



A.S(MD)Nos.7 & 26 of 2015

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 25.03.2024

CORAM:

THE HON'BLE MR.JUSTICE **P. DHANABAL**

A.S(MD)Nos.7 & 26 of 2015

A.S(MD)No.7 of 2015:

Rengasamy

... Appellant/2nd Defendant

Vs.

1.Tamilselvi

... 1st Respondent/Plaintiff

2.Duraisamy @ Durairaj

3.Saravanan

4.Ramesh

5.Muthulakshmi

(Minor respondents 3 to 5 are declared as majors and guardianship of their father and natural guardian (R-2) is discharged vide Court order, dated 25.04.2022 made in C.M.P(MD)Nos.3683 & 3684 of 2022 in A.S(MD)Nos.7 & 26 of 2015)

6.Nallammal

... Respondents 2 to 6/
Defendants 1, 3 to 6



A.S(MD)Nos.7 & 26 of 2015

Prayer : This Appeal Suit filed under Section 96 of CPC., against the judgment and decree, dated 27.02.2014 passed in O.S.No.57 of 2012 on the file of the II Additional District Judge, Tiruchirappalli.

For Appellant : Mr.P.Vinoth
For R-1 : Mr.M.Saravanan
For R-2 to R-4 &
R-6 : No appearance
R-5 : SS Petition due

A.S(MD)No.26 of 2015:
Tamilselvi

... Appellant/Plaintiff

Vs.

1.Duraisamy @ Durairaj

2.Rengasamy

3.Saravanan

4.Ramesh

5.Muthulakshmi

(Minor respondents 3 to 5 are declared as majors and guardianship of their father and natural guardian (R-1) is discharged vide Court order, dated 25.04.2022 made in C.M.P(MD)Nos.3683 & 3684 of 2022 in A.S(MD)Nos.7 & 26 of 2015)

6.Nallammal

... Respondents/Defendants



A.S(MD)Nos.7 & 26 of 2015

Prayer : This Appeal Suit filed under Section 96 of CPC., to set aside the judgment and decree, dated 27.02.2014 passed in O.S.No.57 of 2012 on the file of the II Additional District Judge, Tiruchirappalli.

For Appellant : Mr.M.Saravanan

For R-1 & R-3 to
R-6 : No appearance

For R-2 : Mr.P.Vinoth

COMMON JUDGMENT

These appeals have been preferred as against the decree and judgment passed in O.S.No.57 of 2012 on the file of the II Additional District Judge, Tiruchirappalli, wherein the first respondent herein in A.S(MD)No.7 of 2015 and appellant in A.S(MD)No.26 of 2015 has filed a suit for partition as against the defendants therein and the suit was partly decreed in her favour. As against the decree and judgment, the second defendant has filed the appeal in A.S(MD)No.7 of 2015 and plaintiff has filed the appeal in A.S(MD)No.26 of 2015.

2. The gist of the plaint averments are as follows:

The plaintiff and the second defendant are daughter and son of first defendant. The marriage between the first defendant and the father of



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plaintiff and second defendant was solemnized on 24.11.1983 and the same was registered at Kulithalai Sub Registrar Office. Due to their wedlock, the first defendant and the plaintiff born to them through their mother Lakshmi. The first defendant had illicit intimacy with one Pachaiammal and the defendants 3 to 5 are children born to the first defendant through the said Pachaiammal. Since the first defendant had illicit intimacy with Pachaiammal, he abandoned his first wife, plaintiff and the second defendant before 15 years. Defendants 3 to 5 are illegitimate children of first defendant. The suit property was allotted to the first defendant through partition between their brothers, dated 17.02.2011. The properties are Hindu un-divided joint family properties of the plaintiff and first and second defendants and they are in joint possession over the properties. In order to defeat the valuable rights of the plaintiff over the properties, the first defendant executed a settlement deed in favour of the sixth defendant, dated 09.01.2012. The said settlement deed was not acted upon and the sixth defendant also not in possession of the property. Since the property is un-divided property, the first defendant cannot execute settlement deed in favour of the sixth defendant. The plaintiff and defendants 1 and 2 each are entitled to 1/3 share over the suit



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properties. The plaintiff demanded the first defendant for amicable partition. But he was not amenable for amicable partition. Hence, the plaintiff and the second defendant issued notice to the first defendant, dated 23.02.2012. The said notice was received by the first defendant but he has not come forward to partition over the properties. Therefore, the plaintiff filed the suit for partition.

3. The written statement filed by the first defendant are as follows:

The plaint averments are denied as false, frivolous and vexatious. The suit is not maintainable either in law or on facts and the same is liable to be dismissed *in limine*. The properties are not joint family properties as alleged in the plaint. It is false to state that the defendants 3 to 5 are illegitimate children of first defendant. In fact the suit property was allotted to the first defendant in a partition deed between himself and his brothers. The first defendant enjoyed the property as his self acquired property and he sold the property to the sixth defendant on 09.01.2012 for valuable consideration. There is no cause of action for the suit and the suit is liable to be dismissed.



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4. The gist of the written averments of the sixth defendant are as follows:

The allegations in the plaint are denied as false. The suit is not maintainable either in law or on facts and the same is liable to be dismissed *in limine*. It is false to state that the suit property is ancestral property and the plaintiff and defendants 1 and 2 are entitled to 1/3 share over the property. In fact this sixth defendant has purchased the suit property for good and valuable consideration from her brother first defendant. In order to avoid stamp duty, she registered it as a gift deed. From the date of gift deed, the sixth defendant is in possession and enjoyment of the suit property. Since the suit property was purchased by the sixth defendant from the first defendant, the plaintiff is not entitled to any share over the property. Hence, the suit is liable to be dismissed.

5. Based on the above said pleadings, the Trial Court has framed the following issues:

1. Whether the suit properties are Hindu Joint Family properties?
2. Whether the suit properties are separate properties of the first



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defendant by virtue of partition made already and whether such partition is proved?

3. Whether the settlement deed executed by first defendant in favour of the sixth defendant is true and valid and binding on the plaintiff?

4. Whether the plaintiff is entitled for the relief of partition as prayed for?

5. To what other relief?

6. Before the Trial Court, on the side of the plaintiff, she herself was examined as P.W.1 and another witnesses also was examined as P.W.2 and also marked Exhibits A.1 to A.6. On the side of the defendants, they examined D.W.1 and D.W.2 and marked Exhibit B.1.

7. The Trial Court after considering the evidences adduced on both sides has partly decreed the suit and ordered the suit property to be divided into 6 shares and allot one such share to the plaintiff and second defendant along with the children born to the first defendant through second wife (i.e.,) defendants 3 to 5 are also entitled to each 1/6 share.



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8. Aggrieved by the above said judgments, the second defendant has filed the appeal in A.S(MD)No.7 of 2015 and the plaintiff has filed the appeal in A.S(MD)No.26 of 2015. In both the appeals, the appellants have raised the same grounds.

9. The grounds raised in A.S(MD)Nos.7 & 26 of 2015 are as follows:

1. The judgment and decree of the Court below are vitiated by material irregularity, perverse and un-sustainable.

2. The Trial Court rightly held that the suit properties are the ancestral properties and the first defendant had no right to alienate to sixth defendant, who is his sister.

3. The Trial Court rightly held that Exhibit A.3 - Partition Deed through which the first defendant and his brothers Periyasamy and Pichai divided among themselves the properties and that 'C' schedule property, which is the suit property was allotted to the first defendant.

4. The Trial Court rightly held that the plaintiff and the second defendant are the legitimate children born to the legally wedded wife of the first defendant but denied 1/3 share to the plaintiff.



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5. The Trial Court ought to held that the plaintiff, the first defendant and the second defendant are entitled share equally among themselves the suit property.

6. The Trial Court erred in holding that the illegitimate children are entitled to the ancestral property in equal share with the legitimate children.

7. The Trial Court failed to appreciate that the illegitimate children are entitled to succeed to the separate property of their father and not entitled to share the ancestral property.

8. The Trial Court strangely decreed 1/6 share to each of the defendants 3 to 4 who themselves did not claim any share in the suit property.

9. The Trial Court ought to have decreed the suit for partition as prayed for passing a preliminary decree for partition to divide the suit property into three shares and allot one such share to the plaintiff.

10. Since both the appeals are arising out of the same judgment, this Court has heard the appeals together and passed common judgment.



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11. For the sake of convenience and brevity, the parties herein after will be referred as per their status / ranking in the Tribunal.

12. The learned Counsel appearing for the appellant / plaintiff in A.S(MD)No.26 of 2015 and first respondent in A.S(MD)No.7 of 2015 would contend that originally the suit properties belonged to the father of the first defendant through ancestrally and the first defendant along with his brothers partitioned their ancestral properties through partition deed, dated 17.02.2011. The first defendant married one Lakshmi as first wife and the plaintiff and second defendant are the children born through the said Lakshmi. The defendants 3 to 5 are born to the first defendant through his second wife. Since the properties are ancestral properties and the first defendant got the properties through partition and on the date of partition, the plaintiff and the second defendant were born, the said properties have to be treated as ancestral properties. Therefore, the plaintiff and second defendants along with the first defendant are each entitled to share over the suit property. The defendants 3 to 5 are illegitimate children of first defendant and thereby, they are only entitled to the property of the first defendant. But the Trial Court at the time of passing preliminary decree,



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allotted shares equally to all the children of the first defendant (i.e.,) legitimate children and illegitimate children. The defendants 3 to 5 are not entitled to share over the ancestral property and they are only entitled to the property allotted to the first defendant. Therefore, the decree and judgment passed by the Trial Court are not in accordance with law and the same are liable to be set aside.

13. To support the contention of the learned Counsel for the appellant, he relied upon the following judgments:

1) Revanasiddappa and Another Vs. Mallikarjun and Others reported in 2023 (10) SCC page 1 and

2) Partvati and Others Vs. Gangawwa and Others reported on the file of High Court of Karnataka, Kalaburagi Bench.

14. The learned Counsel appearing for the appellant in A.S(MD)No. 7 of 2015 and first respondent in A.S(MD)No.26 of 2015 has adopted the arguments of appellant in A.S(MD)No.26 of 2015 and other respondents not appeared and their names were printed in the cause-list.



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15. This Court had heard both sides and perused the records and upon hearing both sides and perusing the records, the points for determination in A.S(MD)No.7 of 2015 are as follows:

1) Whether the second respondent / first defendant is entitled to execute settlement deed in respect of the un-divided joint family properties in favour of sixth respondent / sixth defendant?

2) Whether the respondents 3 to 5 / defendants 3 to 5 are entitled to share over the suit properties when the second respondent / first defendant father is alive?

3) Whether the second defendant / appellant is entitled to 1/3 share over the suit properties?

3) Whether the appeal has to be allowed or not?

4) To what relief the appellant is entitled to?

16. The points for determination in A.S(MD)No.26 of 2015 are as follows:

1) Whether the first respondent / first defendant is entitled to execute settlement deed in respect of the un-divided joint family properties in favour of sixth respondent / sixth defendant?



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2) Whether the respondents 3 to 5 / defendants 3 to 5 are entitled to share over the suit properties when the first defendant father is alive?

3) Whether the appellant / plaintiff is entitled to 1/3 share over the suit properties?

3) Whether the appeal has to be allowed or not?

4) To what relief the appellant is entitled to?

Point Nos.1 and 2 in both the appeals:

17. This is the case filed by the plaintiff (i.e.,) appellant in A.S(MD)No.26 of 2015 has filed a suit for relief of partition as against the defendants in the suit and the suit was decreed and allotted the share along with defendants 3 to 5, who are the sons born to the first defendant through second wife. Therefore, the children of first wife filed the present appeal. It is admitted fact that the suit properties are allotted to the first defendant through partition between his brothers. The copy of partition has been marked as Exhibit A.3. On careful perusal of Exhibit A.3, it reveals that the properties are ancestral properties of the first defendant and his brothers and they partitioned their properties. Since the properties are ancestral properties, the first defendant is entitled the property through



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ancestrally after partition, the properties shall be treated as separate property of the first defendant until his children born to him. Until such time, he can deal with the property as his separate property. Once any children born to him then the properties have to be treated as his ancestral properties.

18. To support his contention, he relied upon the judgment in *Rohit Chauhan Vs. Surinder Singh and Others reported in 2013 (4) CTC 539*.

On careful perusal of the above said judgment, it is clear that the partition of ancestral shall be treated as separate property of the individual until his son is born. But once he has a son, he cannot alienate the ancestral property. In the case on hand also the first defendant got the ancestral property through partition. On the date of partition itself, the plaintiff and second defendant were born to the first defendant. Therefore, in view of the above said judgment, the first defendant cannot alienate the property. Further the learned Counsel appearing for the appellant also would relied upon the judgment in *Shanmugaiah and Another Vs. Thirumalayandi @ Thirumalai Pandaram and Others reported in 2004 (2) MLJ 457*, wherein, this Court held that it is well settled proposition of law that one



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of the coparcener in the coparcenary without the consent of the other coparceners cannot execute a settlement deed. Therefore, in view of the above said judgment, the first defendant cannot alienate the property and cannot execute settlement deed in favour of the sixth defendant in respect of the un-divided coparcenary property.

19. In this case, on the date of partition itself, the plaintiff and defendants were born to him and thereby, the properties have to be treated as ancestral property. Once the property is treated as ancestral property, the first defendant has no right to alienate the property and he could alienate the property only for his particular share. It is admitted fact that the plaintiff and the second defendant (i.e.,) appellants in both appeals are children of first defendant through first wife. The defendants 3 to 5 (i.e.,) respondents 2 to 5 herein are children born to first defendant through second wife. It is well settled law that the illegitimate children are entitled to share over the properties of their father and not from other person.

20. In this context, the learned Counsel appearing for the appellant has relied judgments in *Revanasiddappa and Another Vs. Mallikarjun*



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and Others reported in 2023 (10) SCC 1 and Partvati and Others Vs. Gangawwa and Others, on the file of High Court of Karnataka, Kalaburagi Bench.

21. In *Revanasiddappa's case*, the Hon'ble Supreme Court in paragraph No.3 has held as follows:

3. The correctness of the decisions in Jinia Keotin, Neelamma, and Bharatha Matha has been doubted by a two-Judge Bench in Revanasiddappa Vs. Mallikarjun. In its order referring the correctness of the earlier decisions to a larger Bench, the Court has premised its doubt on the following basis:

3.1. Section 16(3) does not qualify the expression "property" either with "ancestral or self-acquired" property. It sets out an express mandate that such children are only entitled to the property of their parents and not of any other relations;

3.2. Once children born from a void marriage (or a voidable marriage which has been declared to be nullity) are declared to be legitimate by sub-sections(1) and (2) of Section 16, they cannot be discriminated against and will be on a par with other legitimate children for the purpose of all the rights in the property of their parents, both self-acquired and ancestral;



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3.3. Section 16 was amended by Act 68 of 1976.

As a consequence of the amendment, the common law view that children of a marriage which is void or voidable "are illegitimate" "ipso jure" has to change completely. The law has a socially beneficial purpose of removing the stigma of illegitimacy faced by children of such marriages, since the children themselves are innocent;

3.4. The benefit of Section 16(3) is available only when there is a marriage but the marriage is either void or voidable in view of the provisions of the legislation;

*3.5. In the case of joint family property, children born from a void or voidable marriage will only be entitled to a share in their parents' property but not in their own right: (**Revanasiddappa case**, SCC page 11, para 38)*

"38.Logically, on the partition of an ancestral property, the property falling in the share of the parents of such children is regarded as their self-acquired and absolute property. In view of the amendment, we see no reason why such children will have no share in such property since such children are equated under the amended law with legitimate offspring of valid marriage. The only limitation even after the amendment seems to be that during the lifetime of their parents such children



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cannot ask for partition but they can exercise this right only after the death of their parents."

3.6. While the relationship between the parents may not be sanctioned by law, the birth of a child in such a relationship has to be viewed independently of such relationship. The interpretation of Section 16(3) must be based on the constitutional values of equality of status and opportunity as well as individual dignity;

3.7. A child born in such a relationship is innocent and is entitled to all the rights which are given to other children born in a valid marriage subject to the limitation that the right is confined to the property of the parents; and

3.8. Section 16(3) as amended does not impose any restriction on the property rights of the children born of a void or voidable marriage except limiting it to the property of their parents. Hence, such children will have a right to whatever becomes the property of their parents, whether self-acquired or ancestral."

22. The Hon'ble High Court of Karnataka [*Paravati and Others Vs. Gangawwa and Others*] after referring the judgment of Supreme Court in *Revanasiddappa's case* held in paragraph No.15:

"15. The Hon'ble Supreme Court in the case of Revanasiddappa and another Vs. Mallikarjun and



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Others reported in 2023 (10) SCC 1 had an occasion to deal with the rights of the illegitimate children of the deceased in respect of the share of the property left by the deceased father. In that connection, taking into consideration that the plaintiffs along with deceased Mallappa Patil shall get 1/4th share each in the suit."

23. On careful perusal of the above said judgments, it is clear that the illegitimate children will have a right to whatever becomes the property of their parents whether self acquired or ancestral. In the case on hand also the father of the defendants 3 to 5, namely, the first defendant entitled to 1/3rd share over the suit property and thereby, the defendants 3 to 5 are entitled to share of 1/3rd share of the first defendant (i.e.,) their father.

24. In this case, since the properties are ancestral properties, the children of first defendant through first wife each are entitled to 1/3 share over the properties and 1/3 share has to be allotted to the first defendant (i.e.,) father of the plaintiff and first and defendants 3 to 5. The defendants 3 to 5 are entitled to share over the properties allotted to the first defendant. Unfortunately, the first defendant executed a settlement deed in favour of the sixth defendant treating that the property is his absolute



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property. The sixth defendant also filed written statement stating that she purchased the property from the first defendant but in order to avoid the Court fee, she got the deed in the name and style of gift deed. After the date of sale deed she has been in possession and enjoyment of the suit property. It is well settled law that the settlement deed cannot be executed in respect of the un-divided joint family properties without the consent of other coparceners. In this case, the plaintiff and second defendant are also share holder of the property and thereby, the settlement deed executed by the first defendant in favour of the sixth defendant is not binding upon the plaintiffs and it has not been acted upon. Therefore, the settlement deed executed by the first defendant is not valid. Since the father of the defendants 3 to 5 is alive, they are not entitled to any share over the property and they are only entitled to share from their father first defendant. Therefore, the defendants 3 to 5 are not entitled to any share over the property during the lifetime of first defendant. Thus the points are answered.

Point No.3 in both the appeals:

25. This Court has decided in the previous points that the defendants



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3 to 5, who are born to the first defendant through second wife are entitled to share over the property of their father, first defendant and his father is entitled to 1/3 share over the property and in that share only the defendants 3 to 5 are entitled to share over the property and not entitled any share from the ancestral properties. Since the properties are ancestral properties of the plaintiff and the defendants 1 and 2, the plaintiff is entitled to 1/3 share over the property and the defendants 1 and 2 are each entitled to 1/3 share over the property. Therefore, the plaintiff is entitled to 1/3 share over the suit property.

Point No.4 in both the appeals:

26. The plaintiff being the daughter of the first defendant through his first wife has filed the suit for partition before the Trial Court. The Trial Court also held that the properties are ancestral properties of the plaintiff and the defendants 1 and 2. But at the time of allotting the share, the Trial Court failed to consider that the defendants 3 to 5 are born through second wife to the first defendant and thereby, they are only entitled to share over the properties of the first defendant. The first defendant is only entitled to 1/3 share and from that share only, the



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defendants 3 to 5 are entitled to share. Since the first defendant is alive, they are not entitled to any share over the properties during the life time of the first defendant. The Trial Court erroneously allotted share to the defendants 3 to 5 along with plaintiff and defendants 1 and 2. Therefore, the judgment and decree passed by the Trial Court are un-sustainable and liable to be set aside in respect of the allotment of shares.

27. In the result, the appeals in A.S(MD)No.7 of 2015 and A.S(MD)No.26 of 2015 are partly allowed and the decree and judgment passed by the Trial Court in O.S.No.57 of 2012, dated 27.02.2014 is modified to the effect that the plaintiff is entitled to 1/3 share over the property and a preliminary decree for partition is passed in favour of the plaintiff to divide the suit property into three equal shares and allot one such share to the plaintiff. There shall be no order as to costs.

25.03.2024

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

- 1.The II Additional District Judge,
Tiruchirappalli.
- 2.The Section Officer,
Vernacular Record Section,
Madurai Bench of Madras High Court,
Madurai.



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