



S.A.(MD).No.803 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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RESERVED ON : 25.07.2024

DELIVERED ON : 21.10.2024

CORAM

**THE HON'BLE MR.JUSTICE G.ILANGO VAN**

**S.A.(MD).No.803 of 2022**  
**and C.M.P.(MD).No.12195 of 2022**

1.Menagapriyadharshini

2.B.Rani

3.S.Pugazhenth

... Appellants/Appellants/Defendants

Vs.

Kathiresan

... Respondent/Respondent/Plaintiff

**PRAYER :** Second Appeal filed under Section 100 of the Civil Procedure Code, to set aside the Judgment and Decree passed by the learned Subordinate Judge, Theni, in A.S.No.55 of 2017, dated 22.06.2022, confirming the Judgment and Decree passed by the District Munsif Cum Judicial Magistrate Court, Bodinayakanur in O.S.No.97 of 2011 dated 06.03.2017.

For Appellants : Mr.D.Nallathambi

For Respondent : Mr.M.Kannan

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## **JUDGMENT**

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This appeal has been filed against the Judgment and Decree passed by the learned Subordinate Judge, Theni, in A.S.No.55 of 2017, dated 22.06.2022, confirming the Judgment and Decree passed by the District Munsif Cum Judicial Magistrate Court, Bodinayakanur in O.S.No.97 of 2011 dated 06.03.2017.

### **2.The plaint averments are in brief:**

The suit properties and other properties originally belonged to one Veerapathran. Veerapathran had two wives called Agathaammal and Parvathiammal. On 08.07.1964, there was a partition by registered document, by which, 'A' schedule was allotted to Veerapathran and his second wife's children. Veerapathran and Paramasivam died. So the property devolved upon the second wife Parvathiammal and their son Karuppiah. On 23.02.1998, a portion of the A schedule allotted to Veerapathran and second wife's children was sold to the plaintiff by Parvathiammal and Karuppiah. Ever since from the date of sale the plaintiff was in possession and enjoyment. Revenue records were changed in the name of the plaintiff. On the west of the suit property, the



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first defendant is having properties. They wanted to purchase the property. But, the plaintiff refused. To prevent the defendant from further causing trouble the suit is laid for permanent injunction and cost.

3.Statement was filed by the first defendant with the following averments, which are adopted by the defendants 2 and 3:

Original ownership by Veerapathran is admitted. Within a week from the date of partition deed dated 08.07.1964 Paramasivan died. Later Veerapathran also died. But during the life time neither Veerapathran nor Paramasivam executed any document in respect of the properties. Karupppiah executed sale deed in respect of S.No.249/5C measuring about 45 cents on 18.09.1991 in favour of his daughter Kavitha. Karupppiah has no right to execute the settlement deed. After the death of Veerapathran and Paramasivan, the defendants are entitled to the share through Sundarraaj. Sundarraaj is the son born through first wife to the Veerapathran. Since title is under issue, suit ought to have been filed for declaration also. The entire property is in possession and enjoyment of the defendants. The third item was purchased by Sundarraaj from one Natrajan on 13.11.1964. That property was sold by Parvathiammal and



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Karuppiah in favour of the plaintiff, which is not legal, which came to the knowledge of the defendants only belatedly. Sundarraaj is also necessary party, since he is alive. So the suit is bad for non joinder of necessary parties.

4.On the basis of the pleadings, the trial Court formulated the following issues.

- 1.Whether the property belongs to the plaintiff and is possession?
- 2.Whether the suit is bad for non joinder of necessary parties?
- 3.Whether the plaintiff is entitled for the decree of permanent injunction?
- 4.To what other relief?

5.To substantiate the case, on the side of the plaintiff one witness was examined and 8 documents were marked. On the side of the defendants no witness was examined and no document was marked.

6.At the conclusion of the trial Court process suit was decreed as prayed for with costs. Against which appeal was preferred before the Sub Court, Theni in A.S.No.55 of 2017 by the defendants. Appeal was



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dismissed concurring with the Judgment and Decree of the trial Court.

Against which this second appeal is preferred by the defendant.

7. Notice was ordered to the respondent. They have also entered appearance on 21.11.2023. The following substantial question of law was framed?

1. Whether the divided son is entitled to claim share in the properties of the father, allotted to him in partition and the properties purchased by the father after the partition, under Section 8 of Hindu Succession Act?

8. The suit has been filed for permanent injunction. There is concurrent finding by the trial Court and by the appellate Court. Second appeal is preferred against the concurrent findings. Perhaps on this point, the predecessor's Bench of this Court did not intend to admit the second appeal. So notice of motion was ordered. The respondent also appeared and from the recorded proceedings it is seen that the matter was heard by previous Bench and reserved for Judgment. After going through the entire records, I suppose that the previous Bench thought it fit to frame



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the substantial question of law as noted above finding that substantial question of law are involved. More particularly when records were placed before this Court that more than one suit pertaining to subject matter were filed. To give quietus once for all, it appears that the above said substantial question of law was framed.

9. One important aspect omitted to be taken in this is that Sundarraaj still alive. It is admitted by the appellant in the written statement itself that Sundarraaj, his wife and his children namely Pugalendhi, Asila Rani and Menaha Priyadharshini cannot claim any right over the properties. That is why before the trial Court, a specific plea was raised that suit is bad for non joinder of necessary parties. Even Sundarraaj was not brought on record himself, in the absence of Sundarraaj any discussion if made to the title, it will be only academical and perhaps, it appears that realizing this position in the written arguments filed by the appellants, they have stated that the parties must be permitted re-ligate to the comprehensive suit on title. But, however, since the issues are raised it is the duty of the court to address the same.



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10. Now coming to the issue. Before we go into the disputed title, it must be bear in mind that the plaintiff namely Kathiresan, who is the respondent herein is stranger to family, which means family of Veerapathran and his legal heirs. The defendants are the children of Sundarraaj. Sundarraaj was born to Veerapathran through the first wife namely Agathammal. So the plaintiff had to face a fight from one branch of Veerapathran on the ground that he purchased the property from the other branch. The vendor to the plaintiff is the second wife of Veerapathran called Parvathiammal and the son called Karuppiah. The second wife's children are not before the Court. Except the plaintiff, there was no oral evidence from the family of Veerapathran. Not even the defendants, who are the appellants herein, chose to enter into the witness box and give evidence about the affairs of the family. So it is seen that it is a un equal fight. But, however it was argued at length before this Court.

11. The partition was entered between Sundarraaj on one side, Veerapathran and his minor son on the other side through Parvathiammal. Now, the legal heirs of Sundarraaj claims right over the



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property left by Veerapathran, stating that being the first class legal heir their father Sundarraaj get right in the property left by Veerapathran under Section 8 of the Hindu Succession Act.

12.Per contra, it is the legal plea raised by the respondent stating that after separation from the joint family Sundarraaj had no right in the property left by Veerapathran. So according to the respondent herein Sundarraaj can claim right over the property left by Veerapathran, if there was complete disruption of joint family. Then only, after partition, whatever, left by Veerapathran will devolve upon all the legal heirs as per Section 8. If there is no disruption in total, then a separated son cannot lay a claim over the property left by the Veerapathran after partition.

13.To clarify the position more clear, we can take that the joint family originally consists of Veerapathran, Sundarraaj, Rathinam through the first wife and Karuppiah, Paramasivan through the second wife. Now on the date of partition, it is seen that Rathinam and Paramasivan were dead. So partition was entered between Sundarraaj on one side,



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Veerapathran and Karuppiah on the other side. So according to the respondent after partition in 1964 Veerapathran and Karuppiah continued the coparcenary. So by virtue of explanation under Sections 2 to 6 of Hindu Succession Act, 1956, Sundarraaj cannot lay any claim. It is further clarified by the number of judgments. We will refer to the Judgment later.

14. Against this substantial argument on the preliminary issue, the counsel for the appellant would submit that intention of Veerapathran is the deciding factor here. From the recitals made in the partition deed intention was clear to cause disruption of the joint family in entirety. So when there is disruption of the joint family what ever property acquired or allotted to the father is amenable to Section 8 of the Hindu Succession Act. So according to him, the question of survivorship will not arise here. He relies upon the recitals made in the partition deed.

15. Per contra, the learned counsel for the respondent would submit that in addition to the above said preliminary point that there was no total disruption of the joint family, only Sundarraaj himself separated and



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object of the partition deed is that Sundarraaj should not claim any right over the other properties. He is also referring to the equal valuation of the properties allotted to Sundarraaj. He further submitted that the minor continued with father as coparcenary. So according to him Sundarraaj absolutely has no right over the properties left by Veera Pathiran.

16.He gives the oral evidence of the partition. But speak about the intention of Veera Pathiran. None is available except the predecessor. So the appellants ought to have examined any one of the person, who were conversant with the family affairs. But, none was examined. So we will go only by the recitals in the documents. The document reads that the father enter into the partition along with his two minor sons namely Paramasivam and Karuppiah on one side and Sundarraaj on other side; The properties were jointly allotted to Veerapathiran and his minor sons namely Paramasivam and Karuppiah. But, so far Sundarraaj is concerned it was allotted absolutely. So this itself indicate that the Sundarraaj did not want to continue in the coparcenary but separated. So the contention on the part of the appellant that there was total disruption of joint family is not correct on records. The interpretation given by the appellant



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regarding the recitals mentioned above is not supported by the meaning.

So this argument on the side of the appellant is rejected and I find that there was no total disruption of the joint family.

17.To overcome the legal hurdle a new plea has been taken by the appellant herein in the written arguments that Veerapathiran's marriage with Parvathiammal is not valid under law. There is no legal divorce between Veerapathiran and Agathammal. So according to them, in an un-effected partition deed must be construed as a document conferring absolute title upon the Veerapathiran. But, such a belated plea cannot be taken. That was not the plea taken at the time of trial. Moreover as mentioned above, absolutely there is no evidence on record to show the same.

18.Another plea taken by the appellant is that even if Veerapathiran continued as a joint owner along with minor children, after his death, the property will devolve upon his legal heirs namely Sundarraaj. He has referred to Judgment of the Full Bench of this Court, in the case of *The Additional Commissioner of Income Tax, Madras 1*



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***Vs. P.L.Karuppan Chettiar*** reported in ***AIR 1979 Mad. 1***. That Judgment deals about section 8.

19. There can be no quarrel on the preposition of law that the property allotted to father in a partition will become a separate property. But, here it is not the issue as mentioned above. Coparcenary continued with second wife's children.

20. Now coming back to the meaning of separation and the effect of right to Sundarraj, the learned counsel for the respondent referred to the Judgment of the Division Bench of Karnataka High Court in the case of ***M.V.Shivaji Rao Kore and others Vs. Rukminiyamma and others*** reported in ***AIR 1973 Mysore 113*** and another judgment of the Division Bench of the Patna High Court in the case of ***Satyanarain Mahto and another Vs. Rameshwar Mahto and others*** reported in ***AIR 1982 Pat 44***.

21. We can extract the judgment of the Mysore High Court for better appreciation.

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*“Explanation 2, only reproduces the law which was already in force before the Act came into force as understood by some High Courts in India. A son who is divided from a family was not entitled to claim a share in the property of the father on his death if there were undivided son or sons living with him at the time of his death. Explanation 2 does no more than incorporating the same principle of law in the Act. It states that the proviso to Section 6 would not enable a person who has separated himself from the coparcenery before the death of the deceased or any of his heirs to claim on intestacy a share in the estate of the deceased. It declares that the disability which a divided member was suffering from continues to be operative even after the Act comes into force. The principle underlying the said view of law is that persons who continue to remain joint with other members of the family should be preferred in the matter of intestate succession to a person who has gone out of the family by taking away his share. Probably that was considered to be in consonance with the notions of the joint family system prevailing in India. The said disability was a consequence of a voluntary act on the part of the separated member.”*



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22.In Judgment of Patna High Court, the relevant portion is extracted hereunder.

*“5. We explain this point by giving an illustration. There was a separation between A, the father, and his two sons -- B and C. B completely separated from his "father. After partition, C remained joint with A. After the death of A, C will inherit the property by virtue of Expln. 2. B cannot lay any claim for partition in respect of the property left by A after his death. We give another example. There was a separation among A, B and G. A was the father and B and C were his sons. All the three were living separately. A died leaving behind his widow and two sons -- B and C. B and C along with the widow will be entitled to equal share in view of Section 8 of the Act.”*

23.Further it was clarified by this Court in the case of ***N.Pitchai Vs. Oyyammal and Others*** reported in ***1993 (II) MLLJ 236***.

*“16. ...*

*....*

*....*

*....*

*No doubt, the above said proviso would apply since the first defendant is a Class I heir of*



*Nadukkattan. Explanation 2 to the said proviso of Section 6 of the Act says that nothing contained in the said proviso shall be construed as enabling "a person who has separated .himself from the coparcenary before the death of the deceased" to claim on intestacy a share in the interest referred to therein. No doubt it is clear that defendants 2 to 4, having separated themselves from -the coparcenary under Ex.A-1 partition deed, cannot claim inheritance from Nadukkattan when he died subsequently. But the question is whether the first defendant can be deprived of her share of inheritance from Nadukkattan in view of Ex.A-1-partition deed, as contended by the learned Counsel for the appellant. In other words, can it be said that she has separated herself from the coparcenary, pursuant to Ex.A-1."*

Further in Paragraph 24, this Court has also held regarding the continuation of coparcenary as hereunder:-

*"Unless there is definite evidence to show that after Ex.A-1 partition deed, the plaintiff and his father continued only as co-owners, it has to be held that they continued only as co-parceners between themselves. The learned Counsel for the defendants 2 to 4 also could not point out any other decision contra. No doubt he relied on the*



*decision, Kalyani (dead.) by L.Rs. v. Narayanan A.I.R. 1980 S.C. 1173, but that has no application at all to the present facts.”*

24.By pointing out these judgments, the respondent would submit that the explanation too will squarely applies and Sundarraaj cannot lay any claim over the property. Here comes another important aspect. By the Amendment Act of 2005 explanation II is no more on the statute. But this important aspect omitted the attention of the parties probably on the ground that before the Amendment Act Veerapathiran died. This amendment came into effect only after the death of Veerapathiran. So by virtue of Section 6 (3) of the Hindu Succession Act, the interest of Veerapathiran will devolved either by testamentary or by intestate succession and not by survivorship. Since the Veerapathiran died before the amendment act, the right of the devolution of Veerapathiran's share by survivorship in favour of Karupiah, is apparent and legal. Now we will go to the pre-amendment provision which may be extracted hereunder.

***“S.6.Devolution of interest in coparcenary property.- When a male Hindu dies after the***



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*commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:*

*Provided that, if the deceased had left surviving a female relative specified in Class I of the Schedule or a male relative, specified in that class who claims, through such female relative, the interest of the deceased in Milakshara Coparcenary property shall devolve by testamentary or intestate succession, as the came may be, under this Act and not by survivorship.*

*Explanation I.- For the purpose of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.*

*Explanation 2.- Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.”*



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25.As per the pre-amendment Act, only Karuppiah will become entitled to the share of Veerapathiran, Provided that there is no female legal heir left by Veerapathiran, if there was any Class I Female heir, Veerapathiran on his death, then even the survivorship will not survive. So notional partition must be deemed to have been taken place on the date of death of Veerapathiran. But here the correct date of death of Veerapathiran is not available. Now whatever may be even as per the case of the appellant the first wife namely Agathammal died. She did not available on the date of death of Veerapathiran. But daughters were available namely Chandra, Palaniammal, Rakkammal, who are the Class I legal heirs. So in that event whether Sundarraaj is also entitled to the share left by Veerapathiran is a point in the light of explanation 2. But as mentioned above in the absence of Sundarraaj any finding with regard to his right will be only academic and not final. So we can stop the discussion regarding the title at this stage without proceeding further, since it may cause unnecessary trouble or prejudice to the parties in future.



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26.Regarding the second and third item also there is an issue.

According to the respondent this property also ancestral property of Veerapathiran. Out of the joint nucleus only item Nos.2 and 3 were purchased. But according to the appellant, it must be construed only as separate property of Veerapathiran, since those property were purchased only after partition.

27.As noted above Veerapathiran continued as coparcenary consisting of himself and two sons namely Karuppiah and Paramasivam. Absolutely there is no evidence on record to show that Veerapathiran got separate income. Out of the separate income only items 2 and 3 were purchased by him. So far all practical purposes as stated by the respondent those properties must also be construed as the coparcenary property consisting of Veerapathiran, Karuppiah and Paramasivam.

28.Once again here the issue arises as to what happens to the share available to the Veerapathiran at the time of his death. Again we are enter into a darker area, since no definite conclusion can or ought to be reached in the absence of Sundarraaj. So I am also stopping the further



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discussion at this stage.

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29.Now coming back to the original cause of action as to the possession simplicitor, so after the purchase made by the plaintiff patta was issued in his favour. The revenue records mutated and started paying the kist, which are marked as Ex.A6 and Ex.A7. So on the above said basis, the trial court recorded finding that the plaintiff's possession is established and the defendants now tried to disturb the possession of the plaintiff after five years of purchase. Absolutely no documentary evidence was produced by the appellant herein to show their possession, they could not be in possession also in view of the availability of Sundarraaj. So the defendant namely the appellant herein has no right to disturb the possession of the respondent. That was the finding of the trial court.

30.Now coming to the appellate Court finding concurring with the judgment of the trial court as to the possession and apart from that the title was also gone into by virtue of Section 6 of the Hindu Succession Act, which I have pointed out earlier, it may not be proper.



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31. Now coming back to the grounds of second appeal, now it has been submitted by the appellant that without adverting to the title by the appellate court in the absence of Sundarraaj is not proper. In fact attempt was made by this appellant to get joint trial of the suit filed by them for declaration of title in O.S.No.424 of 2015, transfer original petition in Tr.O.P.4 of 2016 was filed. Stay application was filed in this matter. That was dismissed. Against which C.R.P.(MD)No.454 of 2017 was filed. But without waiting for the order to be passed in C.R.P.(MD)No.454 of 2017 the trial Court hurriedly completed the trial. But all those contentions were rejected by the appellate court. So once again we cannot go into that aspect.

32. Now the learned counsel for the appellant by relying upon the judgment of the Honourable Supreme Court reported in the case of ***Hero Vinoth (Minor) Vs. Seshammal*** reported in ***AIR 2006 SUPREME COURT 2234*** would submit that para 13 of the judgment is relevant for consideration.

*“Though as rightly contended by learned counsel for the appellant the scope for interference with*



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*concurrent findings of fact while exercising jurisdiction under Section 100 CPC is very limited, and re-appreciation of evidence is not permissible where the trial Court and/or the first Appellate Court misdirected themselves in appreciating the question of law or placed the onus on the wrong party certainly there is a scope for interference under Section 100 CPC after formulating a substantial question of law.”*

From the above said Judgment, it is clear that interference is permissible in certain circumstances. But, the question of law as mentioned above, must be discussed only in the presence of Sundarraaj.

33.At the worst, even if we consider that the sale effected in favour of the respondent is not binding upon the share of Sundarraaj; He only can file suit for partition and certainly not for declaration of title and other things. But, why he filed that suit is not known. I am not expressing any opinion since no further details are available and the result of the suit is also not available. As noted above only Sundarraaj can make the claim and certainly not the appellants herein. On that ground, I find absolutely no reason to interfere into the Judgment of the trial Court and the



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appellate Court subject to observation that has been made with regard to the title. In view of the above, this appeal fails

34.In the result, this second appeal stands dismissed. No costs. The Judgment and Decree passed by the trial Court as well as the appellate Court are hereby confirmed. Consequently, connected miscellaneous petition is closed.

**21.10.2024**

Index : Yes / No  
Internet : Yes / No  
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To

- 1.The Subordinate Judge, Theni
- 2.The District Munsif Cum Judicial Magistrate, Bodinayakanur.
- 3.The Section Officer, E.R.Section/V.R.Section,  
Madurai Bench of Madras High Court, Madurai.



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**G.ILANGO VAN,J.**

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