



AS (MD)No.87 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED: 01.07.2024

CORAM:

THE HONOURABLE MRS.JUSTICE S.SRIMATHY

AS (MD)No.87 of 2017

Karuppanna Goundar (Died)

1.Papayeeammal

2.K.Subramani

...Appellants

Vs.

1.Pappathi

2.Kulandairasu

...Respondents

PRAYER: This Appeal Suit is filed under Section 96 of the Civil Procedure Code, to modify the Judgment and Decree, dated 07.04.2014 passed in O.S.No.51 of 2005 on the file of Principal District Judge, Karur.

For Appellants : Mr.V.Meenakshi Sundaram
for I.Velpradeep

For R1 : Mr.E.K.Kumaresan

For R2 : No Appearance

JUDGMENT

The present First Appeal is filed against the Judgment and Decree, dated 07.04.2014 passed in O.S.No.51 of 2005 on the file of Principal District Judge, Karur. The suit is filed for partition and separate possession by the respondent /

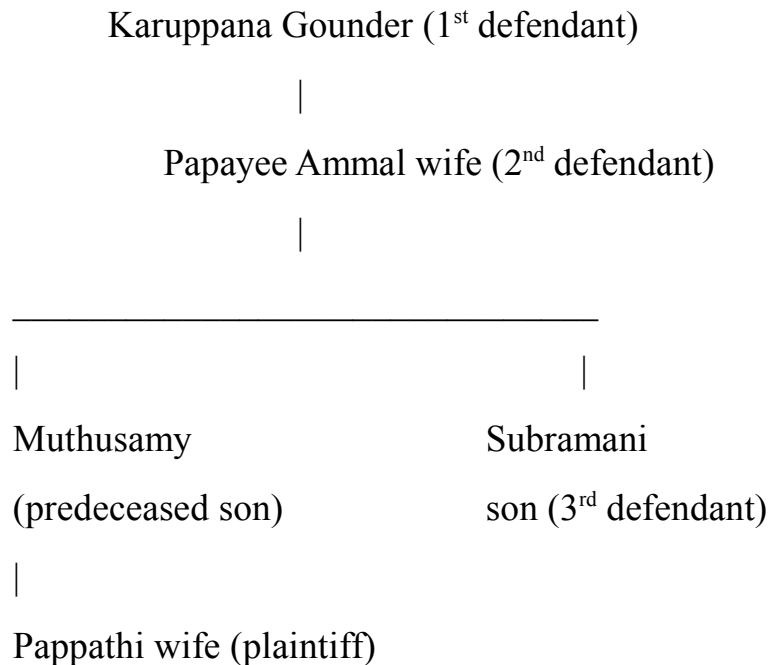


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2. The plaintiff in the suit is the 1st respondent herein, the 2nd and 3rd defendants in the suit are the appellants herein and the 4th defendant in the suit is the 2nd respondent herein. The 1st defendant died during the pendency of the litigation. For the sake of convenience, the contesting parties shall be referred as plaintiff and defendants as per the ranking in the suit.

3. The family tree is as follows:





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The plaintiff is the widowed wife of the predeceased first son of the 1st defendant Karuppana Gounder. The 2nd defendant is the wife of Karuppana Gounder. The 3rd defendant is the second son of Karuppana Gounder. The 4th defendant is the subsequent purchaser of the suit property.

4. The plaintiff had filed suit in O.S.No.51 of 2015 for partition and separate possession of the suit properties. The contention of the plaintiff is that the first item of the suit property is an agricultural nanja lands. The same is ancestral property being treated as joint family properties by the joint family consisting of father and two sons. The joint family was doing agricultural operations by raising various crops in the first item with good yield, thereby the family possessed sufficient surplus nucleus. The other items of the suit properties are purchased by the joint family from and out of the income derived from agricultural operations in the first item of the property. The 1st defendant being the Karta of the joint family all the properties and the records standing in the name of the 1st defendant. And the suit properties were purchased and possessed for the benefit of the joint family and they have also been treated as joint family properties till date. The 1st defendant being the elder member of the family all the revenue records standing in his name, the true copy of patta in respect of the suit properties are produced. After the death of the plaintiff's husband Muthuswamy on 16.11.1994, the



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plaintiff and the defendants are in peaceful possession and enjoyment of the suit properties till date without any partition. There is no debt over the joint family properties and there is no necessity to borrow any amount. As the plaintiff is not able to enjoy the suit properties along with the defendants, hence the plaintiff is demanding amicable partition and separate possession of her $1/6^{\text{th}}$ share in the suit properties. The fourth defendant is the close associate of the defendants and the defendants are colluded together in order to take away the share of the plaintiff, the defendants attempted to create sham and nominal documents in favour of the fourth defendant, hence the fourth defendant is included as a party. Hence suit is filed for partition seeking $1/6^{\text{th}}$ share. During the pendency of the suit, the 1^{st} defendant died intestate. As the widow of the predeceased son, the plaintiff is entitled to a share of the 1^{st} defendant's portion. Therefore, the plaintiff and the 2^{nd} defendant are each entitled to a $5/18^{\text{th}}$ share, while the 3^{rd} defendant is entitled to an $8/18^{\text{th}}$ share. Hence the suit was amended claiming $5/18^{\text{th}}$ share in the suit property.

5. The 4^{th} defendant remained exparte before the Trial Court. The defendants admit the relationship between the parties and the ancestral nature of the 1^{st} item of suit property. Also admit that the 1^{st} defendant is the Karta of the joint family. But deny the other contentions of the plaintiff. The defendants deny



that the 1st item is Nanja Land and the contention of the defendants are that the 1st item is a barren Manavari Punja Land used only for grazing cattle and no agricultural can be carried out and no income is generated. The further contention is that the items 2 to 10 of the suit properties are purchased by the 1st defendant. Especially the items 2 to 5 are purchased from one Rasappa Gounder and others under registered sale deeds dated 17.05.1966 and 22.04.1964. Item 6 from Chinnappa Gounder and others under registered sale deed dated 15.12.1973. Items 7 and 8 from one Sellammal under registered sale deed dated 21.11.1979. And items 9 and 10 from one Maitheen Bava Rowther and others under registered sale deed dated 04.04.1961, from his income through weaving, loading and unloading of sand from the river and other labour works. All the revenue records are in the name of 1st defendant. Hence items 2 to 10 are self-acquired properties of the 1st defendant and only 1st item is ancestral property. The defendants do not know the 4th defendant and he is added with ulterior motives and prayed to dismiss the suit. The 3rd defendant's written statement echoes the first defendant's assertions. Additionally, the 2nd defendant's supplementary statement challenges the plaintiff's entitlement to 5/18th share and submitted that the estate of the deceased 1st defendant solely belongs to defendants 2 and 3. The 2nd defendant submitted that a registered will was executed on 13.7.1995 by the 1st defendant and herself. Thereby bequeathed all properties to the 3rd defendant and a subsequent



cancellation deed dated 16.12.2010 has cancelled the will in respect of her right conferred under the will in favour of the 3rd defendant. 3rd defendant submitted that the plaintiff can only claim from her deceased husband's estate. The 3rd defendant's additional statement emphasizes that the will gives him absolute ownership of the suit properties upon the 1st defendant's death on 02.01.2009. He claims continuous, open, and exclusive possession, asserting that his title is perfected by prescription, thus invalidating the plaintiff's claims, and it is submitted that the plaintiff is not entitled to 1/6th share in the 1st item of the suit property and cannot ask any share in items 2 to 10 of the suit property. Hence, the question of partition and separate possession does not arise, and the averment is imaginary and prayed to dismiss the suit.

6. The plaintiff has filed a reply statement and submitted that the alleged will has no binding effect on her claim and contended that defendants 1 and 2 had no legal right to execute the will concerning the entire suit properties, rendering it invalid. Moreover, since the 1st defendant and 2nd defendant jointly executed the will and the 1st defendant has passed away while the 2nd defendant is still alive, the will cannot come into force. Consequently, the will does not support the defendant's case in any way, and the plaintiff prayed to decree the suit for partition.



7. After considering the plaint, written statement, documentary evidence and depositions filed in O.S.No.51 of 2005 the Trial Court had decreed the suit on 25.07.2011 in respect of items 1 to 5, 9 and 10 of the suit properties granting 1/6th share and dismissed in respect of items 6,7 and 8 of suit properties. Aggrieved over the same the defendants had preferred First Appeal in A.S.No.60 of 2012 and the same was allowed vide Judgment and Decree dated 06.01.2014 by remanding the case to the Trial Court to frame issue regarding the nature of the property and for fresh disposal. The parties were permitted to file additional documents. After re-appreciating the evidence and additional evidence of the parties, the Trial Court passed a preliminary decree dated 07.04.2014 in favour of the plaintiff, granting 1/6th share in items 1 to 8 of the suit properties and 5/18th share in items 9 and 10. Aggrieved over the same the present Appeal Suit is filed to modify the Judgment and Decree passed in the suit after remand.

8. It is seen that the parties have admitted the fact that the 1st item of the suit property is an ancestral property. In such circumstances, the plaintiff is entitled to 1/6th share in the 1st item of the suit property. The Trial Court has also rightly held that the plaintiff is entitled to 1/6th share in the 1st item of the suit property.



9. After remand order the 3rd defendant had filed Ex.B7 to Ex.B10 to prove that the 9th and 10th items of the suit properties are purchased by the 3rd defendant and hence the same belongs to him. However, the Trial Court had rejected the contention of the 3rd defendant and the reason stated is that the 3rd defendant had not pleaded that the 9th and 10th item belongs to him in the written statement. It is seen that the 3rd defendant had filed a separate written statement and verbatim reproduced the written statement of the 1st defendant. In both written statements, the contention of the defendants 1 and 3 is that the items 9 and 10 are self-acquired properties. But there is no clear pleading “whether it belongs to the 1st defendant or 3rd defendant as self-acquired property”. Therefore, it cannot be stated that there is no pleading at all in the present case. On perusing the Ex.B7 it is seen that the property originally belongs to Nallappa Gounder and has sold the same to Vellayappa Gounder. Then the said Vellayappa Gounder had executed two sale deeds, one exclusively by himself and another along with his son Chinnappan and had sold to Ramasamy Gounder which is evident from Ex.B8 and Ex.B9. Then the said Ramasamy Gounder had sold the property to the 3rd defendant which is evident from Ex.B10. When the documents Ex.B7 to Ex.B10 clearly states that the S.No.1157 sold to 3rd defendant, then the documents ought to be relied on. The consistent case of the defendants is that the items 9 and 10 are self-acquired properties. But there is no clarity whether it is 1st defendant’s self-



acquired properties or the 3rd defendant's self-acquired properties, but the same will not vitiate the claim of the defendants that it is "self-acquired property".

However the fact remains the 3rd respondent had purchased the property as per Ex.B10, then it has to be concluded that the item 9 and 10 properties are 3rd respondent's self-acquired property. Hence the plea of the defendants that the items 9 and 10 are self-acquired properties is acceptable. Therefore, this Court is of the considered opinion that the reasoning of the Trial Court is erroneous.

10. Further in the earlier round of litigation the defendants had preferred first appeal in A.S.No.60 of 2012 before this Court with the contention that the properties 2 to 10 are self-acquired properties and the Hon'ble Court had held that the Trial Court had not framed any issues to determine the nature of the property, whether self-acquired or ancestral and remanded the case back to the Trial Court. While remanding the Hon'ble Court permitted the parties to file additional documents to prove their case to determine the nature of the property. In such circumstances, the reasoning of the Trial Court that the 3rd defendant had not pleaded in the written statement that the property is purchased by the 3rd defendant is erroneous.



11. Once it is held that the items 9 and 10 belongs to the 3rd defendant, then the 3rd defendant being a junior member of the joint family, then the presumption that the property is joint family property is not available to the plaintiff. Such presumption is available to the plaintiff only against the Kartha or eldest member of the joint family. Now the burden shifts on the plaintiff to prove that the property is joint family property as far as item 9 and 10 are concerned. The plaintiff had not proved the same and hence this Court is inclined to interfere with that portion of the judgment and consequently, the plaintiff is not entitled to any share in items 9 and 10 of the suit schedule properties.

12. As far as the items 2 to 8 are concerned, the contention of the plaintiff is that the said properties are purchased out of the income from the 1st item, which is an ancestral property. The 1st item is a Nanja land, having Well and the land has yielding capacity, hence the item 2 to 8 properties were purchased from the income of the 1st item. But the said contention was refuted by the defendants and submitted that the 1st item of the property is Punja land and it was used as grazing land for cattle and no income is derived from the 1st item. The contention of the defendants was rejected by the Trial Court by relying on the deposition of the D.W.1 Pappayee (2nd defendant) wherein she had deposed that “1st item is Nanja land, there is a Well in the land, further nearby there is Raja aqueduct”. Further



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admitted that the calculation for cultivation submitted by the plaintiff is right. The

D.W.4 one Subramanian had deposed that “the land has Well and next to the land is Raja aqueduct”. Based on this admission the Trial Court has come to the conclusion that there ought to have been good yield in the land. After hearing the arguments along with the documents, this Court is of the considered opinion that when the land is Nanja and has Well with access to the Raja aqueduct, then it can be safely confirmed that the land is fertile wetland. Further it is seen that the items from 2 to 8 were purchased over a period of time. The Ex.B6 was purchased on 04.04.1961, Ex.B4 was purchased on 15.12.1973 and Ex.B5 was purchased on 27.11.1979 and hence purchase is over a period of time and with time gap. And the purchase on 17.05.1966 and 22.04.1964 (but documents were not produced for this purchase) would indicate that there were purchase periodically. During the 16 years period from 1961 to 1979 there were purchase and during the said period of 16 years there is no plea of draught. Hence definitely there will be surplus amount from the agricultural yield. The claim of the 1st defendant that he had earned through weaving is not proved since not even an iota of evidence is filed to this effect that he had the avocation of weaving. Curiously the defendants have claimed that they have another avocation of loading and unloading of river sand. Removing sand from the river is a crime and hence the claim of the defendants ought to be deprecated. However, even for this also absolutely there is no



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evidence to prove the same. If this avocation of loading and unloading is accepted, then for the same bullock cart or some vehicle is necessary, some instruments to remove the sand is necessary. And those would have been purchased from the basic income yielded from 1st item of the property. The long possession, patta or revenue documents would not prove the nature of the property. Further if the defendants claim ought to be accepted then for item 9 and 10 the patta stands in the name of the 1st defendant but the sale deed is in the name of the 3rd defendant. Since the sale deed stands in the name of the 3rd defendant this Court has held that the item 9 and 10 are self-acquired property of the 3rd defendant. Therefore except for the bare pleading in the written statement there is no evidence to prove that the items 2 to 8 are self-acquired property. The pleading in the written statement is not sufficient to hold the property is self-acquired property. Therefore, this Court is of the considered opinion that the items 2 to 8 are purchased from and out of the income derived from 1st item property and items 2 to 8 are joint family properties.

13. As far as the Will dated 13.07.1995 marked as Ex.B1 is concerned, the said Will was executed by 1st and 2nd defendant in favour of 3rd defendant regarding items 2 to 8. The 1st defendant died in the year 2009 and has come into effect on the date of death of the 1st defendant. The 2nd defendant had cancelled the



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Will dated 13.07.1995 through cancellation deed dated 16.12.2010 marked as

Ex.B2. If the property is self-acquired property, then the 1st defendant has every right to execute Will and the 3rd defendant would have acquired rights over the properties. When the 2nd defendant had cancelled the Will, then as far as her rights over the property is concerned, the same is with the 2nd defendant and it has not transferred to the 3rd defendant. But this Court had held that the items 2 to 8 of the suit properties are only joint family properties. In that case then the 1st defendant is entitled to bequeath only to the extent of his share alone to the 3rd defendant. And the 1st defendant is not entitled to bequeath the share of the predeceased son Muthusamy, through whom the plaintiff is seeking share in items 2 to 8 of the schedule of property. Therefore, this Court is of the considered opinion that the plaintiff is entitled to share in the items 2 to 8 of the suit schedule properties. The 1st defendant, 3rd defendant along with the predeceased son Muthusamy are entitled to 1/3rd share in the items 2 to 8 of the suit schedule properties. Since the son is predeceased, his share of 1/3rd would go to the 2nd defendant and plaintiff. Therefore, this Court is of the considered opinion that the plaintiff is entitled to 1/6th share in items 2 to 8 of the suit schedule properties.

14. For the reasons stated above, the plaintiff is entitled to 1/6th share in 1 to 8 suit schedule properties. But the plaintiff is not entitled to any share in items 9 and



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10 of the suit schedule properties. The impugned Judgment and Decree, dated 07.04.2014 passed in O.S.No.51 of 2005 on the file of Principal District Judge, Karur is modified to the extent stated above. With the above said observations, the appeal suit is disposed of. No Costs.

01.07.2024

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

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To

1. Principal District Judge, Karur.
2. The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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S.SRIMATHY, J.,

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