that the suit was clearly bad for partial partition. According to him, it is well settled that a suit for partial partition without including all the joint family properties was clearly not maintainable. He placed reliance on the decision of the Hon'ble Supreme Court reported in **1994-4-SCC-294 (kenchegowda represented by legal representatives Vs. Siddegowda)** and the decision of the Madras High Court reported in **2006-1-CTC-267 (Gandhi Vs. Saminatha Gounder and another)**. He drew my attention to the testimony of P.W.1. The plaintiff in her cross examination admitted that some of the properties belonging to her mother, have not been included in the suit schedule. She also admitted that in respect of those properties, she has not entered into any partition with her brothers. The learned counsel for the appellant would therefore contend that on the own showing of the plaintiff, this Court must hold that the suit was bad for partial partition. He also submitted that the Courts below completely misconstrued Section 15(1) of the Hindu Succession Act 1956. It may be true that the plaintiff's mother Soliyammal had inherited certain properties from her father. But, when she passed away, those properties must devolve in equal shares on the plaintiff and Pasuvayee Gounder. Only if the plaintiff's mother had died without any issues, the properties inherited from her father would go back to the legal heirs of the father and would not devolve on the husband. But where a woman had left behind her son or a daughter, then Section 15 (2) (b) will not apply. This aspect of the matter was completely lost sight of by the Courts below. On this ground, the learned counsel would distinguish the decision reported in **(1994) 5 SCC 761**. The said decision will apply if the deceased woman had not left behind a son or daughter. When that was not the case, question of invoking Section 15(2) (b) of the Hindu Succession Act, 1956 will not at all arise.

7. Per contra, the learned counsel appearing for the respondents submitted that the impugned judgment does not call for any interference.

8. I carefully considered the rival contentions and went through the evidence on record.

9. No doubt, the defence of partial partition is a formidable one. The proposition advanced by the learned counsel for the appellant cannot be disputed. But, then as rightly pointed out by the learned counsel for the plaintiff, the written statement is wholly silent on this aspect. If the appellant had pleaded in his



issues have been framed on that basis, certainly, the appellant would be entitled to canvas the said contention before this Court. Having failed to raise the issue of partial partition in the written statement, it is not open to the appellant to canvas the same before this Court.

10. Therefore, I decline to interfere with the impugned judgment passed by the Court below. It is for this reason, the question of law cannot also be answered in favour of the appellant. A person who failed to raise the plea before the Court below cannot raise it as a substantial question of law before this Court. However, I give liberty to the appellant herein to file an independent suit for partition in respect of the items, which according to him, have been left out by the plaintiff. The learned counsel for the plaintiff undertakes before this Court that if such a suit is filed, its maintainability will not be questioned. The said case will be contested only on merits. The interpretation as regards Section 15 of the Hindu Succession Act, 1956 and its applicability to the facts are left open. Whatever findings that have been rendered by the Court below in this regard also stand vacated. They will not come in the way of the appellant from establishing his claim in respect of the left out properties.

11. With this liberty and clarification in favour of the appellant, the second appeal is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CO)

// True Copy //

/ /2021

Sub Assistant Registrar (CS)

sbn

To:

1.The Principal District Court, Karur.

2.The Principal Subordinate Court, Karur.

Copy to

The Section Officer, V.R.Section(2C)

Madurai Bench of Madras High Court, Madurai

+1 CC to M/s.E.K.KUMARESAN, Advocate (SR-24650[F] dated 30/07/2021)



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S.A.(MD).No.802 of 2014

+1 CC to M/s.M.P.SENTHIL, Advocate (SR-24345[F] dated 29/07/2021)

S.A. (MD) .No.802 of 2014and

M.P (MD) .No.1 of 2014and

C.M.P. (MD) .No.5092 of 2021

28.07.2021

DJ (CO)

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