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S.A. No.442 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.12.2024

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THE HON'BLE MRS. JUSTICE T.V.THAMILSELVI

S.A.No.442 of 2023
and
CMP.No.13299 of 2023

N.Senthil Kumar
S/o.Late S.P.Nagarajan

... Appellant

Vs

1.Shanthi
W/o.Pandiyan
2.N.Kannagi
W/o.Nagarajan
3.S.Lakshmi
W/o.Selvaraj
4.Chandralekha
W/o.Srinivasan
5.Minor S.Vishwa
S/o.Late Srinivasan

... Respondents

PRAYER: Second Appeal filed Under Section 100 of the Civil Procedure Code, against the Judgment and decree passed in A.S.No.20 of 2022 on the file of the Court of Principal District Court, Ariyalur, dated 15.11.2022, confirming the order and decree passed in O.S.No.24 of 2010 on the file of the Court of Principal Subordinate Court, Ariyalur, dated 01.11.2019.



For Appellants : Mr.K.Gandhi Kumar
For R1 : Mr.S.Sivakumar
For R4 : No appearance
For R5 : Minor

JUDGMENT

The appellant has filed this Second Appeal against the judgment and decree passed in A.S. No. 20 of 2022 on the file of the Principal District Court, Ariyalur, dated 15.11.2022, confirming the order and decree passed in O.S. No. 24 of 2010 on the file of the Principal Subordinate Court, Ariyalur, dated 01.11.2019.

2. For the sake of convenience, the parties herein are referred to as they were ranked in the original suit.

3. The appellant herein is the second defendant in O.S. No. 24 of 2010. The first respondent, his sister Shanthi, filed a suit for partition, claiming a one-fifth share in the entire suit properties, asserting that it absolutely belonged to their father. Upon his demise, as one of his legal heirs, she claims entitlement to a one-fifth share along with the other heirs.



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Defendants 1 and 2 remained ex parte, while defendants 4, 5, and 6 contested the case. One Nagarajan, the father of the plaintiff and husband of the first defendant, had two sons and two daughters—namely, the plaintiff and defendants 2 to 4.

4. During the pendency of the suit, the third defendant died, leaving behind his legal heirs, D5 and D6. During his lifetime, Nagarajan purchased the first item of the suit properties (a vacant site) via a sale deed dated 29.05.1974 and constructed two houses. Subsequently, he pledged the said property and sold some of his wife's jewels to purchase the second and third items of the suit properties in the names of his sons, D2 and D3. However, at the time of purchase, D2 and D3 had no separate income. A commercial complex currently exists on items 2 and 3. All three items were jointly purchased and enjoyed by Nagarajan and his family. He died intestate on 20.06.1999. Due to inconvenience in common enjoyment, the plaintiff demanded partition, which was not accepted, hence, the suit. The mother of the plaintiff contended that the suit was filed at the instigation of the second defendant.



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D1 and D3 contended that an oral partition took place in 1996, under which the first item was allotted to D2 and D3. They also claimed that items 2 and 3 were not joint family properties and were not purchased by the plaintiff's father, nor were they funded by pledging item 1 or through the jewels of D4. Instead, they claimed these were purchased using the separate income of D2 and D3, and that the plaintiff has no right or title to them. D2 and D3 also constructed a commercial complex on the said items at their own expense.

5. The fourth defendant, another sister of the plaintiff, claimed that after the demise of her husband, she resided with her father and supported the family and its business. She asserted that D2 and D3 had no separate income to purchase items 2 and 3 and also claimed a one-fifth share. Legal heirs of the deceased third defendant, Srinivasan (D5 and D6, his wife and son), contended that they reside in a portion of the house on item 1. They further claimed that the third item was purchased by Srinivasan in 1998, and the second item was purchased by D2, both from their own earnings. D4, on the other hand, was operating a beauty parlor on the first floor. They



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contended that item 1 belonged to Nagarajan and denied D4's claim that she maintained the family. They insisted that all properties are joint family properties.

6. Before the trial court, both parties adduced oral and documentary evidence. On the plaintiff's side, P.W.1 was examined and Ex.P1 was marked. On the defendants' side, D.W.1 and D.W.2 were examined and Ex.B1 to Ex.B12 were marked.

7. The relationship between the parties is an admitted fact. It is also undisputed that the plaintiff's father, Nagarajan, from his own earnings, purchased the first item as a vacant site and built two houses. The plaintiff's case is that Nagarajan died intestate and purchased items 2 and 3 from the income derived from item 1, although they were registered in the names of D2 and D3. She claimed that all the properties were joint family properties and sought a one-fifth share. Item 1 is admittedly purchased by the father. Since he died intestate, the legal heirs are entitled to a share. As for items 2 and 3, the initial burden lies on the plaintiff to prove that they were



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WEB COPY purchased from joint family income. D4, examined as D.W.1, stated that her jewels were pledged and item 1 was mortgaged in 1994 to borrow money to purchase a lorry. Exhibit B12 supported this claim. The trial court observed that D4, being the eldest daughter, also contributed to the acquisition of family property. Since D2 remained ex parte and did not prove that he purchased item 2 with his separate income, and D3 also failed to establish that item 3 was self-acquired, the court held that the plaintiff and D4 had sufficiently proved that items 2 and 3 were acquired with joint family income and were used for joint business (SKN Gold Covering and Fancy Store). Accordingly, the trial court held that the suit properties were joint family properties and allotted a one-fifth share to the plaintiff.

8. Challenging the said findings, the second defendant preferred A.S. No. 20 of 2022, on the file of Principal District Court, Ariyalur. The learned first appellate judge analyzed the evidence on record and held that the oral partition claimed by the mother was not proved. Further, D2 and D3 failed to establish that they had separate income for purchasing items 2 and 3. D4, however, proved that she contributed to the joint family business through



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the pledge shown in Ex.B12. Thus, the appellate court affirmed that items 2 and 3 were joint family properties and dismissed the appeal by confirming the trial court's findings.

9. Challenging these concurrent findings, the second defendant preferred this Second Appeal, raising the following grounds:

(i) The Courts below failed to see that taken on file and numbering of O.S.No.24 of 2010 itself without producing a single document by the plaintiff to substantiate her claims / averments / allegations is bad in law and unsustainable in law and on that single ground the judgments and decrees of the courts below is liable to be set aside.

(ii) The Courts below failed to see that the plaintiff has not produced employment proof of the father, death certificate, legal heirship certificate, sale deeds, guideline value or market value of the property, genealogy tree, birth certificate of the 2nd and 3rd defendants or any other documents to substantiate her case but in spite of it the Courts below numbered it and passed preliminary decree on 01.11.2019 without insisting for any documents from the plaintiff to substantiate her case, which is erroneous



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and against the procedures laid down under the Civil Procedure Code and on that simple ground the judgements and decrees of the courts below is liable to be set aside.

(iii) The Courts below failed to see that the plaintiff has not given a single reason /explanation for non-production of documents either in her plaint or in her Proof Affidavit and even the Trial Court (Hon'ble Subordinate Judge, Ariyalur) has not insisted for the same either at the time of numbering or at the time of evidence of the Plaintiff) and that therefore the judgments and decrees of the Courts below is liable to be set aside.

(iv) The Courts below failed to see that the suit is collusive one in-between the Plaintiff and the 4th defendant and that therefore the judgments and decrees of the Court below shall be set aside and finally the suit shall be dismissed in limine.

(v) The Courts below miserably failed to follow the Order VII Rule 14 of CPC and taken on file of the suit without insisting for the documents to substantiate the claim of the plaintiff and that therefore the Judgments and Decrees of the Courts below are liable to be set aside:



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Order VII Rule 14 of Civil Procedure Code is mandatory in nature

which says, "Production of document on which plaintiff sues or relies - (1)

(1) Where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint.

(2) Where any such documents not in the possession or power of the plaintiff, he shall, wherever possible, state in whose possession or power it is.

(3) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not without the leave of the Court, be received in evidence on his behalf at the hearing of the suit

(4) Nothing in this rule shall apply to document produced for the cross examination of the plaintiff's witnesses, or, handed over to a witness merely to refresh his memory.



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(vi) The Courts below miserably failed to follow the Order XIII of CPC and proceed with the suit without insisting for the documents to substantiate the claim of the plaintiff and that therefore the Judgments and Decrees of the Courts below are liable to be set aside:

[1]. Original documents to be produced at or before the settlement of issues

(1) The parties or their pleader shall produce, on or before the settlement of issues, all the documentary evidence of in original where the copies thereof have been filed along with plaint or written statement.

(2) The Court shall receive the documents so produced:

Provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

(3) Nothing in sub-rule (1) shall apply to documents,-

(a) produced for the cross-examination of the witnesses of the other party, or

(b) Handed over to a witness merely to refresh his memory.]

(vii). The Courts below failed to see that the plaintiff herself clearly admits that the Item No.2 and 3 are in the name of the 2nd and 3rd defendants and that therefore passing preliminary decree by the Trial Court



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and confirming the same by the First Appellate Court with regard to Item No.2 and 3 without looking into the documents pertaining to Item No.2 and 3 are erroneous and liable to be set aside.

(viii). The Courts below failed to see that there is no single document produced before the Trial Court as well as before the First Appellate Court either by the Plaintiff or by the 4th defendant to prove that the cost of construction of building in Item No.1 was from and out of mortgaging of property of the 4th defendant on that particular period of construction and also sale of jewels of the 4th defendant on that period of construction and that therefore the judgments and decrees of the Courts below are liable to be set aside.

(ix). The Courts below failed to see when the plaintiff admits that her father has some more property at Pazhuvur measuring 2 acres, then non-inclusion of that property is also fatal to the suit as it is well settled law that "PARTIAL PARTITION IS NOT MAINTAINABLE IN LAW (Admitted in the Cross Examination dated 03.03.2018 when cross examined by the 5th & 6 th Defendant's Counsel) and as such the judgments and decrees of the Courts below are liable to be set aside.



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(x). The Courts below failed to see that the date of mortgage alleged and relied by the Plaintiff and the 4th defendant was 10.10.1994 but the Sale Deed in the name of the 2nd and 3rd defendant was 23.09.1998 and that therefore there is no proximity or connection between those two transactions and that therefore accepting the said version is erroneous and liable to be set aside.

(xi). The Courts below failed to see when the age difference between the plaintiff and the defendants are between 2 to 3 years, the averment that elder sister has taken care of the family is unbelievable and unacceptable and the same has not been visualized by the Courts below more particularly by the Trial Court before passing Preliminary Decree and by the First Appellate Court before confirming the Judgment and Decree of the Trial Court and that therefore the judgment and decree shall be set aside and the suit shall be dismissed in limine.

(xii). The Courts below erroneously come to the conclusion that since the Opening Ceremony Invitation Card bears the names of the family members, the Item No.2 and 3 are Joint Family Property and passed the Preliminary decree dated 01.11.2019 by the Trial Court and confirmed by

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the First Appellate Court. It is pertinent to state that Opening Ceremony Invitation Card has no authenticity to disprove the registered sale deed in the name of the 2nd the 3rd defendants and that therefore the reasoning of the Courts below on the basis of Opening Ceremony Invitation Card is erroneous and unsustainable in law.”

10. This Court admitted the Second Appeal on the following substantial questions of law:

(A) Whether the sale deed dated 23.09.1998 with regard to item No. 3 of the suit property, which stands in the name of the third defendant, affects the plaintiff's claim?

(B) Whether the plaintiff has proved that the properties in item Nos. 2 and 3, which are in the names of the second and third defendants, were purchased from the income of the plaintiff's father or from joint family resources, thereby entitling her to seek partition?



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(C) Whether the plaintiff has proved that the transactions relating to item Nos. 2 and 3 are benami in nature in favor of the second and third defendants?

11. The learned counsel for the respondents contended that the courts below rightly appreciated the evidence on record and held that all the properties are joint family properties. A one-fifth share was rightly granted in favour of the plaintiff, which requires no interference. Hence, he prayed for the dismissal of the appeal. He further submitted that the contesting defendants failed to establish that the properties were their separate properties. Therefore, no substantial question of law arises in this case.

12. Considering the submissions of both sides, and upon perusal of the records, it reveals that one Nagarajan and the first defendant are husband and wife. They had two sons and two daughters, namely the plaintiff and defendants 2 to 4. It is an admitted fact that the first item of the suit properties was purchased by Nagarajan as a vacant site, and he later constructed two houses on it. This fact remains undisputed. Items 2 and 3



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stand in the names of defendants 2 and 3, the sons of Nagarajan, as per sale deeds dated 1998. According to the plaintiff and the fourth defendant (her sister), Nagarajan purchased items 2 and 3 in the names of his sons using joint family funds. D4 also claimed to have contributed funds by pledging her jewels. Being the eldest daughter, she produced the mortgage deed marked as Exhibit B-12, dated 10.10.1994. While D2 remained ex parte, the legal heirs of deceased D3 contested the suit and relied on Exhibit B-12.

13. The courts below held that items 2 and 3 were purchased with income derived from the family business and the contributions made by D4. However, as rightly pointed out by the learned counsel for the respondents, although Exhibit B-12 relates to a mortgage dated 1994, the properties were purchased only in 1998. There is no direct evidence to prove that the mortgage amount was utilized for purchasing items 2 and 3. The courts below failed to appreciate this fact properly. At the time of purchase, D2 and D3 were majors. They contended that they had purchased the third item from their own income. Therefore, the burden was heavily on the plaintiff to prove that the properties were purchased from joint family funds.



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14. Considering the entire facts, it is evident that the plaintiff's father was employed in a private company and purchased the first item of the suit property as a vacant site and constructed two houses. There is no evidence of any ancestral property or joint family nucleus to infer that the second and third items were purchased from joint family income. Therefore, as the sale deeds stand in the names of D2 and D3, items 2 and 3 are deemed to be their separate properties. The courts below erroneously granted a one-fifth share to the plaintiff in those items, and such findings are liable to be set aside. Accordingly, substantial questions of law 5, 6, and 7 are answered. Hence, in respect of items 2 and 3, the suit is dismissed.

15. When the matter was taken up for final arguments, both parties appeared before this Court. It is admitted that item 1 of the suit property belongs to the father and comprises two houses. Since it is a house property, the parties were directed to appear before this Court. Accordingly, they appeared. The sisters, namely, the plaintiff (Shanthi) and the fourth defendant (Lakshmi), agreed to take 800 sq. ft. each from the Eastern



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portion of the first item of the suit property. The remaining extent of item 1 shall go to the brothers, D2 and D3.

16. Accordingly, a preliminary decree is passed. In respect of items 2 and 3, the suit is dismissed, and those properties are declared to belong to D2 and the legal heirs of deceased D3 (i.e., D5 and D6). As per the rough plan, from East, 800 sq. ft. is allotted to the plaintiff (Shanthi) and 800 sq. ft. to Lakshmi (D4). The remaining 2000 sq. ft. is allotted to D2 and D3. The plan forms part of this order.

17. In view of the above, the Second Appeal is disposed of accordingly. Consequently, the connected miscellaneous petition is closed. There shall be no order as to costs.

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Index : Yes/No
Neutral Citation : Yes/No
Speaking/Non Speaking order

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To
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1. The Principal District Judge, Ariyalur.
- 2.The Principal Subordinate Judge, Ariyalur,
- 3.The Section Officer, VR Section, High Court of Madras.



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T.V.THAMILSELVI, J.

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