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S.A.No.372 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.11.2023

CORAM

THE HONOURABLE MR. JUSTICE S.SOUNTHAR

S.A.No.372 of 2017

1. S.Chinnasamy
2. Kempamma

...Appellants

Vs.

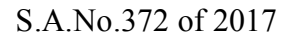
M.Ganesan

...Respondent

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree of the Lower Appellate Court in A.S.No.38 of 2015 on the file of the Principal District Judge, Krishnagiri dated 09.09.2016, reversing the judgment and decree in O.S.No.133 of 2013 on the file of Principal Subordinate Court, Krishnagiri dated 06.08.2015 in respect of item 1 and 2 of the plaint schedule measuring 1.50 acres may kindly be set aside.

For Appellants : M/s.S.Uma Maheswari
for Mr.C.Jagadish

For Respondent : Mr.V.Nicholas



The plaintiff and the 2nd defendant in a suit for partition are the appellants. The 1st appellant filed the suit for partition claiming 4/9 share in suit properties. The suit was decreed as prayed for in respect of items 3 to 13. In respect of items 1 and 2, the Trial Court granted preliminary decree for partition of 1/3rd share. Aggrieved by the same, the respondent/1st defendant preferred a first appeal. The first appeal was partly allowed by dismissing the suit in respect of 1.26 acres in item 1 and 2, in other respects, the decree of the Trial Court was confirmed by the First Appellate Court. Aggrieved by allowing of appeal in part, the plaintiff and the 2nd defendant jointly preferred this second appeal.

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that he along with the respondent's father Munisamy and Siddan @ Siddapan constituted hindu joint family and each of them entitled to 1/3 share in the suit properties. After the death of Siddan @ Siddapan and his wife Thottiammal, Siddan @ Siddapan's 1/3 share devolves on the appellants and the respondent. Hence, each of them entitled to 1/9 share in the suit properties. Thus, the 1st appellant and the respondent's father Munisamy entitled to 4/9 share in the suit properties and daughter of Siddan @ Siddapan/ 2nd appellant entitled to 1/9 share in the suit properties.

3. The contesting respondent filed the written statement denying the averment found in the plaint as if the entire suit properties are ancestral properties of Siddan @ Siddapan. It was the specific case of the respondent that the suit item 1 to 9 belong to him exclusively and he succeeded the same through his father and had been in exclusive possession and enjoyment of the same.

4. Before the Trial Court, the 1st appellant was examined as P.W.1 and one P.Chinnasamy was examined as P.W.2. On behalf of the 1st appellant/plaintiff, 11 documents were marked as Ex.A1 to Ex.A11. The respondent was examined as D.W.1 and two other witnesses were examined as



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D.W.2 and D.W.3. On behalf of the respondent, 7 documents were marked as Ex.B1 to Ex.B7.

5. The Trial Court on appreciation of oral and documentary evidence available on record came to the conclusion that item 1 and 2 were properties of Siddan @ Siddapan's wife Thottiammal. Therefore, on her death, the appellants and the respondent were entitled to 1/3 share each. As far as other items namely suit item 3 to 13 were concerned, the Trial Court came to the conclusion that those properties were ancestral properties and hence, the 1st appellant and the respondent were entitled to 4/9 share and the 2nd appellant, being married prior to 1989 was entitled to 1/9 share. Accordingly, the preliminary decree for partition was passed by the Trial Court. Aggrieved by the same, the respondent herein preferred an appeal in A.S.No.38 of 2015 on the file of Principal District Court, Krishnagiri.

6. The First Appellate Court on appreciation of evidence available on record came to the conclusion that 1.26 acres in item 1 and 2 was purchased by the respondent and hence, the same was not available for partition. Accordingly, the preliminary decree for partition granted by the Trial Court



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was set aside by the First Appellate Court in respect of 1.26 acres in item 1 and

2. In respect of remaining properties, the preliminary decree passed by the Trial Court was confirmed. Aggrieved by the same, the plaintiff in the suit and the 2nd defendant have come up by way of this second appeal.

7. At the time of admission, this Court formulated the following substantial question of law vide order dated 12.06.2017 and the same reads as follows;

"Whether the Lower Appellate Court is right in law in denying the relief of partition in respect of item 1 and item 2 measuring an extent of 1.50 acres on the ground that the first respondent's father is the absolute owner of the properties based on Ex.A5 patta and ignoring Ex.A1 mortgage deed under which Siddappan @ Siddan the original owner of the joint family properties have dealt with?"

8. The learned counsel appearing for the appellants submitted that the findings rendered by the First Appellate Court as if 1.26 acres of land in item 1 and 2 were purchased by father of the respondent namely Munisamy is not supported by any evidence on record. The learned counsel further submitted that the respondent has not raised any plea as if 1.26 acres of land in item 1



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and 2 were purchased by his father Munisamy. In the absence of any plea and evidence to that effect, the 1st Appellate Court ought not to have come to the conclusion that 1.26 acres of land in item 1 and 2 were purchased by father of the respondent Munisamy and consequently, the same was not available for partition.

9. The learned counsel appearing for the respondent submitted that the evidence available on record clearly established that Thottiammal mother of the appellants and grand mother of the respondent had no independent source of income and hence, even though under Ex.A2, 1.26 acres of land in item 1 and 2 was purchased in the name of Thottiammal, the funds for purchase of the same was provided by the respondent's father Munisamy. Therefore, the First Appellate Court is justified in coming to the conclusion that the said land purchased by the respondent's father was not available for partition. The learned counsel by taking this Court to Ex.A5 patta standing in the name of Munisamy father of the respondent in respect of item 1 to 7 submitted that the revenue records in the name of Munisamy supports the findings of the First Appellate Court that 1.26 acres in item 1 and 2 was purchased by Munisamy.



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10. The 1st appellant herein filed the suit for partition claiming suit properties are ancestral properties of his father Siddan @ Siddapan. The appellants are son and daughter of Siddan @ Siddapan and the respondent is grand son of Siddan @ Siddapan through his another deceased son Munisamy. The 1st appellant in his plaint averment stated that all the suit properties are ancestral properties.

11. The respondent herein resisted the suit by contending that the suit items 1 to 9 belong to him exclusively as he succeeded the same through his father. However, there is no plea in the written statement that father of the respondent Munisamy purchased the suit properties. Therefore, the respondent failed to aver in his written statement what was the source of title for his father to claim exclusive right over the suit items 1 to 9.

12. The First Appellate Court came to the conclusion that 1.26 acres of land in item 1 and 2 was purchased by the respondent's father Munisamy. However, absolutely there is no evidence available on record to show that Munisamy purchased 1.26 acres of land in item 1 and 2. In fact, the said 1.26 acres of land was purchased in the name of grand mother of the respondent and mother of the appellants namely Thottiammal under Ex.A2. Therefore, the Trial Court came to the conclusion that after the death of Thottiammal, all the



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parties are entitled to 1/3 share each. Further, the First Appellate Court based on the evidence available on record concluded that there was no independent source of income for Thottiammal and therefore, the properties should have been purchased by the respondent's father Munisamy.

13. The First Appellate Court also observed that there was plea by the respondent that the suit properties were purchased by Munisamy, however, the respondent has not raised any plea in the written statement as if 1.26 acres in item 1 and 2 was purchased by Munisamy out of his own funds. The evidence available on record makes it clear that Siddan @ Siddapan owned vast extent of properties nearly 7 acres in item 1 and 2. Ex.A1 is the mortgage deed executed by Siddan @ Siddapan in respect of nearly 7 acres of land in S.Nos. 484 and 486 in item 1 and 2. In such circumstances, there is evidence available on record to show that father of the appellants Siddan @ Siddapan left behind vast extent of properties, there was sufficient nucleus in the hindu joint family. There is no plea or evidence available on record to show that the respondent's father Munisamy had independent source of income. In such circumstances, the properties purchased in the name of Thottiammal should have been purchased out of income derived from the ancestral properties left behind by Siddan @ Siddapan. Therefore, the finding rendered by the First Appellate



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Court that 1.26 acres of land in item 1 and 2 was purchased by father of the respondent is based on no evidence. Further, in the absence of any specific plea by the respondent to that effect, the First Appellate Court ought not to have rendered the finding as if 1.26 acres of land in item 1 and 2 was purchased by father of the respondent. Consequently, the said finding of the First Appellate Court deserves to be treated as perverse finding and liable to be set aside.

14. In view of the discussions made earlier, the substantial question of law formulated at the time of admission is answered in favour of the appellants. In a nutshell, the second appeal stands allowed by setting aside the Clause 2 judgment and decree of the First Appellate Court in dismissing the suit in respect of 1.26 acres of land in item 1 and 2. In other respects, the judgment of the First Appellate Court is confirmed. In the above facts and circumstances of the case, there is no order as to costs.

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Index : Yes/No
Internet : Yes/No
Neutral Citation Case : Yes/No
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S.SOUNTHAR, J.



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To

1. The Principal District Judge, Krishnagiri.
2. The Principal Subordinate Court, Krishnagiri.

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