



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 04.02.2022

PRONOUNCED ON : 13.06.2022

CORAM

THE HONOURABLE MR.JUSTICE A.A.NAKKIRAN

AS.No.18 of 2016

1. R.Srinivasan
2.Minor Swathika
Rep.by her next friend and
Father R.Srinivasan ..Appellants/Defendants 3 & 4

Vs

1.Dhanapal
..R1/Plaintiff
2.Ramasamy Gounder
3.Sellammal
..RR2 & 3/Defendants

Prayer:- This Appeal Suit has been filed, under Order 41 Rule 1, read with Section 96 of CPC, against the judgement and decree, dated 13.01.2015, made in OS.No.241 of 2012, by the III Additional District and Sessions Judge, Salem.

For Appellants : ***Mr.T.Murugamanickam, SC**
for Mr.S.Kaithamalai Kumaran

For Respondents : Mr.Sathya for Ms.Zeenath Begum-R1
R3-(Served) No appearance

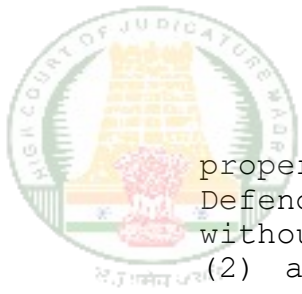
JUDGEMENT

- 1.This Appeal Suit has been filed, by the Defendants 3 and 4, against the judgement and decree, dated 13.01.2015, made in OS.No.241 of 2012, by the III Additional District and Sessions Judge, Salem
- 2.The suit was filed, seeking a preliminary decree, directing the Defendants 1 to 3 to divide the suit properties into 3 equal shares and allot one such share to the Plaintiff, failing which, to pass an order to appoint an Advocate Commissioner to divide the suit properties into 3 equal shares and allot one such share to the Plaintiff and for separate possession of the same and also a decree, declaring the two gift settlement deeds, executed by the 1st Defendant to the Defendants 3 and 4, regarding the items (1) and (2) of the suit properties, dated 19.06.2012, as null and void and for costs.



3. The case of the Plaintiff is that the Defendants 1 and 2 are husband and wife and the Plaintiff and the 3rd Defendant are their sons. The 4th Defendant is the daughter of the 3rd Defendant. Item (1) was acquired by the 1st Defendant through his family partition. Item (2) were purchased by the 1st Defendant, under the registered sale deeds, dated 14.09.1972 and 12.03.1974, out of the income derived from the Item (1). The Item (2) of the suit properties was purchased by the 1st Defendant in the name of the 2nd Defendant, out of the income derived from the items (1) and (2) of the suit properties. The 2nd Defendant has no independent income. The Item (3) of the suit properties was purchased in the name of the 2nd Defendant by the 1st Defendant. The Plaintiff and the Defendants 1 and 3 are each entitled to 1/3rd share in the suit properties. The Plaintiff has been residing in the Item (3) of the suit properties. The Defendants 1 to 3 are in possession and enjoyment of the items (1) and (2) of the suit properties. The Plaintiff came to know that the 1st Defendant has executed a Gift Settlement Deed to the 3rd Defendant in respect of the Item (1) of the suit properties and another Gift Settlement Deed to the 4th Defendant, in respect of the Item (2) of the suit properties. The Plaintiff demanded for partition from the Defendants and convened a Panchayat on 01.11.2012, but it ended in vain. The suit properties are the joint family properties of the Plaintiff and the Defendants 1 to 3. The 1st Defendant has no right to execute the Gift Settlement Deeds in favour of the 3rd and 4th Defendants. In such circumstances, the suit has been filed, seeking the reliefs, as stated above.

4. The case of the Defendants, as set out in the written statement, filed by the Defendants 1 and 3 and adopted by other Defendants is that the relationship between the parties are true. The entire suit properties are not the joint family properties. Item (1) alone is the joint family property. The items (2) and (3) are the self acquired property of the 1st Defendant and the 2nd Defendant, respectively. The 1st Defendant had purchased the item (2) of the suit properties from his separate income. There was no surplus joint family income from the Item (1) of the suit properties. The Plaintiff is entitled to share in the Item (1) of the suit properties only and his share is 1/5th only. The younger, son namely, Gunasekaran died 25 years ago. Another son, Sounder Rajan went missing about 30 years ago. The only daughter also died about 25 years ago. Therefore, the Plaintiff is not entitled to claim 1/3rd share in the ancestral property, i.e. Item (1) of the suit properties. Thus, the Defendants 1 and 3 are having 1/5 share each and 2nd Defendant is having 2/5th share thereto. The 3rd Defendant permitted the Plaintiff to reside in the Item (3) of the suit properties. The Defendants 1 to 3 are in joint possession of the Item (1) of the suit properties. The Plaintiff is a stranger to the items (2) and (3) of the suit properties. It is not correct to say that the Plaintiff and Defendants are in joint possession of the suit



properties. It is not correct to allege that the 1st Defendant has no right to execute the Gift Settlement Deeds without dividing the joint family properties since the items (2) and (3) of the suit properties are not joint family properties and the same will bind the Plaintiff. The Plaintiff is not in joint possession of the Item (1) of the suit properties. In such circumstances, the suit is liable to be dismissed.

5. Based on the pleadings, the following issues were framed by the Trial Court:-

i. Whether the Plaintiff is entitled to 1/3rd share in the suit properties?

ii. Whether the gift settlement deeds executed in respect of the items (1) and (2) of the suit properties in favour of the Defendants 3 and 4 are valid?

iii. Whether the item (2) of the suit properties is the exclusive property of the 1st Defendant?

iv. Whether the item (3) of the suit properties is the exclusive property of the 2nd Defendant?

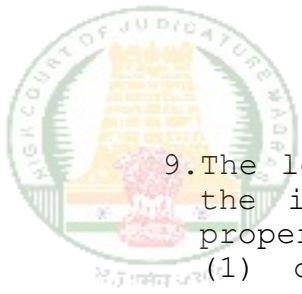
v. Whether the Plaintiff is a stranger to the items (2) and (3) of the suit properties?

vi. To what other reliefs the Plaintiff is entitled to?

6. Before the Trial Court, on the side of the Plaintiff, Ex.A1 to Ex.A5 were marked and PW.1 was examined. On the side of the Defendants, Ex.B1 to Ex.B4 were marked and DW.1 and DW.2 were examined. The Trial Court had granted a preliminary decree, granting partition of 1/3rd share in the items (1) to (3) of the suit properties and declaring that the gift settlement deeds executed by the 1st Defendant in favour of the Defendants 3 and 4 are not binding on the Plaintiff. Aggrieved against the same, this Appeal Suit has been filed by the Defendants 3 and 4.

7. This Court heard the submissions of the learned counsel on either side.

8. The learned counsel for the Appellants has submitted that he acquired the item (1) of the suit properties through partition and that the item (2) of the suit properties was purchased by him and it is his self acquired property and that the item (3) of the suit properties was purchased by his wife and it belongs to her and that the 1st Respondent is not entitled to any share in the items (2) and (3) of the suit properties. The learned counsel would further submit that two sons were born and they died as bachelors and that as a legal heir, his wife also inherited a share and that there is no evidence to prove that the items (2) and (3) of the suit properties were purchased from and out of the income derived from the item (1) of the suit properties and that the Trial Court, without appreciating the oral and documentary evidence, came to the wrong conclusion and hence, this appeal is to be allowed.



9. The learned counsel for the 1st Respondent would submit that the item (1) of the suit properties is the joint family property and that out of the income derived from the item (1) of the suit properties, the item (2) of the suit properties was purchased and that out of the income from the items (1) and (2), the item (3) was purchased and that therefore, all the properties are the joint family properties. The learned counsel would further submit that the 1st Appellant settled the joint family properties in favour of the Defendants 3 and 4 and that the court below, after appreciating the oral and documentary evidence, came to the proper conclusion and pray for dismissal of this appeal. The learned counsel would rely on the decisions reported in 2017 9 SCC 586 (Adivappa and others Vs. Bhimappa and another) and 2018 16 SCC 645 (Vinod Kumar Dhall Vs. Dharampal Dhall).
10. This Court considered the submissions of the learned counsel on either side and also perused the materials available on record.
11. PW.1 had deposed that the item (1) of the suit properties was acquired by the 1st Defendant through partition and it is a joint family property. Out of the income derived from the item (1) of the suit properties, his father had purchased the item (2) of the suit properties and out of the income derived from the items (1) and (2) of the suit properties, the item (3) of the suit properties was purchased in his mother's name and his mother has no separate income and so, the items (1) to (3) are the joint family properties and he is entitled to 1/3rd share in the suit properties.
12. DW.1 has deposed that the item (1) of the suit properties alone is the joint family property. Item (2) of the suit properties was purchased by him and it is his self acquired property. He has further deposed that his wife sold jewels and purchased the item (3) of the suit properties and it is her self acquired property and so items (2) and (3) are not joint family properties and that he earned money through cattle brokerage and business and purchased the item (2) of the suit properties and no surplus income was derived from the item (1) of the suit properties.
13. A perusal of Ex.A1 reveals that item (3) of the suit properties stands in the name of the 2nd Defendant. Ex.B1 and Ex.B2 reveals that the item (2) of the suit properties stands in the name of the 1st Defendant.
14. The Plaintiff has to prove that there existed ancestral nucleus and such an ancestral nucleus yielded income and from that yielded income, there was surplus income. The Plaintiff has to prove that there was some income and has to prove the surplus income and that from that surplus income, the properties were purchased and then only, they would be considered as the joint family properties. Even though it is proved that there existed ancestral nucleus, the Plaintiff has failed to prove that there was surplus income, with which the other properties were purchased. There is no



evidence available on record to prove that fact and therefore, the other properties in the individual names of the Defendants cannot be considered as the joint family properties.

15.DW.2 has deposed that she sold the jewels and out of that income, she purchased the item (3) of the suit properties in her name. In the cross examination, she has deposed that "என்னுடைய தாயாருக்கு அவருடைய பெற்றோர்கள் வீட்டில் எவ்வளவு நகை போட்டார்கள் என்பது எனக்கு தெரியாது." So it is clearly proved that she did not know anything about his mother's jewels. Further, the properties stand in her name. So it is her exclusive property.

16.Regarding the item (2) of the suit properties, it stands in the name of DW.1 and so he has every right to settle the property in favour of DW.4 and so it cannot be questioned.

17.DW.1 has admitted in his written statement and in his chief examination that item (1) of the suit properties alone is the joint family property. He has deposed that his son Gunasekaran died 27 years ago. Another son Soundararajan went missing about 32 years ago and his only daughter also died about 27 years ago. This was not denied by the Plaintiff. So the joint family is consisted of the 1st Defendant and his four sons and one daughter and therefore, this Court held that the Plaintiff is entitled to 1/6th share in the item (1) of the suit property only. The Trial Court failed to appreciate the evidence both oral and documentary and erred in granting a preliminary decree for partition of 1/3rd share in the suit properties in favour of the Plaintiff and hence, it needs to be modified.

18.In fine, this Appeal Suit is partly allowed. In so far as the prayer for partition is concerned, the impugned judgement is modified to the effect that the Plaintiff is entitled to 1/6th share in the item (1) of the suit properties only and the suit is dismissed in respect of items (2) and (3) of the suit properties and the suit is decreed to the extent indicated above. No costs.

Sd/-

Assistant Registrar(CCC)

//True Copy//

***Corrected as per order of
this Court dated 16.06.2022
and made in A.S.18/2016**

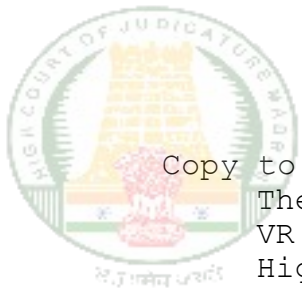
//True Copy//

Sub Assistant Registrar

Srcm

To

The III Additional District and Sessions Judge, Salem



Copy to:

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

WEB COPY

+2 ccs to Ms. Zeenath Begum, Advocate Sr.NO.34824,35846

+1 cc to Mr.S.Kaithamalai Kumaran, Advocate Sr.NO. 34408

AS.No.18 of 2016

EV(CO)

A.SK(30/06/2022)