

HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.12.2013

CORAM :

THE HONOURABLE Mr.JUSTICE G.M. AKBAR ALI

Civil Miscellaneous Appeal No.1610 of 2013
and M.P.No.1 of 2013

1.Minor B. Dharaniya
2.Minor B. Yalini
(minors rep by their mother
U.E.GeethaBalan)
3.Minor.R. Dhaniya
(Minor rep. by her mother Indirani) Appellants

vs

1.A. Chandran
2.G. Senthilmurugan
3.K.N. Balan
4.N. Gajendran
5.P.Maheswari
6.P.Indradevi
7.R. Sekhar
(R.7 impleaded as per order dated 9.7.13
in M.P.No.2 of 2013) ... Respondents

Civil Miscellaneous Appeal filed against the fair and deceetal order dated 01.03.2013 made in E.A.No.6 of 2010 in E.P.No.10 of 2009 in O.S.No..29 of 2006 on the file of First Additional District Court, Erode.

For Appellants : Mr.N. Manokaran

For R.1 and R.2 : Mr.T. Muruga Manickam
R.3 to R.6 : Ex-parte
R.7 : Mr.A.K. Kumarasamy

JUDGMENT

The appellants, who are minors, have filed a claim petition under Order 21 rule 58 of Civil Procedure Code in E.A. No.6 of 2010 in E.P No.10 of 2009. The above execution petition was filed in a decree passed in O.S No.29 of 2006 filed by the respondents 1 and 2.

2. The respondents 1 and 2 filed the above suit for the return of the advance amount of Rs.10,00,000/- from one K. Nachimuthu Gounder and his two sons K.N.Balan and N. Gajendran. According to the purchasers, the father and two sons entered into a sale agreement dated 6.11.1995 and received a sum of Rs.10,00,000/- as advance. Though the intending purchasers were ready and willing, the vendors did not execute a sale deed. Meanwhile, it is found that one of the sons had already executed a Release deed in favour of father and brother and he had no title. Some third party have also interfered with the property and therefore, the vendors rescinding the contract of sale, have filed a suit for return of advance money.

3. According to the appellants, the father died on 4.5.2002. Wife and other two daughters were impleaded as parties. The wife died on 17.2.2004. There should be a factual error in the date of the death of these two persons. The original suit was filed in the year 2006 against Nachimuthu Gounder and his two sons. Only in pending suit, the wife and two daughters were impleaded as per order dated 19.9.2007.

4. However, the suit was resisted on two grounds - (i) the sale agreement was not genuine and (ii) the purchasers ought to have filed a suit for specific performance. However, the trial court found that the execution of the sale agreement was true and admitted and decreed the suit on 16.9. 2008, for return of the advance amount with subsequent interest.

5. The respondents/deGREE holders filed execution petition in E.P.No.10 of 2009 and sought for attachment and sale of the very same properties which was the subject matter of the agreement. Pending execution, the daughters of one of the son namely, Balan, 3rd respondent, have filed the claim petition, stating that they have 7/24th share in the properties sought to be attached and their claims have to be declared. The claim was as coparceners as per Sec.6 of the Hindu Succession Act 1956, as amended by the act 39 of 2005.

6. The respondents 1 and 2 resisted the claim.

7. Initially, the claim petition was dismissed on the ground that the claimants have not come forward to adduce any evidence. However, an order on merit was passed. The said order was challenged in CMA No.3002 of 2002 and this court set aside the order and remanded back the matter for fresh disposal after giving equal opportunities to both the parties.

8. Again the matter was taken up for enquiry by the Executing Court. Documents were filed. Parties were examined. However, the Executing court again dismissed the claim of the petitioners, against which the present appeal is filed on various grounds.

9. Reiterating the various grounds raised in the appeal, Mr.N. Manokaran, learned counsel for the appellants/claim petitioners submits that the executing court is wrong in dismissing the claim petition on the ground that the appellants were not even born at the time of execution of the sale agreement. He also pointed out that the execution of the sale agreement has nothing to do with the claim of the appellants.

10. He also pointed out that admittedly, in a partition of the year 1990, the grand father of the appellants was allotted properties which include the properties sought to be attached in the execution proceedings. After the death of the grandfather, his grandchildren became co-parceners in the ancestral properties along with their father and therefore, they are entitled for a share in the property.

11. He also pointed out that when a claim is made under Order 21 Rule 58 of Civil Procedure Code, the duty of the Court is to adjudicate such claim as envisaged in the provision. The learned counsel relied on the following case laws:

(i) 2008 (2) CTC 774 (Kancherla Lakshminarayana vs Mattaparthi Syamala & Others)

(ii) 2012 3 MWN (civil) 715 (S. Parimala vs A. Mayil and others)

(iii) 2013 (4) CTC 539 (Rohit Chauhan vs Surinder Singh and Others)

12. He also pointed out that the executing court has not decided the issue whether the suit properties are ancestral and after the amendment of the Act, and by birth the grandchildren are entitled to a share in the property along with their father.

13. On the other hand, Mr.T. Murugamanickam, learned counsel for respondents 1 and 2 would submit that the claim petition itself is not maintainable as Order 21 Rule 58 of Civil Procedure Code can come into play only when there is attachment. He also relied on a decision reported in 2009 5 CTC 170 (M. Yogendra and Others vs N. Leelamma and Others)

14. Mr.A.K.Kumaraswamy, learned counsel for 7th respondent would rely on the decision reported in 2010 5 LW 329 (M. Kumaran and another vs J. Rajesh (Minor) and another, wherein a learned Single Judge of this court held as follows:

"18. The sum and subsistence of the above said decisions go to the effect that when a divided son or daughter has got the property belonging to their father in a partition, whether it is ancestral or self-acquired property of the father, they become absolute owners of their respective shares and they can deal with the properties exclusively excluding their sons. The son of a divided son does not get right from his father by virtue of Section 8 of the Hindu Succession Act and he cannot become a co-parcener in the property in question.

15. Heard and perused the materials available on record.

16. In a suit where a decree was passed for return of advance, otherwise a money decree, the execution proceeding for the attachment of sale of property is challenged by filing a claim petition under Order 21 Rule 58 of Civil Procedure Code. Order 21 Rule 58 of Civil Procedure Code reads as follows:

58. Adjudication of claims to, or objections to attachment of property:—

(1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions therein contained:

Provided that no such claim or objection shall be entertained

(a) where, before the claim is preferred or objection is made, the property attached has already been sold; or

(b) where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) All questions (including questions

relating to right, title or interest in the property attached) arising between the parties to a proceeding or their representatives under this rule and relevant to the adjudication of the claim or objection, shall be determined by the Court dealing with the claim or objection and not by a separate suit.

(3) Upon the determination of the questions referred to in sub-rule(2), the Court shall, in accordance with such determination, _

(a) allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit; or

(b) disallow the claim or objection; or

© continue the attachment subject to any mortgage, charge or other interest in favour of any person; or

(d) pass such order as in the circumstance of the case it deems fit.

(4) Where any claim or objection has been adjudicated upon under this rule, the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(5) Where a claim or an objection is preferred and the Court, under the proviso to sub-rule (1), refuses to entertain it, the party against whom such order is made may institute a suit to establish the right which he claims to the property in dispute; but, subject to the result of such suit, if any, an order so refusing to entertain the claim or objection shall be conclusive.

17. It is trite when a claim petition is filed under the above said provision, it has to be treated as a suit and findings have to be given on the contentious issues raised.

18. The appellants have claimed to declare that they have 7/24th share in the property sought to be attached by the decree holders. Their claim is based on that after the death of their grandfather and by birth, they became co-parceners along with their father and entitled for a share in the property. A partition deed dated 28.3.1990 executed between one K. Nachimuthu and others is

relied on to show that the properties are ancestral and joint.

19. In 2013 4 CTC 539 (Rohit Chauhan vs Surinder Singh & Others), the Hon'ble Supreme Court held as follows:

"11..... In our opinion coparcenary property means the property which consists of ancestral property and a co-parcener would mean a person who shares equally with others in inheritance in the estate of common ancestor. Co-parcenary is a narrower body than the Joint Hindu Family and before commencement of Hindu Succession (Amendment) Act, 2005, only male members of the family used to acquire by birth an interest in the coparcenary property. A coparcener has no definite share in the coparcenary property but he has an undivided interest in it and one has to bear in mind that it enlarges by deaths and diminishes by births in the family. It is not static. We are further of the opinion that so long, on partition an ancestral property remains in the hand of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his separate property but if a son is subsequently born, the alienation made before the birth cannot be questioned. But, the moment a son is born, the property becomes a coparcenary property and the son would acquire interest in that and become a coparcener. The view which we have taken finds support from a judgment of this Court in the case of M. Yogendra v Leelamma N., 2009 (5) CTC 170 (SC):2009 (15) SCC 184, in which it has been held as follows:

"29. It is now well settled in view of several decisions of this Court that the property in the hands of a sole coparcener allotted to him in partition shall be his separate property for the same shall revive only when a son is born to him. It is one thing to say that the property remains a coparcenary property but it is another thing to say that it revives. The distinction between the two is absolutely clear and

unambiguous. In the case of former any sale or alienation which has been done by the sole survivor coparcener shall be valid whereas in the case of a coparcener any alienation made by the Karta would be valid".

20. In 2010 5 LW 329 (M. Kumaran and another vs J. Rajesh (Minor) and another, wherein this Court has held as follows:

18. The sum and subsistence of the above said decisions go to the effect that when a divided son or daughter has got the property belonging to their father in a partition, whether it is ancestral or self-acquired property of the father, they become absolute owners of their respective shares and they can deal with the properties exclusively excluding their sons. The son of a divided son does not get right from his father by virtue of Section 8 of the Hindu Succession Act and he cannot become a co-parcener in the property in question.

21. Sec.6 of the Hindu Succession Act 1956, as amended by the act 39 of 2005 reads as follows:

6. Devolution of interest in coparcenary property.-(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,-

(a) by birth become a coparcener in her own right in the same manner as the son;

(b) have the same rights in the coparcenary property as she would have had if she had been a son;

(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son,

and any reference to a Hindu Mitakshara coparcener shall be deemed to include a

reference to a daughter of a coparcener:

Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

22. Sec.8 lays down the general rules of succession that the property of a male, dying intestate devolves according to the provisions of the chapter as specified in clause I of the schedule. In the schedule appended to the Act, natural sons and daughters are placed as class I heirs. But grandson has not been included. Sec.8 will come into play for a succession of the self acquired property of a male dying intestate. A decision of the learned Single Judge of this court reported in 2010 5 LW 329 (M. Kumaran and another vs J. Rajesh (Minor) and another, deals with sec.8 of the Hindu Succession Act.

23. However, Sec.6 of the Act deals with devolution of interest in the co-parcenary property. Before the amendment of the Hindu Succession (Amendment) Act 2005, only male members of the family acquire interest by birth and acquire a right in the co-parcenary properties. Now the daughters are also included. In 2013 4 CTC 539 (Rohit Chauhan vs Surinder Singh & Others), the Hon'ble Supreme court has held that so long, on partition an ancestral property remains in the hands of a single person, it has to be treated as separate property and such person shall be entitled to dispose of the co-parcenary property treating it to be his separate property, but if a son is subsequently born, the property becomes co-parcenary property and the son would acquire interest in that and become co-parcener. The son would now include daughter also. The Central Act was amended only in the year 2005 and came in to force on 09.09.2005. There was a State amendment in the year 1989, thereby section 6 was amended by Tamil Nadu State Amendment Act. The daughter was recognised as a coparcenar. However the Central Act supersede the State amendment and from 9.9.2005 the daughter is a coparcenar along with the son. The dates are crucial to decide whether the petitioners/appellants are entitled a share in the property of their grandfather along with their father. Another aspect is the right of disposal after partition by the coparcenar to whom it was allotted.

24. In 2013 4 CTC 539 (Rohit Chauhan vs Surinder Singh & Others), (cited supra) the Hon'ble Supreme Court held that "so

long, on partition an ancestral property remains in the hand of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his separate property but if a son is subsequently born, the alienation made before the birth cannot be questioned." Admittedly, the partition was between the said Nachimuthu Gounder and his two sons on one side and one Ponnusamy, brother of Nachimuthu Gounder on the other side in the year 1990. After such partition the property has to be treated as the ancestral property in the hands of father and two sons. They had entered in to a sale agreement in the year 1995. The father along with his sons had received the suit amount. Now there is decree against them. There was no division of property between father and sons. The properties of Hindu Joint family was divided between two brothers and sons, particularly, "A" schedule was allotted to the said Nachimuthu Gounder and his two sons as one share and remains to be so. It has to be borne in mind that a share in the coparcenary property enlarges by death and diminishes by birth, the moment any son (now daughter also included) is born, the share diminishes and on the death of one co-parcener, viz., the grandfather, as in this case, the share enlarges. As long as the properties are joint is in the hands of the co-parceners, the son and daughter of the co-parcener gets a right in the property. However the liabilities also to be shared. It is a money decree on the joint family. Sec.6 of the Hindu Succession (Amendment) Act 2005 would state that "the daughter of a coparcener shall,-

(a) by birth become a coparcener in her own right in the same manner as the son;

(b) have the same rights in the coparcenary property as she would have had if she had been a son;

© be subject to the same liabilities in respect of the said coparcenary property as that of a son"

When she acquires the same right of a son, she is also subjected to the same liabilities as that of a son.

25. Therefore, the appellants, though entitled to their 7/24th share in the properties which are sought to be attached, are also subjected for the joint family liability. They can not resist the attachment.

26. In the result, the civil miscellaneous appeal is dismissed and the order passed in E.A.No.6 of 2010 in E.P.No.10 of 2009 in

O.S.No..29 of 2006 on the file of First Additional District Court,
Erode is confirmed. No costs. Consequently, connected MP is closed.

Sd/-
Assistant Registrar(CS-II)
10.01.2014

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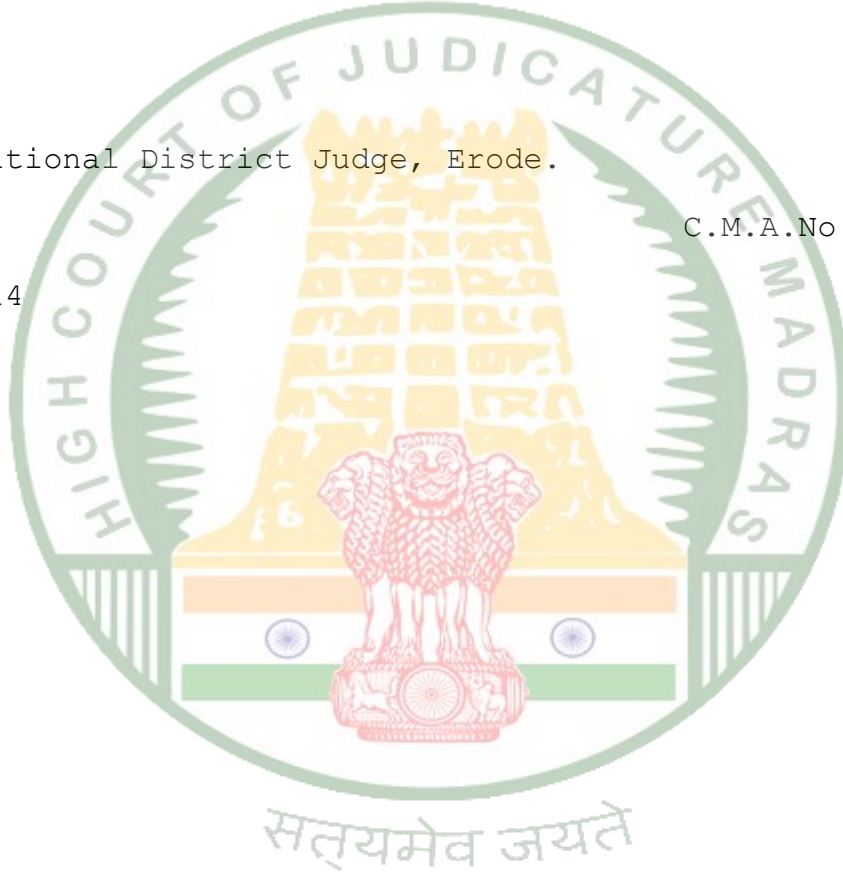
Sub. Assistant Registrar

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To
The I Additional District Judge, Erode.

C.M.A.No.1610 of 2013

KSJ(CO)
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