



S.A. Nos.330 & 331 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 12.03.2024

Pronounced on: 05.04.2024

CORAM :

THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.Nos.330 & 331 of 2017
and
CMP. No.7809 & 7810 of 2017

S.A. No.330 of 2017

Balakrishnan

...Appellant

Vs.

1.Thangamuthu
2.Rukmani
3.Selvaraju
4.Vimalanathan
5.Suganthi
Muthayammal (Died)
6.The Branch Manager,
Canara Bank,
Gobi.
7.R.Thangaraj
8.M.Shanmugam
9.M.Arunachalam

...Respondents

PRAYER : Second Appeal filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree dated 28.11.2016 made in A.S. No.36 of 2015 on the file of the learned Principal District Court, Erode reversal of the judgment and decree dated 10.12.2013 made in O.S. No.180



S.A. Nos.330 & 331 of 2017

of 2010 on the file of the learned Sub Court, Perundurai, Erode.

S.A. No.331 of 2017

Balakrishnan

...Appellant

Vs.

- 1.R. Thangaraj
- 2.M.Shanmugam
- 3.M.Arunachalam
- 4.Thangamuthu
- 5.Rukmani
- 6.Selvaraju
- 7.The Branch Manager,
Canara Bank,
Gobichettipalayam,
Erode District.
- 8.Vimalanathan
9. Suganthi

...Respondents

PRAYER : Second Appeal filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree dated 28.11.2016 made in A.S. No.37 of 2015 on the file of the learned Principal District Court, Erode reversal of the judgment and decree dated 10.12.2013 made in O.S. No.180 of 2010 on the file of the learned Sub Court, Perundurai, Erode.

For Appellant : Mr.N.Manokaran, in both S.As.

For Respondents : Mr.A.Sundaravadhanan for
R1 to R5 in S.A. No.330 of 2017
R4 to R9 in S.A. No.331 of 2017
Mr.K.M.Anand for
R6 in S.A. No.330 of 2017
Mr.T.Murugamanickam,
Senior Counsel for
Mr.C.S.Saravanan for
R7 to R9 in S.A. No.330 of 2017



R1 to R3 in S.A. No.331 of 2017
COMMON JUDGMENT

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The plaintiff in a suit for partition is the appellant in both the Appeals.

2. The parties are described as per their litigative status before the trial Court.

3. Both the Second Appeals arise out of judgment and decree in O.S. No.180 of 2010 on the file of the Sub Court, Perundurai. The said suit was decreed in favour of the appellant herein. However, two appeals, viz., one Appeal in A.S. No.36 of 2005, by defendants 1, 3, 4, 6 and 7 and another in A.S. No. 37 of 2015, by defendants 8 to 10, came to be filed challenging the judgment and decree of the Trial Court. Both the Appeals were allowed by the First Appellate Court as against which the above Second Appeals have been preferred.

4. On 06.06.2017, the above Second Appeals were admitted on the following five substantial questions of law:-



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S.A. Nos.330 & 331 of 2017

“(1) Whether the First Appellate Court is right in holding that the plaintiff is not entitled to get right by birth when there exists a coparcenary and the joint family properties as on the date of his birth?

(2) Whether the First Appellate Court is right in holding that the plaintiff did not question the property sold under Ex.B6 to Ex.B8 dated 27.08.1981 particularly when the sale deeds executed by the 1st defendant to the extent of the entire coparcenary property are illegal, null and void?

(3) Whether the Will dated 11.03.1969 (Ex.B5) has been proved by the defendant, if so, what the effect of the said Will on the suit properties in the event of holding it to be the Joint family properties?

(4) Whether the prevaricative conclusion of the First Appellate Court in dismissing the suit is vitiated in view of the categorical findings given in Para Nos. 62 and 63 of the judgment, by and which, the plaintiff was granted 1/4th share?

(5) Whether the judgment of the First Appellate Court that a grandson/plaintiff is disqualified to sue for partition in view of the death of his grandfather, before he was born in view of the assumed notional partition is a correct one, after the Amendment Act, 39 of 2005”

5. I have heard Mr.N.Manokaran, learned counsel for the appellant in both the Second Appeals and Mr.A.Sundaravadanan, learned counsel for the respondents 1 to 5 in S.A. No.330 of 2017 and 4 to 9 in S.A. No.331 of 2017, Mr.T.Murugamanicam, learned Senior Counsel for Mr.C.S.Saravanan for the respondents 7 to 9 in S.A. No.330 of 2017 and respondents 1 to 3 in S.A. No.331 of 2017 and Mr.K.M.Anand, learned counsel for the 6th respondent in S.A. No.331 of 2017.



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6. The learned counsel for the appellant would submit that the suit properties consisted of totally 17 items, insofar as the contesting respondents in S.A.No.331 of 2017 are concerned, it relates to item 14 alone. The learned counsel for the appellant would submit that item No.14, though purchased in the name of the first defendant would also be only joint family property. He would bring to my notice in Ex.B4, under which, the said item was purchased when the first defendant was eight months old. The Trial Court held that income from properties covered by Ex.B4 and Ex.B5 was sufficient for purchase of item No.14 property in Ex.B9. The learned counsel would state that admittedly, D.W.1 has stated that he had no income and he has also not produced any documents to establish that the 14th item of property was purchased in his name from and out of his separate income.

7. The learned counsel for the appellant would further contend that when the family admittedly had joint family properties, presumption would only be that the said item No.14 of the suit property was also purchased only out of the joint family income and has to be treated only as the property of the family and not the separate property of the first defendant. The



learned counsel would invite my attention to the findings of the judgment of the First Appellate Court in this regard and contend that the First Appellate Court has erroneously found, in the absence of evidence to establish income available at the hands of the first defendant to have acquired the 14th item of the property, to be the separate property of the first defendant. He would also challenge the findings of the First Appellate Court, that the plaintiff ought to have included the properties covered in Ex.B4, B6 to B8, as suit properties in the plaint. With regard to the S.A. No.330 of 2017, the learned counsel would submit that admittedly, item 1 was an ancestral property, comprising of an extent of 80 cents. The same has been settled under Ex.B17 and B18, in favour of the daughter and grandchildren.

8. The learned counsel for the appellant would mainly rely on the ratio laid down by the Hon'ble Supreme Court in *Uttam Vs. Soubhag Singh and others*, reported in 2016-4-LW 309, to non suit the plaintiff and in view of the law now settled with regard to interpretation of Section 6 and 8 of the Hindu Succession Act, 1956, the decision of the First Appellate Court holding that the plaintiff has no right to claim the suit properties has to be necessarily set aside.



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S.A. Nos.330 & 331 of 2017

9. The learned counsel for the appellant would place reliance on the following decisions:-

- (i) *Arshnoor Singh Vs. Harpal Kaur and others* reported in 2020 (14) SCC 436;
- (ii) *Rohit Chauhan vs. Surinder Singh and others* reported in (2013) 9 SCC 491;
- (iii) *M.Krishnamoorthy Vs. K.Pondeepankar and others* reported in (2017) SCC Online Mad 37611; and
- (iv) *Thamma Venkata Subbamma (Dead) by LR vs. Thamma Rattamma and others* reported in (1987) 3 SCC 294.

10. In the first case, viz., *Arshnoor Singh's* case, the ratio in Uttam's case, referred herein supra, was distinguished and it was held that shares allotted in partition to coparceners would continue to remain as a coparcenary property in their hands qua male descendants. In *Rohit Chauhan's* case, referred herein supra, the Hon'ble Supreme Court held that a person, who for the time being was a sole surviving coparcener, before the birth of plaintiff, was entitled to dispose of the coparcenary property as if it were a separate property. However, with the birth of the plaintiff, the plaintiff would get a share in the father's property as a coparcener and the property allotted to the father was no longer separate property on the birth of the plaintiff and the Hon'ble Supreme Court set aside the alienation to the



extent of the entire coparcenary property as being illegal, null and void.

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11. In *M.Krishnamoorthy's* case, referred herein supra, this Court, referring to *Uttam Singh's* case, held that only the property which is inherited by the application of Section 8 or proviso to Section 6 would devolve by interstate succession and not by survivorship. This Court held that on the birth of a son, the property would devolve on him as a coparcener and would continue to retain the character of the coparcenary property in his hands vis-a-vis, his son/daughter (after 09.09.2005), on which date, the Central Act was amended by Act 39 of 2005. The learned counsel for the appellants would also place reliance in the case of *Thamma Venkata Subbamma's* case, referred herein supra, where the Hon'ble Supreme Court held that a coparcener can make a gift of his undivided interest in the coparcenary property to another coparcener or to a stranger only with the prior consent of all other coparceners and any alienation without the consent of other coparceners was void.

12. Per contra, Mr.T.Murugamanickam, learned Senior Counsel appearing for the contesting respondents 1 to 3 in S.A. No.331 of 2017 being defendants 8 to 10 in the original suit stated that admittedly, when



item 14 of property was purchased under Ex.B9, the plaintiff was a major and the document did not mention that he was a minor and represented by his guardian, father or any other competent person. Further the learned Senior Counsel would also state that admittedly, the first defendant was not the eldest male coparcener and the fact that the property was purchased in the name of the first defendant under Ex.B9, would itself clearly evidence and establish the fact that it can only be a separate property and not the property purchased out of joint family funds, in which event, the property would have been purchased only in the name of eldest male member of the family and not in the first defendant's name.

13. The learned Senior Counsel would take me through the admissions of D.W.1 in the cross examination regarding the reasons for purchase of item 14 property. That apart, the learned Senior Counsel would also state that the property purchased under Ex.B4 was sold under Exhibits. B7, B8 and B9 and only out of the income derived from the said sales, the first defendant met the sale consideration for purchase of item 14 under Ex.B9, dated 11.07.1992. The learned Senior Counsel would therefore, pray for confirmation of the judgment and decree passed by the First Appellate



Court, insofar as item 14 was concerned.

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14. Insofar as the other items, the learned counsel for the contesting respondents Mr.Sundaravadanan, would submit that father, Marappa Gounder died in the year 1974, and admittedly, the plaintiff was born only on 10.10.1977 and therefore, the decision in *Uttam Singh's* case, referred herein supra, would squarely apply to the facts of the present case. He would also refer to Ex.B5, Will and dismissal of the earlier suit filed for partition which was filed by the maternal grandfather of the plaintiff, representing by the plaintiff. Insofar as the Will executed by maternal grandfather, Ex.B5, the learned counsel would state that the Will has been proved by secondary evidence and insofar as, settlement deeds in Ex.B17 and Ex.B18, which was conceded even before the First Appellate Court that they were not valid and no appeal was preferred against the same. He would refer to the discussions of the First Appellate Court, referring to *Uttam Singh's* case and contend that no interference is warranted with the well merited findings of the First Appellate Court.

15. I have paid my careful and anxious consideration to the rival submissions advanced by the learned counsel on either side. I have also



perused the pleadings available before the Court, the oral and documentary evidence adduced by the parties before the Trial Court as well as the judgments of the Courts below.

16. The above Second Appeals can be decided in two parts. One, relating to the contest in S.A. No. 330 of 2017 and the other relating to specific contest in S.A. No. 331 of 2017. Let me take up the contentious issues in S.A. No.330 of 2017. The limited point that arises for consideration is as to whether the plaintiff, who was admittedly born after the demise of the father, Marappa Gounder would become a coparcener by birth and whether he could seek for partition. The Hon'ble Supreme Court, in *Rohit Chauhan's* case, referred herein supra, specifically dealt with this issue after taking note of the decision of the Hon'ble Supreme Court earlier in *Uttam Singh's* case, in Paragraph No. 20, the same is extracted for easy reference:-

“20. Some other judgments were cited before us for the proposition that joint family property continues as such even with a sole surviving coparcener, and if a son is born to such coparcener thereafter, the joint family property continues as such, there being no hiatus merely by virtue of the fact there is a sole surviving coparcener. Dharma Shamrao Agalawe v. Pandurang Miragu Agalawe (1988) 2 SCC 126, Sheela Devi v. Lal Chand, (2006) 8 SCC 581, and Rohit Chauhan v. Surinder Singh (2013) 9 SCC 419, were cited for this purpose. None of



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S.A. Nos.330 & 331 of 2017

these judgments would take the appellant any further in view of the fact that in none of them is there any consideration of the effect of Sections 4, 8 and 19 of the Hindu Succession Act. The law, therefore, insofar as it applies to joint family property governed by the Mitakshara School, prior to the amendment of 2005, could therefore be summarized as follows:-

(i) When a male Hindu dies after the commencement of the Hindu Succession Act, 1956, having at the time of his death an interest in Mitakshara coparcenary property, his interest in the property will devolve by survivorship upon the surviving members of the coparcenary (vide Section 6).

(ii) To proposition (i), an exception is contained in Section 30 Explanation of the Act, making it clear that notwithstanding anything contained in the Act, the interest of a male Hindu in Mitakshara coparcenary property is property that can be disposed of by him by will or other testamentary disposition.

(iii) A second exception engrafted on proposition (i) is contained in the proviso to Section 6, which states that if such a male Hindu had died leaving behind a female relative specified in Class I of the Schedule or a male relative specified in that Class who claims through such female relative surviving him, then the interest of the deceased in the coparcenary property would devolve by testamentary or intestate succession, and not by survivorship.

(iv) In order to determine the share of the Hindu male coparcener who is governed by Section 6 proviso, a partition is effected by operation of law immediately before his death. In this partition, all the coparceners and the male Hindu's widow get a share in the joint family property.

(v) On the application of Section 8 of the Act, either by reason of the death of a male Hindu leaving self-acquired property or by the application of Section 6 proviso, such property would devolve only by intestacy and not survivorship.

(vi) On a conjoint reading of Sections 4, 8 and 19 of the Act, after joint family property has been distributed in accordance with section 8 on principles of intestacy, the joint family property ceases to be joint family property in the hands of the various persons who have succeeded to it as they hold the property as tenants in common and not as joint tenants."



17. Answering the said issue, the Hon'ble Supreme Court held that the legislature by making a clear distinction between two modes of succession, one viz., coparcenary property and other being self acquired property concluded that irrespective of the date of birth of the son, the property would devolve on him as a coparcener and he would continue to retain character of coparcenary property at his hands. Here, admittedly the suit properties are joint family properties (without reference to item 14 for the present). The Hon'ble Supreme Court also held that if an interpretation was given to the effect that a son or daughter born after 1956 would not become a coparcener is accepted, then the provisions of Act 39 of 2005 would be rendered otiose.

18. Recently, in the case of *Vineeta Sharma vs. Rakesh Sharma and Ors*, reported in (2020) 9 SCC 1, the larger Bench of the Hon'ble Supreme Court, held that irrespective of the father being alive or not, the daughter would become a coparcener in the joint family property. On an overall conspectus of the ratio laid down the above decisions of the Hon'ble Supreme Court as well as this Court, it is clear that the plaintiff is entitled to claim his share in the suit properties (Excepting Item 14 which is being



separately discussed herein below). In fact, the First Appellate Court, having found that the plaintiff would be entitled to 1/4th share, ought not to have allowed the Appeal, thereby dismissing the suit for partition intoto. After the death of Marappa Gonder, his half share would be inherited by the plaintiff and the first defendant in equal shares thereby, the plaintiff would become entitled to 1/4th share in all the items of the suit property (except item 14 which is discussed separately)

19. Coming to Item 14 of the suit property, this property admittedly, has been purchased in the name of the first defendant. It is the case of the first defendant that the said item of the property is his self acquired property. It is for the plaintiff, who claims that it is joint family property to prove that item 14 was purchased out of joint family funds or applying surplus joint family funds or income accruing from joint family property. Though there is a dispute with regard to the first defendant being a major or a minor on the day of purchase of item 14 in Ex.B9, in terms of the document, it is seen that the first defendant was a major. De hors this fact, if the plaintiff is able to establish that the property was only purchased in his



name and first defendant was only a name lender and the sale consideration came from the joint family funds, then the item 14 property can be treated joint family property. In this regard, the evidence on record shows that the property under Ex.B4. It is the specific case of the first defendant that property under Ex.B4 was purchased in his name and under Ex.B5, his maternal grandfather had bequeathed 30 cents in his favour and that both the lands were giving sufficient yield and only from the income that was accruing from the said lands, under Ex.B4 and B5, item 14 was purchased under Ex.B9, sale deed. It is not disputed that the properties covered under Ex.B4 and B5 were subsequently sold by the first defendant, along with his mother under Ex.B6 to B8 on 27.08.1989.

20. It is also the specific case of the first defendant that, if Ex.B14 property was joint family property, then the plaintiff ought to have treated properties covered under Ex.B4 and Ex.B5 also as joint family properties. Admittedly, property under Ex.B4 was purchased in the year 1954, when the first defendant was barely 8 months old and the consideration was paid by the father of the first defendant. Therefore, it cannot be contended that the said property was joint family property as claimed by the plaintiff. If it was



joint family property, the property would not have been purchased in the name of the junior member who was having no income. Thus, the intention of the father was only to treat the property covered under Ex.B4 to be the separate property of the first defendant. The First Appellate Court found that the mother stood as the guardian, for purchase of Ex.B4 property and not the father.

21. It is also stated in the sale deed that the property was purchased by sale of jewels of the mother of the first defendant, who is also cited as the second defendant in the suit. The contents of Ex.B4, sale deed cannot be called in question, especially by letting in oral evidence to be contrary, which is a bar under the provisions of the Indian Evidence Act, 1872. Therefore, Item 14 property purchased under Ex.B9, can only be treated as a separate property of the first defendant to benefit him and not joint family property available for partition at the hands of the coparceners.

22. From the evidence, it is seen that property covered under Ex.B4, sale deed and Ex.B5 Will, were fertile lands, having water supply from lower Bhavani and also from Well. D.W.1 also states that out of income that



was accruing from the said properties and along with the income of the mother's milk vending business, the property under Ex.B9, viz., item 14 was purchased. He has also denied the suggestions that property in Ex.B4, was not his separate property but purchased out of joint family funds.

23. I do not find any admission made by D.W.1 in cross examination, which goes to the aid of the plaintiff to support the plaintiff's case that item 14 was the joint family property and not separate property of the first defendant. Even on the side of the plaintiff, there is no satisfactory evidence adduced to dislodge the presumption that the property standing in the name of the first defendant was not his separate property. Therefore, in view of the same, I do not find any interference required insofar as the finding arrived at by the First Appellate Court, under challenge in S.A. No.331 of 2017.

24. With regard to S.A. No.330 of 2017, the plaintiff being the first defendant's son and grandson of Marappa Gounder would admittedly be entitled to 1/4th share in the suit properties (the half share of the first defendant). **However, the First Appellate Court, despite recording the**



same, dismissed the Appeal, confirming the dismissal of the suit by the Trial Court. Therefore, exercising power under Section 100 CPC, I am constrained to interfere with the findings of the Courts below. S.A. No.330 of 2017 is partly allowed by decreeing the suit insofar as items 1 to 13 and 15 to 17 and the plaintiff's 1/4th share in these items has to be necessarily declared and there shall be a preliminary decree to such effect and S.A. No.331 of 2017 is hereby dismissed. Consequently, connected Miscellaneous Petitions are closed. No costs.

05.04.2024

Index :Yes/No
Internet : Yes/No
Neutral Citation :Yes/No.
Speaking order/Non-speaking order
rkp

To

1. The Principal District Judge, Erode.
2. The Sub Judge, Perundurai, Erode



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S.A. Nos.330 & 331 of 2017

P.B.BALAJI, J,

rkp

Pre-delivery Judgment in
S.A.Nos.330 & 331 of 2017
and
CMP. No.7809 & 7810 of 2017

05.04.2024



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S.A. Nos.330 & 331 of 2017

S.A. Nos.330 & 331 of 2017

P.B.BALAJI, J.,

Today, this matter is listed under the caption '*for being mentioned*'.

2. The learned counsel for the respondents 7 to 9 in S.A. No.330 of 2017, respondents 1 to 3 in S.A. No.331 of 2017, would bring to my notice, a factual error at paragraph No.20 of the judgment dated 05.04.2024. In the sixth line of the paragraph No.20, it should read as “maternal grandfather” of the first defendant instead of “father” of the first defendant. Hence, the Registry is directed to correct the said error viz., “maternal grandfather” instead of “father” in the judgment dated 05.04.2024.

3. Except for the aforesaid modification, judgment dated 05.04.2024, remains unaltered in all other respects.

29.04.2024

rkp

Note: Registry is directed to issue a fresh