



S.A.No.294 of 2001

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 28.04.2023

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

S.A.No.294 of 2001

1.Periaperumal
2.Sreelingam
3.Palmmal
4.Thangammal

... Defendants 3,4,,6 & 7/
Respondents 3,4,6 & 7/Appellants

Vs.

1.Kasi Nadar (Died)
2.Retnaswamy
3.Shajahan
4.G.Nepal Raj

.... Plaintiff/Respondent/Respondent

5.Seenivasan
6.Sathya Joseph
7.R.J.K.Thilak
(R5 to R7 impleaded vide order
dated 30.03.2009)

...Defendants 2,5,8/Respondents
2,5,8/Respondents

8.S.Selvarajan
9.S.M.Azhakeksh
(R8 & R9 impleaded vide



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order dated 7.2.2013)
10.Lakshmi Thangam
11.Bagavathi Thangam
12.Kasi Thangam
13.Rajagopal
14.Selvakumar
15.Selvagopal
(RR 10 to 15 are brought on record
as Lrs of RR1 vide Court Order
dated 12.10.2017)

...Respondents 5 to 15

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree, dated 30.11.2000 and made in A.S.No.35 of 1999, on the file of the Additional District Judge, Kanyakumari District at Nagercoil, reversing the judgment and decree dated 30.06.1997 and made in O.S.No.160 of 1992, on the file of the Principal Subordinate Judge, Nagercoil.

For Appellants	: Mr.V.Meenakshisundaram for D.Nallathambi
For R2 to R7	: Mr.G.Gomathi Sankar
For R3	: Mr.K.P.Krishnadoss
For R8 & R9	: Mr.C.K.M.Appaji
For R10 to R14	: Mrs.J.Anandhavalli for K.Sreekumaran Nair
For R15	: Mr.Xavier Rajini



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J U D G M E N T

The first respondent in the second appeal filed a suit in O.S.No. 160 of 1992, on the file of the Principal Subordinate Court, Nagercoil against the appellants and the respondents 2 to 4 for declaration to declare the partition deed, dated 24.06.1992 is null and void and decree for partition by metes and bounds of the plaintiff's 1/5th share in the plaint schedule properties and separate possession for the same with costs.

2. After trial, the trial Court passed the preliminary decree for partition in respect of items 1 to 5 and in which the plaintiff is entitled to 1/7th share. With respect to other items viz., 6 to 12 the suit was dismissed. Challenging the said judgment and decree passed by the trial Court, the plaintiff filed an appeal before the Principal District Court, Kanyakumari District at Nagercoil in A.S.No.35 of 1999 the same was made over to the Additional District Court, Kanyakumari District at Nagercoil. Pending appeal, the plaintiff/appellant therein filed an application under Order 41 Rule 27 in I.A.No.202 of 2000. Both the appeal and the interlocutory



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application were heard together and after hearing the arguments and considering the materials, I.A.No.202 of 2000 was allowed and received the additional documents Ex.A8 to Ex.A10. The appellate Court allowed the appeal filed by the plaintiff. Challenging the said judgment and decree of the appellate Court, the defendants 3,4,6 & 7 in the original suit, respondents 3,4,6 & 7 in the first appeal have filed the present second appeal by raising the following substantial question of law:

“i. When the plaintiff admitted possession of certain properties by the children of the deceased (Chelliah Nadar) as pleaded by the defendants is the learned Additional District Judge right in holding that there was no family arrangement as pleaded by the defendants?

ii) When it is settled in law that a person coming forward with the case that the properties are joint family properties the initial onus is on him and in the instant case the plaintiff having failed to discharge the onus by letting in evidence regarding actual income, expenses and the surplus if any, is the learned Additional District Judge right in holding that the properties I.e., items 6 to 12 are the joint family



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properties?

iii) Whether learned Additional District Judge right in allowing the additional evidence let in by the plaintiff without following the principle enunciated under Order 41 Rule 12 CPC?

3. The other defendants have not filed any appeal or any cross-objection.

4. The learned counsel for the appellant would submit that it is a settled proposition of law that the person, who filed the suit stating that suit property is joint family property, should establish that the properties are joint family properties and initial burden on the plaintiff to discharge the same then the contesting the parties need to prove otherwise. The first respondent as a plaintiff has come forward with the specific plea that item Nos.6 to 12 of the suit properties were purchased out of the income from item Nos.1 to 5 of the suit properties and whereas, he has not established that out of the income derived from item Nos.1 to 5 of the suit properties, there was surplus income out of which, items 6 to 12 were purchased. The



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evidence of the plaintiff shows that the income from item Nos.1 & 2 was only Rs.1,500/- which is not even sufficient to run the family. Item Nos.6 to 12 of the suit properties are self-acquired properties of the father of the plaintiff and he is entitled to dispose the said properties on his own free will. The plaintiff has no right to dispute or object the same. The father while aliving there was no dispute or difference of opinion between the children and he thought fit that during his life time he entered into a family arrangements orally and allotted the properties to his children. The appellants were clearly stated in their written statement about the oral family arrangements and subsequent partition between the sons and daughters of the Chellaiah Nadar.

5. He would further submit that the father of the plaintiff gave one of the properties to the first respondent/plaintiff and he has not included that properties in the suit and he sold that property. If he accepted and sold the properties that the properties are self acquired properties of the father and he cannot claimed that this properties are ancestral property of his



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father and partition between the brother and sisters are not valid. Further, he would submit that the family arrangements was questioned after a period of 11 years mainly due to the fact that the respective defendants who were allotted the property under the family arrangement, improved the properties and made it valuable and some of the properties have been sold by some of the persons and therefore, now, the first respondent/plaintiff cannot challenge the same. Therefore, once the first respondent/plaintiff admitted the possession of the certain properties by the children of the deceased Chellaiah Nadar as pleaded by the appellants herein the defendants in the suit and the appellate Court would not have come to the conclusion that there was no family arrangements as pleaded by the appellant. If a person come forward with the case that properties purchased by the name of any individual members of the joint family are joint family properties, initial burden is upon him to prove that there was surplus income from the ancestral nucleus, out of which, subsequently the other properties were purchased. Therefore, initial onus is upon the first respondent/plaintiff to prove the same and the first appellate Court erroneously allowed the I.A.No.



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202 of 2005 filed by the plaintiff. Therefore, the second appeal has to be allowed and the judgment and decree of the first appellate Court is liable to be set aside and the judgment and the preliminary decree passed by the trial Court have to be confirmed.

6. The learned counsel for the first respondent/plaintiff would submit that the Chellaiah Nadar is the father of the plaintiff. First defendant is the mother of the plaintiff. The defendants 2 to 4 are the brothers and defendants 6 & 7 are the sisters. The 5th defendant in the suit is the alienee of the defendants 2 and 3. 8th defendant is the alienee of the defendants 2 to 4. The appellants and other defendants admitted that item Nos.1 to 5 are ancestral properties. The disputed Ex.A3 partition deed was prepared and registered without the consent of the first respondent herein/plaintiff, who is admittedly one of the sons of the Chellaiah Nadar. A small portion of the suit property was allotted to the plaintiff which is 7th schedule. The properties allotted to the sharers are separately shown in the partition deed. Though the trial Court held that the suit is maintainable and the plaintiff is



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entitled to 1/7th share in items Nos.1 to 5 of the suit property, The oral transfers made by Chellaiah Nadar to various parties are valid and therefore, the suit was dismissed in respect of item nos.6 to 12 of the suit properties and the shares allotted under Ex.A3 is fair and not vitiated by illegality. The trial Court failed to consider that the appellants themselves admitted that item Nos.1 & 2 are ancestral properties and item Nos.3 to 8 were purchased from the income of item Nos.1 and 2, but however they denied that the item Nos.6 to 12 are not the joint family properties. It is the self acquired property of the Chellaiah Nadar.

7. The trial Court failed to consider that the appellant themselves admitted that item Nos.1 to 5 are the joint family properties and the defendants failed to establish that apart from the income from the item nos.1 to 5, Chellaiah Nadar has no other source of income to purchase the other property and even in the evidence, the first respondent/plaintiff was suggested by the appellants/defendants that item No.1 derived income of Rs. 1,000/- per year. Item No.2 derived income of Rs.500/- per year and



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further, even the re-examination, he has stated that Chellaiah Nadar sold some of the properties from the income of the joint family properties and purchased 21 acres of land which clearly shows that the first respondent has clearly proved that there was a income from the ancestral properties and once it is proved, when the joint family nucleus is their and ancestral nucleus is there, the initial burden of first respondent/plaintiff is discharged that there was an ancestral property and there was a income. When the ancestral property and nucleus available and income is admitted, then when during the existing of joint family, if the Kartha of the family purchased the property, it is deemed to be an ancestral property. When the appellants/defendants stated that it is a self acquired property they have to prove that, apart from the ancestral property all income there on Chellaiah Nadar was having separate income and which was not established. Therefore, when the appellants themselves admitted that the item Nos.1 & 2 are the joint family ancestral property and the item nos.3 to 5 are derived from that ancestral property, then the other properties are also purchased in the name of one Chellaiah Nadar and during the life time of Chellaiah



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Nadar, there was no partition, after the death of the Chellaiah Nadar, the appellants entered into partition and left the first respondent/plaintiff. Without the knowledge of the first respondent, they entered into the partition though they have stated that during the life time Chellaiah Nadar, there was a oral settlement which is not established by the appellants/defendants and even the mother was alive at the time of executing Ex.A3 the alleged disputed partition and the mother was not examined before the Court and who is the best person to say about the family arrangements or family settlement among the family members. But mother was not examined before the trial Court. The trial Court failed to consider the entire materials and only passed the preliminary decree irrespective of item Nos.1 to 5 alone, in respect of item Nos.6 to 12 the suit was dismissed. When the first respondent/plaintiff approached the first appellate Court, the appellate Court re-appreciated the evidence and also considered that the item Nos.6 to 12 also ancestral property and the first respondent/plaintiff is entitled for partition.



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8. Though defendants 3,4,6 & 7 alone filed an appeal, other defendants have not filed any appeal which means they accepted the judgment of the first appellate Court. As far as item Nos.1 to 5 of the schedule properties are concerned the appellants in the second appeal have no objection for fresh partition after setting aside the Ex.A3 partition deed. As far as item Nos.6 to 12 of the suit properties are concerned, the case of the appellants/defendants is that those properties are self acquired properties of Chellaiah Nadar. In respect of separate properties of Chellaiah Nadar, oral family settlement is accepted. One of the conditions for a valid oral family arrangements is that all the members must have pre-existing title. But the case of the appellants/defendants in the written statement is that item Nos.6 to 12 are separate properties of Chellaiah Nadar. If item No.6 to 12 of the suit properties are the separate properties of Chellaih Nadar, he could convey items 6 to 12 either by sale deed under Section 54 of Transfer of Property Act or by a gift deed under Section 123 of transfer of properties Act. In both cases, the transfer shall be only by registered documents. But in the instant case there is no registered deed of conveyance. Therefore, the



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alleged family settlement is not invalid for the purpose of defence.

9. Further he would submit that immediately before the death of the Chellaiah Nadar, there were 5 co-parceners. The first respondent/plaintiff is one among the five and therefore, he got $1/5^{\text{th}}$ share. As per the provisions of amended Section 6 of Hindu succession Act, the first respondent/plaintiff is entitled to $1/35^{\text{th}}$ share. Thus the first respondent/plaintiff is entitled to $1/5^{\text{th}} + 1/35 = 8/35$ share in all the properties. The first appellate Court has rightly granted a preliminary decree for $8/35$ share. Therefore, there is no merit in the second appeal and there is no substantial question of law involved in this case and hence, the appeal is liable to be dismissed.

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

11. Admittedly, the original suit was filed for partition and separate possession of the suit properties and also declared Ex.A3 partition



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deed is null and void. Though the trial Court partly allowed the suit, the appellate Court set aside the judgment of the trial Court in respect of disallowed portion and granted preliminary decree. Some of the defendants have filed the second appeal. At the time of admission, this Court has formulated the following substantial questions of law.

“1. Whether the judgment of the Lower Appellate Court that the family arrangement is not established is opposed to the evidence on record?

2. On the established facts, whether the judgment of the Lower Appellate Court that item Nos.6 to 12 are also impressed with the character of joint family properties can be sustained?”

12. Since it is second appeal and this Court cannot go into the merit of the factual aspects and the appreciation and re-appreciation of evidence as held by the first appellate Court.



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13. As this appeal is a statutory appeal under Section 100 C.P.C., and the Court has to entertain the appeal only if the substantial questions of law involved in the appeal and answer for the formulated substantial questions of law.

14. In this case, this Court formulated the substantial questions of law as show above. The questions 1 & 2 are interlinked and therefore, both the questions of law are answered as follows:-

15. Though in the careful reading of the plaint, the plaintiff does not specifically reveals that the item Nos.1 to 5 are the ancestral properties and item Nos.6 to 12 are purchased from and out of the nucleus of the ancestral property. However, the appellants/defendants have admitted that item Nos.1 & 2 are the ancestral properties and item Nos.3 to 5 are derived from that properties. Even in the written statement, the appellants herein clearly admitted that item Nos.1 to 5 are the ancestral properties and item



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Nos.6 to 12 are the self acquired properties of the Chellaiah Nadar. One the appellants admitted that Chellaiah Nadar was having ancestral property and some of the properties acquired from the ancestral nucleus and rest of the properties also purchased in the name of the Kartha of the family and the law presumes that all the properties purchased from the ancestral nucleus or source are also deemed to be an ancestral properties. The appellants put a suggestion before the first respondent while he was examining as P.W.1 before the trial Court that in the first and second item of the property, there was a standing coconut trees. From the first item there was a income of Rs.1,000/- per year from the second item there was a income of Rs.500/- per year. But it is only an ancestral properties and the income of the ancestral properties was admitted and the item Nos.3 to 5 also derived from that properties therefore, that was not denied by the appellants.

16. Once the appellants admitted that there was an ancestral property and there is an income whether there is a surplus income to purchase the other properties or not, that has to be established through the



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evidence. P.W.2 has clearly stated about the income and also purchasing of the properties. When the appellants have stated that these disputed items 6 to 12 also the properties of Chellaiah Nadar, their specific case that it is a self acquired properties of the Chellaiah Nadar then it is for them to prove that the Chellaiah Nadar has got a separate income apart from the income of the ancestral properties.

17. The appellants have not proved that apart from the income of the ancestral properties or nucleus, the Chellaiah Nadar has got an independent income or source of income to purchase those properties. Therefore, once it is admitted there is an ancestral property, there was a nucleus and there was income from the property whether it is surplus or not whether that was enough to purchase the property or not to be proved by way of evidence. In this regard, the evidence of P.W.2 is very clear that only Chellaiah Nadar doing an agricultural work in the ancestral properties thereafter, purchased some other properties and the first respondent/plaintiff also worked together along with Chellaiah Nadar and they purchased some



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of the properties. Admittedly, all the properties purchased in the name of Chellaiah Nadar and the said Chellaiah Nadar is admittedly being the Kartha of the family and therefore, the law presumes that once the ancestral property is there, ancestral nucleus is there and the subsequent properties are purchased out of the income, even a small amount spent for purchasing other properties from the income of the ancestral properties or nucleus that is also deemed to ancestral property. Then it is for the appellant to prove that there was no ancestral property and there was no ancestral nucleus and there is no income and none of the income from the nucleus is spent for purchasing the other properties.

18. Therefore, in this case, admittedly, during the life time of the Chellaiah Nadar no partition was entered. If at all family arrangement made during the life time of the Chellaiah Nadar, he ought to have entered into the partition, but the appellants only after the death of the Chellaiah Nadar, said to have executed a partition deed Ex.A3, but in which, the first respondent/plaintiff is not a party. If the first respondent has no interest at



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all to acquire all the properties of Chellaiah Nadar, he wanted to settle the properties to the appellants alone and the appellants need not added the first respondent/plaintiff in the partition deed and allotted the share. Therefore, considering the facts and circumstances, once it is admitted that there is an ancestral property and ancestral nucleus and income from the property and evidence also shows that the other properties also purchased from income from the ancestral properties, though the trial Court has failed to appreciate the evidence of P.Ws.1 & 2, the appellate Court considered the admission made by the appellants even in the pleadings as well as the evidence and rightly held that the other items 6 to 12 also ancestral properties. The first respondent/plaintiff is entitled to get the share and the disputed partition deed Ex.A3 is not valid and not binding on the respondent.

19. Therefore, the dispute between the sons and daughters of the Chellaiah Nadar, admittedly, Chellaiah Nadar has got ancestral properties and some other properties were also purchased in the name of Chellaiah Nadar during his life time, there was no partition. Admittedly, Chellaiah



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Nadar was Kartha of the family. Even though the appellants stated that during the life time of Chellaiah Nadar he has settled properties to some of the sons and daughters, but once it is admitted there was a ancestral property and ancestral nucleus and all the properties are ancestral properties, where they enjoyed the same without partition for convenience, will not take away the right of the other co-parceners.

20. Hence, the appeal fails and the same is dismissed. The judgment and decree passed by the first appellate Court is confirmed and the trial Court is set aside. Therefore, all the legal heirs of the Chellaiah Nadar are entitled to equal share and hence, the first respondent is entitled to 1/7th share in the suit properties. In a recent judgment of the Hon'ble Supreme Court reported in **2022 Live Law (SC) 549, Kattukandi Edathil Krishnan and another vs. Kattukandi Edathil Valsan and others**, it has been held as follows:-



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"33. We are of the view that once a preliminary decree is passed by the Trial Court, the court should proceed with the case for drawing up the final decree suo motu. After passing of the preliminary decree, the Trial Court has to list the matter for taking steps under Order XX Rule 18 of the CPC. The courts should not adjourn the matter sine die, as has been done in the instant case. There is also no need to file a separate final decree proceedings. In the same suit, the court should allow the concerned party to file an appropriate application for drawing up the final decree. Needless to state that the suit comes to an end only when a final decree is drawn. Therefore, we direct the Trial Courts to list the matter for taking steps under Order XX Rule 18 of the CPC soon after passing of the preliminary decree for partition and separate possession of the property, suo motu and without requiring initiation of any separate proceedings.

34. We direct the Registry of this Court to forward a copy of this judgment to the Registrar Generals of all the High



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Courts who in turn are directed to circulate the directions contained in paragraph '33' of this judgment to the concerned Trial Courts in their respective States."

21. As per the above latest decision of the Hon'ble Supreme Court, a party need not file a final decree application separately. The Court itself can *suo motu* initiate final decree proceedings after passing the preliminary decree. Therefore, the appellants are directed to divide the property by metes and bounds and hand over the possession to the respondent as per the judgment and decree passed by the first appellate Court, within a month from the date of receipt of a copy of this judgment, otherwise, the trial Court is directed to initiate *suo motu* final decree proceedings and appoint an advocate commissioner and proceed with the same and pass a final decree. Since already the suit is pending from 1992, all the final decree proceedings shall be completed within a period of six months from the date of its initiation. Registry is directed to send the original records to the trial Court concerned along with the judgment and decree made in this appeal within a



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period of fifteen days from the date of this judgment.

22.Considering the facts and circumstances of the case and also the relationship between the parties, there shall be no order as to costs.

Index : Yes / No

Speaking Order : Yes / No

28.04.2023

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To

- 1.The Additional District Judge,
Kanyakumari District at Nagercoil.
- 2.The Principal Subordinate Judge,
Nagercoil.
3. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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P.VELMURUGAN, J.

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