



A.S.(MD)No.231 of 2015

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 20.06.2023

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

A.S.(MD)No.231 of 2015
and
CROS.OBJ.(MD)No.10 of 2016

A.S.(MD)No.231 of 2015:

R.Gowri

...Appellant/Plaintiff

Vs.

1.A.G.K.Rajendran
2.A.G.K.Sankar
3.A.G.K.Ayyalusamy
4.K.Kothainacchiyar

...Respondents/Defendants

PRAYER: This Appeal Suit is filed under Section 96 of the Civil Procedure Code, to set aside the judgment and decree made in O.S.No.32 of 2009 dated 10.02.2015 passed by the Principal District Court, Tuticorin relating to the first schedule Item Nos.2, 6 to 9 and 5th item of 4th schedule of suit properties.

Cross Objection (MD)No.10 of 2016:-

1.A.G.K.Rajendran
2.A.G.K.Sankar

...Cross Objectors

1/15



A.S.(MD)No.231 of 2015

WEB COPY

VS.

1.R.Gowri
2.A.G.K.Ayyalusamy
3.K.Kothainacchiyar

...Respondents

PRAYER: This Cross Objection is filed under Order XLI Rule 22 of the Civil Procedure Code, against the judgment and decree dated 10.02.2015 passed in O.S.No.32 of 2008 on the file of the Principal District Court, Tuticorin.

A.S.(MD)No.231 of 2015:

For Appellants	: Mr. S.Anand Chandrasekar for M/s.Sarvabhauman Associates
For R1 & R2	: Mr.S.Kadarkarai for Mr.V.Rajesh Babu
For R3 and R4	: No Appearance

In Cros.Obj.(MD)No.10 of 2016:

For Cross objector:	Mr.S.Kadarkarai for Mr.V.Rajesh Babu
For R1	: Mr. S.Anand Chandrasekar

COMMON JUDGMENT

Since the appeal Suit and the cross objection are arising out of the same judgment, both are disposed by way of this common judgment.



A.S.(MD)No.231 of 2015

2. Aggrieved over the preliminary decree granted in respect of Item Nos. 2, 6 and 9 of the second schedule and Item No.5 in the fourth schedule property and dismissing the suit in respect of the other properties, this appeal has been filed by the plaintiff.

3. The Cross objection is filed by the first and second defendants challenging the preliminary decree made in respect of Item Nos.1, 3, 4 and 5 of the second schedule and Item Nos.1 to 4 of the 4th schedule and fifth and sixth schedule of the suit properties.

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

5. The brief facts, leading to the filing of this Appeal Suit, are as follows:-

(i) the plaintiff and the defendants are the children of one Krishnasamy Naiker and Subbalakshmiammal. The defendants 1 to 3 are the brothers and fourth defendant is the sister of the plaintiff. It is the case of the plaintiff that the



A.S.(MD)No.231 of 2015

first schedule of the suit property belongs to the father Krishnasamy Naiker. The second schedule belonged to his mother. The father died intestate on 14.09.2000 and the mother also died intestate on 14.12.2006. The third and fourth schedule properties were purchased in the name of the first defendant out of the joint family nucleus. The fifth schedule is the movable property. The sixth schedule is the shares in the name of the father of the plaintiff.

(ii) Since the plaintiff was residing with her husband at Chennai, the properties were managed by the first defendant, who is the brother of the plaintiff. However, the shares have not been properly divided. Hence, the plaintiff issued a legal notice, dated 22.02.2008, which has been replied by the first defendant on 20.03.2008 with false allegations. As the first defendant has not come forward for partition of the properties, the suit has been filed by the plaintiff.

(iii) The first defendant filed a written statement, which has been adopted by the second defendant, denying the allegations of the plaintiff. It is the specific case of the first defendant that his father had executed a Will in respect of the 4th and 5th schedule property in his favour. However, in respect of the cash deposits, since no one had not raised any objection, the amount had been withdrawn and



utilized. It is the further contention of the first defendant that Item No.6 in second schedule property is not entirely belonged to the joint family. Only part of that property alone belonged to the joint family. Similarly, the fifth schedule is also not absolutely belong to the joint family. The plaintiff is not entitled to claim a share as a coparcener in view of Act 39 of 2005. Hence, he opposed the suit.

(iv)The third and fourth defendant filed written statement supporting the case of the plaintiff.

6.Based on the pleadings, the trial Court had framed the following issues:

- 1.Whether Krishnasamy Naiker had left any Will?*
- 2.Whether the suit properties are in joint possession of the plaintiff and the defendants.*
- 3.Whether the plaintiff is entitled to 1/5 share in the suit properties?*
- 4.Whether the plaintiff is entitled to mesne profits?*
- 5.To what other reliefs the plaintiff is entitled to?*



A.S.(MD)No.231 of 2015

WEB COPY

7. Before the trial Court, on the side of the plaintiff P.W.1 was examined and Ex.A1 to Ex.A29 were marked. On the side of the defendants D.W.1 and D.W.2 were examined and Ex.B1 to Ex.B7 were marked.

8. Based on the evidence and materials available on records, the trial Court granted preliminary decree only in respect of Item Nos.1, 3, 4 and 5 of the second schedule property, Item Nos.1 to 4 of the fourth schedule property and the fifth and sixth schedule properties in favour of the plaintiff. In respect of the other items, the suit was dismissed.

9. The learned counsel for the appellant/plaintiff would submit that the first schedule is consisting of 35 items. The first schedule belongs to his father. The second schedule of the property is the absolute property of his mother, which is also consisting of 9 items. It is also admitted by the defendants. Admittedly, there is no Will, whatsoever left by the father and the mother. The Will has been projected only in respect of the movable property, namely fourth and fifth schedule of the suit properties. However, the said Will was also not seen the light of the day.



A.S.(MD)No.231 of 2015

WEB COPY

10.It is the further contention of the appellant that the first and second schedule properties are belonged to the father and mother of the plaintiff. This fact has not been specifically denied in the reply notice under Ex.A3. That apart, even in the entire written statement, no specific denial has been made except evasive denial of the rights of the plaintiff. It is not stated by the defendants that how the property came into their possession. Whereas, Ex.A6, partition deed, executed between the father of the parties and his brothers clearly indicates that Item Nos.2, 3, 5, 7, 8, 15, 16, 17 and 33 to 35 of the first schedule are the joint family properties and allotted to the father of the parties. Similarly, the revenue records in the name of the father of the parties were also filed in respect of Item Nos.11, 13, 20 and 21, which is marked as Ex.A18, 20, 23 and 24.

11.With regard to Item Nos.22 to 28 of the first schedule, the first defendant in fact had admitted in his cross examination that the same are the properties of his father. Despite the above proof, the trial Court had dismissed the suit in respect of the first schedule of the suit properties. The learned counsel for the appellant submitted that since the plaintiff has not established that the third item of the property was purchased only out of the joint family nucleus, the same



A.S.(MD)No.231 of 2015

may be excluded from the suit properties. In some of the immovable properties also, she is not claiming any share. However, she is entitled to a share in respect of other items, hence, prayed that the finding of the trial Court has to be set aside.

12.The learned counsel for the respondents would submit that the plaintiff has not established that the father and mother owned properties. Further, the revenue records also stand in the name of the joint pattathards. Such being the position, without impleading the other pattathars, the suit is not maintainable. Further, the plaintiff in her evidence clearly stated that she is not aware of the details of the properties. Hence, it is the contention that the trial Court after carefully analyzing the entire materials, particularly the admission of the plaintiff, had granted the limited decree. Further, when the plaintiff is not able to establish her case, partition in respect of certain properties is also not maintainable in the eye of law. Hence, prayed for allowing the cross objection and dismissal of the appeal.

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



A.S.(MD)No.231 of 2015

(1)Whether the trial Court is right in disbelieving the case of the plaintiff merely on the ground that no documents were filed, when the defendants had not denied the character of the property?

(2)Whether the trial Court is right in dismissing the suit holding that the plaintiff is married prior to 1989?

(3)Whether the plaintiff is entitled to a share in the property?

14.Heard the learned counsel appearing on either side and perused the materials available on record.

15.As far as the question with regard to the coparcenary right is no longer *res integra* in view of the dictum laid by the Hon'ble Apex Court in the case of ***Vineeta Sharma vs. Rakesh Sharma*** [(2020) 9 SCC 1], wherein it has been clearly held that the question of father being alive does not arise to claim a share under Act 39 of 2005 of the Hindu Succession Act.

16.It is admitted by the parties that certain properties are owned by their father and mother. The specific case of the plaintiff is that the first schedule of the property belongs to her father. It has also been established under Ex.A6 that



A.S.(MD)No.231 of 2015

certain items in first schedule of properties, particularly, Item Nos. 2, 3, 5, 7, 8, 15, 16, 17 and 33 to 35 were allotted to her father. In respect of Item Nos.11, 13, 20 and 21, the revenue records, viz., Ex.A18, 20, 23 and 24 stood in the name of the father of the parties.

17.As far as Item Nos.22 to 28 are concerned, the first defendant in his cross examination also admitted that it belongs to his father. Further, in the entire written statement, the pleadings of the plaintiff in the plaint are not even disputed. Except evasive denial, no specific stand in the form of defence was set up in the entire written statement by the first defendant except saying that with regard to the movable properties, the father of the parties left the Will. It is also well settled that denial in the written statement must be specific, even any evasive denial is made in respect of the specific pleading, such evasive denial shall deemed to be the admission as per Order 8 Rule 5 of the Civil Procedure Code. Such being the position, the trial Court non-suiting the plaintiff merely on the ground that she has not produced any documents is not valid in the eye of law.

18.It is also relevant to note that in respect of the second schedule properties, it is the specific case of the plaintiff that it belongs to her mother. The



A.S.(MD)No.231 of 2015

mother of the plaintiff also died intestate. The fact that the father and mother of the parties died intestate is not disputed in the entire written statement. Such being the position, when in the written statement itself, the first defendant had admitted that only part of the second schedule is belonged to his mother, the burden is on him to show that other than the mother, who is entitled to the properties. But, no steps whatsoever had been taken by the defendants to prove their contention.

19.As far as the partition suit is concerned, the plaintiff as well as the defendants stand in the same footing. The burden is also on the party, who set up evasive defence. It is also relevant to note that even in the written statement, it is specifically admitted by the first defendant that second item of property is jointly owned by his mother. In the absence of any contrary evidence to show that who are entitled to the suit property along with his mother, it has to be necessarily hold that the property is belonged to the family. Admittedly, these properties are in the possession of the first and second defendants. This fact is not disputed. When the co-owners are enjoying the property on their own and without any obstruction or claim from any third party, it has to be presumed that the property is only the family property.



A.S.(MD)No.231 of 2015

WEB COPY

20. In such view of the matter, the trial Court non-suiting the plaintiff in respect of the first schedule in its entirety and some portions in second schedule is totally contrary to the evidence. Admittedly, under Ex.A6, the properties have been allotted to the father of the parties, which came into hands of the defendants being sons and daughters. These properties have not been partitioned. Once the properties are inherited by way of partition, the plaintiff being the daughter also becomes a coparcener in view of Act 39 /2005. In such view of the matter, she is entitled to a share in the family properties.

21. As far as the third schedule is concerned, the learned counsel for the appellant fairly submitted that since the plaintiff has not established the nucleus, she is not claiming any right over that. Item No.5 in fourth schedule, in respect of the jewels, the learned counsel for the appellant also clearly submitted that there is no evidence available to prove that the jewels owned by her mother and the same may also be excluded. In respect of other items in second schedule, the trial Court decreed the suit in favour of the plaintiff.



A.S.(MD)No.231 of 2015

22.The contention of the defendants that the father had left the Will in respect of the movable properties, the Will has not seen the light of the day. It is not produced before the Court. In such view of the matter, the defence has to necessarily fail.

23.Accordingly, the decree of the trial Court dismissing the suit in respect of the first schedule, Item Nos.6 to 9 in second schedule and third schedule of suit properties, is set aside. The suit is decreed for the preliminary decree

- (i)in respect of first schedule in its entirety;
- (ii)in respect of second schedule excluding the second item; and
- (iii)in respect of fourth schedule excluding the fifth item.

and the suit is dismissed in respect of second item in second schedule, third schedule and fifth item in the fourth schedule of the suit properties. The decree passed by the trial Court in respect of the fifth and sixth schedule properties is hereby confirmed.



A.S.(MD)No.231 of 2015

24.It is to be noted that the plaintiff is certainly entitled to 1/5 share in the properties, in respect of which the suit is decreed. Similarly, each defendants are entitled to 1/5 share in the decreed items. They can workout their shares by paying proper court fee in the final decree proceedings.

25.Accordingly all the points are answered. The Appeal Suit is partly allowed and the cross objection is dismissed. No costs.

20.06.2023

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

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



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A.S.(MD)No.231 of 2015

N.SATHISH KUMAR, J.

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Judgment made in
A.S.(MD)No.231 of 2015
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CROS.OBJ.(MD)No.10 of 2016

20.06.2023