



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.04.2022

CORAM

THE HONOURABLE MRS.JUSTICE R.HEMALATHA

S.A.Nos.421 & 422 of 2006

and

C.M.P. No.5483 of 2006

Lakshmi

...Appellant in both appeals/
Respondent No.1/Plaintiff

Vs.

1.Subramani (Deceased)

...Respondent No.2/Defendant No.3

2.Ramasamy

3.Chinnappa Gounder

4.Kaliappa Gounder

5.Muthusamy Gounder

...Respondents 3 to 18/D 7
D8, D9, D10, D14, D17,
D20 to D29

6.Muthusamy N.Arumugham

7.K.Thangaraj

8.Muniamooppan

9.Karuppayammal

10.Ramasamy

11.Valliammal

12.Pappathi

13.Duraisamy

14.Pavayammal

15.Minor. Myilsami @ Jeevanandam

(Rep. by his mother Pavayammal)

16.Muthayammal

17.C.Duraisamy

18.Saraswathi

19.Pappathi

20.Vijayakumar

21.Sugumar

22.Chellammal

23.Boopathy

24.Kannammal

25.Marayammal

26.Jayammal

27.Ganapathi

28.Devi

...Respondents in S.A.No.421 of 2006/
R4 to R9 and R11 to R29 set Exparte

(RR25 to 28 brought on record as LR's of the deceased R1 vide
order of Court dated 17.09.2010 made in C.M.P.No.1816/2007)

1.Subramani (Deceased)

2.Ramasamy

...R2/R3/R3

3.K.Thangaraj

...R3 to R18/D7 to D10



D14, D17, D20, D21 to D29

- 4.C.Duraisamy
- 5.Chinnappa Gounder
- 6.Kaliappa Gounder
- 7.Muthusamy Gounder
8. N.Arumugham
- 9.Muniamooppan
- 10.Karuppayammal
- 11.Ramasamy
- 12.Valliammal
- 13.Pappathi
- 14.Duraisamy
- 15.Pavayammal
- 16.Minor. Myilsami @ Jeevanandam
(Rep. by his mother Pavayammal)
- 17.Muthayammal
- 18.Saraswathi
- 19.Pappathi
- 20.Vijayakumar
- 21.Sugumar
- 22.Chellammal
- 23.Boopathy
- 24.Kannammal
- 25.Marayammal
- 26.Jayammal
- 27.Ganapathi
- 28.Devi

...R4 to R9 - Set Exparte & 11 to 29

...Respondents in S.A.No.422 of 2006
(RR25 to 28 brought on record as LRs of the deceased R1 vide
order of Court dated 17.09.2010 made in C.M.P.No.1817/2007)

Prayer in S.A.No.421 of 2006: Second Appeal filed under Section 100 CPC, 1908 against the decree and judgment dated 18.03.2005 passed in A.S.No.50 of 2001, on the file of the I Additional District Court, Erode, reversing the decree and judgment dated 18.08.1998 passed in O.S.No.680 of 1981, on the file of the I Additional District Munsif Court, Erode.

Prayer in S.A.No.422 of 2006: Second Appeal filed under Section 100 CPC, 1908 against the decree and judgment dated 18.03.2005 passed in A.S.No.51 of 2001, on the file of the I Additional District Court, Erode, upholding the decree and judgment dated 18.08.1998 passed in O.S.No.680 of 1981, on the file of the I Additional District Munsif Court, Erode.

For Appellant

(in both the appeals) : Mr. Abu Backer Sidhic
for Mr. Narendhiran

For R7 in S.A. No.421/2006 &

R3 In S.A. No.422/2006 : Mr. M. Palani



COMMON JUDGMENT

The appellant in both the appeals is the plaintiff in O.S.No.680/1981 on the file of I Additional District Munsif Court, Erode. She filed the suit for partition and separate possession of the suit properties.

2. For the sake of convenience, the parties are referred to as per their ranking in the trial court and at appropriate places, their rank in the present appeals would also be indicated.

3.The minimum facts that are required for the disposal of the present second appeals are as follows :

The plaintiff is the daughter of the first defendant and the defendants 2 & 3 are her brothers. The tenth defendant is the husband of the plaintiff. The case of the plaintiff is that the suit properties are the self acquired properties of her father late Kolandha Gounder and that she is entitled to 1/32 share in Item Nos.1 to 3 and 1/64 share in Item Nos. 4 & 5 and 1/4 share in Item Nos.6 to 8 of the suit properties. According to her, the defendants 4, 6, 8 and 9 are having 1/8 share in Item Nos.1 & 2 of the suit schedule properties. It is further contended by her that though she requested the defendants 1 to 3 for effecting partition, they did not come forward to do the same. Hence, she has filed the suit.

4.The defendants 4 to 9 and 11 to 29 remained absent before the trial Court and were set ex parte.

5.The suit was resisted by the defendants 1 to 3 and 10 on the following grounds :

- 1) The suit properties are not the self acquired properties of late Kolandha Gounder. He had purchased the suit items 1 to 3 from out of the income derived from his ancestral properties and also by selling some of his ancestral properties.
- 2) The suit items 4 & 5 were purchased by the defendants 2 & 10 jointly and the plaintiff cannot claim any right over the same.
- 3) The suit items 6 to 8 are dwelling houses and hence, the plaintiff cannot seek for any partition as per Section 23 of the Hindu Succession Act, 1956.
- 4) The plaintiff is entitled to get only 1/12 share in suit items 1 to 3 alone.

6.The trial Court after framing necessary issues and after full contest decreed the suit partly vide its decree and judgment dated 18.08.1998. A preliminary decree for partition dividing suit items 1 to 3 and 6 to 8 into four equal shares and to allot one such share in favour of the plaintiff was passed by the trial Court. The suit was dismissed as regards items 4 & 5



and also with regard to mesne profit on the following grounds :

- 1) The suit items 1 to 3 and 6 to 8 are the self acquired properties of late Kolandha Gounder.
- 2) Ex.A9 to Ex.A18 proves that Kolandha Gounder purchased the suit Items 6 to 8 from out of the income derived from suit items 1 to 3 and therefore, the plaintiff is entitled to get 1/4 share in the above items.

7. Aggrieved over same the plaintiff preferred an appeal in A.S.No.51 of 2001 and the second defendant preferred an appeal in A.S.No.50 of 2001 before the I Additional District Court, Erode. The first appellate court after analysing the oral and documentary evidence adduced on both sides, passed a common judgment dated 18.03.2005 reducing the share of the plaintiff on the following grounds:

- 1) The suit items 1 to 3 were purchased by late Kolandha Gounder by selling his ancestral properties and therefore, they have to be treated as his ancestral properties and not self acquired properties.
- 2) After the death of Kolandha Gounder, the plaintiff is entitled to 1/12 share alone in suit items 1 to 3.
- 3) The above mentioned share of the plaintiff would be excluding the 1/8 share owned by the defendants 4 to 9. As far as the suit items 4 & 5 are concerned, it is self acquired properties of the defendants 2 & 10 and therefore, the plaintiff is not entitled to get any share.
- 4) The plaintiff cannot claim any partition in respect of suit items 6 to 8 as per Section 23 of the Hindu Succession Act, 1956 as they are dwelling houses where male co-parceners are residing.

8. Now the present second appeals are filed by the plaintiff. At the time of admission, the following substantial questions of law were framed by this Court :

- 1) Whether the lower appellate Court erred in holding that the suit items 1 to 3 and 6 to 8 are joint family properties in the absence of any evidence to show that an ancestral nucleus existed and from such ancestral nucleus there was surplus income derived for acquiring the above said items of the suit properties?
- 2) Whether the lower appellate Court erred in not following well established principles of law that a person claiming a property as joint family property is not only bound to plead and prove that there was an ancestral nucleus in the family and also to establish that such ancestral nucleus was capable of yielding surplus income to acquire such properties on the date of such purchase ?

9. Mr. Abu Backer Sidhic learned counsel for the appellant



contended that the suit items 1 to 3 and 6 to 8 stand in the name of late Kolandha Gounder and they are the self acquired properties of late Kolandha Gounder. In any event, even if the properties are treated as ancestral properties, as per the recent decision in Vineeta Sharma vs. Rakesh Sharma & Others, reported in 2020 (5) CTC 302, female legal heirs also to be considered as co-parceners and therefore entitled for equal shares in the ancestral properties as per the Hindu Succession (Amendment) Act, 2005 in the absence of any prior partition. He would further contend that after the repealing of Section 23 of Hindu Succession Act in 2005, a female member is entitled to claim partition even in respect of a dwelling house. In the circumstances, the first appellate Court's observation that the plaintiff cannot claim any share in suit items 6 to 8 cannot be accepted. He did not press his claim as far as items 4 & 5 are concerned.

10. No representation on behalf of the respondents except the seventh respondent. Mr. M. Palani, learned counsel for the seventh respondent who contended that he does not have any interest in the suit properties.

11. At the outset, it may be observed that the defendants 1 to 3 and 10, though contested the suit, did not file any appeal against the judgment of the trial Court. The second defendant and the plaintiff alone filed the first appeal. The first appellate Court did not grant any share in respect of suit items 6 to 8 mainly on the basis that they are dwelling houses and as per Section 23 of the Hindu Succession Act, the plaintiff and the first defendant (mother of the plaintiff) cannot claim any share in those properties. Therefore, the first appellate Court set aside the share given to the plaintiff by the trial Court with regard to suit items 6 to 8. Under Section 23 of the Hindu Succession Act, the female members are not entitled to claim partition of a dwelling house until the male heir chose to divide his share. However, Section 23 was amended by Hindu Succession (Amendment) Act, 2005 and thus, there is no bar for a daughter to claim a share in the dwelling house. Therefore, the plaintiff can very well claim a share in respect of the same.

12. When the trial Court held that suit Items 1 to 3 and 6 to 8 are the self acquired properties of late Kolandha Gounder, the first appellate Court held that they are ancestral properties. Now as per the recent decision in "Vineeta Sharma vs. Rakesh Sharma & Others" (cited supra) the female heirs are co-parceners and they are entitled to get an equal share in ancestral properties also as per the Hindu Succession (Amendment) Act 2005. In the instant case, admittedly there was no prior partition and in such circumstances, the plaintiff is entitled to get a share in suit items 1 to 3 and 6 to 8. As far as suit items 4 & 5 are concerned, both the Courts below concurrently and rightly held that they were purchased by the



second defendant and the tenth defendant (husband of the plaintiff) and the plaintiff cannot claim any share. A perusal of the records shows that suit items 4 & 5 were purchased by the defendants 2 & 10 in their names and the plaintiff has not proved her claim that her father purchased suit items 4 & 5 in the name of the defendants 2 & 10. In the circumstances, the observation of the trial Court and the first appellate Court that the plaintiff cannot claim any right in respect of suit items 4 & 5 is upheld.

13. It is admitted that the defendants 4, 6, 8 & 9 have 1/8 share in suit items 1 & 2 and therefore the plaintiff is entitled to 1/32 share in suit items 1 & 2. As regards, suit items 3, 6 to 8, the plaintiffs are entitled to get 1/4 share. The suit with regard to items 4 & 5 are dismissed. In view of the decision in "Vineeta Sharma vs. Rakesh Sharma & Others" (cited supra), answering the substantial questions of law 1 & 2 does not arise as the daughter has filed the suit for partition against her mother, brothers and other co-sharers.

14. In the result,

i. the second appeals are allowed. No costs. Consequently connected miscellaneous petition is closed.

ii. The decree and judgment dated 18.03.2005 passed in A.S.Nos.50 & 51 of 2001, on the file of the I Additional District Court, Erode, and the decree and judgment dated 18.08.1998 passed in O.S.No.680 of 1981, on the file of the I Additional District Munsif Court, Erode, are set aside.

iii. The plaintiff is entitled for the following shares.

1) 1/32 share in suit items 1 & 2.

2) 1/4 share in suit items 3, 6 to 8.

3) The plaintiff is not entitled any share in suit items 4 and 5.

Sd/-

Assistant Registrar(CS-I)

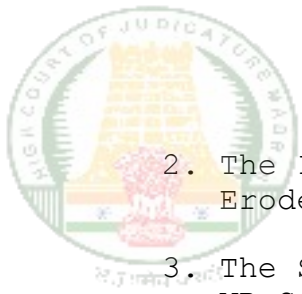
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Sub Assistant Registrar

bga

To

1. The I Additional District Court,
Erode.



2. The I Additional District Munsif Court,
Erode.

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

+2cc to Mr.S.Abubacker Sidhic, Advocate, S.R.No.27892

S.A.Nos.421 & 422 of 2006

PPA (CO)
RGA (25/05/2022)