



A.S.(MD)No.196 of 2011

WEB COPY **BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

DATED : 06.11.2024

CORAM:

**THE HONOURABLE MR.JUSTICE P.VELMURUGAN
AND
THE HON'BLE MR.JUSTICE K.K.RAMAKRISHNAN**

A.S.(MD)No.196 of 2011

Pitchai

... Appellant/
1st Defendant

versus

1. K.Chinnamalayakkal

2. M.Veerakkal

... Respondents 1 and 2/
Plaintiffs 1 and 2

3. R.S.Ganeshan

4. M.Philliammal

5. V.Panneer

... Respondents 3 to 5/
Defendants 2 to 4

(Respondents 3 to 5/Defendants 2 to 4 are
set ex parte in the suit. So, they are given up)

PRAYER: Appeal Suit filed under Section 96 of Civil Procedure Code, against the Judgment and Decree dated 19.04.2011 passed in O.S.No.63 of 2008 on the file of the learned Additional District Judge, Fast Track Court No.3, Madurai.



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For Appellant : M/s.K.Abiya

For R1 and R2 : Mr.G.Rajaraman

JUDGMENT

(Judgment of the Court was delivered by **P.VELMURUGAN,J.**)

The appellant herein is the first defendant in O.S.No.63 of 2008. The respondents 1 and 2 herein are the plaintiffs and the respondents 3 to 5 herein are the defendants 2 to 4 in the said suit. The respondents 1 and 2 herein, as the plaintiffs, filed a suit for partition in O.S.No.63 of 2008 on the file of the learned Additional District and Sessions Judge, Fast Tract Court No.III, Madurai, against the appellant and the respondents 3 to 5 herein, who are the defendants in the suit. The trial Court, after the completion of pleadings, trial and the arguments advanced on either side, decreed the suit, by Judgment and Decree dated 19.04.2011. Challenging the same, the first defendant in the suit has filed the present appeal.

2. For the sake of convenience, the parties shall be referred to as per their rank before the trial Court.



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3. The brief facts of the case of the plaintiffs as averred in the plaint before the trial Court are that the suit properties are the ancestral properties, which originally belonged to one Ivon, who is the father of the first plaintiff and first defendant and the maternal grandfather of the second plaintiff. One Periyamalaiyakkal, who is the sister of the first plaintiff and the first defendant, died in the year 1975, leaving behind her three children, namely, M.Veerakkal (second plaintiff), M.Philliyammal (third defendant) and Panneer (fourth defendant). After the demise of the said Ivon, the first defendant, being an elder member of the Hindu Joint Family, was looking after the ancestral properties and maintaining the family. They have also enjoyed the suit properties as joint family properties. According to the plaintiffs, they put their physical labour for agricultural operation in the ancestral properties and they were given shares in the sale proceeds. In the meanwhile, during the year 2006, the Government announced the economic policy to set up special economic zone in various districts. One among is in Madurai District located near Valayankulam Village. Therefore, the land value continued to rise higher. Due to the sudden steep rise in the land value, the first defendant started behaving indifferently and hostile to the plaintiffs and started secret arrangements to sell the joint family property to the



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third parties. In the meantime, the first defendant sold some of the properties to the second defendant and third parties. Therefore, the plaintiffs sent a legal notice through an Advocate on 10.09.2007 to the first defendant. After receiving the same, the first defendant sent a vague reply. The second defendant has refused to receive the notice sent by the plaintiffs. Therefore, the plaintiffs were constrained to file the suit for partition.

4. The brief facts of the first defendant/appellant as per the written statement are that except two items of the suit properties, all other items are his self acquired properties. The first defendant and his family members used to work hard, out of which, they purchased the suit properties. The joint family properties are only the dry lands and cultivation on the said lands was totally depending on the rain water and due to uncertain rain, the cultivation was irregular and there was no sufficient income from the said lands. The first defendant having purchased the suit properties, has been continuously enjoying the same in his absolute possession and ownership. According to him, the first plaintiff and the second plaintiff's family had received Rs.70,000/- and Rs.50,000/- respectively as “சீர்வரிசை” and since both the plaintiffs have benefited over and above their



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shares, they are not entitled for partition in the ancestral properties. Further, there is no cause of action in the said suit and the suit is barred by limitation and the Court fee paid by them is not correct. Therefore, the suit is liable to be dismissed.

5. The trial Court framed certain issues and subsequently, after the arguments advanced on either side, recasted the following issues:

(i) Whether the plaintiffs are entitled to the share in the suit properties as prayed for?

(ii) Whether the first defendant proves that except two items, all the other items stated in the plaint are the self-acquired properties of the first defendant?

(iii) Whether the first respondent further proves that the first plaintiff had received “Seervarisai” about Rs.70,000/- and the second plaintiff's family too had received Rs.50,000/- from the first defendant as “Seervarisai” and as such, they had received money worth more than their entitled share from the actual joint family properties?

(iv) Whether the plaintiffs prove that they are in joint possession of the suit properties and the suit is valued correctly and the Court fee paid is correct?

(v) To what relief, these plaintiffs are entitled to?



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6. Before the trial Court, on the side of the plaintiffs, two witnesses were examined as P.W.1 and P.W.2 and eight documents were marked as Exs.A1 to A8 and on the side of the defendants, two witnesses were examined as D.W.1 and D.W.2 and 12 documents were marked as Exs.B1 to B12. After the trial and considering the materials on either side, the trial Court decreed the suit and passed a preliminary decree. Aggrieved over the same, the first defendant has filed the present appeal.

7. The learned counsel appearing for the first defendant/appellant submits that the trial Court has simply shifted the burden of proof on the side of the first defendant. Though the first respondent has produced several documents to prove that he has purchased some of the suit properties out of the income from his hard work, the trial Court has wrongly observed that no documentary evidence was produced by the first defendant except his oral version. The trial Court has erroneously taken an initial presumption that the suit properties are the ancestral properties and the properties stand in the name of the individual have been purchased out of the income from the joint family properties. Though the first defendant has clearly proved that the properties stand in his name are the self-



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acquired properties purchased out of his own income, the trial Court has wrongly made an observation that the properties in the name of the individual have been purchased from the income of the joint family properties and it is for the first defendant to rebut the same.

8. The learned counsel appearing for the first defendant/appellant further submits that unless the plaintiffs prove that there was a surplus income from the ancestral properties, the properties stand in the name of the individual of the joint family cannot be treated as joint family properties. It is the for the plaintiffs to prove that the properties are the ancestral properties and the properties stand in the name of the individual have been purchased out of the income from the joint family properties. But, the trial Court has wrongly shifted the burden of proof to the first defendant. The learned counsel further submits that in the proof affidavit, the first defendant has clearly stated that item Nos.4, 6, 7, 12, 15, 16 and 17 are the ancestral properties, totally, to an extent of 92 cents and except those properties, other properties are his self-acquired properties, purchased out of his own income. Further, the first defendant has given customary gifts to the first plaintiff worth about Rs.70,000/- and to the second plaintiff's family worth about



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Rs.50,000/- more than their entitled share in the ancestral properties. Though the first defendant has marked the documents to prove that some of the suit properties are his self-acquired properties, the trial Court has wrongly decreed the suit as prayed for by the plaintiffs.

9. In support of his contentions, the learned counsel appearing for the first defendant has relied upon the Judgment of the Hon'ble Supreme Court in ***D.S.Lakshmaiah and another vs. L.Balasubramanyam and another***, reported in ***(2003) 10 SCC 310***, wherein, it has been held as follows:

“There is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person, so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available.”



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10. By relying on the said Judgment, the learned counsel for the appellant submits that the plaintiffs having failed to discharge the initial burden of proof that there was any nucleus in the form of any income whatsoever from the ancestral properties and no other nucleus was claimed, the burden remained on the plaintiffs to establish that the ancestral properties have sufficient nucleus. In the absence of the same, all the properties standing in the name of the first defendant are only the self-acquired properties. Therefore, the Judgment and Decree dated 19.04.2011 passed by the learned Additional District Judge, Fast Track Court No.III, Madurai, in O.S.No.63 of 2008, is liable to be set aside.

11. The learned counsel appearing for the plaintiffs/respondents 1 and 2 submits that the suit properties are the ancestral properties. One Ivon, who is the father of the 1st plaintiff and 1st defendant and the maternal grandfather of the 2nd plaintiff, died intestate. After his demise, the plaintiffs and the defendants have been enjoying the properties as joint family properties. The first defendant, being an elder member of the family, became kartha of the joint family and looked after the joint family properties. According to him, the plaintiffs and their family members have put their labour for agricultural operation in the ancestral



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properties. Further, the first defendant has also admitted that he was an agriculturist and he did not have any other business. Therefore, the first defendant has purchased the suit properties in his name, out of the income of the ancestral properties. But, due to sudden steep rise in the land value, the first defendant, without the knowledge of the plaintiffs, sold some of the properties to the third parties and 2nd defendant. Though the plaintiffs had sent legal notice, the first defendant has not come forward to divide the properties. Therefore, the plaintiffs filed the suit for partition.

12. The learned counsel appearing for the plaintiffs/respondents 1 and 2 further submits that the first defendant has admitted the existence of ancestral properties. Even in the sale deeds (Exs.B1 to B4), the first defendant has stated that the properties are the ancestral properties. He further submits that the first defendant claimed that he and his family members were doing mason works and daily works, other than the agricultural work and out of that income only, he has purchased the suit properties, but, he has not produced any proof for the same. The first defendant has also admitted that originally, the patta stood in the name of his father and subsequently, it was transferred to his name. According to him,



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the first defendant, without intimating the plaintiffs and other family members, has changed the patta by making use of the Village Administrative Officer. Even otherwise, if any property stands in any one of the coparceners or in any one of the joint family members and mutation of records stands in any one of the family members, unless the member proved that the properties are divided or self-acquired, all the properties, standing either in the name of Kartha or any one of the family members, are presumed to be joint family properties. Therefore, in this case, the plaintiffs have proved that the suit properties are the ancestral properties by examining P.W.2 and there was a surplus nucleus from the ancestral properties. Further, the sale deeds (Exs.B1 to B4) revealed that the properties sold by the first defendant are ancestral properties. Therefore, the trial Court, after considering the oral and documentary evidence, came to a conclusion that the first defendant has not proved that he had independent source of income to purchase the suit properties standing in his name other than the income from the ancestral property. Therefore, there is no merit in the appeal and the same is liable to be dismissed.

13. From the above said facts and circumstances of the case, the points for consideration in this appeal suit are:



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- (i) Whether the suit properties are the ancestral properties?
- (ii) Whether the first defendant has proved that except two items of the properties, other items are only the self acquired properties?
- (iii) Whether the plaintiffs are entitled for a preliminary decree for partition as sought for in the plaint?

14. The First Appellate Court, being a fact-finding Court, has to re-appreciate the evidence independently and to give the findings independently.

15. Admittedly, the first plaintiff, the second plaintiff's mother Periyamalayakkal and the first defendant are sisters and brother. The first defendant is the maternal uncle of the second plaintiff. The plaintiffs claimed that the suit properties are the ancestral properties, whereas, the first defendant claimed that except two items of the suit properties, other properties are his self-acquired properties. But, in the written statement, the first defendant has not stated what are the items belonged to the joint family properties. The first defendant further claimed that the ancestral properties are only the dry lands (மானாவாரி நிலம்) and the cultivation in the said lands depends upon the



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rainfall. Since the rainfall was irregular, there was no income from those properties and therefore, there was no surplus income for purchasing other items of the suit properties. The first defendant further claimed that he had purchased some of the suit properties out of the income from doing mason work and coolie works by himself and his family members.

16. The averments of the plaint were reiterated in the proof affidavit filed by the first plaintiff. The plaintiffs, in order to prove their case, have examined one Veeranan as P.W.2. P.W.2. has categorically stated that the first plaintiff's father got ancestral properties, which are the cultivable lands and there was surplus income in the said lands and out of that income only, they have purchased other items of suit properties. On the contrary, the first defendant has stated that the ancestral properties are dry lands, but, he has not produced a copy of the adangal to prove that the properties are dry lands and there was no cultivation in the lands.

17. Though the plaintiffs have to prove their case, as far as the partition suit is concerned, both the plaintiffs as well as the defendants are equally liable to



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prove their cases. The first plaintiff got married and she is living in the matrimonial home. All the properties are being maintained by the first defendant and all the documents are under the custody of the first defendant. When the first defendant pleaded that the ancestral properties are dry lands and there was no cultivation, then, he ought to have filed a copy of the adangal to prove the same, but, he failed to do so. Further, the first defendant has admitted the existence of ancestral properties and he sold some of the ancestral properties to the third parties and the second defendant, in which, the plaintiffs are not the parties to those documents. A reading of the sale deeds (Exs.B1 to B4) would show that the suit properties are the ancestral properties. Further, the first defendant himself admitted that the patta, which stood in the name of his father, was transferred to his name. If the patta stands in the name of the Karta or any one of the joint family members, it cannot be treated that the properties are the self-acquired properties.

18. Further, though the first defendant has stated that the property to an extent of 21 cents was gifted to the first plaintiff, but, there was no material to prove the same. On the other hand, the first plaintiff claimed that the property to



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an extent of 21 cents was purchased by her husband, by paying a valuable sale consideration to the first defendant. Therefore, it cannot be treated that the property to an extent of 21 cents has been gifted to the first plaintiff.

19. It is not the specific plea of the first defendant that the ancestral properties were already divided. Further, the main defence of first defendant is that several customary gifts (சீர்வரிசை) were given to the first plaintiff and the second defendant's family worth about Rs.70,000/- and Rs.50,000/- respectively, but, there was no iota of evidence to prove that they spent worth about Rs.70,000/- and Rs.50,000/- respectively.

20. It is a settled proposition of law that merely because the customary valuable gifts were given to the female members while performing their marriage, they are not entitled to any share in the ancestral properties. After the amendment Act 39 of 2005 came into force, all the female members become coparcener. Therefore, after the amendment Act 39 of 2005 came into force, the plaintiffs and other defendants have become coparceners. Therefore, the plaintiffs are entitled to a share in the ancestral properties. The first defendant admitted the existence of



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the ancestral properties, but, there was no partition of ancestral properties prior to the amendment Act 39 of 2005 came into force. Further, the sale made by the first defendant to the third parties are only in the year of 2007. But, till the year 2007, all the properties were treated as joint family properties.

21. The first defendant stated that some of the suit properties were purchased out of the income from doing mason work and coolie work by himself and his family members. Though the first defendant examined one Ivon as D.W.2 to prove his case, the evidence of D.W.2 is not sufficient to prove that he and his family members were doing mason work and coolie work and from the income only, they purchased other items of the suit properties. Therefore, no evidence is available either to presume or prove the independent source of income of the 1st defendant. Hence, only available nucleus to purchase the property is the ancestral property which was continuously enjoyed by the appellant till date as Kartha of the family. In the said circumstances, the first principle that the plaintiff has to prove the surplus income existed to purchase a property is not applicable to the present facts and circumstances of the case. Since the 1st defendant admitted that there are ancestral properties and when he has not proved his independent source



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of income, it is not correct to hold that the appellant proved his purchase made out of his own source of income without aid of income from the ancestral property.

22. Though the learned counsel appearing for the first defendant/appellant has relied on the Judgment of the Hon'ble Supreme Court in ***D.S.Lakshmaiah and another vs. L.Balasubramanyam and another***, reported in (2003) 10 SCC 310, there is no quarrel over the said proposition of law. The first defendant, in his proof affidavit, has admitted the existence of the ancestral properties to an extent of 92 cents and with regard to item No.18 of the suit property, he stated that he and his family members have constructed a house in that property, out of the income earned by his family members by doing mason work and coolie work. However, during the cross examination, the first defendant has admitted that the item No.18 is the ancestral property. The first defendant has also admitted that for some of the properties, patta stands in the name of his father and thereafter, it was subsequently transferred to his name.



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23. Further, the first defendant claimed that the ancestral properties are only dry lands, however, he has not produced a copy of the adangal to show that the ancestral properties are only dry lands. In the absence of adangal, it cannot be accepted that the ancestral properties are dry lands. Further, if at all, when the first defendant admitted the existence of ancestral property to an extent of 92 cents, he ought to have divided the ancestral property and given the respective shares to the plaintiffs. But, the first defendant sold some extent of the property to third parties and some extent of the properties to the husband of the second defendant and that too only after the amendment Act 39 of 2005 came into force. Under these circumstances, this Court is of the view that the suit properties are the ancestral properties and the sale made by the first defendant in favour of the second defendant and third parties are not binding on the share of the plaintiffs. The first plaintiff and the mother of the second plaintiff are sisters of the first defendant. The second plaintiff and the defendants 3 and 4 are sisters and brother. Therefore, the first plaintiff is entitled to 1/3rd share in the suit properties and the second plaintiff is entitled to 1/9th share in the suit properties.



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24. As per the decision of the Hon'ble Supreme Court in the case of ***Kattukandi Edathil Krishnan and another vs. Kattukandi Edathil Valsan and others*** reported in **2022 LiveLaw (SC) 549**, the trial Court is directed to comply with para 33 of the said Judgment in case the plaintiff has not filed any application for final decree so far. The relevant portion of the said Judgment reads as follows:

“33. We are of the view that once a preliminary decree is passed by the Trial Court, the court should proceed with the case for drawing up the final decree suo motu. After passing of the preliminary decree, the Trial Court has to list the matter for taking steps under Order XX Rule 18 of the CPC. The Courts should not adjourn the matter sine die, as has been done in the instance case. There is also no need to file a separate final decree proceedings. In the same suit, the Court should allow the concerned party to file an appropriate application for drawing up the final decree. Needless to state that the suit comes to an end only when a final decree is drawn. Therefore, we direct the Trial Courts to list the matter for taking steps under Order XX Rule 18 of the CPC soon after passing of the preliminary decree for partition and separate possession of the property, suo motu and without requiring initiation of any separate proceedings.”



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24. In the result, the Appeal Suit is dismissed and the Judgment and Decree dated 19.04.2011 passed in O.S.No.63 of 2008 on the file of the learned Additional District Judge, Fast Track Court No.III, Madurai is hereby confirmed.
No costs.

[P.V.,J.] [K.K.R.K.,J.]
06.11.2024

NCC : Yes/No
Index : Yes / No
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To

The Additional District Judge,
Fast Track Court No.III,
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