



S.A.No.1376 of 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 22.08.2022

Coram

The Hon'ble Mr. Justice **C.V.KARTHIKEYAN**

Second Appeal No.1376 of 2011

1. Chandrasekaran

2. Annadurai

3. Malakodi

...Appellants

Vs.

1. Nanjundan

2. Kuppusamy

3. Soodamani @ Eswari

4. Siva

5. Duraisamy

... Respondents

The Second Appeal filed under Section 100 of CPC, against the judgment and decree of the District and Sessions Judge's Court at Dharmapuri, dated 26.04.2011 in A.S.No.6 of 2008 reversing the judgment and decree of the Subordinate Judge's Court, Dharmapuri, dated 23.10.2003 in O.S.No.94 of 1990.



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For Appellant : Mr.P.Valliappan

For Respondents : Mr.S.Saravana Kumar
for Mr.I.Abrar Md.Abdullah [for R.1]

JUDGMENT

The plaintiffs in O.S.No.94 of 1990 on the file of the Sub Court, Dharmapuri, are the appellants herein.

2. They had instituted the aforementioned suit, seeking partition and separate possession of the properties, which are mainly vacant lands.

3. By judgment dated 23.10.2003, the learned Sub Judge, Dharmapuri, decreed the suit and granted partition and separate possession. Aggrieved by the said judgment, the 1st defendant filed A.S.No.6 of 2008, which came up for consideration before the District Court at Dharmapuri. The learned District Judge, by judgment dated 26.04.2011, allowed the Appeal Suit and thereby dismissed O.S.No.94 of 1990. This had necessitated the plaintiffs to approach this Court by filing the present Second Appeal.



4. This Second Appeal has been admitted on the following 3 substantial questions of law;

"1. Whether the lower Appellate Court is correct in law in non-suiting the appellants after finding the suit properties are ancestral properties of the 1st respondent and that the appellants are his children?

2. Whether the lower appellate Court is correct in law in holding that the appellants had not produced any evidence to prove their case by eschewing exhibits coupled with the oral evidence of P.W.1 to 3?

3. Whether the lower Appellate Court, being the final Court on facts, is justified in rendering a superficial judgment without addressing the real issues involved in the matter?"

5. The plaintiffs claimed that the properties mentioned in the schedule to the plaint are ancestral properties which had been inherited by their father / 1st defendant. They further stated that the 1st defendant and the 2nd and 3rd defendants / his brothers orally partitioned the properties among themselves. They claimed that notice had been issued prior to the suit but since partition was not acceded by the 1st defendant, they had no other option but to institute the suit as aforementioned seeking separate possession of their shares in the said properties.



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6. The 1st defendant filed a written statement denying and disputing the stand of the plaintiffs. He even disputed that they were his children or that their mother was his wife. He claimed that she had divorced him. With respect to the properties, he stated that some of the properties had been inherited from his father and with respect to those properties there was subsequent partition between among the 3 brothers namely himself and the 2nd and 3rd defendants. There were also some properties which he had inherited from his mother. But he claimed that substantial number of properties had been leased out to third parties who have taken possession, and it was therefore claimed that the said properties were not partitionable. He also stated that two of the properties had been purchased by him out of his own funds and therefore stated that plaintiffs cannot seek partition of the said properties. In effect, he claimed that the suit should be dismissed.

7. The learned Sub Judge, Dharmapuri, framed issues. The first issue was with respect to lands in Sy.No.93/6 and 95/1, Velampatti village in Dharmapuri District. There were further issues with respect to whether the 2nd and 3rd defendants were necessary parties and also whether the properties were joint family properties and also whether



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the properties dealt with by the 1st defendant were for necessity. A further issue was also framed whether the plaintiffs were born to the 1st defendant and finally whether the plaintiffs were entitled for separate possession.

8. During trial, the 1st plaintiff examined himself as P.W.1 and he examined his mother Venkatammal as P.W.2 and, Nagarajan an independent witness as P.W.3. The 1st defendant examined himself as D.W.1 and examined one other witness as D.W.2.

9. The plaintiff marked Exs.A.1 to A.12. Ex.A.1 and A.5 were the notices exchanged between the parties. Ex.A.6, A.7 & A.8 related to the school certificates of the plaintiffs wherein reference was made to the 1st defendant as their father. Ex.A.8 was Transfer Certificate of the 3rd plaintiff in which both the names of the 1st defendant and P.W.2 were found. The defendants marked Exs.B.1 to B.4. Exs.B.1 & B.2 were two sale deeds of two properties which, formed part of Issue No.1, and in the name of the 1st defendant.

10. On the basis of the oral and documentary evidence, the learned Sub Judge proceeded to examine the very nature of the



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properties in Sy.Nos.93/6, 95/1 which land, the 1st defendant claimed as his self acquired property and were therefore not available for partition.

11. However, it was noted that the sale deeds with respect to said properties had not been produced. The obligation to produce documents was placed on the 1st defendant since he claimed to have purchased the property. It was also found that the 1st defendant had not let in any evidence to establish his means to purchase any property. In view of that particular finding, the learned Sub Judge came to a definite conclusion with respect to Issue No - I that the property in Sy.No.96 were not the self acquired properties of the 1st defendant.

12. Thereafter, with respect to Issue No - V, which required adjudication whether the properties given in the schedule to the plaint were available for partition or not, the learned Sub Judge entered into a discussion in respect of each one of the Survey Number namely Sy.Nos.200/6B, 19/1B, 90/3B, 181/104, 200/6B, 184/B, 180/1C, 181/J, 80/84. With respect to these properties, the evidence of D.W.1 that some of these properties were self acquired properties, some of



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them he had sold and that thereafter there had been partition among himself and his brothers, were set out in the judgment. The learned Sub Judge appears to have shifted the burden to prove whether the properties were available for partition to the 1st defendant.

13. The evidence of P.W.1 that he admitted that he did not know how the properties devolved into the family and whether they were joint family properties or self acquired properties of D.W.1 was noted. However, the learned Sub Judge held with respect to the Issue No.5 that the properties were actually joint family properties. It was also stated that in the written statement, the 1st defendant has stated that he had obtained loans from various 3rd persons and had put them to advantage in various properties. This issue was answered against the 1st defendant and it was held that he had not established from where he had obtained the said loans. Exs.A.6, A.7, A.8 & A.9 certificate in which the name of the 1st defendant was shown as the father of the plaintiffs in their school certificates was considered. A preliminary decree was granted.

14. The 1st defendant then filed A.S.No.6 of 2008. The appeal suit came up for consideration before the District Judge, Dharmapuri



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who framed necessary points for consideration. The District Judge was of the opinion that the burden was on the plaintiffs to prove that the properties were joint family properties or properties acquired by the 1st defendant from and out of income of the joint family nucleus. It was held that P.W.1 has not given necessary details to show that properties were joint family properties. It was held that the joint family nucleus had not been established. The Appeal Suit was allowed. This necessitated the plaintiffs to file the Second Appeal.

15. Heard arguments advanced by P.Valliappan learned counsel for the appellants and Mr.S.Saravana Kumar, learned counsel for the 1st respondent.

16. The 3 substantial questions of law framed at the time of admission revolve around appreciation of the evidence adduced.

17. The 1st substantial question of law is with reference to the finding of the Appellate Court that the properties are not partitionable though it was held that some of the properties were ancestral in nature and the 2nd substantial question of law revolved with reference to the evidence produced by the appellant and the 3rd substantial



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question of law revolved around appreciation of evidence produced before the First Appellate Court.

18. Let me answer all the substantial questions of law together. The appellants shall be termed as plaintiffs and the 1st respondent as the 1st defendant.

19. The suit had been filed by the appellants claiming to be sons and daughter of the 1st defendant. The 1st defendant however denied that he was their father and he also denied his marriage subsisted. He claimed that the mother of the plaintiffs had moved away from the marital life.

20. P.W.2 was examined and she denied such allegations made during the cross examination. Exs.A.6, A.7 & A.8 had been produced, Ex.A.6 was the Transfer Certificate of the 1st plaintiff M.Chandrasekaran, which Transfer Certificate was issued by the Government High School, Dharmapuri District, in which the name of his father was given as Nanjundan / 1st defendant. Ex.A.7 is the Transfer Certificate of the 2nd plaintiff / Annadurai and again the name of his father has been given as Nanjundan / 1st defendant. Ex.A.8 is



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the Transfer Certificate of Malarkodi, the 3rd plaintiff and again the name of her father had been given as Nanjundan / 1st defendant.

21. The three documents are original documents and *prima facie* can be taken as being correct, unless, it is proved that the details therein had been wrongly given. Ex.A.9 is the wedding card of the 3rd plaintiff / Malarkodi in which, the name of both the 1st defendant and P.W.2 had been given as the invitees. I hold that with the available evidence, the plaintiffs have established that they belong to the same family as the 1st defendant. Once this aspect is established by the plaintiffs, then the averments in the written statement denying relationship has to be viewed as being a false statement. Naturally, a cloud of suspicion then arises over every other statement mentioned by the 1st defendant in his written statement. It is for that purpose that I first took up the issue of relationship among the parties. That would go to the root of their status.

22. The 1st defendant had gone to the extent of denying continuous relationship with his wife Venkatammal / P.W.2 and doubted whether he was the father of plaintiffs. But the documents, Exs.A6, A7, A8 and A9 hold otherwise. They are documents which



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cannot be rejected by this Court. They have been produced in manner known to law and have been proved in a manner known to law.

23. The Plaintiffs have come to Court claiming that the properties are ancestral properties and that subsequently, the 1st defendant, the 2nd defendant and the 3rd defendant had entered into an oral partition among themselves and the properties had fallen to the share of the 1st defendant and therefore partition was sought.

24. In the written statement filed by the 1st defendant, he had stated that about 15 years prior to the date on which he had filed the written statement, he and the other defendants had inherited properties and in Sy.Nos.181/1C measuring 0.60 hectares in Sy.No.200 B measuring 0.325 hectares but that there was a partition among the 3 brothers namely the 1st, 2nd and 3rd defendants. He stated that therefore all the properties were not available for partition. Neither of the parties have come to Court giving a correct picture as to which of the properties are ancestral in nature and which have been acquired by the 1st defendant.



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25. Once it is established that the plaintiffs are the children of the 1st defendant, then properties to which he had a share by virtue of having inherited the same, would be available for partition. The 1st defendant himself in his written statement has mentioned that he had put creditors in possession of the said suit property. The names have also been given. He, therefore claimed that the properties allotted to him were not available for partition. Creditors are put in possession of the property till the time the loans are repaid. Title is not transferred.

26. The First Appellate Judge in the course of his judgment had stated that the burden was on the plaintiffs to establish that each and every item of the properties was actually available for partition. As a matter a fact, this statement will have to be corroborated with the statement of the 1st defendant, who claimed that none of properties are ancestral.

27. The learned counsel for the 1st defendant / 1st respondent relied on a judgment reported in **2021 (2) CTC 811 [Rajendran Vs. R.V.Saravanan]** wherein it had been stated that in a suit for partition, if the properties get mingled / mixed with the properties purchased by the defendant, then the plaint must disclose the properties sufficiently to identify them.



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28. In a suit for partition, burden is on the plaintiffs to substantiate the pleading of co-ownership and joint title. It was stated that if such burden is not discharged, the suit would have to suffer an order of dismissal.

29. The learned counsel for the 1st respondent also relied on a judgment of a learned Single Judge of this Court reported in **2022 1 LW 105 [P.Kalyanasundaram Vs. P.Saraswathy]** where the onus was laid on the plaintiffs to prove that the properties were joint family properties. It must be stated that reliance was placed on a Will which was not produced and therefore the learned Judge examined the suspicious circumstances surrounding the Will.

30. The learned counsel for the 1st respondent also relied on a judgment of the Hon'ble Supreme Court reported in **2020 6 SCC 387 [Bhagwat Sharan Vs. Purushottam & others]**. It was held that the burden is on person who alleges existence of HUF to prove the same. It was stated that proof is required not only with respect to jointness of family but also that the property belongs to joint Hindu family.



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31. The next judgment relied on by the learned counsel for the 1st defendant was **2018 (3) L.W. 751 [Chandran & others Vs. Sendurpandian & another]**. Again it was held that the contention that existence of the joint family will not lead to any presumption that the properties held by any member of the family was a joint family property.

32. In the instant case, the plaintiffs had come to Court giving separate survey numbers for the various lands available, for partition and separate possession. That the lands are available is not denied by the 1st defendant. The contention of the 1st defendant is that several of the said lands have been given in possession to various creditors for rents received by him. It is also his contention that some of the lands have been inherited and partitioned among his two brothers. It was further contended by him that some of the properties have been inherited from his mother. It was further contended that two of the properties have been purchased by him.

33. Be that as it may, the burden on the plaintiffs starts and ends by showing that properties were available for partition.

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34. In the written statement, the 1st defendant should show that the properties which are claimed to be available for partition are not available for partition.

35. A careful perusal of the written statement shows that the 1st defendant had claimed that he had inherited the properties in S.Nos.181/1C and 200/6B. He claimed that there was an oral partition of the said lands among himself and the 2nd and 3rd defendants. But he then stated with reference to land in Sy.No.90/1B that he had purchased it along with 3rd defendant, from one Nanjappan and they subsequently partitioned the property amongst them. The fact of purchase is admitted but the fact of division has not been proved. With reference to lands in Sy.No.90/8B, again the 1st defendant claimed that he had purchased it. He had obtained loan of Rs.18,000/- from one Mottaiyan and towards the interest component, he had handed over possession to Mottaiyan with a condition that on re-payment of Rs.14,000/-, he should return back the possession of lands to him. With reference to the lands in Sy.No.93/6, 95/1, he claimed that they are self acquired properties. With reference to the lands in Sy.No.180/4B, he claimed that it was purchased by the 3rd defendant,



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Soodan from one Nanjappan and later on divided. The 1st defendant claimed that he has no right or claim over the said lands. With reference to the land in Sy.No.180/4E, he claimed that they do not belong to him. With respect to the lands in Sy.No.181/1C, he claimed that he had obtained a loan of Rs.20,000/- from one Soodan and had handed over possession of the said lands. With reference to lands in Sy.No.181/J, he claimed that they belonged to one Soodan and patta had been also granted in his favour. The lands in Sy.No.181/1L was claimed to belong to Soodan and that patta was issued in his name. With reference to the lands in Sy.No.200/6B, he claimed that he had received loan from Gundan and had handed over possession. With reference to the properties in Item No.11, he again claimed that they were not in his name. With reference to item No.12, he again claimed that the said lands had been sold to Soodan. Even if the statements are taken to be correct, though such elaborate discussion has not been undertaken by both the Courts below, it would still reflect that the lands in Sy.No.181/1C, 200/6B, 90/1B, 90/8B, 93/6, 95/1 and 180/4B are still available for partition.

36. In view of the above discussion, the substantial questions of law are therefore answered that the First Appellate Court has erred in



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not entering into a detailed discussion with reference to the availability for partition of the lands mentioned in the schedule to the plaint. The First Appellate Court had also erred in rejecting the documents produced particularly the Transfer Certificates produced by the plaintiffs which referred that the 1st defendant was their father. It must also be understood that the documents which are alone available can be produced and parties cannot be expected to create documents. In the instant case, the Transfer Certificates from the Government Schools had been produced by 1st, 2nd and 3rd plaintiffs and there is no reason to dispute the same.

37. With respect to the 3rd substantial question of law, I would hold that the First Appellate Court had not ventured into a detailed examination of the entire facts.

38. With reference to the judgments produced there cannot be any quarrel that the burden is on the plaintiffs to prove that the properties available are joint family properties. In this case, even in the written statement, the 1st defendant stated that he has given possession to the third parties on receipt of loan amounts.



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39. The final allotment of the properties can be worked out during the final decree application.

40. With the above directions, this Second Appeal stands partly allowed and the judgment and decree of First Appellate Court is set aside and the judgment and decree in O.S.No.94 of 1990 is partly interfered and partition and separate possession is granted for the lands in S.Nos.181/1C, 200/6B, 90/1B, 90/8B, 93/6, 95/1 and 180/4B as detailed in the schedule to the plaint. No order as to costs.

22.08.2022

Index:Yes/No
Internet:Yes/No
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To

- 1.The District and Sessions Judge's Court at Dharmapuri.
- 2.The Subordinate Judge's Court, Dharmapuri.
- 3.The Section Officer, VR Section, Madras High Court.



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