

IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 28.04.2022

PRONOUNCING ORDERS ON : 18.05.2022

Coram:

THE HONOURABLE JUSTICE MR.N.ANAND VENKATESH

Second Appeal No.211 of 2015
and MP.No.1 of 2015

- 1.Ramasamy Gounder @ Senban (died)
- 2.Muthammal @ Santhosam
- 3.Nithya
- 4.Saminathan

..Plaintiff/Appellant/Appellants

..Vs..

- 1.Chinnapillai @ Nallammal
- 2.Thenmozhi
- 3.Dhanlakshmi

..Defendant/Respondent/Respondents

(Appellants 2 to 4 and Respondents 2 and 3 brought on record as LRs of the deceased sole appellant vide Court order dt.21.04.2021 made in CMP.11953 to 11955/2019 in SA.211/2015-PTAJ)

Prayer: Second Appeal filed Under Section 100 of the Code of Civil Procedure against the Judgment and Decree of the learned Subordinate Judge, Namakkal dated 31.03.2011 made in A.S.No.23/2008 reversing that of the learned Additional District Munsif, Namakkal dated 23.01.2007 made in O.S.No.1078/1989.

For Appellants : Mr.N.Manokaran,

For Respondents : Mr.V.Lakshminarayanan,
for Mr.M.Guruprasad

J U D G M E N T

The defendant in the suit was the appellant in this Second Appeal. On his demise, his second wife and two children born through her have been substituted as appellants.

2.The respondent/ plaintiff filed the suit seeking for the relief of partition and for allotment of half share in the suit properties. She died during the pendency of this Second Appeal and her daughters born through the appellant have been impleaded as the legal representatives of the deceased respondent.

3.The case of the plaintiff was that she was the legally wedded wife of the defendant and out of the said wedlock, one son and two daughters were born. The son named Annadurai *alias* Mathiazhagan predeceased them. The further case of the plaintiff was that the suit properties are ancestral properties in which the defendant and the predeceased son were entitled for half share. It is further alleged that the defendant left the plaintiff and her daughters in lurch and started living with one Muthammal and two children were also born to the defendant through the said Muthammal. The daughters of the plaintiff born through the defendant got married and are living in their respective matrimonial homes.

4.The grievance of the plaintiff was that she was calling upon the defendant to partition the suit properties and give half share to the plaintiff to which she was entitled as the Class-I legal heir of her deceased son. Since the defendant was not coming forward to give the share of the plaintiff, legal notice was issued to the defendant through Ex.A1. The same was not acted upon and hence the suit came to be filed seeking for the relief of partition.

5.The defendant filed a written statement in the year 1990. In the said written statement, he had taken a stand that the entire suit properties are his absolute properties and therefore the plaintiff was not entitled for any share in the properties. The defendant also denied the second marriage. Thereafter, an additional written statement came to be filed in the year 2006. In the additional written statement, the defendant referred to all the documents pertaining to the suit properties and explained as to how he is absolutely entitled to the suit properties. Thereby, the defendant once again reiterated that his predeceased son did not have any share in the suit properties and consequently, the plaintiff is also not entitled for any share in the suit properties.

6.The trial Court, on appreciation of oral and documentary evidence and after considering the facts and circumstances of the case, dismissed the suit, through Judgment and Decree dated 23.1.2007. Aggrieved by the same, the plaintiff filed an appeal before the Sub Court, Namakkal in A.S. No. 23 of 2008. The lower Appellate Court on re-appreciation of the oral and documentary evidence and after considering the

findings of the trial Court, was pleased to allow the appeal through Judgment and Decree dated 31.3.2011 and thereby, the Judgment and Decree passed by the trial Court was set aside. Consequently, a preliminary decree was passed in favour of the plaintiff declaring her to be entitled for half share in the suit properties. Aggrieved by the same, the defendant filed the present Second Appeal.

7. When the Second Appeal was admitted, the following substantial questions of law were framed:

- a) Whether the lower appellate Court while reversing the findings of the trial Court had assigned cogent reasons for differing with the findings of the trial Court as mandated under Order 41 Rule 31 of C.P.C.?
- b) Whether the lower appellate Court was right in shifting the burden on the defendant when the plaintiff had not discharged her burden to show that the suit properties which stood in the name of the defendant were the ancestral properties and were purchased from the surplus income yielded from the ancestral properties?
- c) Whether the findings of the lower appellate Court can be held to be perverse due to improper appreciation of the oral and documentary evidence available on record?

8. Heard Mr.N.Manokaran, learned counsel for the appellants and Mr.V.Lakshminarayanan, learned counsel for the respondent. This Court also carefully

considered the materials available on record and the findings of both the Courts below.

9.The suit properties consist of properties in three different Survey Numbers viz., Survey Nos. 387/1, 389/3 and 389/4. The documents marked pertaining to these properties can be described through a tabular column:

Sl. No.	Survey Number	Title documents	Parent documents
	387/1	a) Ex. B4 Will dated 24.6.1957. b) Ex. B9 sale deed dated 14.10.1963. c) Ex. B11 sale deed dated 19.2.1964.	a) Exhibits B5 and B6 are the parent documents of Ex.B4 Will. b) Ex. B10 is the parent document of Ex.B9 sale deed. c) Ex.B12 is the parent document of Ex.B11 sale deed.
	389/3	Ex.B13 sale deed dated 2.10.1969.	-----
	389/4	Ex. B7 sale deed dated 24.6.1957.	Ex.B8 is the parent document of Ex.B7 sale deed.

10.A careful perusal of all the above documents marked on the side of the defendant shows that those documents stand in the name of and in favour of the defendant. In view of the same, the defendant was claiming exclusive right over the suit properties.

11.The plaintiff neither in her pleadings nor during her chief examination explained or laid any foundation as to how she took a stand that the suit properties are ancestral properties. After the cross-examination of the plaintiff, who was examined as PW-1, she was recalled and Ex.A3 and Ex.A4 sale deeds were marked. Ex.A3 sale deed

pertained to properties in Survey Nos.123/3 and 123/5 sold by the defendant along with his son on 17.2.1964. The parent document of Ex.A3 sale deed were marked on the side of the defendant as Ex.B19 and Ex.B20. Similarly, Ex.A4 sale deed dated 9.7.1979 executed by the defendant, his father and his son, pertained to the properties in Inam Survey No. 9/3. The parent document of Ex.A4 sale deed were marked on the side of the defendant as Exhibits B17 and B18.

12.The plaintiff developed her case through Exhibits A3 and A4 wherein, there is a specific reference that the properties conveyed under those documents are ancestral properties. The further stand taken by the plaintiff was that Exhibits A3 and A4 sale deeds were executed by the defendant, his son and his father only due to the fact that the properties are ancestral properties. According to the plaintiff, there is a clear admission that the properties are in the nature of joint family properties and it is only from the income derived from these properties, the suit properties were purchased and are enjoyed in common. Consequently, the plaintiff claimed that her son was entitled for half share in the suit properties and on his demise, she inherited his share as the Class-I legal heir.

13.The trial Court on appreciation of the oral and documentary evidence found that the plaintiff did not establish that the suit properties are joint family properties and as a result, the trial Court rejected the claim made by the plaintiff and dismissed the suit.

14.The lower Appellate Court laid a lot of emphasis on Ex.A3 and Ex.A4 sale

deeds. The lower Appellate Court rendered a finding to the effect that the properties were enjoyed in common and was always recognised as ancestral properties. The lower Appellate Court also held that the sale consideration received from Ex.A3 sale deed was utilised by the defendant to purchase a portion of the property in Survey No.387/1 under Ex.B11 sale deed, which came to be registered within two days after the sale took place under Ex.A3 sale deed.

15.The lower Appellate Court rendered a further finding to the effect that Exhibits B7, B9, B11 and B13 sale deeds were registered even before the Will executed by Perumayeeammal on 24.6.1957 (Ex.B4) came into force. The lower Appellate Court did not believe Ex. B16 death certificate marked on the side of the defendant since the suit was filed in the year 1989 and whereas this certificate was obtained only in the year 2006. The lower Appellate Court gave a finding to the effect that the exact date of death of Perumayeeammal was not established. Hence, the stand taken by the plaintiff to the effect that Exhibits B7, B9, B11 and B13 sale deeds came to be registered even before the Will came into force, was accepted by the lower Appellate Court. The lower Appellate Court also rendered a finding to the effect that the defendant had improved the case by filing an additional written statement after getting the death certificate in the year 2006 and thereby, the defendant did not discharge his burden to prove that the suit properties are his exclusive properties. Accordingly, all the suit properties were held to be joint family properties and the relief sought for by the plaintiff was granted after setting aside the Judgment and Decree of the trial Court.

16.The learned counsel for the appellants submitted that the lower Appellate Court erroneously rendered a finding by assuming that the suit properties are ancestral properties even without the plaintiff laying the foundational facts in her pleadings. The learned counsel submitted that no amount of evidence will come to the aid of the plaintiff without there being any pleadings.

17.Per contra, the learned counsel for the respondents submitted that the plaintiff was left in lurch and was not having any access to any of the documents. The documents marked as Ex.A3 and Ex.A4 clearly establish the fact that all the properties were enjoyed as joint family properties. It was in fact an admission made in those two documents. Therefore, a thing that is admitted need not be proved and the burden of proof was on the defendant to establish that the suit properties are his exclusive properties. This burden was not properly discharged by the defendant and the lower Appellate Court on appreciation of the oral and documentary evidence came to a conclusion that the suit properties are joint family properties. It was further submitted that there is no perversity in the findings rendered by the lower Appellate Court and hence, there is no ground to interfere with the Judgment and Decree passed by the lower Appellate Court.

18.There is no dispute on the legal proposition that no amount of evidence can be looked into where the same has not been laid down as foundational facts in the pleadings. In a suit for partition, the plaintiff is expected to plead certain essential facts

and the same has been dealt with by the Hon'ble Supreme Court in ***Shasidhar and Others v. Ashwini Uma Mathad and Others*** reported in **(2015) 11 SCC 269** and the relevant portions are extracted hereunder:

“20. We may consider it apposite to state, being a well-settled principle of law that in a suit filed by a co-sharer, coparcener, co-owner or joint owner, as the case may be, for partition and separate possession of his/her share qua others, it is necessary for the court to examine, in the first instance, the nature and character of the properties in suit such as who was the original owner of the suit properties, how and by which source he/she acquired such properties, whether it was his/her self-acquired property or ancestral property, or joint property or coparcenary property in his/her hand and, if so, who are/were the coparceners or joint owners with him/her as the case may be. Secondly, how the devolution of his/her interest in the property took place consequent upon his/her death on surviving members of the family and in what proportion, whether he/she died intestate or left behind any testamentary succession in favour of any family member or outsider to inherit his/her share in properties and if so, its effect. Thirdly, whether the properties in suit are capable of being partitioned effectively and if so, in what manner? Lastly, whether all properties are included in the suit and all co-sharers, coparceners, co-owners or joint owners, as the case may be, are made parties to the suit? These issues, being material for proper disposal of the partition suit, have to be answered by the court on the basis of family tree, inter se relations of family members, evidence adduced and the principles of law applicable to the case. (See Hindu Law by Mulla, 17th Edn., Ch. XVI, Partition and Reunion — Mitakshara Law, pp. 493-547.)”

19. In the present case, there was not even a reference about Exhibits A3 and A4

in the pleadings and these documents came very late in the picture when the plaintiff was recalled and examined in chief on 23.1.2003. Therefore, there was no occasion for the defendant to deal with these documents in the original written statement. The object and purpose of pleadings is to enable the other party to know the case he/she has to meet. The other party cannot be taken by surprise in the middle of the proceedings. This exactly had taken place in the present case. That necessitated the defendant to file an additional written statement and explain about all the documents pertaining to the suit properties and also the properties covered under Exhibits A3 and A4.

20.The lower Appellate Court had placed a lot of reliance on the recitals in Exhibits A3 and A4 to the effect that the properties therein are ancestral properties. The lower Appellate Court was also swayed by the fact that the son of the defendant also joined as a joint vendor in those sale deeds.

21.The proof of the existence of a joint family does not lead to the presumption that the property held by any member of the family is joint. The plaintiff is expected to prove that there was a joint family nucleus and the joint family properties were capable of earning income and further there was surplus income to purchase the suit property after meeting other commitments of the joint family. The property standing in the individual name of a co-owner will be presumed to be his property and the burden of proof is upon the plaintiff to establish that it was purchased from the surplus income from the joint family nucleus. This is not a matter of assumption and it has to be

necessarily pleaded and proved through evidence.

22. Even though there are no pleadings with reference to Exhibits A3 and A4 documents, the recitals contained therein is attempted to be taken as an admission which requires no further proof and hence it is contended that the burden of proof was shifted to the defendant and he did not discharge the said burden.

23. This Court has to necessarily deal with the above contention and analyse the legal effect of the recitals contained in Exhibits A3 and A4 documents and whether the fact that the son of the defendant being added as a co-vendor will give rise to a presumption that the properties dealt with therein are joint family properties. This Court must also analyse as to whether Exhibits A3 and A4 documents will have a bearing while deciding the nature of the suit properties covered under Exhibits B4, B7, B9, B11 and B13 documents.

24. The parent documents of Ex.A3 are Ex.B19 and Ex.B20. Ex.B20 sale deed stood in the name of the mother of the defendant viz. Pavayeeammal. She left behind the defendant as her legal heir. The same is the case with Ex.B19 also. There is nothing to indicate in these two parent documents that the property concerned was an ancestral property. This was the property that was dealt with under Ex.A3.

25. The parent documents of Ex.A4 are Ex.B17 and Ex.B18. Under Ex.B17, the

grandfather of the defendant executed a sale deed in favour of the defendant on 13.10.1955 and on the same day, the defendant executed a settlement deed in favour of his father (Ex.B18) giving him life interest. Thereafter, Ex.A4 sale deed came to be executed by the defendant, his father and his son. There is nothing to indicate in Ex.B17 and Ex.B18 that the property concerned is an ancestral property.

26.The stand taken by the defendant is that merely because there is a recital in Ex.A3 and Ex.A4 to the effect that the properties are ancestral properties, that by itself does not automatically give those properties the colour of ancestral properties. The further stand taken by the defendant is that the purchasers of the properties insisted for the son joining the execution of the sale deeds, out of abundant caution and that by itself will not confer any right on the son of the defendant to be recognized as a co-owner of those properties.

27.In order to appreciate the stand taken by the defendant, it will be more appropriate to take note of some judgments cited by the learned counsel for the appellants ;

a) Bhagwat Sharan v. Purushottam reported in **(2020) 6 SCC 387**. The relevant portions are extracted hereunder:

"18. However, there is no material on record to show that the properties belonged to an HUF. They may have been joint properties but merely on the basis of the recitals in the mortgage deed they cannot be

said to be a joint family property. It appears that by another mortgage deed dated 26-11-1946, the value of the mortgaged properties was enhanced to Rs 45,000, and in addition to the 5 houses, one oil mill at Pachhar was also mortgaged. Seth Budhmal filed a suit (Ext. P-4) against Hari Ram, Brij Mohan, Rameshwar Lal, Radha Krishan, Nathu Lal, etc. for realisation of the mortgage money under the said mortgage deed. In Paras 6 and 8 of the plaint it was averred as follows:

“6. That, the defendants at the time of execution of aforesaid documents constituted a trading joint Hindu family and of which all major members personally and minor members through their head of the branch were represented in the execution of mortgage deeds.

8. That, minors mentioned in the documents have now attained majority. Therefore, they have been impleaded in person as defendants. Their liability is limited to the extent of property of joint Hindu family and personal dealing. Defendants 1 to 3 are personally and in the capacity of head of their branch are made in as defendants.”

21. An admission made by a party is only a piece of evidence and not conclusive proof of what is stated therein. It is in this light that we have to examine the admission made by Hari Ram and his brothers while filing the written statement to the suit filed by Seth Budhmal. In Para 6, the averment was that the defendants constituted trading joint Hindu family. It is obvious that the admission was with regard to a trading family and not HUF. In view of the law cited above, it is clear that not only jointness of the family has to be proved but burden lies upon the person alleging existence of a joint family to prove that the property belongs to the joint Hindu family unless there is material on record to show that the property is the nucleus of the joint Hindu family or that it was purchased

through funds coming out of this nucleus. In our opinion, this has not been proved in the present case. Merely because the business is joint would not raise the presumption that there is a joint Hindu family. As far as Para 8 is concerned, in our view, there is no clear-cut admission. The allegation made was that the minors were represented by Defendants 1 to 3, who were head of their respective branches. In reply to this it was stated that Defendants 1 to 3 were neither the head or the karta, nor was the mortgage transaction made in that capacity. This admission cannot be said to be an unequivocal admission of there being a joint family.”

b) Pandian Vs. Madhanmohan reported in **2018 (4) LAW WEEKLY 193**. The relevant portions are extracted hereunder:

13. In the light of the above position, it is seen that PW3 Kannan cannot claim any right to the suit property on the footing that it is the ancestral property of the family. Accordingly, it is found that the suit property is only the absolute property of Muthukumarasamy and when admittedly, Muthukumarasamy has not joined the execution of Ex.A1, under which, the plaintiff claims title to the suit property, it is found that the plaintiff cannot lay any claim of right or partition in the suit property by way of the said document.”

c) Amudha and Others Vs. Janardhanan and Others reported in **2015 SCC OnLine Mad 14064 : (2015) 3 MWN (Civil) 353**. The relevant portions are extracted hereunder:

“13. Now, this Court has to decide whether the ‘D’ schedule property is the joint family property of the parties or the separate property of the deceased Sridhar? The learned counsel appearing for the appellants would submit that the person who pleaded that the property is the joint family property must prove that the property is the joint family

property and the if he proved the same, then only the burden will be shifted to the party who asserts that it is his separate property. At this juncture, it is appropriate to consider the decisions relied upon by the learned counsel appearing for the appellants and the learned counsel appearing for the respondents.

24. Furthermore, D.W.1 in her evidence has stated that during the lifetime of the Sridhar, he is the subscriber of chit from the year 1988 and that has been evidence from Exs.B4, B5, B9, B10 and B11. After the death of the Sridhar, his wife, namely, the first defendant/first respondent is the subscriber of the chit. Furthermore, the deceased Sridhar obtained loan from Indian Bank and the statement of account has been marked as Ex. B8. Even in the year 1991, as per Ex. A12, the partnership business has been dissolved on 30.07.1991 and thereafter he did his business independently and earned money and purchased the property. The Trial Court on perusal of P.W.1 came to the conclusion that in the year 1977 the deceased Sridhar left the native place and went to Chennai for his work. He worked under P.W.2, Ramadas, his junior paternal uncle for five years. He further stated that during the lifetime of his father, the deceased Sridhar was at Chennai. But on perusal of Ex. B15, sale agreement and Ex. A5, sale deed, he has not assigned any reason why this property alone has been purchased in the name of the deceased Sridhar since he is the junior member of the family. But he himself purchased the property at Ambattur, Chennai in his name i.e. the 'C' schedule property. The deceased Sridhar got married on his own accord and he lead his life and that has been proved by the appellant. Merely because there is a recital in the document it shall not be presumed that the property has been purchased out of the joint family nucleus. Admittedly, P.W.1, the first respondent was in possession and enjoyment

of the entire joint family properties But he has not filed any document to show what is the surplus income from the ancestral properties and how many properties were purchased. Furthermore, the First Appellate Court has rightly dismissed the suit in respect of 'E' schedule property stating that it is the separate property of the deceased Sridhar because from the year 1991 onwards he is doing his business independently after dissolving the partnership with Radhakrishnan under Ex. A12."

d) *Ekambaram Vs. Jayalakshmi and Others* reported in **CDJ (2019) MHC 3722.**

The relevant portion is extracted hereunder:

" 10.The argument has also been put forth that in respect of the properties standing in the name of Mannathan and which had been sold, all the brothers had joined in the execution of the sale deed. As held by the Courts below, merely because, the four brothers had joined in the sale of the abovesaid items that would not lead to inference that the properties standing in the name of Mannathan are only the joint family properties. Mere joining of the party in the execution of the sale deed or mortgage deed does not create any right for such a person and such inclusion might be at the instance of the purchasers or the mortgagee. Therefore, it is found that the abovesaid position of law has been rightly appreciated and followed by the Courts below and in such view of the matter, the Courts below are found to be totally justified in holding that the items 9, 20 & 21 of the plaint schedule properties are not the joint family properties and they are the separate and independent properties of Mannathan and hence, they are not liable for partition as claimed by the plaintiff."

e) Nedunchezhiyan and Others Vs. Rani and Others reported in **MANU/TN/4034/2020: 2020 SCC OnLine Mad 11573**. The relevant portion is extracted hereunder:

“10. As regards the other claim, it is common knowledge that sons join fathers in execution of Sale Deed by way of abundant caution at the instance of the purchaser/s. Merely because a son joins the execution of Sale Deed by the father, there cannot be a presumption that the properties are ancestral properties or joint family properties in which the son acquires a right by birth. A property which is assigned to an individual by the Government cannot and will not par take the character of ancestral property.”

“12. However, the Courts below seems to have been carried away by the recitals found in the sale deed dated 13.03.1982, under which, the defendant claims title to the suit property marked as Ex.B1. No doubt, in Ex.B1, the recitals disclose that the suit property has been described as the ancestral as well as the self acquired property of the vendor Muthukumarasamy. On that basis, the Courts below have proceeded to hold that the suit property is only the ancestral property and accordingly, both Muthukumarasamy as well as his son Kannan would be entitled to equal share in the same. However, when the facts, as discussed above, unerringly lead to

the conclusion that the suit property had been acquired by Rethina Padyachi only by way of purchase as depicted in Ex. A1 and when the same is admitted by his grandson Kannan examined as PW3 and also by the plaintiff examined as PW1, the mere recitals found in Ex.B1 as the suit property being ancestral as well as the separate property of Muthukumarasamy by itself would not lead to the conclusion that the same is the ancestral of the family consisting of Muthukumarasamy and Kannan.

28.It is clear from the above judgments that merely because a property is described as an ancestral property in the recitals of the document, that by itself is not a conclusive proof as to what is stated therein, more particularly when there are other materials to show that properties concerned are not ancestral properties. In the present case, there is no pleading available in the plaint making reference to Ex.A3 and Ex.A4. Therefore, there was no occasion for the defendant to deny and to explain about the properties dealt with under Ex.A3 and Ex.A4. All of a sudden, these documents cropped up during evidence and it is clear from the parent documents that the properties concerned are not ancestral properties.

29.Insofar as adding the name of the son while executing Ex.A3 and Ex.A4 documents, that by itself does not confer any right on the son. The above judgments have dealt with cases with almost similar facts and it has been held that such practice is

very common where the purchasers of the property insist for the son to join in the execution of the document along with the father. Therefore, the son of the defendant joining the defendant in the execution of Ex.A3 and Ex.A4 documents, by itself does not convert the properties as ancestral properties.

30.The lower Appellate Court did not believe the contents of the death certificate of Perumayeeammal marked as Ex.B16 only on the ground that the registration certificate was issued in the year 2006. Nobody had any grievance with respect to the properties bequeathed under the Will executed by Perumayeeammal marked as Ex.B4. Only if this Will comes into force, a portion of the property in Survey No.387/1 can be dealt with. It is seen from Ex.B16 that Perumayeeammal was aged about 80 years when she died on 12.12.1957. There is no contra evidence available to prove that the said Perumayeeammal had died subsequent to this date. The death of Perumayeeammal has not been questioned. The death certificate has been given after fulfilling the legal requirements and it cannot be disregarded unless contra evidence is available to discredit the contents of the death certificate. This document was also marked through a competent witness DW-2, who was the Village Administrative Officer who issued the certificate.

31.The learned counsel for the respondents submitted that there is no mention

about the Survey Number in Ex.B4 Will. The parent documents of Ex.B4 Will are Ex.B5 and Ex.B6 documents. These documents along with Ex.B9 and Ex.B11 correlate all the four boundaries of Survey No.387/1. The same has been properly demonstrated by the learned counsel for the appellant by submitting a comparative table. In any case, the identity of the properties was never disputed before both the Courts below and therefore, there is no requirement for this Court to delve deep into this issue for the first time in this Second Appeal.

32.The finding of the lower Appellate Court to the effect that Ex.B11 sale deed through which the defendant purchased a portion of the property in Survey No.387/1 was through the sale consideration received under Ex.A3 sale deed, will not have any bearing since the property covered under Ex.A3 has been held by this Court not to be an ancestral property.

33.The further finding of the lower Appellate Court to the effect that the properties dealt with under Ex.A3 and Ex.A4 sale deeds are ancestral properties, is unsustainable and goes against the evidence and materials available on record. The same has been discussed by this Court in detail supra. Accordingly, this finding has to be held to be perverse.

34.The further finding of the lower Appellate Court to the effect that Exhibits B7,

B9, B11 and B13 documents came to be registered even before the Will (Ex.B4) came into force, is also not sustainable since Ex.B9, B11 and B13 were registered in the year 1963, 1964 and 1969 respectively, much after the death of Perumayeeammal in the year 1957 (Ex.B16). In any event, the plaintiff has not proved that the suit properties were purchased from the surplus income arising out of the joint family nucleus. Thus, the plaintiff never discharged her burden in proving that the suit properties are ancestral properties, even though they stood in the name of the defendant. Therefore, the said finding also requires the interference of this Court.

35.The contention raised by the learned counsel for the respondent that the initial burden was discharged by the plaintiff through Ex.A3 and Ex.A4 documents, is not sustainable. This Court has already given reasons as to why the properties covered under Ex.A3 and Ex.A4 documents are not ancestral properties. For the very same reasons, the issue of estoppel by instrument/ deed raised by the learned counsel for the respondent is also not sustainable. In the considered view of this Court, the evidence that has been brought forth by the plaintiff during the course of the proceedings without even laying foundational facts in the pleadings, is liable to be rejected outright. However, considering the background facts of this case and the questionable integrity of the defendant, this Court took the effort to analyse the facts of the case with the available materials since such a power is available under Section 103 of C.P.C. Such analysis of facts was required to see if the findings of the lower Appellate Court suffers from perversity. On such

analysis, this Court holds that the plaintiff did not prove that the suit properties are in the nature of ancestral properties.

36. In view of the above discussion, this Court holds that the plaintiff did not discharge her burden by proving that the suit properties are ancestral properties, even though the properties stood in the name of the defendant. The plaintiff also did not prove that the suit properties were purchased from the surplus income yielded by the ancestral properties. The second substantial question of law is answered accordingly.

37. The findings rendered by the lower Appellate Court to come to a conclusion that the suit properties are ancestral properties, is found to be perverse due to improper appreciation of oral and documentary evidence available on record. There were no strong grounds available for the Lower Appellate Court to upset the findings of the trial Court. The first and third substantial questions of law are answered accordingly.

38. The answers given to the substantial questions of law framed by this Court, leads to the only conclusion that the Judgment and Decree passed by the lower Appellate Court requires the interference of this Court and is liable to be set aside. The consequence of the same would be to sustain the Judgment and Decree of the trial Court wherein, the suit was dismissed. However, the subsequent development that has taken place in this case requires moulding of the relief and to pass a preliminary decree in the suit. The reason for the same is captured by the Order passed by this Court on 17.3.2022

and the same is extracted hereunder:

“It is seen from the records that both the appellant as well as the respondent expired and in the place of the appellant, the second wife and their children have been impleaded. In the place of the respondent, the daughter born through the original defendant have been impleaded. If ultimately the property is held be the self-acquired property of the deceased appellant, the impleaded 3rd and 4th appellants as well as the impleaded 2nd and 3rd respondents will be entitled for a share. If the property is held to be a joint family property, the impleaded 2nd and 3rd respondents will be entitled for 1/3rd share each and the impleaded 3rd and 4th appellants will be entitled for 1/6th share each on the 1/3rd share of the deceased appellant. The learned counsel for the appellant shall get instructions as to whether the appellant had executed any Will or settlement before his death.”

39.The learned counsel for the appellants on instructions submitted that the appellant did not leave behind any Will or settlement deed and he died intestate. This Court has come to a conclusion that the suit properties are the self-acquired properties of the deceased appellant. In view of the same, the children born through the second wife as well as the children born through the first wife will be entitled for a share. In other words, the 3rd and 4th appellants and the 2nd and 3rd respondents will be entitled for 1/4th share each in the suit properties. This Court can always mould the relief by taking into consideration the subsequent events if it does not cause prejudice to the parties and there is no inconsistency while granting such a moulded relief.

40.In the result, the Second Appeal is allowed and the Judgment and Decree of the lower Appellate Court is hereby set aside and the Judgment and Decree of the trial

Court is modified and there shall be a preliminary decree for partition in favour of the 3rd and 4th appellants and the 2nd and 3rd respondents and each will be entitled for 1/4th share in the suit properties. It goes without saying that the 3rd and 4th appellants will pay the necessary Court fees within a period of **six weeks** from the date of receipt of the copy of the Judgment and Decree in this Second Appeal. Thereafter, it will be left open to the parties to file an appropriate application for passing of the Final Decree and for division of the suit properties by metes and bounds and for allotment of 1/4th share to each party. Considering the relationship between the parties and considering the facts and circumstances of this case, the parties shall bear their own costs. Consequently, connected miscellaneous petition is closed.

18.05.2022

Internet : Yes

Index : Yes

KP

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To

1.Subordinate Judge,
Namakkal.

2.Additional District Munsif,
Namakkal

3.The Section Officer
V.R.Section,High Court, Madras.

N.ANAND VENKATESH,J.
KP

Pre-Delivery Judgment in
Second Appeal No.211 of 2015

18.05.2022