



A.S.(MD)No.152 of 2015

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 10.03.2023

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

A.S.(MD)No.152 of 2015
and
C.M.P.(MD)No.9082 of 2022

K.Karthikeyan

..Appellant/Plaintiff

Vs.

A.K.K.Kannan

...Respondent/Defendant

PRAYER: This Appeal Suit is filed under Order 96 of the Civil Procedure Code to set aside the judgment and decree dated 17.12.2014 made in O.S.No.223 of 2010 on the file of the V Additional District Judge, Madurai and decree the suit as prayed for and allow this appeal with cost.

For Appellant : Mr. T.Selvan
For Respondent : Mr. R.Ganesan

JUDGMENT

This appeal has been directed against the decree and judgment passed by the trial Court dismissing the suit filed by the plaintiff in O.S.No.223 of 2010 dated 17.12.2014 claiming half share in the suit properties.



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2. For the sake of convenience, the parties are referred to herein as per their rank before the trial Court.

3.The brief facts leading to the filing of the present Appeal Suit is as follows:-

(i) It is the case of the plaintiff that he is the only son of the defendant. He is a coparcener along with his father in the suit properties. The marriage between the defendant and the mother of the plaintiff was solemnized on 21.08.1989 and they were living in Madurai. The defendant has developed suspicious over his wife and started to treat her with cruelty. As a result, she went to her matrimonial home at Tirunelveli. While she was in the matrimonial home, the plaintiff was born on 11.05.1991. Thereafter, the defendant has filed divorce petition in H.M.O.P.No.96 of 1996 on the ground of adultery, besides he has also denied the paternity of the plaintiff. The contention of the plaintiff is that the defendant is the biological father of the plaintiff. Further he has contended that the suit property was devolved on the defendant by way of partition deed on 02.08.1959. He also become a coparcener along with his father. Hence, claiming equal share in the suit property, he has filed the suit.



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4. Before the trial Court, on the side of the plaintiff P.W.1 was examined and Ex.A1 to Ex.A5 were marked and on the side of the defendants D.W.1 was examined and Ex.B1 and Ex.B2 were marked.

5. In the written statement, the stand of the defendant is that his wife Parasakthi was leading immoral life and she was found in a compromising position with one Rajendran on 09.02.1991. Therefore, immediately, he took his wife to his matrimonial home, which is at Tirunelveli District and left her there. At the relevant point of time, his wife did not tell him about her pregnancy. However, on 31.05.1991, the defendant received a telegram to the effect that his wife has delivered a male child. According to the defendant, the male child is not born to him and he is born only through the illegal relationship of his wife with one Rajendran. The application filed by him seeking divorce was also allowed on 03.11.2011. Hence, it is the contention that the plaintiff is not entitled to any share in the suit properties, as he is not the son of the defendant. Further, he has sold the property in Item Nos.13 and 14 before the birth of the plaintiff. The plaintiff is not the coparcener. He further contended that DNA test, that was done in the divorce proceedings, was not properly taken and denied the pleadings of the plaintiff.



6. Based on the above pleadings, the trial Court has framed the following issues:-

(1) Whether the plaintiff is the son of the defendant and being a coparcener?

(2) Whether the properties are ancestral one to the plaintiff?

(3) Whether judgment in H.M.O.P.No.96 of 1996 prevail over the DNA test.

(4) Whether proper court fee paid?

(5) Whether Item 13 and 14 sold by the defendant and not liable for partition?

(6) Whether the plaintiffs are entitled to 1/2 share in the suit properties?

(7) To what other reliefs the parties are entitled?

7. After framing of the above issues, the trial Court has deleted the issue Nos.3, 4 and 5 for the reasons best known to the trial Court.

8. Based on the evidence and materials, the trial Court dismissed the suit on the ground that the plaintiff has not established the paternity, since the Family Court has not disposed the H.M.O.P.No.96 of 1996 filed by the defendant seeking divorce. According to the trial Court, even in DNA report filed, nothing has been



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stated to hold that the plaintiff is the son of the defendant. Challenging the same, the present appeal has been filed.

9.During the pendency of the appeal, an application has been filed to receive the additional evidence, namely certified copies of the decree and judgment rendered in H.M.O.P.No.96 of 1996 dated 14.08.2015 on the file of the Family Court, Madurai in C.M.P.(MD)No.9082 of 2022 on the ground that the said petition was decided after the dismissal of the suit filed by the plaintiff. Therefore, the issue with regard to the paternity, which has been established before the Family Court has to be brought on record in the present appeal.

10.Counter affidavit has also been filed in the said application. Though counter has been filed by the defendant, the only stand taken by the defendant is that the additional documents sought to be marked by the plaintiff are not maintainable and the same are not relevant to decide the appeal.

11.The learned counsel for the plaintiff submitted that even in the other proceedings between the defendant and his wife, the very question of paternity is also one of the issues. In the said proceedings, DNA test was taken. A report has also been filed to that effect and an expert was also examined, who had clearly



established that the plaintiff is the son of the defendant. Therefore, the certified copies of the decree and judgment is relevant to decide the issues in the present appeal.

12. Similarly, it is the contention that the suit property came into possession of the defendant from his father by way of partition happened in the year 1959. As long as the property remains in the possession of the sole coparcener, it could be treated as self acquired property, however the moment, when the son is born to him, the son gets right by birth. Therefore, as the plaintiff was born in the year 1991, he automatically gets right in the ancestral property along with his father as a coparcener. The trial Court has not considered these facts and simply thrown the burden on the plaintiff to establish the relationship and dismissed the suit without adverting to the legal position and the facts of the case. Hence, prayed for reception of additional evidence and also allow this appeal.

13. The learned counsel for the defendant would submit that even though the relationship has been established by DNA test and though the certified copies of the judgment in H.M.O.P.No.96 of 1996 are filed, the plaintiff cannot be considered as a coparcener, since the defendant has acquired the property by way



of partition deed. Therefore, the same has to be treated only as an individual property and the plaintiff is not entitled to claim any share in the said properties.

14. In respect of his submission, he relied upon the following judgments:

(i) *Chinnusamy and another vs. S.Thangammal* reported in 2022-2-L.W.154.

(ii) *Commissioner of Wealth tax, Kanpur etc., vs. Chander Sen etc.,* reported in AIR 1986 Supreme Court 1753.

(iii) *M.Kandasamy and another vs. V.Subramanian and others* reported in 2013 (3) TNCJ 680 (MAD) (MD).

15. In the light of the above submission, now the points arise for consideration in this appeal are as follows:

(i) Whether the additional evidence, that is the certified copies of the decree and judgment passed and in a *lis* between the defendant and his wife is relevant to decide this appeal?

(ii) Whether the defendant namely the respondent herein has proved his non-access to deny the paternity of the plaintiff?

(iii) Whether the properties are self acquired property of the defendant and the plaintiff has no right in the property?



Point No.:1

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16.1. The in C.M.P.P.(MD)No.9082 of 2022 application has been filed only to receive additional evidences namely the judgment and decree made in H.M.O.P.No.96 of 1996. The above said divorce petition was filed by the defendant on the ground of adultery, wherein a specific issue has been raised about the paternity of the plaintiff. The family Court directed the parties to DNA examination and accordingly, it was done. DNA report was in favour of the plaintiff. The expert was also testified before the trial Court. Based on this evidence, the Family Court concluded that the paternity has been established and the defendant is the biological father of the plaintiff. Since the above finding has not been challenged, the same is binding on the defendant. It is also relevant here to mention Section 41 of the Indian Evidence Act hereunder:-

*“41.Relevancy of certain judgments in probate, etc., jurisdiction.—
A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.*

Such judgment, order or decree is conclusive proof—



that any legal character, which it confers accrued at the time when such judgment, order or decree came into operation;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, [order or decree] declares it to have accrued to that person;

that any legal character which it takes away from any such person ceased at the time from which such judgment, 1[order or decree] declares that it had been or should be his property.”

16.2.Since the additional document is only the certified copies of the decree and judgment made in the divorce proceedings, wherein the defendant and his wife were parties, the same could be received as an evidence. The learned counsel appearing on either side also submitted that no oral evidence is required in this regard. Such view of the matter, the application filed for reception of additional evidence is allowed and the documents, namely, the certified copies of the judgment and decree in H.M.O.P.No.96 of 1996 are received as evidence and marked as Ex.A6 and Ex.A7.

Point No.2.

17.1.The marriage between the defendant and his wife Parasakthi is not in dispute. The date of marriage i.e., on 21.08.1989 is also not in dispute. It is the



only contention of the defendant that on seeing his wife in a compromising position with one Rajendran, he took her to the matrimonial home at Tirunelveli and left her there on 09.02.1991. Thereafter, he was informed that his wife had delivered a male child on 31.05.1991. According to him, the child born to his wife is not born to him. Such view of the matter, it is for the defendant to establish that there is no access to his wife at the relevant period.

17.2. It is relevant to extract Section 112 of the Indian Evidence Act hereunder:-

“Birth during marriage, conclusive proof of legitimacy.—The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.”

17.3. Admittedly, the plaintiff, namely the appellant was born during the continuance of the valid marriage between the defendant and his wife. Therefore, it is a conclusive proof that the child born during the existence of the marriage is the legitimate son of that man unless it is shown by him that he had no access to



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his wife at any time, when she became pregnant. The very case of the defendant itself indicates that from the date of marriage till 09.02.1991, the husband and wife, namely the defendant and his wife/mother of the plaintiff were residing in the same roof. Thereafter, within three months from the child was born. Such view of the matter, the presumption available under Section 112 of the Indian Evidence Act as extracted above clearly gets attracted and it is a conclusive proof since there is no evidence on the side of the defendant to show his non-access to his wife from the date of marriage till the wife became pregnant. Such view of the matter, this Court is of the view that the trial Court has not even gone into this aspect and erred in dismissing the suit merely on the ground that the plaintiff has not produced any documents.

17.4.Be that as it may, an yet another strong circumstances is also available against the defendant. That is the judgment and decree of the Family Court, wherein in one of the specific issue with regard to the paternity of the child, in fact the Family Court has directed the parties to give blood sample and on that basis, DNA report has been filed before the Family Court, which has been proved by an Expert, who was examined as R.W.1 as could be the seen in Ex.A6.



17.5.The said judgment is not challenged by the defendant and hence, it reached its finality. Though the judgment was passed on 14.08.2015, the same has not been challenged and reached its finality. Such being the position, the said judgment of the Family Court is also a conclusive proof, wherein the plaintiff was held to be the son of the defendant.

Point No.3:

18.1.On perusal of Ex.A1, the partition deed entered between the defendant and his father, makes it clear that the property in question was originally allotted to the father of the defendant by way of partition that had taken place in the year 1940. Thereafter, the defendant and his brother partitioned the said property in the year 1959. The recitals in the documents clearly show that the property came into possession of the defendant's grandfather ancestrally, Thereafter, a partition deed was executed in the year 1959 between the defendant and his father and defendant's brother. Therefore, the above document itself clearly shows that the property is ancestrally devolved upon the parties.

18.2.The law is well settled that as long as the property remains in the possession of the sole coparcener, it could be treated as self acquired property and



the sole coparcener shall deal with the property as his own property. The moment, when a son or daughter is born, the said son or daughter will get right by their birth in the property as coparceners. It is also fortified by the judgment of the Hon'ble Supreme Court in **Rohit Chauhan vs. Surinder Singh and others** [2013 (4) CTC 539], wherein it has been held that on the partition of ancestral property, the property in the hands of single person to be treated as separate property, however, after the son is born, the said property becomes the coparcenary property and the son acquires interest over the same. Similarly in a judgment of the Apex Court in the case of **M.Yogendra v. Leelamma N.** [2009 (15) SCC 184], it has been held as follows:

“29.It is now well settled in view of several decisions of this Court that the property in the hands of a sole coparcener allotted to him in partition shall be his separate property for the same shall revive only when a son is born to him. It is one thing to say that the property remains a coparcenary property by it is another thing to say that it revives. The distinction between the two is absolutely clear and unambiguous. In the case of former any sale or alienation which has been done by the sole survivor coparcener shall be valid whereas in the case of a coparcener any alienation made by the Karta would be valid.”



18.3. Admittedly, except Item Nos.13 and 14 as per the evidence on record, the other properties were not sold and still enjoyed by the defendant alone. In view of the above settled legal position except Item Nos.13 & 14, which has already been sold prior to the birth of the plaintiff, in all other items, by birth the plaintiff is entitled to equal share.

18.4. Much emphasis has been made by the learned counsel for the respondent that this property cannot be treated as ancestral property and at the most it has to be treated as separate property. In this regard, the judgment of this Court in the case of *Chinnusamy and another vs. S.Thangammal* [2022-2-L.W. 154] was relied by the learned counsel for the respondent.

18.5. In the above case, this Court taking note of the fact that the properties, which were originally ancestral in nature, thereafter divided among the parties and supported by a partition deed, lost the character of ancestral property. The above judgment is not applicable to the facts of this case.

18.6. The case of Commissioner of *Wealth-tax, Kanpur, etc., vs. V.Chander Sen etc.*, [AIR 1986 SC 1753], is also relied on the side of the learned counsel for the respondent to show that the subject property is his individual property. The



above judgment had arisen out of Wealth-tax Act (27 of 1957), wherein there was a partition of joint family business between the father and his only son. Thereafter, they continued the business in the name of the partnership firm. The son formed a joint family with his own sons. The father died and the amount standing to the credit of the deceased father in account of firm devolves on the son and his individual income. The Apex Court invoking the provision under Section 8 of the Hindu Succession Act has held that the amount standing in the credit of the father and the firm will devolves on the son, The above judgment is also not applicable to the facts of the present case.

18.7. In this case, the property itself is an ancestral in nature came to the family of the defendant in the year 1940. Thereafter, it was divided in the year 1959 and the defendant was allotted the suit properties. As discussed above, so long as the defendant was the sole coparcener and there was no legal heir, he could deal with the property as his individual property. The moment, when the son is born, he also get equal rights as coparcener. Therefore, the contention of the respondent that the son is not the coparcener and he is not entitled to claim any share in the suit property is not in accordance with law.



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19. In view of the discussions above, the points arisen for consideration in this appeal are answered. Accordingly, except Item Nos.13 and 14, as it is admitted by the plaintiff that that were already sold the same prior to the birth of the plaintiff, in all other items, the plaintiff is entitled to half share and accordingly, the decree and judgment of the trial Court dismissing the suit is set aside and the preliminary decree is passed holding that the plaintiff is entitled to half share in all the properties belonging to the defendant except Item Nos.13 and 14. The trial Court shall proceed to initiate final decree proceedings in accordance with law. Accordingly, the appeal stands allowed and the judgment and decree passed by the trial Court is set aside. Considering the relationship of the parties no costs is ordered.

10.03.2023

NCC : Yes /No
Index : Yes/No
Internet : Yes/No
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To

1. The District Court, Madurai.
2. The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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N.SATHISH KUMAR, J.

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Judgment made in
A.S.(MD)No.152 of 2015

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