

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :30.07.2015

CORAM :

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

S.A.Nos.26 and 220 of 2009

1. Anandayee
2. Manickam
3. Anbalagan

... Appellants in both the Appeals

Vs.

1. Govindasamy
2. Thulasi Ammal

...Respondents in S.A.No.26 of 2009

1. Kala
2. Sangeetha
3. Devarajan
4. Govindasamy

..Respondents in S.A.No.220 of 2009

Prayer in S.A.No.26 of 2009:- Appeal under Section 100 of the Civil Procedure Code, against the judgment and decree dated 18.04.2006 made in A.S.No.1 of 2006 on the file of the Principal District Court, Salem, confirming the judgment and decree dated 16.11.2004 made in O.S.No.354 of 2000 on the file of the Additional Subordinate Court, Salem.

Prayer in S.A.No.220 of 2009: Appeal under Section 100 of the Civil Procedure Code, against the judgment and decree dated 18.04.2006 made in A.S.No.107 of 2006 on the file of the Principal District Court,

Salem, reversing the judgment and decree dated 16.11.2004 made in O.S.No.642 of 1995 on the file of the Additional Subordinate Court, Salem.

For Appellants in both appeals : Mr.T.Gowthaman

For Respondents 1 & 2 in S.A.No.26 of 2009	: Mrs.Hema Sampath,
and	Senior Counsel
For Respondents 1 to 3 in S.A.No.220 of 2009	for Mrs.R.Meenal

For Respondent-4 in S.A.No.220 of 2009	: No Appearance
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COMMON JUDGMENT

The above appeals arise out of common judgment dated 18.04.2006 made in A.S.No.1 of 2006 and A.S.No.107 of 2005 on the file of the Principal District Judge, Salem. O.S.No.354 of 2000 on the file of the Additional Subordinate Judge, Salem was dismissed and confirmed by the lower Appellate Court in A.S.No.1 of 2006, whereas, O.S.No.642 of 1995 on the file of Additional Subordinate Judge, Salem was reversed by the lower Appellate Court in A.S.No.107 of 2005.

2. The brief facts leading to the above appeals are as follows:

The suit in O.S.No.354 of 2000 was filed by the appellants herein namely, Anandayee, Manickam and Anbalagan, seeking declaration with

respect to 'A' schedule properties and for declaration and possession with respect to 'B' schedule properties. Similarly, O.S.No.642 of 1995 was filed by the respondents 1 to 3 in S.A.No.220 of 2009, namely, Kala, Sangeetha and Devarajan, seeking partition of 3/4th share in the suit properties. Both the suits were tried in common and disposed of by the common judgment dated 16.11.2004, dismissing them both. As against the same, A.S.No.1 of 2006 and A.S.No.107 of 2005 were filed by the aggrieved parties, which were also disposed of by a common judgment dated 18.04.2006, wherein, the dismissal of suit for declaration and recovery of possession in O.S.No.354 of 2000 was confirmed and dismissal of the partition suit in O.S.No.642 of 1995 was reversed.

2.1. In so far as the relationship of the parties are concerned, the first appellant in both the second appeals namely, Anandayee, is the second wife of Govindasamy, who is arrayed as first and fourth respondent in S.A.Nos.26 and 220 of 2009 respectively. The appellants 2 and 3 are children born to Anandayee and Govindasamy. The respondents in S.A.No.220 of 2009 are the children of the said Govindasamy, through his third wife, Thulasiammal, who was arrayed as second respondent in

S.A.No.26 of 2009.

2.2 The first respondent in S.A.No.26 of 2009/fourth respondent in S.A.No.220 of 2009 - Govindasamy was originally married to one Baggiyam and out of the said wedlock, they begot two sons and one daughter. As the father of the first respondent allegedly made overtures towards the said Baggiyam, she was frustrated and attempted suicide along with her three children. In the said attempt, though Baggiyam survived, unfortunately, the children were killed. As a consequence, criminal prosecution was launched against the said Baggiyam and she was convicted. When Baggiyam was undergoing sentence, the said Govindasamy contracted marriage with the first appellant, namely, Anandayee and out of the said wedlock, appellants 2 and 3 were born. Later, when the said Baggiyam was released from the jail, Govindasamy started living with her also and got a daughter by name Chandra. Meanwhile, the said Baggiyam died and Govindasamy married another woman by name Thulasiammal as his third wife, who is the second respondent in S.A.No.26 of 2009. It is stated that the said Thulasiammal divorced her first husband as per the customary practice prevalent in her

community and married Govindasamy and three children were born to them are the respondents 1 to 3 in S.A.No.220 of 2009.

2.3. Govindasamy's father had effected a partition deed dated 07.09.1962 between himself and four sons. In the said partition, there is a mention about the earlier partition and the separate possession of their shares. A clause was introduced in the said deed, restricted Govindasamy's right of alienation and encumbrance over his share of the property. There was a further condition that Govindasamy should live only with his wife Anandayee and to maintain his children and in the event of Govindasamy developing extra marital affair, his right over the share of ancestral property shall stand forfeited and the said property shall get transfer to the first appellant herein with life interest and the second and third appellants would get the absolute interest. Despite the above mentioned restriction clause, the said Govindasamy married Thulasiammal and further settled some of the properties allotted to his share in favour of his third wife Thulasiammal.

2.4. Hence the appellants herein had filed a suit for declaration

of the suit properties allotted to the share of the first defendant Govindasamy on the strength of the restriction clause to the partition deed dated 07.09.1962. Similarly, the respondents 1 to 3 in S.A.No.220 of 2009 filed a suit for partition of 3/4th share in the suit properties allotted to Govindasamy, after excluding the properties settled in favour of Thulasiammal.

3. Before the Trial Court, the first plaintiff examined herself as PW.1 and three more witnesses were examined as P.W.2 to P.W.4 and Exs.A1 to A7 were marked. On the side of the defendants, the first defendant examined himself as DW.1 and four more witnesses were examined as DW.2 to D.W.5 and Exs.B1 to B11 were marked.

4. The trial Court after appreciating both the oral and documentary evidence adduced on both sides, by the common judgment dismissed both the suits. As against the same, the aggrieved parties had preferred appeals before the first appellate court, which were also disposed of by a common judgment wherein, the dismissal of suit for declaration and recovery of possession in O.S.No.354 of 2000 was

confirmed and dismissal of the partition suit in O.S.No.642 of 1995 was reversed.

5. When the Second Appeal S.A.No.220 of 2009 came up for admission only notice was ordered. In S.A.No.26 of 2009, the following substantial questions of law were formulated as under:

“(1) Whether an oral arrangement made prior to a written partition deed supersedes the contents and intent of the partition deed executed, admitted and acted upon?.

(2) Whether the Courts below are right in taking inconsistent view by rejecting the customary divorce underwent by the 1st plaintiff while upholding the customary divorce said to have been underwent by the 2nd defendant?.

6. Heard Mr.T.Gowthaman, learned counsel appearing for the appellants and Mrs.Hema Sampath, Senior Counsel appearing on behalf of Mrs.R.Meenal for Respondents 1 to 3 and perused the records.

7. The learned counsel for the appellants in both the second

appeals had submitted that the execution of the partition deed was admitted by Govindasamy and having admitted the execution of the same, the clause imposing the restrictions on his right is self-imposed restrictions and he is bound by the same. The learned counsel further submitted that in view of the undisputed act of Govindasamy's marriage with Thulasiammal, the said restrictions also become operative conferring rights upon the first appellant herein with only life interest and appellants 2 and 3 herein with absolute rights. Having his rights forfeited in view of the operation of the above mentioned clause, Govindasamy has no right whatsoever to settle some of the properties in favour of Thulasimmal and further the settlement deed is void and not binding upon the appellants herein. On the strength of the above submissions, the learned counsel further contended that there are serious infirmities in the judgment of the lower appellate Court and sought to set aside the same.

8. Per contra, it was submitted by the learned counsel appearing for the respondents in both the appeals that the restriction clause in the partition deed dated 17.09.1962 is hit by Section 10 of the Transfer of

Property Act which declares such restriction as void in the eye of law. In view of the same, the learned counsel appearing for the respondents prayed for dismissal of the appeals.

9. The findings of the lower appellate Court and also the submissions of the learned counsel for the respondents in both the appeals that the restriction clause in the partition deed dated 07.09.1962 is hit by Section 10 of the Transfer of Property Act, which declares such restriction as void in the eye of law, is not appealing and convincing. Whether the partition is transfer or not as held in various judgments cannot be lost sight of.

10. In **AIR 1951 Madras 213 Radhakrishna Ayyar -Vs- Sarasamma**, this Court had observed that the partition is really a process in and by which a joint enjoyment is transformed into an enjoyment in severalty. Each vendor had an antecedent title and therefore, no conveyance is involved in the process as a conferment of new title is not necessary. The crucial test of a transfer namely a conveyance by a person in favour of a person having no right in the property previously, is not satisfied.

11. Similarly, the Hon'ble Apex Court reported in **AIR 1988 SC 1365 Moharsingh Vs.Devicharan and others**, wherein it has been held as follows:-

“It is true that a partition is not actually a transfer of property but would only classify the surrender of a portion of a joint right in exchange for a similar right from the other co-sharers.

12. In **V.N.Sarin Vs. Major Ajith Kumar Poplai**, reported in **AIR 1966 SC 432**, the Hon'ble Apex Court has held as follows:-

10. Mr. Purshottam, however, contends that when an item of property belonging to the undivided Hindu family is allotted to the share of one of the coparceners on partition, such allotment in substance amounts to the transfer of the said property to the said person and it is, therefore, an acquisition of the said property by transfer Prima facie, it is not easy to accept this contention. Community of interest and unity of possession are the essential attributes of coparcenary property; and so, the true effect of partition is that each coparcener gets a specific property in lieu of his undivided right in respect of the totality of the property of the family. In other

words, what happens at a partition is that in lieu of the property allotted to individual coparceners they, in substance, renounce their right in respect of the other properties; they get exclusive title to the properties allotted to them and as a consequence, they renounce their undefined right in respect of the rest of the property, The process of partition, therefore, involves the transfer of joint enjoyment of the properties by all the coparceners into an enjoyment in severalty by them of the respective properties allotted to their shares. Having regard to this basic character of joint Hindu family property, it cannot be denied that each coparcener has an antecedent title to the said property, though its extent is not determined until partition takes place. That being so, partition really means that whereas initially all the coparceners have subsisting title to the totality of the property of the family jointly, that joint title is by partition transformed into separate titles of the individual coparceners in respect of several items of properties allotted to them respectively. If that be the true nature of partition, it would not be easy to uphold the broad contention raised by Mr. Purshottam that partition of an undivided Hindu family property must necessarily mean transfer of the property to the individual coparceners. As was observed by the Privy Council in

Girja Bai v. Sadashiv Dhundiraj, 43 Ind App 151 at p. 161: (AIR 1916 PC 104 at p.108):

"Partition does not give him (a coparcener) a title or create a title in him; it only enables him to obtain what is his own in a definite and specific form for purposes of disposition independent of the wishes of his former co-shares".

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14. *In this connection, we may refer to a recent decision of this Court in the Commr. of Income-tax, Gujarat v. Keshavlal Lallubhai Patel, (1965) 55 ITR 637. In that case, the respondent Keshavlal had thrown all his self-acquired property into the common hotch-pot of the Hindu undivided family which consisted of himself, his wife, a major son and a minor son. Thereafter, an oral partition took place between the members of the said family and properties were transferred in accordance with it in the names of the several members. The question which arose for the decision of this Court was whether there was an indirect transfer of the properties allotted to the wife and minor son in the partition within the meaning of S. 16 (3) (a) (iii) and (iv) of the Indian Income-tax Act, 1922. This Court held that the oral partition in question was not a transfer in the*

strict sense, and should not, therefore, be said to attract the provisions of S. 16 (3) (a) (iii) and (iv) of the said Act. This decision shows that having regard to the context of the provision of the Income-tax Act with which the Court was dealing, it was thought that a partition is not a transfer, Considerations which weighed with the Court in determining the true effect of partition in the light of the provisions of the said section, apply with equal force to the interpretation of S. 14 (6) of the Act.

13. Considering the above decisions, I hold that a partition is not a transfer and consequently, Section 10 of the Transfer of Property Act has no application over the same. Thus, the findings of the Lower Appellate Court and submissions of the learned counsel appearing for the respondents that the restriction Clause in the partition deed dated 07.09.1962 is hit by Section 10 of the Transfer of Property Act is legally unsustainable. However, it is open to this Court to examine the validity of the said restriction clause in terms with other provisions of law.

14. On the question of marriage of Govindasamy with Anandayee, it is found by the lower Appellate Court, on appraisal of evidence let in by both the parties, that the said marriage is illegal and void as the same

had been contracted during the subsistence of the first marriage between the Govindasamy and Baggiyam. The said finding of the Appellate court on the legality of the said marriage does not require any interference by this Court. In view of the categorical finding rendered by the lower Appellate Court that the marriage between Govindasamy and Anandayee is illegal and void as the same had been contracted during the subsistence of the first marriage between Govindasamy and Baggiyam. The restriction clause is hit by Section 23 of Contract Act. Thus, the restriction clause forcing Govindasamy to live with Anandayee with whom he contracted marriage is invalid and consequently it is held that the said restriction clause in the partition deed dated 07.09.1962 as void by virtue of Section 23 of the Indian Contract Act. Consequently, the settlement deed executed by Govindasamy in favour of his third wife, Thulasiammal is legally valid. It is needless to say that in view of the above finding, the appellants 2 and 3 who are legitimate children can inherit only a self acquired property of their father Govindasamy and that too, after his death as they cannot constitute co-parcenary to lay any claim on the ancestral properties. The said position of law finds support in **2003(1) SCC 730 JINIA KEOTIN -VS- KUMAR SITARAM**, in

which it has been held as follows:-

5. “ In the light of such an express mandate of the legislature itself, there is no room for according upon such children who but for Section 16 would have been branded as illegitimate any further rights than envisaged therein by resorting to any presumptive or inferential process of reasoning, having recourse to the mere object or purpose of enacting Section 16 of the Act. Any attempt to do so would amount to doing not only violence to the provision specifically engrafted in sub-section (3) of Section 16 of the Act but also would attempt to court re-legislating on the subject under the guise of interpretation, against even the will expressed in the enactment itself.”

15. In Neelamma and others Vs.Sarasamma and others reported in (2006) 9 SCC Page 612, it has been held that

“legitimate children would only be entitled to share of the self acquired property of the appellants of the father and not to the joint Hindu family property”.

16. The same principle was reiterated in AIR 2010 SCC 2685

Bharathamadha and others -vs- R.Vijayarenganathan and others,
wherein, it has been held that:

“A child born in a void or voidable marriage was not entitled to claim inheritance ancestral co-parcenary properties, but was entitled to claim only a share in the self acquired property.”

17. Similarly, the Lower Appellate Court on appraisal of the evidence let in by both the parties had reached the categorical conclusion that the marriage between Govindasamy and Thulasiammal is legally valid as the same had been contracted only after the death of the legally wedded first wife Baggiyam. The said finding of the Appellate Court on the legality of the said marriage does not require any interference by this Court. In view of the above said findings, the respondents 1 to 4 herein in S.A.No.220 of 2009 (i.e) Govindasamy and his three children born through Thulasiammal alone constitute co-parcenary was rightly decreed by the Courts below.

18. In the result, both the Second Appeals are dismissed as devoid

of any merit and the questions of law framed are answered accordingly.
Considering the relationship between parties, the parties are directed to
bear their own costs.

30.07.2015.

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Index :Yes/No

Internet :Yes/No.

To

1. The Principal District Judge, Salem
2. The Additional Subordinate Judge, Salem

PUSHPA SATHYANARAYANA.J.

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**Judgment
made in
S.A.Nos.26 and 220 of 2009**

30.07.2015