



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 21.02.2022	Pronounced on : 02.03.2022
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THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

Appeal Suit No.20 of 2011

&

C.M.P.Nos.16467 & 16468 of 2021

1. Thiyagi Rama Gounder (died)

2. Devendiran,

.. Appellants/Plaintiffs

2nd Appellant and RR1, 2 & 8 and 9 LR's of the deceased as per memo dated 16.09.2021 (SR 27747) and order of the Court dated 17/04/2021 made in A.S.No.20/2011.

/versus/

1. R.Devarajan,

2. R.Devanandam,

3. Ramesh Proprietor,
Srinivasa Bakery,

4. Rajamanickam,

5. Karunanithi,

6. Prithiv,
Proprietor, Sri Amman Dry Laundry,

7. Pasuvaiyan,
Proprietor of Readymade Shop

8. R.Devaki,

9. Subramanian,

.. Respondents/Defendants

Prayer: Appeal Suit has been filed under Section 96 C.P.C., praying against the judgment and decree dated 10.02.2010 in O.S.No.108 of 2006 on the file of Additional District Judge, (Fast Track Court No.2) Salem.



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For Appellants : Mr.P.Jagadeesan
For R1 & R2 : Mr.T.N.Rajagopalan,
For R3 to R7 : Given up
For R8 & R9 : No appearance

J U D G M E N T

The suit for partition filed in respect of 2 items of immovable properties and 2 items of movable properties. The Trial Court passed a preliminary decree in respect of first item of schedule which is an immovable property and disallowed the suit in respect of other items of properties in the schedule. As against the disallowed portion, particularly in respect of 2nd item of the schedule, which is land and building, the present appeal is filed by the plaintiffs 1 and 3. In the appeal, the second plaintiff, who deposed, did not join the appellants, hence arrayed as 9th respondent. The tenants who were arrayed as Respondents 3 to 7 were given up.

2. Pending appeal, the first appellant/first plaintiff, who is the father of other sharers died. Since his legal representatives were already parties to the proceedings, memo filed to that effect and same was recorded. Two miscellaneous petitions C.M.P Nos.16467 and 16468 of 2021 were filed to receive additional documents, namely the Wills executed by Rama Gounder on 26.12.2008 and 31.03.2011 and to permit the sole surviving appellant to raise additional grounds in view of the demise of Rama Gounder and his Wills dealing with the dispossession of his share.

3. The parties are related this way: Thiyagi Rama Gounder, the first plaintiff had four sons and one daughter. His two sons, Subramaniam and Devendiran are the Second and third plaintiffs respectively. His other two sons, Devarajan and Devanandam are the first and second defendants respectively. His daughter Devaki is the eight defendant. The tenants in occupation of the second item of the suit property are the Defendants 3 to 7.

4. According to the complaint, Thiyagi Rama Gounder (the first plaintiff) and his wife had four sons and one daughter. His wife Lakshmi ammal died on 17.03.1996. The first item of the suit property is an ancestral property. The first defendant in his income from milk business and contractor work



purchased second item property in the name of the first defendant. The other family members also contributed to improve the second item of the suit property. Item Nos.3 and 4 are motor vehicles which stand in the name of the first defendant and they also form part of the joint family properties. In the second item property, the first plaintiff constructed building and established a wet grinder industries in the name of "Naveen Industries" along with his friend Satyamoorthy as a partnership firm. The capital for the industries was made by the family members pooling their resources. Later, Satyamoorthy was relieved from the partnership on payment of Rs.45,000/-. While so, without the consent of the plaintiffs, the defendants 2 and 3 had let out portion of the suit 2nd item properties to defendants 3 to 7 and collecting rent without sharing it with the plaintiffs.

5. Initially, the suit was laid claiming 1/5th share in the suit property by each of the plaintiffs without impleading the daughter of the first plaintiff. Later she got impleaded as 8th respondent and pleaded that she should also be given a share in the suit properties and apportioned accordingly.

6. The first defendant, in his written statement denied the claim of the plaintiffs in the suit properties. According to him, the suit properties are not ancestral property or properties purchased from ancestral nucleus. As far as the first item of the suit property, it was purchased under two different sale deeds. Initially, in the year 1958 one Peryathiammal purchased 77½ cents of land from Rama Gounder. Later, in the year 1966, Peryathiammal and Lakshmiammal jointly purchased 77 ½ cents of land. Subsequently, as per resurvey, the land was assigned new Survey Nos.48/7 C, 48/7 F, 48/7 E and 48/7 H and patta issued in the year 1972 in the name of Peryathiammal, her father Kolanda Gounder, Lakshmiammal and her husband Rama Gounder (first plaintiff). On 11/02/1981, Peryathiammal executed a consent letter ascertaining 1.50 acres of land in S.No.48/7 belongs to Lakshmiammal and Rama Gounder alone.

7. The said Lakshmiammal died on 17.03.1996 leaving behind her husband (the first plaintiff), four sons (the plaintiffs 2 and 3 and defendants 1 and 2) and a daughter by name Devagi. Therefore, in the first item of the suit property in S.No.48/7, only ½ share belongs to Lakshmiammal out of 1.50 acres and the balance belongs to the legal heirs of Peryathiammal. They are necessary parties to the suit since in the first item of the suit property, the legal heirs of Peryathiammal have half share. Also, omitting the daughter who is one of the sharer in the ancestral property, the suit is



filed and therefore, bad for non-joinder of necessary party.

8. Further, the first plaintiff for past 30 years not doing any work and leading a wayward life. His sons, the plaintiffs 2 and 3 as well as defendants 1 and 2 married and living separately and at no point of time they all were living together as joint family under one roof, after their marriage.

9. Regarding the second item of the suit property, the case of the first defendant is, he was employed as sales representative in K.A.S Wet Grinder Company at Erode between 1977 and 1979. The vacant land in the second item property was purchased by him as a vacant land on 24/10/1980 for a sum of Rs.10,000/-. He mortgaged the vacant land and obtained loan from Canara Bank, Suramangalam, for constructing building on the said land. Hence, the second item property which was purchased by him from out of his own income as sales man and superstructure constructed by raising loan from bank by him is now falsely claimed by the plaintiffs as joint family property and they were jointly in enjoyment of it. He got married in the year 1974. Living separately at Salem, Erode and later settled at Salem. From his experience as sales man in Wet Grinder business, he started 'Naveen Industries' in the year 1981 in the second item property and carrying on business independently. Neither the plaintiffs nor the second defendant have any right in the said property or in the business. From out of the income from the "Naveen Industries" the property was improved and portion of it is let out for rent to the defendants 3 to 7.

10. After the demise of their mother Lakshmiammal, there was dispute regarding sharing the first item property. The defendants 1 and 2 demanded share in the first item property from their father, instead of parting the share in first item property which is in the name of their mother Lakshmiammal, the first plaintiff along with the plaintiffs 2 and 3 had instituted this vexatious suit claiming right in the second item property which is his self acquired property and in items 3 and 4 which are not his properties.

11. In the additional written statement, the first defendant averred that, the first plaintiff filed a suit for partition against one Ranganayaki in O.S.No.506 of 1986 before Sub-Court, Salem and those properties were not included in the suit for partition. Further, in the year 1964, a money decree was passed against the first plaintiff in O.S.No.521 of 1964 filed by one Marimuthu. This will show that the first plaintiff had no source of income to purchase the 2nd item of the suit property.



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12. The 8th defendant, who got impleaded subsequently, in her written statement claim the suit properties are joint family properties and she is also entitled for a share in the suit property along with the plaintiffs.

13. On the above pleadings, the following issues were framed and later re-casted as below by the Trial court:-

(i). Whether 2nd schedule property was purchased and Naveen Industries and other buildings were constructed with the aid of the joint family income consisting of the plaintiffs and D1 and D2?

(ii). Whether the item No.3 and 4 are the joint family properties?

(iii). Whether the plaintiffs are entitled to get 3/6 shares in the plaint schedule properties?

(iv). To what relief, if any the plaintiff is entitled to?

14. The Second Plaintiff/Subramaniam mounted the witness box and deposed. 11 documents were marked as plaintiff side exhibits. The First Defendant mounted the witness box and deposed. 19 documents were marked as defendant side exhibits.

15. The Trial Court held that the 1st item of the suit property belongs to Rama Gounder and his wife Lakshmiammal. It is ancestral property of the parties. Hence, the plaintiffs 1 to 3, together are entitled for 3/6th share in the first item of the suit property. However, the 2nd item property is not the joint family property of the plaintiffs and defendants 1, 2 and 8. Contrarily, it is the self acquired property of the first defendant. Therefore, the suit claim seeking share in the 2nd item of the suit property was dismissed. Since the plaintiffs have not produced any documents to show that the movables item 3 and 4 were purchased from and out of the joint family income, suit against items 3 and 4 also dismissed.

16. The Learned Counsel for the appellant submitted that the Trial Court erred in holding the 2nd item of the suit property is the self acquired property of the first defendant by drawing adverse inference for not examining the first plaintiff, ignoring the fact that he was 92 years old at the time of Trial and one of his son namely Subramaniam the 2nd plaintiff had



mounted the box and deposited on behalf of all the plaintiffs. Further, it also ignored the evidence adduced by the plaintiffs to show the 2nd item of the suit property was purchased by the plaintiffs jointly in the name of the first defendant pooling fund by pleading the jewels of the 2nd and 3rd plaintiffs and by mortgaging their properties.

17. The Court below failed to appreciate the fact that when 2nd item of the suit property purchased, the first defendant was a student and had no separate income of his own to purchase the said property. Documents Ex.A-1 to Ex.A-11 would establish that the 2nd item of the suit property was purchased by first plaintiffs from out of the joint family nucleus and as such, it is a joint family property and in the absence of evidence that the family was divided by status, the Trial Court ought to have allowed the suit in entirety.

18. Per contra, the Learned Counsel appearing for the Respondent submit that the plaintiffs who had pleaded that the 2nd item of the suit schedule was purchased from the pleading jewels and borrowing money and from the surplus of income derived by the first plaintiff from his milk business and contracts, ought to have produced documentary evidence. None of the documents filed in support of the plaintiffs relates to proof of income or show that the first plaintiff or the other two plaintiffs had contributed for the purchase of 2nd item of the suit schedule property or for the establishment of the Wet grinder industry in the name of "Naveen Industries" or the construction of the superstructure on the said land. Except the notices exchanged between parties Ex.A-1 to Ex.A-8 and the account book in respect of Naveen Industries which is marked as Ex.A-11 nothing connected with the 2nd item filed. Nothing elucidated from the witness P.W-1 or in Ex.A-11 to substantiate the case of the plaintiffs. Contrarily, the first defendant had relied on the documents such as the sale deed for the 2nd item which stands in his name, the invoice for the machineries purchased for the "Naveen Industries", TNEB letter addressed to the first defendant, Electricity, Building Plan Approval and Tax receipts which will as goes to show that the 2nd item property was exclusively owned and enjoyed by the first defendant/first respondent and in this property no other family members have any right or share.

Point for consideration:-

Whether Ex.A-1 to Ex.A-11 are documents to prove the 2nd item of the suit schedule property is joint family property and partible between the plaintiffs and



defendants 1, 2 and 8?

19. At the outset, it is reiterated and to be noted that, the suit was instituted by the father along with two sons against his other two sons. The daughter who was not made a party in the partition suit got herself impleaded and 8th defendant. The suit was contested only by the first defendant in whose name the 2nd item of the property stands. The second plaintiff/Subramaniam who deposed as P.W-1 on behalf of the plaintiffs did not file any appeal against the disallowed portion of the suit claim. Therefore, he had been impleaded as one of the respondent in the appeal.

20. In the said background of facts, one will appreciate the observation of the Trial Court that P.W-1 the father who claims that the 2nd item property was purchased from out of his income and the joint contribution of the other family members, is the appropriate person to depose about the facts pleaded. The plaintiffs ought to have taken steps to examine his atleast through Court Commissioner.

21. The pleadings in the plaint states that the first plaintiff was supplying milk to Railway canteen and also doing contract work in Dalmiya Magnesite and thereby earning. The first plaintiff borrowed money from his friend Thangavel for the purchase of the said property and raised fund by selling his cattle and jewels. No documents to support these pleadings filed by the plaintiffs. These facts are within the personal knowledge of the first plaintiff and certain documents ought to be available if these plea are true. If the documents filed in support of the plaintiffs are scrutinised, one will find no document which speak about these facts. The law laid by the Courts based on Section 92 to 94 of the Evidence Act says, nothing contrary to content of the registered document be presumed unless the content of the document is properly disproved through oral or documentary evidence. Particularly, in case of partition suits, where a property stands in the name of one individual is claimed to be the property of joint family purchased in the name of that individual, who form part of joint family, then the person who pleads so has to adduced evidence to the effect that there was nucleus from which there was surplus and also the said individual had no separate income of his own. Further, it is also necessary to satisfy the Court about how the contribution made to acquire the property. There shall be no presumption of joint family property on account of the existence of joint family.

22. In the instant case, the embellished oral evidence of P.W-1 which contains details of contribution neither pleaded



specifically in the plaint nor supported by documents. The 11 documents relied by the plaintiffs are copy of lawyer notices, acknowledgement cards and return covers addressed to tenants. That apart, the plaintiffs rely upon Ex.A-9 which is Patta and Ex.A-10 the Adangal for the first item of the suit property, for which the Trial Court after appreciation of the document had passed preliminary decree of partition in favour of the plaintiffs. The Account books of Naveen Industries which is marked as Ex.A-11 is noway helpful to the plaintiffs to establish their case of joint contribution by the members of the to make the 2nd item of the suit property a joint family property. If one look at the documents relied by the first defendant, we could find that the property has been purchased in the name of first defendant (Ex.B-4), machineries for the Naveen Industries purchased by the first defendant (Ex B-5), electricity service connection and property tax assessed in the name of the first defendant. The admission in the cross examination of D.W-1 (the first defendant) that he and his younger brothers were studying at the time of purchase the property and only elder brother Subramaniam was working will not take away the right of the title holder, since the witness was later recalled and reconciled by stating that he was studying only till 1976 and thereafter he did not continue his study. He worked as sales representative in K.A.S industries dealing with wet grinder and saved money and learned the nuances of the trade and started a wet grinder company by name Naveen Industries on his own. The evidence shows, the 2nd item of the suit property was purchased on 24/10/1980. P.W-1 admits in his cross examination that he know nothing about wet grinder manufacturing.

23. This Court finds that the Trial Court has come to the conclusion rightly on proper appreciation of the facts and law. The judgement and preliminary decree of the Trial Court is therefore confirmed.

C.M.P.Nos.16467 and 16468 of 2021:-

24. The Learned counsel for the Petitioner/Appellant submitted that the first plaintiff Rama Gounder died pending appeal leaving two wills. These two wills, if taken into account, the shares of the parties will change and therefore, the preliminary decree of allotting 1/6th share each may get altered. Since law permits multiple preliminary decree can be passed, these two applications to file additional documents and additional grounds to be allowed.

25. In support of his submission, the Learned Counsel for the petitioner/appellant rely upon the judgments of the Supreme



Court reported in AIR 1967 SC 1470 (Phoolchand and Another -vs- Gopal Lal) and 2011 (9) SCC 788 (Ganduri Koteshwaramma and another -vs- Chakiriyandi and another) which was subsequently relied and followed by the Madras High Court in Alagammal and others -vs- Minor Manikandan, Rep by his mother (judgment dated 21/11/2016).

26. The contesting respondents have filed a counter to these applications. They deny the validity of these two documents and oppose the request to receive additional documents for not disclosing the existence of the wills for past 10 years.

27. This appeal is filed against the preliminary decree passed in a partition suit and neither the Code of Civil Procedure nor any other law prohibits passing multiple preliminary decree in a suit for partition, if the situation warrants. This Court has no other view except the one, the Hon'ble Supreme Court candidly expressed in Phoolchand case (cited supra) as below:-

"7. We are of opinion that there is nothing in the Code of Civil Procedure which prohibits the passing of more than one preliminary decree if circumstances justify the same and that it may be necessary to do so particularly in partition suits when after the preliminary decree some parties die and shares of other parties are thereby augmented. We have already said that it is not disputed that in partition suits the court can do so even after the preliminary decree is passed. It would in our opinion be convenient to the court and advantageous to the parties, specially in partition suits, to have disputed rights finally settled and specification of shares in the preliminary decree varied before a final decree is prepared. If this is done, there is a clear determination of the rights of parties to the suit on the question in dispute and we see no difficulty in holding that in such cases there is a decree deciding these disputed rights; if so, there is no reason why a second preliminary decree correcting the shares in a partition suit cannot be passed by the court. So far therefore as partition suits are concerned we have no



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doubt that if an event transpires after the preliminary decree which necessitates a change in shares, the court can and should do so; and if there is a dispute in that behalf, the order of the court deciding that dispute and making variation in shares specified in the preliminary decree already passed is a decree in itself which would be liable to appeal."

28. In Ganduri Koteshwaramma case (cited supra), the Hon'ble Supreme Court held that,

"14. A preliminary decree determines the rights and interests of the parties. The suit for partition is not disposed of by passing of the preliminary decree. It is by a final decree that the immovable property of joint Hindu family is partitioned by metes and bounds. After the passing of the preliminary decree, the suit continues until the final decree is passed. If in the interregnum i.e. after passing of the preliminary decree and before the final decree is passed, the events and supervening circumstances occur necessitating change in shares, there is no impediment for the court to amend the preliminary decree or pass another preliminary decree redetermining the rights and interests of the parties having regard to the changed situation."

29. In the light of the above judgments, there cannot be any legal impediment for a party to ask for modification or alteration of the preliminary decree or for passing a supplementary preliminary decree in view of subsequent event, but then, only in extra-ordinary circumstances, such request should be entertained at the Appellate Court, in other normal circumstances, the request for modification of the preliminary decree should be only before the trial court.

30. In the instant case, two documents which are purported to be the wills executed by one of the appellant is not admitted by the contesting respondent. Hence, the petitions cannot be entertained by the Appellate Court to revisit the proportion of share allotted under the preliminary decree. It is always open to the appellants to work out their right under the wills in the execution proceedings or before the Trial Court which passed the preliminary decree and pray for a supplementary



decree or even file a fresh suit to prove the due execution of the wills and seek consequential relief, whichever course they chooses to be fit and proper, but this Court is certain and clear in its mind that the Appellate court cannot be the Court to test the genuineness of a will afresh like Court of first instance, merely because it was incidentally executed by one of the party, who died pending appeal. With these observations, the Civil Miscellaneous Petitions are disposed.

31. In the result, the Appeal Suit is dismissed. Consequently, connected Miscellaneous Petitions are disposed of with liberty. There shall be no order as to costs.

Sd/-

Assistant Registrar(I)

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Sub Assistant Registrar

To:-

1. The Additional District Judge,
(Fast Track Court No.2) Salem.
2. The Section Officer,
V.R.Section, High Court, Madras.

Copy To

The Section Officer,
English Record Section,
High Court, Madras - 104.

(for Complying order of Returning the Original Documents)

+1cc to Mr.P.Jagadeesan, Advocate SR.No.13690

+1cc to Mr.T.N.Rajagopalan, Advocate SR.No.13570

Appeal Suit No.20 of 2011
& C.M.P.Nos.16467 & 16468 of 2021

SSV(CO)
GN(18/03/2022)