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S.A.NOS.1227 AND 1228 OF 2007

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 19 / 03 / 2024

JUDGMENT PRONOUNCED ON : 19 / 06 / 2024

CORAM:

THE HON'BLE MR.JUSTICE R.SAKTHIVEL

S.A.NOS.1227 AND 1228 OF 2007

S.A.NO.1227 OF 2007

1.Kamalam
2.Kavitha
3.P.Balu
(Appellant No.3 is declared as
Major and Guardian is discharged
through this judgment)

... Appellants/Appellants /
Petitioners

Versus

1.Palaniammal (Deceased)
2.Periannan
3.Nallammal
4.Vijaya
5.Palaniyandi
6.Chitra
7.Raja
(R4 recorded as LR of the deceased R1
vide order of Court dated 28.10.2014
made in M.P.Nos.1 and 1 of 2014 in
S.A.Nos.1227 and 1228 of 2007)

... Respondent/Respondent /
Petitioner – Plaintiff

... Respondents/Respondents
Defendant Nos.1 to 6



S.A.NOS.1227 AND 1228 OF 2007

PRAYER: Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree dated 29.06.2007 made in A.S.No.21 of 2007 on the file of Subordinate Judge, Namakkal confirming the fair and decreetal order dated 15.12.2006 made in R.E.A.No.861 of 2005 in R.E.P.No.354 of 2004 in O.S.No.150 of 1997 on the file of Additional District Munsif, Namakkal.

For Appellants	:	Mr.S.Saravanakumar for M/s.I.Abrar Mohamed Abdullah
For Respondent-1	:	Died – Steps taken
For Respondents-2 to 6	:	Served – No appearance
For Respondent-7	:	Mr.Perumal for M/s.T.Dhanyakumar

S.A.NO.1228 OF 2007

1.Kamalam
2.Kavitha
3.P.Balu
(Appellant No.3 is declared as
Major and Guardian is discharged
through this judgment)

... Appellants / Appellants /
Plaintiffs

Versus

1.Palaniammal (Deceased)
2.Palaniyandi
3.Chitra
4.Raja
5.Nallammal
6.Periyannan
7.Vijaya
(R7 recorded as LR of the deceased R1
vide order of Court dated 28.10.2014
made in M.P.Nos.1 and 1 of 2014 in
S.A.Nos.1227 and 1228 of 2007)

... Respondents/Respondents /
Defendants



S.A.NOS.1227 AND 1228 OF 2007

PRAYER: Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree dated 29.06.2007 made in A.S.No.50 of 2005 on the file of Subordinate Judge, Namakkal confirming the judgment and decree dated 23.02.2005 made in O.S.No.66 of 2003 on the file of Additional District Munsif, Namakkal.

For Appellants	:	Mr.S.Saravanakumar for M/s.I. Abrar Md. Abdullah
For Respondent-1	:	Died – Steps taken
For Respondents-2 to 6	:	Served – No appearance
For Respondent-7	:	Mr.Perumal for M/s.T.Dhanyakumar

COMMON JUDGMENT

The Second Appeal in *S.A.No.1227 of 2007* is directed against the judgment and decree dated June 29, 2007 passed in A.S.No.21 of 2007 by the 'Subordinate Court, Namakkal' [henceforth 'First Appellate Court' for the sake of brevity], confirming the fair and decretal order dated December 15, 2006 passed in *R.E.A.No.861 of 2005* in *R.E.P.No.354 of 2004* in O.S.No.150 of 1997 by the Additional District Munsif, Namakkal [henceforth 'Execution Court' for the sake of brevity].

2.The Second Appeal in *S.A.No.1228 of 2007* is directed against the judgment and decree dated June 29, 2007 passed in A.S.No.50 of 2005 by the First Appellate Court, confirming the judgment and decree dated February 23, 2005 passed in O.S.No.66 of 2003 by the 'Additional



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District Munsif, Namakkal' [henceforth 'Trial Court' for the sake of brevity].

3.In *S.A.No.1227 of 2007*, the appellants and the first respondent – Palaniammal are the petitioners / obstructors and the petitioner / plaintiff respectively in R.E.A.No.861 of 2005 in R.E.P.No.354 of 2004 in O.S.No.150 of 1997 before the Execution Court.

4.In *S.A.No.1228 of 2007*, the appellants and the respondents are the plaintiffs and the defendants respectively in O.S.No.66 of 2003 before the Trial Court.

5.Henceforth, for the sake of clarity and convenience, unless otherwise specified, the parties will be referred to as per their array in the O.S.No.66 of 2003 on the file of Trial Court.

O.S.NO.150 OF 1997

6.Tmt.Palaniammal filed a Suit in O.S.No.413 of 1990 before the the Subordinate Court, Namakkal, praying for partition and to direct



Periyannan - first defendant (D1) therein to pay *mesne* profits to the plaintiff.

6.1.The case of Palaniammal - plaintiff therein, is that, her husband - Kandasamy Gounder died intestate in the year 1987, leaving behind him, his son Periyannan (1st defendant), three daughters namely Sarasu (2nd defendant), Nallammal (3rd defendant) and Vijaya (4th defendant). The 2nd defendant Sarasu passed away in 1995, leaving behind 5th defendant to 7th defendant (D5 to D7) therein as her legal heirs. The Suit Properties are self-acquired of her husband. She along with her children are entitled equal share under Section 8 of 'the Hindu Succession Act, 1956' (henceforth 'H.S. Act'). Her son - Periyannan, tried to acquire the Suit Properties entirely for himself. Hence, she caused legal notice dated September 12, 1990 to her son. Since there was no reply from her son, she filed the Suit in O.S.No.413 of 1990 before the Subordinate Court, Namakkal for the above stated reliefs.

7.Her son – Periyannan, filed written statement wherein he has evasively resisted the averments made by the plaintiff and prayed to dismiss the Suit.



8.The second defendant – Sarasu also filed written statement wherein she has evasively resisted the averments made by the plaintiff and prayed to dismiss the Suit.

9.The Suit in O.S.No.413 of 1990 was subsequently transferred to the file of Trial Court and renumbered as O.S.No.150 of 1997.

9.1.The following issue was framed by the Trial Court in the Suit in O.S.No.150 of 1997:

“1. Whether the Suit is liable to be entertained?”

9.2.On the side of the plaintiff, Palaniammal examined herself as P.W.1 and Ex-A.1 and Ex-A.2 were marked. Neither witnesses nor documents were marked on the side of the defendants therein. The defendants therein, did not appear and choose to contest the case, hence, they were called absent and set *ex-parte*.

9.3.The Trial Court passed a preliminary decree as prayed for on January 11, 2000 in O.S.No.150 of 1997. The judgment reads thus:



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“Defendant counsel reports no instruction. Defendant called absent. Set exparte. Evidence of PW1 is already on record. (Ex.A1, A2 marked) claim proved. Preliminary decree is passed as prayed for with cost. Mesne profits will be decided at the time of Final Decree in separate proceedings.

Pronounced by me in this Court, on this the 11th day of January 2000.”

9.4. Thereafter, plaintiff therein – Palaniammal filed an Interlocutory Application in I.A.No.527 of 2001 in O.S.No.150 of 1997, seeking to appoint an Advocate Commissioner to measure and divide the Suit Properties and to pass final decree. I.A.No.527 of 2001 in O.S.No.150 of 1997 was allowed on March 17, 2004.

10. Thereafter, plaintiff therein / decree holder filed an Execution Petition in R.E.P.No.354 of 2004 in O.S.No.150 of 1997 seeking to deliver possession as per the final decree passed on March 17, 2004.

10.1. Kamalam, who is none other than the wife of Periyannan, along with her minor children filed a petition under Order 21



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Rule 97 of the Code of Civil Procedure, 1908 [henceforth 'C.P.C.'] in R.E.A.No.861 of 2005 in R.E.P.No.354 of 2004 in O.S.No.150 of 1997.

10.2.The plaintiff therein / decree holder – Palaniammal filed counter denying the allegations made by the obstructor – Kamalam who filed the petition for herself and on behalf of their minor children namely Kavitha and Balu and sought to dismiss the above petition.

10.3.At enquiry, obstructor – Kamalam was examined as P.W.1 . Ex-P.1 to Ex-P.8 were marked. No oral and documentary evidence was produced by the respondent – decree holder / plaintiff side.

10.4.The Execution Court dismissed the application on December 15, 2006 in R.E.A.No.861 of 2005 in R.E.P.No.354 of 2004 in O.S.No.150 of 1997 filed by Kamalam by assigning reasons that the petitioners / obstructors have no right to object the execution proceedings, since no share has been allotted in favour of the obstructors in O.S.No.66 of 2003 and unless and until the decree and judgment is set aside, the obstructing petitioners cannot obstruct the execution proceedings.



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O.S.NO.66 OF 2003

11.Out of the wedlock between Periyannan and Kamalam, three children – Saravanan, Kavitha and Balu were born to them. It is stated that, Saravanan unfortunately passed away at the age of three. Kamalam along with her two children filed the Suit in O.S.No.66 of 2003 seeking the relief of declaration that the judgment and decree passed in O.S.No.150 of 1997 by the Trial Court will not bind them and to pass a preliminary decree for partition of the Suit Properties.

12.The case of the plaintiffs is that her husband - 6th defendant - Periyannan, who is D1 in O.S.No.150 of 1997, failed to perform his duties as a father and as a husband. Hence, the first plaintiff - Kamalam along with her minor children is living separately from her husband - D6. According to the plaintiffs, D6's grandfather possessed ancestral Nanja agricultural land in Pidaripatti Village, Namakkal Taluk. The aforesaid ancestral Properties were sold by way of a Sale Deed dated January 27, 1961. From and out of the said sale consideration, her father-



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in-law - Kandasamy Gounder, purchased the Suit Properties vide Sale Deeds dated February 24, 1961, April 1, 1963 and September 2, 1978.

According to the plaintiffs, the Suit Properties purchased by Kandasamy Gounder from and out of the sale consideration derived from selling the ancestral Properties, are also ancestral Properties. After the demise of said Kandasamy Gounder, her mother-in-law – Palaniammal (D1), her husband (D6) and herself are in joint possession and enjoyment of the Suit Properties. With a view to defeat and defraud the legitimate rights of the 1st plaintiff and her children, her mother-in-law (D1) in collusion with her husband (D6) filed a Suit in O.S.No.150 of 1997 without the plaintiffs' knowledge and without adding the plaintiffs as parties to the Suit. The said Suit was decreed *ex parte* as if the Suit Properties are self-acquired Properties of her father-in-law – Kandasamy. Since the 2nd and 3rd plaintiffs are coparceners having equal right in the Suit Properties along with first plaintiff's husband (D6), the plaintiffs filed the Suit in O.S.No.66 of 2003 praying to declare that the judgment and decree passed in O.S.No.150 of 1997 by Trial Court will not bind them and to pass a preliminary decree for partition of the Suit Properties.



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13.D1, who is the mother-in-law of the first plaintiff - Kamalam and the plaintiff in O.S.No.150 of 1997, filed written statement stating that D2 to D6, with a view to drag on the final decree proceedings in O.S.No.150 of 1997 as long as possible and to defeat and defraud her rights over the Suit Properties, colluded with the first plaintiff - Kamalam in filing the Suit. Further, it is stated that the earlier Suit was contested by her son - Periyannan (D6). An Advocate Commissioner was appointed in O.S.No.150 of 1997 to measure and divide the Suit Properties. In such a scenario, this Suit was filed to drag on the proceedings. Accordingly, she prayed to dismiss the Suit.

14.The following issues were framed by the Trial Court in the Suit in O.S.No.66 of 2003:

(i)Whether the plaintiffs are entitled for the relief of declaration declaring that the judgment and decree passed in O.S.No.150 of 1997 will not bind on them?

(ii)Whether the plaintiffs are entitled to the relief of partition and separate possession?

(iii)To what other reliefs?



(iv) *Whether it is true that the Suit schedule Properties were purchased from and out of the sale consideration of ancestral Properties?*

14.1. On the side of the plaintiffs, first plaintiff – Kamalam was examined as P.W.1. One Rajamanickam and one Pachaimuthu were examined as P.W.2 and P.W.3 and Ex-A.1 to Ex-A.8 and Ex-X.1 and Ex-X.2 were marked. On the side of the defendants, first defendant – Palaniammal was examined as D.W.1 and D7 – Vijaya was examined as D.W.2 and Ex-B.1 to Ex-B.15 were marked.

14.2. The Trial Court, after hearing both sides and conducting full trial, concluded that the Suit Properties are ancestral Properties in the hands of Periyannan; that the 2nd and 3rd plaintiffs are entitled to share in the Suit Properties, however, since the plaintiff has not sought for the relief of setting aside the decree, the Suit is not maintainable. Accordingly, the Trial Court dismissed the Suit on February 23, 2005.

15. Aggrieved Kamalam and her children, preferred an appeal in A.S.No.21 of 2007 against the decretal order passed in *R.E.A.No.861 of 2005* in *R.E.P.No.354 of 2004* in O.S.No.150 of 1997 and another



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appeal in A.S.No.50 of 2005 against the judgment and decree in O.S.No.66 of 2003 before the First Appellate Court.

15.1.The First Appellate Court, after hearing both sides and conducting full trial, concluded that 2nd Plaintiff and 3rd Plaintiff were duly represented in O.S.No.150 of 1997 by their father - Periyannan, and hence the judgment and decree passed therein is binding on them. Further held that, since the plaintiff has not sought for the relief of setting aside the decree passed therein, the Suit in O.S.No.66 of 2003 is not maintainable. Accordingly, both the appeals were dismissed by the First Appellate Court on June 29, 2007.

16.Aggrieved Kamalam and her children, preferred the Second Appeals in S.A.No.1227 of 2007 and S.A.No.1228 of 2007 against the judgments and decrees in A.S.No.21 of 2007 and A.S.No.50 of 2005 respectively.

Substantial Questions of Law:

17.Both the Second Appeals were admitted on July 22, 2009 on the following substantial questions of law:



“1.Whether the decree in a partition Suit obtained by one coparcener will bind the other minor coparceners, those are not impleaded as parties in the said Suit?

2.Whether the Application filed by the Minor Coparceners under Order 21 Rule 97 seeking a relief of partition of is not maintainable or not?

3.Is the learned appellate Judge right in holding that the partition cannot be re-opened unless the same is set aside?

4.Is the learned appellate Judge right in holding that the minor coparcener in the ancestral Properties could claim his share only through his father and not independently?

5.Having the executing court found that the determination of share in the partition decree is unfair, Is the executing Court right in not granting a decree for partition, in an application filed by the obstructors, under Order 21, Rule 97 of CPC?”

Arguments:

18.The learned counsel for the plaintiffs would argue that the Suit Properties are ancestral Properties and the plaintiffs are coparceners; that the Trial Court while deciding the Suit in O.S.No.150 of 1997 failed to analyze the character of the Suit Properties and erred in decreeing the Suit as prayed for; that though the Trial Court while deciding O.S.No.66 of



2003 held that the Suit Properties are ancestral Properties, it miserably failed to decree the Suit as prayed for; that, since the 2nd and 3rd plaintiffs, who are necessary parties to the Suit in O.S.No.150 of 1997, were not impleaded in the said Suit, the decree passed therein will not bind them; that the Trial Court erred in dismissing the Suit on the ground that the earlier decree passed cannot be re-opened at the instance of the minors since the minors were duly represented by their father.

18.1.Further would argue that, the Trial Court as well as the First Appellate Court concurrently held that the Suit Properties are ancestral Properties. The first defendant did not file any cross appeal or objection to the said finding. Hence, the said findings has reached its finality. Accordingly, he prayed to allow these two second appeals.

19.Per contra, learned counsel for the seventh defendant-Tmt.Vijaya would argue that the husband of the first plaintiff and father of the plaintiffs 2 and 3, namely Periyannan, was a party to the Suit in O.S.No.150 of 1997. In the said Suit, he filed written statement. Thereafter, with a view to defeat and defraud the rights of the seventh



defendant and her mother Palaniammal and to drag on the proceedings, the said Periyannan did not appear before the Trial Court and let the Suit proceed *ex parte*.

19.1.Further would submit that, the plaintiffs and the Periyannan are living under one roof. Only with a view to devoid D7 and her mother (D1) of the benefit of the decree passed in O.S.No.150 of 1997 and to thwart their right over the Suit Property, this Suit has been filed with active collusion between the plaintiffs and the said Periyannan.

19.2.Further would submit that, unless and until the decree passed in O.S.No.150 of 1997 is set aside or cancelled, the said decree would bind the plaintiffs, since they were duly represented by their father - Periyannan in O.S.No.150 of 1997.

19.3.Further would submit that the Trial Court as well as the First Appellate Court has categorically held that the Suit is not maintainable. In view of the concurrent findings recorded, these appeals are devoid of any merit. Accordingly, he prayed to dismiss both the



appeals.

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Discussion and Decision:

20. Before delve into the matter, this Court wants to correct the small procedural aspects. On the date of filing the Suit in O.S.No.66 of 2003, the 3rd plaintiff was 11 years old. Hence, he was represented through his mother 1st plaintiff. Pending appeal, he attained the age of majority and elected to conduct both the appeals and filed vakalat on February 10, 2023. Hence, a formal order alone is required.

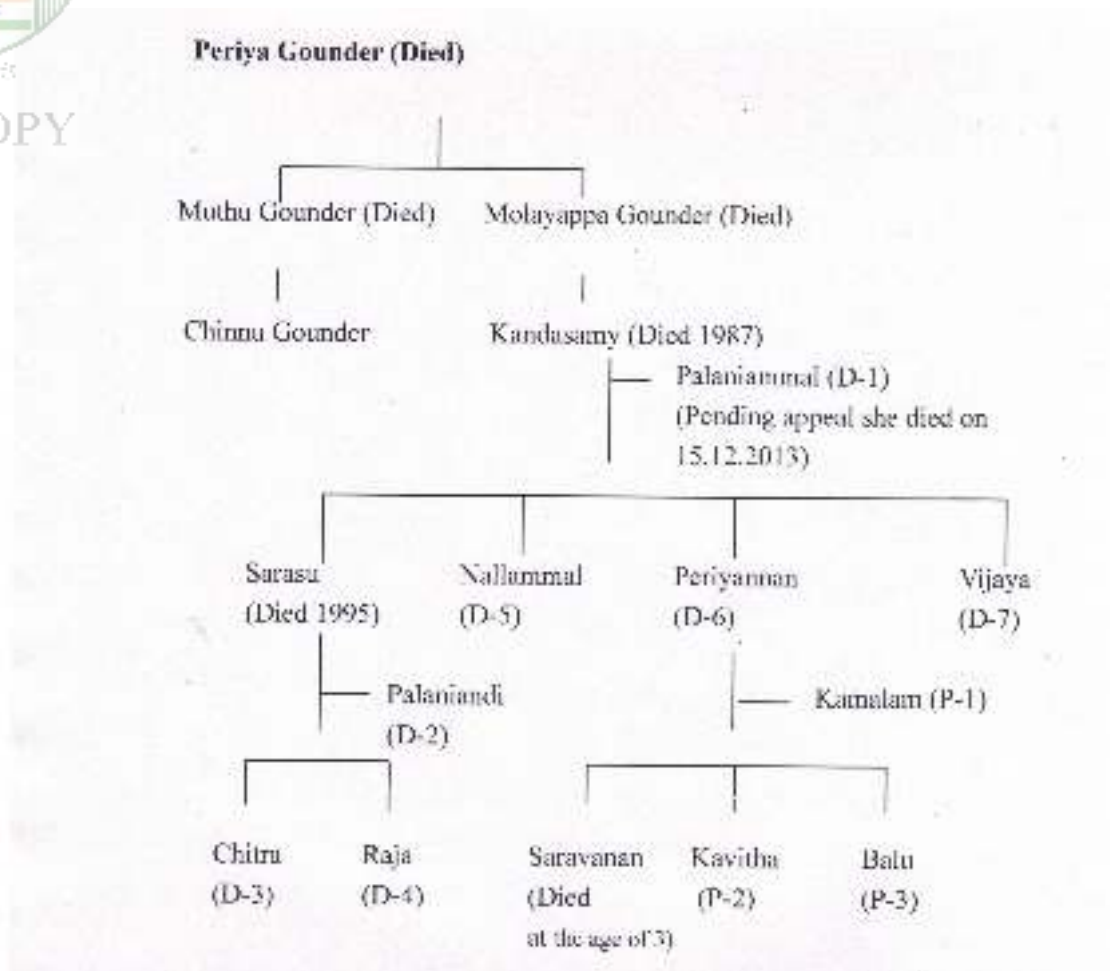
20.1. Hence, the 3rd plaintiff is hereby declared as Major and 1st plaintiff herein is discharged from Guardianship of 3rd plaintiff. Registry shall carry out the necessary amendment in the Memorandum of Appeals before issuing this judgment copy.

21. This Court has considered the submissions made on either side and perused the evidence available on record.

22. The relationship stated hereunder in the Genealogy is admitted:



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23.D1 – Palaniammal filed a Suit in O.S.No.150 of 1997 on the file of Additional District Munsif, Namakkal stating that the Suit Properties are self-acquired Properties of her husband - Kandasamy Gounder. He died in the year 1987 leaving behind his wife Palaniammal, his three daughters, namely Sarasu, Nallammal and Vijaya, and his son - Periyannan. She sought to divide the Suit Properties into five equal shares and allot respective shares.



24.In the said Suit, Periyannan was arrayed as D1. He filed a written statement stating that the Suit Properties are ancestral Properties. His father executed a Will in his favour and hence, he alone is entitled to the Suit Properties entirely.

25.Pending the said Suit, Sarasu passed away. Her legal heirs were brought on record as defendant nos.5 to 7 therein. D5 to D7 therein, who are the legal heirs of deceased Sarasu, filed a written statement sailing with their maternal uncle, namely Periyannan. Though the D1, D5 to D7 therein filed a written statement, they did not choose to contest the Suit. Hence, the said Suit was decreed *ex parte* on January 11, 2000.

26.On the strength of the decree and judgment passed therein, the D1-Palaniammal who is the plaintiff therein filed an application for passing final decree and the final decree was passed on March 17, 2004. Thereafter, the plaintiffs filed an Interlocutory Application in I.A.No.861 of 2005 under Order 21 Rule 97 of Code of Civil Procedure, 1908 and the same was dismissed. In the meantime, the plaintiffs filed the Suit in O.S.No.66 of 2003 praying for a declaration that the decree passed in



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O.S.No.150 of 1997 is not binding the plaintiffs and consequently, for partition.

27.This Court has perused the judgment and decree passed in O.S.No.150 of 1997. Before the Trial Court, in support of her claim, the plaintiff had filed Ex-A.1 - Notice and Ex-A.2 - Acknowledgment Card. She did not file any other document to show that the Suit property is the self-acquired property of her husband - Kandasamy Gounder. Though D1 and D3 to D7 filed written statement contending that the Suit Properties are ancestral Properties, they did not contest the said Suit. The Trial Court, while deciding O.S.No.150 of 1997, ought to have recorded a finding with reasoning as to whether the Suit Properties are ancestral Properties as alleged by the defendants therein or self-acquired Properties as alleged by the plaintiff therein. The Trial Court without applying its mind, has simply decreed the Suit as prayed for without rendering a finding with reasoning regarding the character of the Suit Property. It is relevant to extract the judgment dated January 11, 2000 in O.S.No.150 of 1997 which reads thus:

“Defendant counsel reports no instruction. Defendant



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called absent. Set exparte. Evidence of PW1 is already on record. (Ex.A1, A2 marked) claim proved. Preliminary decree is passed as prayed for with cost. Mesne profits will be decided at the time of Final Decree in separate proceedings.”

28.If the Trial Court had demanded proof from the plaintiff therein to establish that the Suit Properties are self-acquired Properties, the result of the Suit might have been a different one. In a partition Suit, the decision regarding the character of property assumes much significance. Assuming a moment that the Suit Properties are self-acquired Properties of Kandasamy Gounder, in such circumstances, the plaintiffs would not entitle to any share in the Suit Properties. Further, the judgment and decree are not in consonance with Order 20 Rule 4(2) and Rule (5) of Civil Procedure Code, 1908.

29.At this juncture, it is relevant to note the decision of the Hon'ble Allahabad High Court in the case of ***Commissioner of Income-Tax – Vs. - Surendra Singh Pahwa & Others [AIR 1995 All. 259]*** . In the said case, the Court has held as under:

“5.Having heard the learned counsel for the parties and having perused the judgment dated 5-1 -1994, I am of the



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view that it cannot be sustained. Even an ex parte judgment should satisfy the description of 'judgment' as laid down in Order 20, Rule 4(2), C.P.C. which visualizes that the judgment of a Court other than the court of Small Causes "shall contain concise statement of the case, points for determination, decision and the reasons for such decision." A 'judgment' for its sustenance must contain not only findings on the points, but must also contain: ' what evidence consists of, and how does not prove plaintiff's case. A judgment unsupported by reasons is no judgment in the eye of law. It is well settled that reasons are the links between the material on record and the conclusion arrived at by the Court. Mere fact that the defendant absented himself on the date of hearing and the Suit proceeded ex parte, did not by itself entitle the plaintiff to get a decree in his favour. The court was under an obligation to apply its mind to whatever ex parte evidence or affidavit filed under Order 19 of the Code is on the record of the case, and application of mind must be writ large on the face of record. This is possible only if the court directs itself to whatever material is on record of the case, analyses the same and then comes to any conclusion on the basis of evidentiary value of the ex parte evidence or affidavit brought on record by the plaintiff...

30.Further, the plaintiffs filed the Suit in O.S.No.66 of 2003 seeking declaration that the decree passed in O.S.No.150 of 1997 is not binding on the plaintiffs and consequently, they sought for partition. In the



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said Suit, the plaintiffs pleaded that the Properties were purchased by Kandasamy Gounder from and out of the sale consideration derived from the sale of ancestral Properties. The plaintiffs marked Ex-A2 - Partition Deed dated September 6, 1954 and its original is marked in Ex-X.1. In the said partition, Periyannan's father - Kandasamy Gounder and Kandasamy Gounder's father - Molayappa Gounder as one part, and Molayappa Gounder's nephew - Chinnu Gounder as another part, entered partitioned their joint family Properties. In the said partition, Molayappa Gounder and his son Kandasamy Gounder were jointly allotted 1/2 share (approximately 1.75 Acres Nanja land and a house property and a vacant plot were allotted to Molayappa Gounder and Kandasamy Gounder) and Chinnu Gounder was allotted 1/2 share equally. Thereafter, under Ex-A.1 : Ex-X.2 - Sale Deed, dated January 27, 1961 Kandasamy Gounder sold a portion of the property allotted in Ex-A.2 : Ex-X.1, in favour of the said Chinnu Gounder. Ex-A.1 = Ex-X.2 contains specific recitals that the Sale is for the purpose of meeting out the family expenses and for the purpose of purchasing a land. Relevant extract reads as follows:

“... கந்தசாமி கவுண்டர் ஆகிய நான் எழுதிக்
கொடுத்த நஞ்சை நில கிரையப்பத்திரம்



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என்னவென்றால் இதன் அடியில் காட்டிய சொத்தை
உமக்கு சுத்தக்கிரயம் செய்து கொடுத்து உம்மால் நான்
பெற்றுக் கொண்ட துகை ரூ.3000/- மூபலகு
மூவாயிரம் ரூபாயும் என் குடும்ப செலவுக்கும் வேறு
நிலம் வாங்கவும் அடியில் கண்ட சாட்சிகள் முன்
நிலையில் உம்மால் நான் ரொக்கமாய் பெற்றுக்
கொண்டபடியால் இனி”

(Emphasis supplied)

31. Thereafter, he purchased the Suit Properties on February 24, 1961 vide Ex-A.3; on April 1, 1963 under Ex-A.4; and on September 2, 1978 under Ex-A.5. To be noted, admittedly, the parties belonged to agricultural family. Considerable agricultural lands had been sold under Ex-A.1 to Chinnu Gounder who is none other than Kandasamy Gounder's first cousin. Hence, this Court comes to the conclusion that the Properties purchased under Ex-A.3 to Ex-A.5 by Kandasamy Gounder, were from and out of the the sale consideration derived from the ancestral Properties. Hence, the Trial Court as well as the First Appellate Court concurrent finding that the Suit Properties are ancestral Properties are right. This Court does not find any irregularity or illegality in the said finding. To be noted, the first defendant did not file any appeal or cross objections against such findings.



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32.The Trial Court as well as the First Appellate Court, though concurrently held that the Suit Properties are ancestral Properties, dismissed the Suit on the ground that the plaintiffs did not pray for setting aside the decree passed in O.S.No.150 of 1997.

33.The contention of the learned counsel for the plaintiffs in this regard is that since the plaintiffs were not parties to the said proceedings, they could not seek for a prayer to set aside the decree and judgment as the said decree and judgment would not bind them.

34.Per contra, learned counsel appearing for the D1 submitted that since the plaintiffs were represented by their father - Periyannan, law presumes that the plaintiffs were duly represented. Hence, the decree passed therein would bind the plaintiffs and the Suit as framed by the plaintiffs would not be maintainable. Therefore, the concurrent finding rendered by the Trial Court as well the First Appellate Court need not be interfered with.



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35.This Court has carefully considered the arguments advanced by the learned counsel on either side. It is true that minors can be duly represented by their father in a Partition Suit. According to the first plaintiff, she is living separately from her husband, and her husband in collusion with mother-in-law has filed the Suit in O.S.No.150 of 1997. According to the mother-in-law (D1) her son and the first plaintiff have collusively filed the Suit in O.S.No.66 of 2003 with a view to drag on the execution proceedings. Both the sides are alleging collusion on the other side. The Trial Court as well as the First Appellate Court held that the Suit has been filed collusively by the plaintiffs and Periyannan. However, with the evidence available on record, this Court is unable to ascertain the truth as to who is in collusion with who.

35.1.D6 - Periyannan's stand is that the Suit Properties are ancestral. It aligns with the stand of the plaintiffs. It is true that if D6 - Periyannan had properly contested the Suit in O.S.No.150 of 1997, there would have been no necessity for the plaintiffs to file the Suit in O.S.No.66 of 2003. The intention of D6 - Periyannan is obvious. He let the Suit proceed *ex parte* only with a view to prolong the proceedings and thwart



the lawful right of his mother and sister.

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35.2. That apart, the Suit in O.S.No.150 of 1997 was filed stating that the Suit Properties are self-acquired Properties of Kandasamy Gounder who died intestate in 1987 leaving behind his wife(D1), his son(D6) and three daughters (D5, D7 and one Sarasu). Hence, in view of the alleged nature of the Suit Properties pleaded in O.S.No.150 of 1997, it cannot be said that 2nd and 3rd plaintiff were duly represented in the said Suit by their father - Periyannan. If the plaintiff therein had filed the Suit contending that the nature of the Suit Properties is joint family or ancestral, then it could be reasonably said that the 2nd and 3rd plaintiff were duly represented in the said Suit by their father. Further, though technically the prayer of the plaintiffs in O.S.No.66 of 2003 is limited to the relief of declaration that the decree passed in O.S.No.150 of 1997 would not bind them and to the relief of partition, in effect it means that the plaintiffs are more or less praying to set aside the decree and consequently, seeking partition.

35.3. The Court is always zealous to guard the interest of the minor. At the same time, this Court is mindful of the fact that the mother-in-law who filed O.S.No.150 of 1997 in the year 1997, passed away on



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December 15, 2013 pending these second appeals without being able to enjoy the fruits of the decree.

35.4.Hence, in view of the concurrent findings of the Trial Court as well as the First Appellate Court that the Suit Properties are ancestral Properties, this Court is of the view that if these appeals are not allowed, the plaintiffs would be deprived of their right to property which is a constitutional right guaranteed under Article 300-A of the Constitution of India. Therefore, this Court is inclined to allow these Second Appeals. The judgment and decree passed in O.S.No.150 of 1997 without deciding the nature of the Properties, are set aside and hereby declared not binding on the plaintiffs.

35.5.However, considering the conduct of D6 - Periyannan, this Court directs him to pay cost of Rs.1,00,000/- (Rupees One Lakh Only) to the contesting seventh defendant, namely Vijaya for the reason stated supra in para 35.1.



36.As stated *supra*, the Suit Properties are all ancestral Properties. Tmt.Sarasu, who is the mother of D3 and D4 (Chitra and Raja) passed away in the year 1995 *i.e.*, before the commencement of ‘the Hindu Succession (Amendment) Act, 2005 (Act No.39 of 2005)’ (henceforth ‘2005 H.S. Amendment Act’). Keeping in mind the age of D3 and D4, it can be reasonably inferred that the marriage between Palaniaandi (D2) and Sarasu would have held before *March 25, 1989*. D3 and D4 filed written statement in the earlier Suit contending that the Suit Properties are ancestral Properties in which they do not have any share. In view of the judgment of the Hon'ble Supreme Court in ***Vineeta Sharma Vs. Rakesh Sharma and others [2020 (9) SCC 1]*** the mother of the D3 and D4 – Sarasu died in the year 1995, before commencement of H.S.Amendment Act, 2005. Hence, D5 to D7 have no interest in the coparcenery. The relevant portion of the said judgment reads as follows:

“73. It was vehemently argued that if the daughter is given the right to be a coparcener by birth and deemed to become a coparcener at any point in the past, in the normal working of the law, uncertainty would be caused. In our opinion, no uncertainty is brought about by the provisions of section 6 as the law of Mitakshara coparcenary makes the share of surviving coparceners uncertain till actual partition takes place.



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*Uncertainty in the right of share in a Mitakshara coparcenary is inhered in its underlying principles, and there is no question of upturning it when the daughter is treated like a son and is given the right by birth; to be exercised from a particular date, i.e., 9.9.2005. **It is not to resurrect the past but recognising an antecedent event for conferral of rights, prospectively.***

(Emphasis supplied)

37. Admittedly, Kandasamy Gounder passed away in the year 1987 leaving behind his wife- Palaniammal (D1) and his daughters Nallammal(D5), Vijaya(D7) & Sarasu, and son - Periyannan (D6). Tmt.Sarasu, one of the legal heirs of Kandasamy Gounder pre-deceased her mother Palaniammal in the year 1995. Palaniammal died on December 15, 2013. Hence, during the lifetime of Kandasamy Gounder, applying Section 6 of H.S. Act as amended by 2005 H.S. Amendment Act, Nallammal(D5), Periyannan(D6), Vijaya(D7) and Kandasamy Gounder would be entitled to 1/4 share each. This 1/4 share is ancestral in the hands of D6 - Periyannan and hence, the 2nd and 3rd plaintiff would be entitled to equal share along with D6 i.e., each would be entitled 1/12 share.

38. After the demise of Kandasamy Gounder (1987), his 1/4th



share shall devolve upon Palaniammal, legal heirs of Sarasu (jointly), Nallammal, Vijaya and Periyannan under Section 8 of H.S.Act, 1956, *i.e.*, each would be entitled to 1/20 share. These 1/20 share are separate properties on the hands of the said legal heirs vide **(i) *Additional Commissioner of Income Tax Vs. P.K.Karuppan Chettiar [AIR 1979 MAD 1]***; **(ii) *Commissioner of Wealth Tax, Kanpur and Others Vs. Chander Sen [1986 (3) SCC 567]***; **(iii) *Commissioner of Income Tax Vs. P.L.Karuppan Chettiar [1993 Supp (1) SCC 580]*** and **(iv) *Yudhishter Vs. Ashok Kumar [1987 (1) SCC 204]*** and hence, 2nd and 3rd plaintiffs are not entitled to any share in it during the lifetime of D6.

39.The seventh defendant – Vijaya is entitled to 15/60 share as per Section 6 of H.S. Act as amended by 2005 H.S. Amendment Act and 3/60 share under Section 8 of the H.S.Act, 1956. Pending the Suit, Palaniammal died on December 15, 2013 left her 3/20 share in the Suit properties.

40.Hence, the parties are entitled to share as follows:



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Share Calculation	
Person	Share allotted
2 nd Plaintiff - Kavitha	5/60
3 rd Plaintiff - Balu	5/60
D1 - Palaniammal	3/60
D2 - Palaniandi D3 - Chithra. D4 - Raja	} Legal Representatives of Sarasu Jointly entitled 3/ 60
D5 - Nallammal	
D6 - Periyannan	
D7 - Vijaya	

41. Admittedly, seventh defendant - Vijaya filed M.P.Nos.1 and 1 of 2014 in S.A.Nos.1227 and 1228 of 2007 stating as follows:

“3.I state that the 1st respondent in the above Second Appeal namely Palaniammal died on 15.12.2013. I state that before her death she executed a Will dated 27.12.2011 and registered as document No.138 of 2011 on the file of the Joint Sub Registrar – II, Namakkal in my favour. Hence, I am entitled to the share of the deceased Palaniammal who is my mother. This proceedings is also referred to in the abovesaid Will. Since already I am on record as 4th respondent in the above Second Appeal I may be recognized as the L.R. of the deceased 1st respondent in the above Second Appeal.”



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42.The above Miscellaneous Petitions viz., M.P.Nos.1 and 1 of 2014 in S.A.Nos.1227 and 1228 of 2007 were allowed by this Court on October 28, 2014 and the order reads as follows:

“Heard both sides.

2.The learned counsel appearing for the respondents submitted that the respondents have no objection for allowing the petitions.

3.Recording the above said submission made by the learned counsel for the respondents, both the M.Ps are allowed.”

43.The 1st defendant - Palaniammal (passed away) is entitled to 3/60 share in the Suit Properties. 7th defendant was recognized as the legal representative of the late Palaniammal by order of this Court. Hence, a formal proof alone is required to the Will executed by Palaniammal. Upon proving the Will, 7th defendant is entitled to her 3/60 share also. Hence, the Trial Court shall conduct an enquiry with regard to the Will and pass order as per the law. If the 7th defendant proves the Will, she is entitled to 3/60 share also besides her 18/60 share in the Suit Properties, subject to payment of Court Fees, if any



Substantial Question of Law No.1

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44.Since the plaintiffs 2 and 3 in O.S.No.66 of 2003 are coparceners, the plaintiff in O.S.No.150 of 1997 ought to have added them as necessary parties. Hence, the decree and judgment passed in O.S.No.150 of 1997 would not bind the plaintiffs 2 and 3 in O.S.No.66 of 2003. Substantial question of law no.(1) is answered in favour of the plaintiffs and against the first defendant.

Substantial Question of Law Nos.2 and 5

45.Since the plaintiffs in O.S.No.66 of 2003 are not parties to the Suit in O.S.No.150 of 1997, the Executing Court cannot go beyond the decree. Hence, the plaintiffs are not entitled to file an objection petition under Order 21 Rule 97 of Civil Procedure Code, 1908. They are entitled to file a separate Suit only. The substantial question of law nos.2 and 5 are answered accordingly.

Substantial Question of Law No.3

46.The decree and judgment passed in O.S.No.150 of 1997 would not bind the plaintiffs. Hence, the plaintiffs 2 and 3 need not file a



Suit for setting aside the decree and judgment. Since the plaintiffs 2 and 3 are not parties to the Suit, the decree passed therein, would not bind them.

Substantial question of law no.3 is answered accordingly.

Substantial Question of Law No.4

47.Considering the facts and circumstances of the case, since D1 is acting against the plaintiffs 2 and 3, the Suit filed by the second and third plaintiffs representing through their next friend – natural Guardian mother is maintainable. Further, the plaintiffs being coparceners, are entitled to maintain a Suit independently. Substantial question of law no.4 is answered accordingly.

48.The questions of law framed in the above Second Appeals are answered as stated above.

49.In fine, the Second Appeals in S.A.Nos.1227 and 1228 of 2007 are allowed. The Judgments and Decrees dated June 29, 2007 passed by the Subordinate Court, Namakkal (First Appellate Court) in A.S.No.21 of 2007 and A.S.No.50 of 2005; and the Judgment and Decree dated



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February 23, 2005 passed by the Additional District Munsif, Namakkal (Trial Court) in O.S.No.66 of 2003 and the Fair and Decretal order passed by the Additional District Munsif Court, Namakkal in R.E.A.No.861 of 2005 in R.E.P.No.354 of 2004 in O.S.No.150 of 1997, are hereby **set aside**. The Suit in O.S.No.66 of 2003 on the file of the Additional District Munsif Court, Namakkal is decreed in the following terms:

(i) Judgment and preliminary decree passed in O.S.No.150 of 1997 on the file of Additional District Munsif Court, Namakkal would not bind the 2nd and 3rd plaintiffs, namely P.Kavitha and P.Balu;

(ii) 2nd and 3rd plaintiffs, namely P.Kavitha and P.Balu, are jointly entitled 10/60 share in the Suit Properties. To that effect preliminary decree is passed in favour of the 2nd and 3rd plaintiffs;

(iii) The sixth defendant - Periyannan is directed to



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pay a sum of Rs.1,00,000/- (Rupees One Lakh only) as costs to the contesting 7th defendant, namely Vijaya, within three months from the date of notice of this Judgment, failing which, 7th defendant is entitled to recover the same through 6th defendant's property. A charge is hereby created on the 6th defendant's property for due payment of the aforementioned amount;

(iv) On mere formal proof of the Will executed by Palaniammal before the Trial Court, the 3/60 share of late Palaniammal (1st defendant) in the Suit Properties shall be allotted to the 7th defendant - Vijaya, besides her 18/60 share in the Suit Properties, subject to payment of Court Fees, if any;

(v) In case, the 7th defendant - Vijaya is not able to prove the Will executed by 1st defendant - Palaniammal, 3/60 share of late Palaniammal in



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the Suit Properties shall devolve as per Section
15 (1) (a) of the Hindu Succession Act, 1956.

(vi) There shall be no order as to costs in
S.A.No.1227 of 2007.

19 / 06 / 2024

Index : Yes
Internet : Yes
Neutral Citation : Yes
Speaking order
TK

To

1.The Subordinate Judge
Namakkal.

2.The Additional District Munsif
Namakkal.



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S.A.NOS.1227 AND 1228 OF 2007

R.SAKTHIVEL, J.

TK

PRE-DELIVERY COMMON JUDGMENT MADE IN
S.A.NOS.1227 AND 1228 OF 2007

19 / 06 / 2024