



*C.M.S.A.No.14 of 2010  
and  
S.A.No.439 of 2010*

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

**DATED : 10.08.2023**

**CORAM :**

**THE HON'BLE MR. JUSTICE P.VELMURUGAN**

**C.M.S.A.No.14 of 2010  
and  
S.A.No.439 of 2010  
and  
M.P.No.1 of 2010**

**C.M.S.A.No.14 of 2010**

1.Palaniammal  
2.Chinnammal

... Appellants

Vs.

1.Sasikala  
2.Kolandasamy Gounder

... Respondents

Civil Miscellaneous Second Appeal filed under Order XXI Rule 97, 99 read with Section 100 C.P.C against the decree and judgment dated 24.2.2010 passed in C.M.A.No.41 of 2009 on the file of the Principal District Court, Erode, reversing the decree and judgment dated 11.04.2008 passed in E.A.No.104 of 2004 in E.P.No.47 of 2004 by the District Munsif-cum-Judicial Magistrate, Perundurai, Erode District.



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For Appellant : Mr.B.K.Singh

For Respondents : Mr.A.K.Kumarasamy  
for Mr.S.Kaithamalai Kumaran  
for R1

**S.A.No.439 of 2010**

1.Palaniammal  
2.Chinnammal ... Appellants

Vs.

1.Sasikala  
2.Kolandasamy Gounder  
3.Santhamani  
4.K.Vijayakumar ... Respondents

Second Appeal filed under Section 100 C.P.C against the decree and judgment dated 24.2.2010 passed in A.S.No.49 of 2009 on the file of the Principal District Court, Erode, reversing the decree and judgment dated 26.3.2007 passed in O.S.No.300 of 2004 by the District Munsif-cum-Judicial Magistrate, Perundurai, Erode District.

For Appellant : Mr.B.K.Singh

For Respondents : Mr.A.K.Kumarasamy  
for Mr.S.Kaithamalai Kumaran  
for R1



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Respondents 2 to 4 remained *ex-parte*  
before the Tribunal

### **COMMON JUDGMENT**

C.M.S.A.No.14 of 2010 has been filed against the decree and judgment dated 24.2.2010 passed in C.M.A.No.41 of 2009 on the file of the Principal District Court, Erode, reversing the decree and judgment dated 11.04.2008 passed in E.A.No.104 of 2004 in E.P.No.47 of 2004 by the District Munsif-cum-Judicial Magistrate, Perundurai, Erode District.

2. S.A.No.439 of 2010 has been filed against the decree and judgment dated 24.2.2010 passed in A.S.No.49 of 2009 on the file of the Principal District Court, Erode, reversing the decree and judgment dated 26.3.2007 passed in O.S.No.300 of 2004 by the District Munsif-cum-Judicial Magistrate, Perundurai, Erode District.

3. Since the issue involved in both the appeals are similar, both the Civil Miscellaneous Second Appeal and the Second Appeal are hereby



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disposed of by this common judgment.

4. The appellants herein are the sisters of the second respondent herein, respondents 1, 2 and 3 herein are the daughters and son of the second respondent.

5. The brief facts of the case are as follows :

(i) The appellants herein originally filed a suit in O.S.No.665 of 1995 for partition and separate possession against their brother-the second respondent (Kolandasamy Gounder) stating that the suit properties are self-acquired properties of their father one Palanisamy Gounder, who died intestate in the year 1983, and thereafter, the appellants herein and the second respondent herein inherited the same and each of them are entitled to 1/3<sup>rd</sup> share and they have also obtained *ex-parte* preliminary decree in the above said suit. While so, they filed I.A.No.752 of 1997 for final decree, in which, Advocate Commissioner was appointed and based on the report of the Advocate Commissioner, final decree was passed on 30.06.2000. Thereafter, the appellants filed Execution Petition in E.P.No.47 of 2004 for



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delivery of possession.

(ii) During the pendency of the Execution Petition, the first respondent herein (Sasikala), who is the daughter of the second respondent filed an application in E.A.No.104 of 2004 stating that the suit properties are ancestral properties of her father Kolandasamy Gounder and her grand father Palanisamy Gounder. The said Palanisamy Gounder bequeathed his entire properties in favour of the second respondent by virtue of unregistered Will. After the death of Palanisamy Gounder, the entire properties devolved upon the second respondent (Kolandasamy Gounder) and he is in possession and enjoyment of the suit properties. Therefore, the first respondent is entitled to 1/8<sup>th</sup> share, who is in joint possession and enjoyment, since she married during the year 1994. However, the said application was dismissed by the Execution Court and as against the said order, the first respondent filed an appeal before the learned Principal District Judge, Erode in C.M.A.No.41 of 2009.

(iii) Further, pending Execution Application, the first



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respondent filed the suit in O.S.No.300 of 2004 before the District Munsif-cum-Judicial Magistrate, Perundurai, Erode District for partition of the suit properties into 8 equal shares and allotment of one share to her, and the said suit was dismissed on merits. Challenging the same, she preferred an appeal in A.S.No.49 of 2009 before the Principal District Judge, Erode. After hearing, the learned Principal District Judge, by a common judgment dated 24.2.2010 allowed both C.M.A.No.41 of 2009 and A.S.No.49 of 2009. Aggrieved by the said judgment and decree, the appellants filed the present Civil Miscellaneous Second Appeal No.14 of 2010 and Second Appeal No.439 of 2010, respectively.

6. At the time of admission, this Court has formulated the following substantial questions of law in C.M.S.A.No.14 of 2010 on 17.08.2010 :

*" (i) Whether the Court below committed an error in allowing the appeal filed by the respondent without taking into consideration that the decree passed in O.S.No.665 of 1995 has become final and hence, the claim*



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*petition was not maintainable without setting aside the said decree and judgment ?*

*(ii) Whether the claim petition filed by the respondent is maintainable in view of the specific bar under Order II Rule 2 of the CPC since the first respondent filed a suit for partition and separate possession against the appellants and respondents 2 to 4 in O.S.No.300 of 2004 on the file of the District Munsif Court, Erode and the same was pending ?*

7. At the time of admission, this Court has formulated the following substantial questions of law in S.A.No.439 of 2010 on 26.04.2010 :

*"1. Whether the lower appellate Court has given a perverse finding that the suit property was the ancestral property of Palanisamy Gounder, the paternal grand father of the plaintiff ?*

*2. Whether the lower appellate Court has committed an error in not properly considering the plea of res judicata ?*



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*3. Whether the lower appellate Court has committed an error in allowing the suit as against the bar provided under Or.XXI R.101 C.P.C ?*

*4. Whether the lower appellate Court has committed an error in sustaining the maintainability of suit despite the fact that the plaintiff had filed a claim petition under Or.XXI R.97 C.P.C ?*

8. The learned counsel for the appellants submitted that the suit properties are self-acquired properties of their father Palanisamy Gounder and he died intestate and therefore, the properties devolved upon the appellants and the second respondent herein and each of them are entitled to 1/3<sup>rd</sup> share in the suit properties. Since the second respondent refused to give their share, the appellants filed the suit in O.S.No.665 of 1995 against the second respondent herein for partition and separate possession and also obtained preliminary decree and thereafter, final decree was also passed. When they filed Execution Petition for delivery of possession, at that time,



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the first respondent, who is the daughter of the second respondent filed the Execution Application under Order XXI Rule 97 CPC and also filed the suit for partition in O.S.No.300 of 2004. He further submitted that since the father of the first respondent is alive, she is not entitled to get any share in the suit properties and the trial Court has rightly dismissed the suit in O.S.No.300 of 2004 and E.A.No.104 of 2004. However, the lower Appellate Court failed to appreciate the evidence that respondents 1, 3 and 4 herein are not entitled for the whole suit properties, but they are entitled to only 1/4<sup>th</sup> share of their father/second respondent, and the lower Appellate Court erroneously allowed the appeals which warrants interference.

9. The learned counsel for the first respondent submitted that the suit properties are the ancestral properties of her paternal grand father Palanisamy Gounder and her father Kolandasamy Gounder. As per Hindu Succession Act, 1956, father and son are entitled to equal share by birth in the properties of grand father. As such, Palanisamy Gounder and



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Kolandasamy Gounder had equal shares in the properties i.e 1/2 share each.

After the death of Palanisamy Gounder, the half share of Palanisamy Gounder would be divided into three equal shares to the son and daughters of Palanisamy Gounder and hence, the said Kolandasamy Gounder is entitled to  $1/2 + 1/6 = 4/6$  or  $2/3$  shares and the appellants are entitled to only  $1/6^{\text{th}}$  share each in the said properties. Since the first respondent married against the wishes of her parents, the second respondent (Kolandasamy Gounder) had purposefully not contested the suit in O.S.No.665 of 1995 filed by the appellants and it was decreed *ex-parte* and also allowed them to claim  $1/3^{\text{rd}}$  share each, instead of  $1/6^{\text{th}}$  share each. He further submitted that at the time of filing of the above suit, the first respondent, third respondent and fourth respondent are alive, but they were not added as parties in the said proceedings. Therefore, the said suit is hit by non-joinder of necessary parties. Further, the Act 1/1990 of Hindu Succession Act came into force only on March 25<sup>th</sup>, 1989 and after the said amendment Act, the unmarried daughters are coparceners with equal right with that of a son. One Palanisamy Gounder died intestate in the year 1983,



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but as per the allegation of the appellants, he died in the year 1985, but no document was produced to correlate the date of death of the deceased Palanisamy Gounder. and the properties were not divided, and even the brother of the said Palanisamy Gounder also filed the suit and the same was pending. He further submitted that, even before passing of final decree in the suit which is pending, the new Hindu Succession Act came into force in the year 1989. Therefore, the first respondent has become coparcener and she is also entitled to the share in the ancestral properties along with her father.

10. The learned counsel for the first respondent further submitted that only in order to defeat the claim of the first respondent, the appellants filed the suit without impleading the first respondent as a party and they colluded with the second respondent and obtained preliminary and thereafter, final decree was also passed. Hence, the first respondent filed O.S.No.300 of 2004, but the trial Court failed to appreciate the evidence and dismissed the suit, whereas, the lower Appellate Court, while



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considering the new amended Act, came to conclusion that the first respondent has become a coparcener and she is entitled to 1/8<sup>th</sup> share in the suit properties and thereby, the First Appeal was allowed. Therefore, there is no merit in the present appeals and the same are liable to be dismissed.

11. Heard the learned counsel for both sides and perused the materials available on record.

12. On a perusal of the records it is seen that though the appellants have stated that the properties purchased by Palanisami Gounder are the self-acquired properties and to prove the same, they produced Ex.B1 to Ex.B4, on the side of the first respondent, Ex.A1 to Ex.A6 were marked. From the said documents, it reveals that the said Palanisamy Gounder and his brother Arappa Gounder purchased the properties mentioned in Ex.B1 to Ex.B4 from the income of the ancestral properties of Subba Gounder. So, naturally, the properties in the hands of Palanisamy Gounder were the ancestral properties. There is no contra evidence produced by the appellants



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herein to prove that the properties are the self-acquired properties of Palanisamy Gounder.

13. It is further seen that, in the said properties, the second respondent is entitled to 1/2 share by birth and the said Palanisamy Gounder is entitled to 1/2 share. The said Palanisamy Gounder died intestate in the year 1985. Only after March 25<sup>th</sup> of 1989 by Act 1/1990, the Hindu Succession State Amendment Act came into force and the appellants, who are the sisters of the second respondent, have got equal share to that of second respondent (Kolandasamy Gounder). However, before the amendment Act came into force, Palanisamy Gounder died and succession was opened and the unamended Hindu Succession Act, 1956, would be applicable and the appellants got married prior to State Amendment Act came into force on that basis, the appellants and the second respondent each are entitled to share from the half share of Palanisamy Gounder and they are entitled 1/3<sup>rd</sup> share each. Hence, the second respondent (Kolandasamy Gounder) is entitled to  $1/2 + 1/6 = 4/6$  or  $2/3$  share and the appellants are



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entitled only  $1/6^{\text{th}}$  share each in the said properties. Only in order to defeat the rights of the first respondent, the appellants filed the suit against their brother. Since the first respondent married against the wish and will of the second respondent, the second respondent had purposefully not contested the suit and allowed the suit to be decreed as *ex-parte*. Pending execution proceedings, the first respondent filed the suit against her father, sister, brother and paternal aunts claiming right of  $1/8^{\text{th}}$  share in the suit properties. At the time of the filing of the suit and execution application, the enactment of the Hindu Succession Act, 1989 was in force, and so she can claim right over the ancestral properties, which were in the hands of the second respondent. Hence, the first respondent and respondents 3 and 4 will have equal share with that of the second respondent in the ancestral properties of half share derived by the second respondent by birth. So the first respondent and respondents 3 and 4 each are entitled to  $1/4^{\text{th}}$  share in that half share derived by the second respondent. Hence, they are entitled  $1/8^{\text{th}}$  share in the suit property.



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14. Further, it would reveal that the suit properties are not divided by metes and bounds till the amendment Act of Hindu Succession Act came into force in the year 1989. Further, it is evident from the records that there is no proper pleadings and the evidence let in to prove that the said properties are self acquired properties. Hence, the daughters and son of the second respondent have become coparceners of the ancestral properties. The lower appellate Court has rightly allowed the appeals by setting aside the judgment and decree passed by the trial Court and the executing Court. Hence, these Civil Miscellaneous Second Appeal and the Second Appeal are liable to be dismissed.

15. S.A.No.439 of 2010

**Substantial Question No.I**

(i) Whether the lower appellate Court has given a perverse finding that the suit property was the ancestral property of Palanisamy Gounder, the paternal grand father of the plaintiff ?

It is evident from the records that there is no proper pleading and the evidence let in to prove the case of the appellants that suit



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properties are the self-acquired properties of Palanisamy Gounder, who is the paternal grand father of the first respondent/plaintiff and in the absence of the documentary evidence, the lower appellate Court had rightly allowed the appeal. Therefore, this substantial question of law is answered in favour of the first respondent.

### **Substantial Question No.II**

(ii) Whether the lower appellate Court has committed an error in not properly considering the plea of res judicata ?

The first respondent was not a party to the suit in O.S.No.665 of 1995 filed by the appellants. The first respondent married her husband in the year 1994 against the wishes of the second respondent. Only in order to defeat the rights of the first respondent in the suit properties, the appellants herein filed the suit against the second respondent and he had purposefully not contested the suit and allowed it to be decreed *ex-parte*. Hence, the suit was not decreed on merits, and it is only an *ex-parte* decree. Even though the first respondent was not a party to the suit in O.S.No.665 of 1995, the principle of *res-judicata* is not applicable to the present case. Therefore, this substantial question of law is answered accordingly.



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**Substantial Question Nos.III and IV**

(iii) Whether the lower appellate Court has committed an error in allowing the suit as against the bar provided under Or.XXI R.101 C.P.C ?

(iv) Whether the lower appellate Court has committed an error in sustaining the maintainability of suit despite the fact that the plaintiff had filed a claim petition under Or.XXI R.97 C.P.C ?

It is evident from the records, that even the paternity and also right over the properties of the first respondent, were denied by the appellants. The first respondent filed an obstruction application under Order XXI Rule 97 CPC claiming right over the suit properties as one of the coparceners, however, the said application was dismissed by the executing Court. However, the appellants have not challenged the maintainability of the suit in the application filed under Order XXI Rule 97 CPC and they have also not challenged the provisions under Order XXI Rule 101 CPC. Further, pending obstruction application, the first respondent filed the suit in O.S.No.300 of 2004 and in that proceedings also, the appellants have not raised any objection regarding the maintainability of the suit. Only after



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findings are rendered by the trial Court and the Executing Court, the first respondent filed the appeals and got succeed. Challenging the said judgments, now the appellants cannot raise any maintainability of the suit in the Second Appeal stage. Therefore, the substantial questions of law are answered, accordingly.

**16. C.M.S.A.No.14 of 2010**

**Substantial Question No.I**

(i) Whether the Court below committed an error in allowing the appeal filed by the respondent without taking into consideration that the decree passed in O.S.No.665 of 1995 has become final and hence, the claim petition was not maintainable without setting aside the said decree and judgment ?

Admittedly, in O.S.No.665 of 1999, the first respondent was not a party, and only in order to defeat the interest of the first respondent in the suit properties, the appellants filed the suit against the second



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respondent, who in turn had not contested the suit and allowed it to be decreed *ex-parte*. Even pending final decree proceedings and before dividing the properties, the State Amendment of the Hindu Succession Act came into force in 1989. Since the suit properties are ancestral properties, the first respondent as a co-parcener, is entitled to a share in the said properties and she had filed the application under Order XXI Rule 97 CPC. Therefore, the application filed by the first respondent before the Executing Court is maintainable.

### **Substantial Question No.II**

(ii) Whether the claim petition filed by the respondent is maintainable in view of the specific bar under Order II Rule 2 of CPC, since the first respondent filed a suit for partition and separate possession against the appellants and respondents 2 to 4 in O.S.No.300 of 2004 on the file of the District Munsif Court, Erode and the same was pending ?

Though the first respondent was not a party in the suit in O.S.No.665 of 1999, she filed a suit for partition in O.S.No.300 of 2004



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against her father and aunts, claiming right over the suit properties as a coparcener. Pending suit, the appellants filed execution petition and tried to take delivery of possession, and hence, the first respondent filed an



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application under Order XXI Rule 97 CPC and the same is not hit by Order II Rule 2 CPC. The suit in O.S.No.300 of 2004 is not hit by Order II Rule 2 CPC. Therefore, the substantial question of law is answered in favour of the first respondent against the appellants

17. Considering the facts and circumstances and the submissions made by the learned counsel on either side, this Court is of opinion that since it is a suit for partition and as per the enactment of the amended Hindu Succession Act in 1989, the first respondent is also one of the coparceners of the ancestral properties. The lower appellate Court rightly appreciated the entire materials and had also taken into consideration the new amendment Act and came to the conclusion and allowed the appeals filed by the first respondent and also allotted 1/8<sup>th</sup> share in the suit properties. Therefore, there is no perversity or infirmity in appreciation of evidence by the Courts below.



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18. In such view of the matter, these appeals are dismissed as devoid of merits. Consequently connected, miscellaneous petition is closed.  
There shall be no order as to costs.

**10.08.2023**

Index: Yes/No  
Speaking Order/Non-Speaking Order  
Neutral Citation Case : Yes/No  
ms

To

1.The Principal District Court,  
Erode.

2.The District Munsif-cum-Judicial Magistrate,  
Perundurai, Erode District.

3.The Section Officer,  
V.R.Section,  
High Court, Madras.



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**P.VELMURUGAN, J.**

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