



A.S(MD).No.104 of 2012

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on : 05.08.2022

Pronounced on : 24.08.2022

CORAM:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

A.S(MD)No.104 of 2012
and C.M.P(MD).No.222 of 2020

P.Krishnasamy
S/o.Periyasamy Pillai

... Appellant/plaintiff

.Vs.

1.S.P.Sivarajan

2.Kalphana

3.S.Gopinath

4.Sridevi

5.G.Dhanalakshmi(died)

6.N.Rajeswari

7.Sumathi

8.Renganathan

9.Sivasubramanian

10.M.G.Ramachandran

...Respondents/Plaintiffs



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(R8 to R10 are brought on LRs of deceased R5 vide Court order dated 03.12.2019 made in C.M.P.No.6182, 6183 and 6186 of 2019)

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PRAYER: Appeal Suit filed under Section 96 of Civil Procedure Code, to call for and set aside the judgment and decree dated 30.09.2011 in O.S.No.66 of 2005 on the file of the Additional District Judge, Trichy.

For Appellant	: Mr.H.Lakshmi Shankar for Mr.T.V.Sivakumar
For Respondents	: Mr.B.Saravanan R1 No appearance for R2 to R10

JUDGMENT

This Appeal Suit has been preferred challenging the judgment and decree of the learned Additional District Judge, Trichy, dated 30.09.2011 made in O.S.No.66 of 2005.

2. The appellant is the plaintiff in O.S.No.66 of 2005 on the file of the learned Additional District Judge, Trichy. The respondents 1 to 7 are the defendants in the said suit. The plaintiff filed a suit against the respondents 1 to 7/defendants for partition and separate possession of the suit property. After trial, the trial Court dismissed the suit. Challenging the said judgment, the appellant/plaintiff filed the present appeal before this Court.



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3.The averments made in the plaint, in brief, are as follows:-

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The plaintiff and the first defendant are brothers. The suit property belonged to the mother. The mother of the plaintiff gifted the suit property to the plaintiff and the first defendant. The gift settlement deed, dated 03.11.2009 was validly executed in favour of the plaintiff and the first defendant and duly attested. Hence, the plaintiff and the first defendant are joint owners of the suit property. A suit in O.S.No.1239 of 1994 has been filed by Shanmugam, against the father of the plaintiff, namely, Periyasamy Pillai, his mother, namely, Parvathiammal and his brothers and sisters. He has categorically admitted that the suit property is self acquired property of the mother Parvathiammal. The father, namely, Periyasamy Pillai has also admitted in the said suit that the suit property is the self acquired property of Parvathiammal and not a joint family property. Parvathiammal executed a settlement deed in favour of the plaintiff and the first defendant. Hence, the defendants 2 to 4 are not entitled to any right, interest or possession in the suit property and also the defendants 3 to 7 cannot claim any right in the suit property under the Will, dated 22.08.1999. The suit property has been settled by Parvathiammal during her life time in favour of the plaintiff and the first defendant. So, the defendants 5 to 7 are not entitled to the suit property.



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The defendants 5 to 7 have come on record at the instigation of the 1st defendant to drag on the proceedings and to defeat the right of the plaintiff. Hence, the plaintiff prays for partition of the suit property into two equal shares and allot one such share to the plaintiff and for separate possession of the same.

4. The averments made in the written statement, in brief, are as follows:

The suit property was purchased by one Periyasamy Pillai, who is the father of the plaintiff and the first defendant. For the sake of the welfare of the family, the property was purchased in the name of his wife, namely, Parvathi ammal. The plaintiff had gone out of the family prior to the year 1988 and he married a girl of his own choice. On 19.04.1993, the plaintiff had executed a registered release deed and thereby, released all his rights over the properties owned by Periasamy Pillai and Parvathiammal by agreeing to receive a lump of Rs.2,00,000/- (Rupees Two Lakhs only). Initially, the mother of the plaintiff has executed a Will, dated 22.08.1999 bequeathing all her rights in favour of her daughters, namely, Dhanalakshmi, Rajeswari and Sumathi. After knowing about the execution of the Will, the plaintiff once again entered



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into the family. At that time, the mother of the plaintiff fell sick and she was in bedridden. Taking advantage of the same, in the absence of the first defendant and his sisters, the plaintiff had obtained the signature of his mother and created a deed purport to the gift settlement deed. The mother of the plaintiff never executed the gift settlement deed in conscience and she never had any wish to settle the properties in favour of the plaintiff. The said Parvathiammal has no right to execute any documents or to create any encumbrance with the respect to the suit property, because the said Parvathiammal was one of the members of the joint family. The said Parvathiammal was living as a house wife and she had no personal income to purchase the suit property. The suit property was purchased by Periyasamy Pillai in the name of Parvathiammal. The plaintiff had wilfully omitted to implead the other members of the family as parties to the suit. The suit is bad for non-joinder of necessary parties. The suit has not been properly valued and no proper Court fee has been paid and there is no cause of action for the suit. Hence, the suit is liable to be dismissed.

5. On the basis of the above pleadings, the learned trial Judge framed the following issues:



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- (i) Whether the gift deed executed in favour of the plaintiff is valid?*
- (ii) Whether the Will executed by Parvathi Ammal has been nullified?*
- (iii) Whether the plaintiff is entitled half share as claimed in the plaint?*
- (iv) To what other reliefs the plaintiff is entitled to?*
- (v) Whether the defendants 2 to 4 have right, title over the suit properties as per the release deed executed by the plaintiff?*

6. In order to substantiate the case, on the side of the plaintiff, three witnesses were examined as P.W.1 to P.W.3 and two documents were marked as Ex.A1 and Ex.A2. On the side of the defendants, two witnesses were examined as DW1 and DW2 and twenty six documents were marked as Ex.B1 to B26.

7. On completion of trial and on hearing of arguments advanced on either side, the learned trial Judge considered the evidence available on record and dismissed the suit. Aggrieved over that, the plaintiff has filed the present appeal.



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8. The learned counsel for the appellant submitted that the suit properties originally belonged to his mother, namely, Parvathiammal. She executed a registered gift settlement deed on 03.11.1999, in favour of the appellant and the first respondent. The gift settlement deed has been marked as Ex.A1. Ex.A1/Gift settlement deed was validly executed, duly attested and registered in accordance with law. The said gift settlement deed was accepted and acted upon and it has come to force. Now, the appellant and the first respondent are in possession of the suit property. The appellant and the first respondent are the joint owners of the suit property as per the settlement deed - Ex.A1 both are entitled to 1/2 share in the suit property. On repeated demands for partition, the first respondent has not come forward for amicable settlement and partition and therefore, the appellant sent a notice to the first respondent and filed the suit. The respondents 2 to 4 are the legal heirs of one Shanmugam and he also attested in Ex.A1/settlement deed. Respondents 5 to 7 are the sisters of the appellant and therefore, they are not entitled for any partition as per Ex.A1.

9. The learned counsel for the appellant further submitted that though the defendants in the written statement challenged the gift



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settlement deed/Ex.A1 being invalid, manipulated and obtained by undue influence and also not acted upon, the Will is not binding on them. He further submitted that though the respondents 5 to 7 claimed that the mother of the appellant executed the Will, dated 22.08.1999 under Ex.B15 and the said Will was revoked and cancelled by executing Ex.A1/settlement deed. The said Will is not a last Will, since the settlement deed is Ex.A1 subsequent to Ex.B15. Therefore, during the life time of Parvathiammal, it was cancelled and executed the gift settlement deed in favour of the appellant and the first respondent, in order to substantiate the case, the appellant examined as P.W.1. In order to prove the settlement deed, one of the attestors of Ex.A1 was examined as P.W.2 and the scribe of the settlement deed was examined as P.W.3. The settlement deed was proved in the manner known to law, even though the trial Court found that the Will has not been established and the settlement deed also proved. However, he has taken a different view that even in the settlement deed, it is stated that the suit properties have been purchased in the name of Parvathiammal from the joint family income. Therefore, the trial Court erroneously held that from the recitals in the settlement deed/Ex.A1, the suit property was purchased out of the joint family income and therefore, Parvathiammal has no right to execute



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the settlement deed and therefore, it is treated as a joint family property and the suit for partition was dismissed. Though this is a suit for partition, Parvathiammal has no right to execute the settlement deed in respect of the entire suit property and the property is treated as a joint family property. The appellant is also entitled to the share and without considering the same, the trial Court dismissed in toto, which is against the settled proposition of law. In the partition suit, all the parties are treated as plaintiffs as well as defendants and even, the defendants have not filed any counter claim and they denied that the settlement deed was forged and obtained by coercion and that has not been established even during the cross-examination of P.W.1, the respondents counsel never put any suggestions. However, they admitted that the appellant was in possession of the property. Even the defendants 5 to 7 have not cross-examined witness of the appellant. Exs.B1, B11, B12 and B15, have not been mentioned that the suit properties were purchased out of the joint family income. In the written statement filed by R5 to R7, it is clearly stated that the suit properties are the self acquired properties of Parvathiammal, which is settled proposition of law that if the property stands in the name of a female, unless the contrary is proved, it is the self acquired property of the female on whose name, the property stands.



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Therefore, the trial Court failed to consider the plaint and the written statement filed by the respondents 5 to 7 and also Exs.A13, 12, 13, 14 and 15 that the suit properties are self-acquired property of Parvathiammal. It was not at all joint family property. Already, there was a partition between the family members as per the partition deed/B12, if at all the suit properties also joint family properties the same should have been included and effected for partition between the family members, since it is a self-acquired property of Parvathiammal, therefore, this was not included in the earlier partition between the family members under Ex.B12. The trial Court failed to consider all the facts and evidence, even in Ex.B11/release deed said to have been executed by the appellant releasing all his rights over the properties owned by his father, for a consideration of Rs.2,00,000/- (Rupees Two Lakhs only) towards his share in the properties, but not in respect of the suit properties.

10. Though in the earlier occasion, she was residing in Thanjavur, subsequently the appellant resided in the portion of the suit property. Even during the life time of the father and mother, the appellant is also residing in the suit property. The trial Court failed to consider all these facts and simply dismissed the suit and directed all the parties to file a



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suit for partition, which is erroneous and the judgment and decree passed by the trial Court is liable to be set aside and the appeal is to be allowed.

11. The learned counsel for the respondents 5 to 7 submitted that the suit property is a self acquired property of Parvathiammal. She executed a Will in favour of the respondents 5 to 7. The said Will is a registered Will and therefore, the respondents 5 to 7 are equally entitled to 1/3 share in the suit properties. Even in Ex.A1 - settlement deed, the mother has stated about the Will executed by the mother dated 12.08.1999, in favour of the respondents 5 to 7 and the appellant and the respondents have also admitted the said Will. Therefore, under Section 58 of Indian Evidence Act, the admitted fact need not be proved and the appellant also executed the release deed in respect of the entire family properties under Ex.B11 and therefore, he is not entitled to any share. Therefore, all the joint family properties were divided under Ex.B12 among joint family members. Since the suit property is self acquired property of Parvathiammal, the suit property was not included in the joint family partition deed/Ex.B12. Since the appellant married a girl of his own choice and left from the family and also executed Ex.B11/release deed and therefore, the appellant is not entitled to any share in any of the



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properties belongs to father and mother. Further admittedly, the mother executed a Will - Ex.B15 in favour of the respondents 5 to 7. The trial Court erroneously held that the same was not proved by examining the attestors and failed to consider the fact that all the parties have admitted the execution of the Will and the admitted fact need not be proved and the trial Court while dismissing the suit, should not have stated the suit property as joint family property and should not have given direction for filing the suit for partition including all the legal heirs of the Parvathiammal.

12. The learned counsel for the other respondents would submit that the suit property was purchased out of the income of the joint family income and therefore, Parvathiammal has no right either to execute the Will or the settlement deed and all the legal heirs are entitled to the share in the suit property. The appellant already executed the release deed and he left from the family. Therefore, he is not entitled to the suit property and except the appellant, all other members are entitled to the suit property and therefore, there is no merit in the appeal. Hence, the appeal is liable to be dismissed.



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13. Heard the learned counsel appearing for the appellant, the learned counsel appearing for the respondents and perused the pleadings, issues framed by the trial Court and oral and documentary evidence adduced and produced by both parties.

14. The relationship of the parties is admitted and all the parties are the legal heirs of the Parvathiammal directly and through the predeceased sons and daughters. The appellant and the first respondent are sons and the respondents 2 to 4 are the legal heirs of one of her sons, namely, Shanmugam. The respondents 5 to 7 are the daughters of Parvathiammal. During the pendency of the suit, the fifth respondent died, who is the one of the daughters of Parvathiammal and the respondents 8 to 10 are the legal heirs of the fifth respondent. Now, the appellant and the respondents 5 to 10 took a stand that the suit property is a self acquired property of Parvathiammal. The appellant is claiming title under ExA1. During her life time, Parvathiammal executed a gift deed, dated 03.11.1999 and settled her property, namely, the suit property in favour of the appellant and the first respondent and therefore, he is entitled for 1/2th share in the suit property. The respondents 5 to 10 claiming title under Ex.B15 Will dated 22.08.1999 the suit property is



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self acquired properties of Parvathiammal and therefore, Parvathiammal executed a registered Will dated 22.08.1999 in favour of the respondents 5 to 7. Therefore, they are entitled to 1/3rd share each. The appellant is not entitled to any share. However, they have not filed either counter claim or paid separate Court fee for passing preliminary decree for their shares. The fifth respondent filed the written statement and the respondents 6 and 7 adopted the same and they have not filed any counter claim or paid the Court fees for dividing their shares.

15. On the other hand, the respondents 1 to 4 have taken a stand that the suit properties are not the self acquired properties of Parvathiammal and she has purchased the suit property from the joint family income and therefore, the appellant is not entitled to any share and even the first respondent is one of the beneficiaries in the alleged settlement deed/Ex.A1. He also stated in his written statement that the suit properties are not self acquired properties of Parvathiammal and though he has stated that there was an earlier Will, which was executed in favour of the respondents 5 to 7, subsequently, taking advantage of the old age and sickness of Parvathiammal, the appellant re-entered into the family and obtained the signature of his mother and created a forged



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document. Therefore, the appellant is not entitled for any share and the properties are joint family properties and the sons and daughters of Periyasamy Pillai and Parvathiammal are entitled to the shares. However, as per Ex.B11 the release deed executed by the appellant he is not entitled to get any share in the suit property.

16. Now, the points that are raised for consideration, are:

(i) Whether the suit properties are self acquired properties of Parvathiammal or the joint family properties?

(ii) If it is a self acquired property, whether the settlement deed executed by Parvathiammal in favour of the appellant and the first respondent is valid and they are entitled for $\frac{1}{2}$ share in the suit property or Whether Parvathiammal executed a Will in favour of the respondents 5 to 7 and whether the Will was proved and the respondents 5 to 7 are entitled to any share in the suit properties?

17. As far as the first point is concerned, it is no doubt that the property was purchased in the name of Parvathiammal under Ex.B13 and B14. Therefore, it is well settled proposition of law that if the property



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stands in the name of the female, it is the property of the family on whose name the property stands and it can be stated that unless the contrary is proved, if the property stands in the name of the female, it is absolute property of the said female.

18. No doubt, in the sale deeds, it is not stated that out of the joint family income, the suit properties were purchased and in the Will/Ex.B15, it is stated that it is a self acquired property of Parvathiammal. In Ex.A1 settlement deed itself, it is stated that the Will was executed under ExA15. However, in Ex.A1/settlement deed, it is stated that the property has been purchased out of the joint family income. Further, the first respondent is one of the beneficiaries and he has denied the execution of the settlement deed. Therefore, the settlement deed is not valid. The first respondent denied the settlement deed and also stated that it was a forged one and obtained by undue influence. No doubt, the respondents have pleaded in the written statement specifically under Order 6 Rule 4 C.P.C. Therefore, it is the duty of the appellant to prove the settlement deed. The appellant examined himself as P.W.1. He has deposed during cross examination that his mother and sisters are only house wives. Even in the chief examination he has not stated the source



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of his mother to purchase the suit property in her name. One of the attestors was examined as P.W.2. The scribe of the settlement deed was examined as P.W.3. But, P.W.2 has not stated that he has seen the Setlor Parvathiammal while signing the settlement deed. During the cross-examination, he has stated that just casually, he went to the house of the appellant. At that time, already the settlement deed was prepared and signed in the settlement deed and also he has stated that he does not know anything about the recitals and the character of the properties mentioned in the settlement deed. Further, there is a recital in Ex.A1 settlement deed that the suit property was purchased only out of the joint family income. As already stated, if the property stands in the name of a female, unless the contrary is proved, it is the self acquired property of the family on whose name, the property stands. There is an exception that if the properties were purchased out of the income of the joint family or the property stands in the name of the family was treated as joint family property, then the property is a joint family property and not a individual property.

19. In this case, in Ex.A1 – recitals, it is stated that the property was purchased from the joint family income and also there is no evidence



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to show that Parvathiammal was having any independent source or independent income to purchase the suit property in her name. There is no separate income or separate fund and she is residing in the joint family and she is only a house wife and if the property was purchased in the name of a female out of the joint family income, the property has to be treated as a joint family property. Already there was a partition in the year 1970 under Ex.B12 in respect of the suit properties, which stood in the name of the father and other family members. No doubt, this suit property is a residential house. Admittedly, at the time of death of Parvathiammal and Periyasamy Pillai, the appellant and the respondents 2 to 4 were residing in the said house. When the first respondent denied that there is no settlement deed, the first respondent has not stated that his mother executed the settlement deed and has taken the possession and admittedly, the appellant also has not stated that he and the first respondent alone took the possession on the date of the settlement deed and they are in exclusive possession and the settlement deed was acted upon. Therefore, it is to be seen from the evidence that in the suit property, the appellant also has not sought any specific relief against the respondents 2 to 4 for evicting them or for recovery of possession from them. Therefore, considering the facts and circumstances, the appellant



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has not established that the suit property is the exclusive properties of his mother, namely, Parvathiammal and she had an independent source to purchase the suit property in her name and from that date, it was treated as her own property. So, in the absence of the same, the case of the appellant cannot be accepted. Therefore, from the oral and documentary evidence, this Court as a first appellant Court being the fact finding Court, considering the pleadings and materials of oral and documentary evidence, finds that the appellant has not proved that Parvathiammal has independent source of income and independently purchased the suit property in her name and it is self acquired property of Parvathiammal. Therefore, this point is answered against the appellant.

20. Once it is held that it is not a self acquired property of Parvathiammal even as per Ex.A1 – recital, it is stated that the property was purchased from and out of the joint family income, the respondents also challenged, the settlement deed, especially, the first respondent, who is said to be one of the beneficiaries to the Ex.A1 and he himself has denied that there is no settlement and he has pleaded that the property was purchased from the joint family income. Admittedly, the respondents 2 to 4 are also in possession of the portion of property. Therefore, the



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settlement was not acted upon. Even otherwise Parvathiammal has no right to execute settlement deed in respect of entire suit property therefore, the settlement deed also not valid, since it is joint family property. Though, the appellant executed the release deed under Ex.B14, however, the same was in respect of the properties stands in the name of his father. Only at a later point of time, the appellant came and rejoined the family and therefore, considering the facts and the oral and documentary evidence, this Court finds that eventhough the suit property was purchased in the name of Parvathiammal and she has no independent source to purchase the suit property. Therefore, the suit property is treated as joint family property. As far as the Will is concerned, though it is admitted that the Will has been executed, however, the Will is peculiar type of document and it has to be proved in the manner known to law under Section 68 of the Indian Evidence Act at least by examining one of the attestors. Unfortunately, the respondents 5 to 7 have not proved the Will in the manner known to law and therefore, from the oral and documentary evidence, this Court finds that the Parvathiammal died intestate and the suit properties are the joint family properties, all the legal heirs of Periyasamy Pillai and Parvathiammal are entitled to the suit properties. Since the appellant claimed that he is entitled to partition of



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the suit property under a different footing, by claiming title under Ex.A1, the trial Court dismissed the suit and has given liberty to file a fresh suit for partition. Though this is a suit for partition, under different footing claiming partition under Ex.A1/settlement deed, the claim of the appellant is rejected. However, the suit property is treated as a joint family property and the other legal heirs of Periyasamy Pillai and Parvathiammal have not been impleaded. Therefore, no partition can be effected without impleading all the members of joint family. In the partition suit, all the coparceners of the joint family members have to be impleaded and therefore, in the absence of the same, the suit property would be hit by the non-joinder of the necessary parties. In order to avoid the technicality, the suit was dismissed in toto and liberty has been given to the parties to file a fresh suit for partition.

C.M.P(MD).No.222 of 2020:

21. The learned counsel for the petitioner/appellant would submit that though in the settlement deed, it is stated that Parvathiammal purchased the suit property from the funds of her husband and joint family funds. She also clearly asserts that the property belongs to her and, she is enjoying the property as absolute owner and that in such a



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capacity, she had cancelled the Will by executing the settlement deed.

The two sons of Parvathiammal, viz., P.Shanmugam and P. Gopalan are attesting witnesses to the said settlement deed. They have not disputed the settlement deed. In fact, in the subsequent suit in O.S.175 of 2012, the judgment and decree of which are sought to be produced as additional evidence, despite being added as parties, they did not appear in the said suit.

22. He would further submit that there is no evidence to prove that ancestral properties are generating income which are available even after the partition in the year 1970. Under Ex-B.12 partition deed joint family properties were divided as early in the year 1970. The suit property was purchased around the same time. It was not sought to be partitioned at any point of time treating it to be a joint family property. In fact, the mortgage dated 27.09.1971 is executed by Parvathiammal treating this property as her absolute one. Her husband - Periyasamy Pillai is also one of the attestors to that document. Moreover, in the partition deed – Ex-B12, the suit property which stands in the name of Parvathiyammal was not at all included.



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23. He would further submit that the suit property has always been treated only as the property of Parvathiammal in all the transactions wherein family members are also parties. Hence, the contentions of the defendants that it is a joint family property and Parvathiyammal had no right to execute the settlement deed, is baseless. As pointed out earlier, they have no *locus standi* to contest the suit. The first defendant also did not appear and give evidence.

24. The judgment in O.S.No.66 of 2005 was passed on 30.09.2011. The present Civil Miscellaneous Petition has been filed only in the year 2019 in the month of December.

25. Though the Document Nos.3 to 6 sought to be received as additional evidence are subsequent to the suit and the appeal, the suit in O.S.No.1239 of 1994, which was not decided on merits after trial, on perusal of records, it shows that the suit was dismissed for default. As far as the first document is concerned, it is stated that it is a self-acquired property. However, in the present suit, in the very same document Ex.A1/settlement deed, Parvathiammal herself stated that the suit



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property was purchased out of the joint family nucleus. Even the appellant herein has admitted in his evidence that the mother and sisters were only the house wives and further, the appellant has not stated in his evidence about the source of income of her mother to purchase the suit properties. Therefore, the documents sought to be received as additional evidence filed in this petition will not improve the case of the appellant. The only question that is to be decided in this case, is as to whether the suit properties stand in the name of Parvathiammal were purchased out of the joint family income or self-acquired properties of Parvathiammal. Even though in the written statement filed by Periyasamy Pillai in O.S.No.1239 of 1994 dated 05.03.1996, in which, the appellant was arrayed as 5th defendant, in the present suit, the appellant was examined as P.W.1, but he has not marked the said judgment and he is also a party to the suit in O.S.No.1239 of 1994. However, the appellant stated that the said suit was not decided on merits and it was dismissed for default. Therefore, there is no occasion to substantiate the defense raised in the written statement filed by his father. As already stated, in this case, the appellant has not stated specifically and proved that his mother was having sufficient independent source of income to purchase the suit properties. Therefore, this Court finds that the appellant has not made out



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any ingredients under Order 41 Rule 27 C.P.C., and even otherwise, these documents will not be helpful to change the decision of the trial Court even if the same are received as additional evidence. Hence, this Civil Miscellaneous Petition is dismissed.

26. Considering the facts and the circumstances of this case, this Court does not find any perversity in the finding of the trial Court and the appeal is liable to be dismissed.

27. In the result, this Appeal Suit is dismissed and the judgment and decree passed in O.S.No.66 of 2005 by the learned Additional District Judge, Trichy, are confirmed. No costs.

24.08.2022

Index:Yes
Internet:Yes
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To
1.learned Additional District Judge,
Trichy.
2.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.

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P.VELMURUGAN,J.

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