

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.02.2015

CORAM

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

Second Appeal No.845 of 2013 and
M.P.No.1 of 2013

1.P.Saraswathi
2.A.Sivagami
3.S.Palaniammal
4.R.Amaravathi
5.T.Maheswari
6.V.Sarala Devi

..... Appellants/Plaintiffs 2 to 7

Vs.

1.A.Rajamanickam
2.R.Natarajan
3.R.Sadasivam
4.K.Valli

... Respondents/Defendants 1 to 3 & 1st Plaintiff

Prayer:- This second appeal has been filed under Section 100 C.P.C., against the judgment and decree of the learned Principal District Judge, Salem in A.S.No.7 of 2012 dated 28.09.2012 in confirming the judgement and decree of the Court of the learned II Additional Subordinate Judge, Salem in O.S.No.120 of 2010 dated 17.12.2011.

For Appellant : Mr.V.Ragavachari
For R.2 : Mr.A.Murugan

JUDGEMENT

The plaintiffs 2 to 7 in O.S.No.120 of 2010 on the file of the learned II Additional Subordinate Judge, Salem are the appellants herein. The respondents 1 to 3 are the defendants in the suit. The fourth respondent Mrs.K.Valli, is the first plaintiff in the suit. The said suit was filed for partition and claiming equal share over the suit property and for other reliefs. The trial Court by decree and judgement dated 17.12.2011, dismissed the suit. As against the same, the appellants herein filed an appeal in A.S.No.7 of 2012 on the file of the learned Principal District Judge, Salem. The First Appellate Court by decree and judgement dated 28.09.2012, dismissed the said appeal thereby confirming the decree and judgement of the trial Court. Challenging the same, the appellants are before this Court with this second appeal.

2.This second appeal has come up today for admission. I have heard the learned counsel for the appellants. The second respondent has made appearance through his learned counsel. I have heard him also and I have also perused the records carefully.

3.The case of the plaintiffs is that the first defendant Mr.A.Rajamanickam is the father of the plaintiffs. The suit properties are the ancestral properties of Mr.A.Rajamanickam. The plaintiffs 1 to 3 got married prior to the coming into force of the Hindu Succession (Tamil Nadu Amendment) Act 1989 (hereinafter referred to as the Tamil Nadu Amendment Act of 1989), amending the Hindu Succession Act, thereby making the daughters also as the members of the co-parceners. The 7th plaintiff Mrs.V.Sarala Devi was given in marriage on 23.08.1993. Therefore, she is entitled for the benefits of the Tamil Nadu Amendment Act of the year 1989. The Hindu Succession Act, 1956 was amended by the Central Act viz., Hindu Succession (Amendment) Act, 2005 (hereinafter referred to as the Central Amendment Act, 2005). According to the plaintiffs, by virtue of the said Amendment Act, they have become members of the co-parcenary, of which, the defendants are also members. Thus, they are entitled for equal share in the suit properties. The demand for partition was not conceded to by the defendants and therefore, according to them, the plaintiffs have filed the suit.

4.The defendants 1 and 3 have filed written statement wherein, they have stated that it is true that the suit properties are the ancestral properties of the first defendant. But, the suit properties were all partitioned by means of a registered partition deed dated 30.09.1988 under document No.1866/86. The defendants are parties to the said document and from the date of division, they have been enjoying their respective shares. According to the partition deed, the first defendant was allotted 0.40 $\frac{1}{2}$ out of 0.81.0 hectares in S.No.198/3E and 0.55 out of 0.78.0 in S.No.199/1B with 1/3 share in the well and motor and pumpset under 'A' schedule of the above partition deed. The second defendant was allotted 0.24 acres out of 0.81.0 hectares in S.No.198/3E acre 1.11 out of 0.78.0 hec in S.No.199/1B and 0.02.5 hec in S.No.199/3B with 1/3 share in the well motor pumpset under 'B' schedule of the above partition deed. The third defendant was allotted acre 0.95 $\frac{1}{2}$ out of 0.81.0 hectares in S.No.198/3E and 0.20 acres out of 0.78.0 hect. S.No.199/1B with 1/3 share in the well and motor and pumpset under 'C' schedule of the above partition deed.

5.As early as on 07.07.1993, the first defendant had executed a general power of attorney in the name of one Mr.R.Elumalai in respect of 0.16 $\frac{1}{2}$ acre in S.No.198/3E and the said power agent Mr.Elumalai has plotted out the site and sold away the same to various persons. Thus, according to the defendants, the defendants are not entitled

for any share since, the partition had already taken effect prior to the coming into force of both the State Amendment Act as well as the Central Amendment Act.

6.The second defendant filed a separate written statement wherein, he had conceded for partition as demanded by the plaintiffs. In other words, he sailed with the plaintiffs.

7.Based on the above pleadings, the trial Court framed appropriate issues and called upon the parties to let in oral as well as documentary evidence. On the side of the plaintiffs as many as one witness was examined and 3 documents were exhibited. On the side of the defendants as many as 3 witnesses were examined and 14 documents were exhibited.

8.Having considered the above oral as well as documentary evidences, the trial Court dismissed the suit which was confirmed by the First Appellate Court holding that the plaintiffs are not entitled for the benefit of both the Central as well as State Act namely the Hindu Succession (Amendment) Act of 2005 and the Hindu Succession (Tamil Nadu) Act of 1989. Aggrieved over the same, the appellants are before this Court with this second appeal

9.In this second appeal, the learned counsel for the appellants would submit that the so called partition deed dated 30.09.1988 (Ex.B.12) is a sham and nominal document. The learned counsel would submit that the defendants 1 and 3 have failed to prove that there was division of properties under a partition deed and therefore, the Courts below according to the learned counsel, ought to have held that Ex.B.12 is only a sham and nominal document and there is no actual partition. The learned counsel further submitted that assuming that Ex.B.12 was duly executed and there was really a partition, even then, the partition should be re-opened afresh and the plaintiffs should be allotted their shares. In respect of the said contention, the learned counsel, has relied on a judgement of the Hon'ble Supreme Court in Shripad Gajanan Suthankar v. Dattaram Kashinath Suthankar and others (1974 (2) SCC 156).

10.Nextly, the learned counsel for the appellants would submit that assuming that the partition is true and that the plaintiffs are not therefore entitled for equal shares in the suit properties, as members of the co-parcenary even then, they are entitled for partition decree since, the first defendant, father died intestate subsequently. Therefore, according to the learned counsel, there should have been decree for partition passed in favour of the plaintiffs for the portion of the properties left behind by the first defendant intestate.

11.I have considered the above submissions.

12. So far as Ex.B.12 is concerned, it is a registered document and it is not a partition chit evidencing oral partition which had already taken place. If it is the case that there was oral partition which was subsequently evidenced by means of unregistered partition deed, factually, an oral partition should be proved by means of evidence. But, here, in this case, as I have already pointed out, Ex.B.12 is a registered document and the said document is a deed of partition which divided the properties. Thus, it is this document which effected partitioning the properties and thus, this is a primary evidence and the production of the deed itself would prove the contents of the same.

13. In my considered opinion, the person who pleads that a particular document is sham and nominal alone should prove the same. In other words, the burden is only upon the person who pleads that the document is sham and nominal because, as per Section 101 of the Indian Evidence Act, if no evidence is let in, the person who pleads that the document is sham and nominal alone would lose. Therefore, undoubtedly, it is for the plaintiffs in this case to prove that Ex.B.12 is a sham and nominal document. That has not been done at all by the plaintiffs. Therefore, in my considered opinion, the Courts below were right in holding that Ex.B.12 is a genuine document, by which, there partition had taken place on 30.09.1988.

14. If once this conclusion is safely arrived at, then, there may be no difficulty for this Court to hold that the plaintiffs are not entitled for any share, the reason being that the plaintiffs 1 to 6 were married even prior to the Tamil Nadu Amendment Act of 19889. Those daughters who remained unmarried as on the date of coming into force of Tamil Nadu Amendment Act of 1989, alone would be entitled for a share as a member of the co-parcenary.

15. Here, in this case, since the plaintiffs 1 to 6 had already been married, i.e., even prior to the coming into force of the Tamil Nadu Amendment Act of 1989, the benefits of the said Act are not available for them. That is the reason why they claim benefit under Central Amendment Act, 2005. This Act was brought into force on 09.09.2005. But, according to this Act, if there had already been partition, then, the said Act shall not affect the said partition.

16. The proviso to Sub Section 1 of Section 6 of the Central Amendment Act, 2005, reads as follows:-

"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."

17. Here, in this case, partition had taken place under Ex.B.12 itself. Therefore, so far as the plaintiffs 1 to 6 are concerned, they are not entitled for the share in these properties. The above proviso makes it clear that the partition which had already taken place shall not be affected.

18. So far as the 7th plaintiff is concerned, admittedly she was married only on 23.08.1993. Therefore, she may claim the benefit of both the enactments namely, Central as well as State Act.

19. From the State Act, if only a daughter remains unmarried as on the date of the coming into force of the Tamil Nadu Amendment Act, 1989, she shall be entitled for the share. It also further states that if there had already been partition, that will not be affected. As I have already pointed out, here, in this case, even before coming into force of the said Act, partition had taken place and therefore, the 7th plaintiff is also not entitled for any share.

20. The learned counsel for the appellants would submit as per the judgement of the Hon'ble Supreme Court in Shripad Gajanan Suthankar v. Dattaram Kashinath Suthankar and others's case (cited supra), partition done already under Ex.B.12 should be re-opened. I have carefully gone through the said judgement. That was a case relating to an adopted son. In that case, even before the date of division, the properties were partitioned and some properties were also alienated. In the said judgement, the Hon'ble Supreme Court has held that the partition which had already taken place would not bind the adopted son and he is entitled for the share. In paragraph No.6 of the said judgement, the Hon'ble Supreme Court has held as follows:-

"6. It is established law that the adoption by a widow relates back to the date of the death of the adoptive father, which, in this case, took place in 1921. Indeed, the complexity of the present case arises from the application, of this legal fiction of "relation-back" and the limitations on the amplitude of that fiction vis-a-vis the partition of 1944, in the light of the rulings of the various High Courts and of the Judicial Committee of the Privy Council, and of this Court, the last of which is Govind v. Nagappa. According to the appellant, the rights of the adopted son, armed as he is with the theory of "relation-back", have to be effectuated retro-actively, the guidelines wherefor are available from the decided cases. It is no doubt true that

"when a member of a joint family governed by Mitakshara law dies and the widow validly adopts

a son to him, a coparcenary interest in the joint property is immediately created by the adoption co-extensive with that which the deceased coparcener had, and it vests at once in the adopted son." (See Mulla on Hindu Law, 13th edn. Page 516)

The same author, however points out that:

"the rights of an adopted son arise for the first time on his adoption. He may, by virtue of his rights as adopted son, divest other persons in whom the property versted after the death of the adoptive father, but all lawful alienations made by previous holder would be binding on him. High right to impeach previous alienations would depend upon the capacity of the holder who made the alienation as well as on the nature of the action of alienation. When the holder was a male, who had unfettered right of transfer, e.g., the last surviving member of a joint family, the adopted son could not impeach the transfer. In case of females who had restricted rights of transfer even apart from any adoption, the transfers would be valid only when they are supported by legal necessity."

"An adopted son is bound by alienations made by his adoptive father prior to the adoption to the same extent as a natural-born son would be."

21. In my considered opinion, that principle cannot be made applicable to the facts of the present case. Here, in this case, since the partition had already taken place, the amended proviso to Sub Section 1 and Section 6 of the Central Amendment Act, 2005 is not applicable. Therefore, in the instant case, the question of re-opening the partition as sought for by the appellants does not arise.

22. The learned counsel lastly contended that now that the first defendant Mr. A. Rajamanickam is no more and therefore, atleast out of his share, a decree for partition should have been passed. In my considered opinion, in the present suit, that kind of relief cannot be granted to the plaintiffs. It is a question of fact as to whether Mr. Rajamanickam had died intestate leaving behind any property and it has to be gone into only by the trial Court on evidence based on proper pleadings. In the present suit, the same cannot be resolved. If it is the stand of the plaintiffs, that Mr. Rajamanickam died intestate leaving behind the properties which were taken by him towards his share under Ex.B.12, and any other property which are his

self acquired properties, they are at liberty to file a separate suit for partition. This suit will not be a res judicata for the same.

23.In view of the above discussion, I find that the issues resolved by the Courts below are all only on facts and there is no substantial question of law at all involved. In the factual findings also, I do not find any perversity. In view of all the above, question of admitting this second appeal does not arise.

24.In the result, the second appeal fails and accordingly, the same is dismissed. No costs. Consequently, connected M.P is closed.

-s/d-

Assistant Registrar(J)

Dt:6/3/2015

True Copy

Sub-Assistant Registrar

To

1.The II Additional Subordinate Judge,
Salem.

2.The Principal District Judge,
Salem.

+ 1 cc to Mr.V.Raghavachari, Advocate SR 6587

+ 1 cc to Mr.A.Murugan, Advocate SR 6847

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Second Appeal No.845 of 2013

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