

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.11.2015

CORAM

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

Second Appeal No.949 of 2011

and

M.P.No.1 of 2011 & M.P.No.1 of 2012

Selvarathinam (died)

- 1.Annammal
- 2.Loganayaki
- 3.N.Vellangiri
- 4.V.Jayakumar
- 5.V.Sethupathi
- 6.V.Dharmaraj

....Appellants/Appellants/Plaintiffs

Vs.

- 1.Chinnappan @ Pazhanisamy
- 2.Aruchami
- 3.Nataraj
- 4.Venugopal

....Respondents/Respondents/Defendants

Prayer:- This second appeal has been filed under Section 100 C.P.C., against the judgment and decree dated 10.11.2009 made in A.S.No.63 of 2008 on the file of the learned Subordinate Judge, Pollachi reversing the judgment and decree dated 09.11.2005 made in O.S.No.2 of 2000 on the file of the learned District Munsif, Pollachi.

For Appellant : Mr.M.V.Krishnan

For RR1 to 4 : Mr.S.Gunalan

JUDGEMENT

The plaintiffs in O.S.No.2 of 2000 on the file of the learned District Munsif, Pollachi are the appellants herein. The respondents are the defendants in the suit. The said suit was filed for partition and for separate possession. The learned District Munsif by decree and judgment dated 09.11.2005 dismissed the suit in its entirety. As against the same, the plaintiffs filed an appeal in A.S.No.63 of 2008 on the file of the learned Subordinate Judge, Pollachi. By decree and judgment dated 10.11.2009, the First Appellate Court allowed the appeal and set aside the decree and judgment of the trial Court and decreed the suit thereby passing a preliminary decree granting 1/35th share for the plaintiffs 1 and 2 and 1/35th to the

plaintiffs 4 to 7 together. The defendants have not filed any appeal against the said preliminary decree passed by the First Appellate Court. Aggrieved over the same, the plaintiffs have come up with this second appeal.

2.The case of the plaintiff is as follows:-

The suit was originally filed by the daughters of one Mr.Vadivel Gounder. The first plaintiff Ms.Selvarathinam died during the pendency of the suit and therefore, the plaintiffs 4 to 7 were brought on record as the legal representatives of the first plaintiff. The defendants 1 to 4 are the other sons of Mr.Vadivel Gounder. According to the plaintiffs, the suit property was originally purchased by one Mr.Sengaliappa Gounder by means of registered sale deed dated 08.12.1922. Mr.Sengaliappa Gounder died in the year 1945 leaving behind his only son Mr.Vadivel Gounder and his wife Mrs.Rasakal. After the demise of Mr.Sengaliappa Gounder, Mr.Vadivel Gounder and his wife Mrs.Rasakal enjoyed the suit property. Mrs.Rasakal also died subsequently. Thus, Mr.Vadivel Gounder was the absolute owner of the suit property. According to the plaintiffs, the suit properties are the self acquired properties of Mr.Vadivel Gounder and therefore, the daughters as well as the sons of Mr.Vadivel Gounder are entitled for equal share i.e., 1/7th share each in the suit properties.

3.But, the defendants took the plea that the suit property was the ancestral property of Mr.Vadivel Gounder. But, after the demise of Mr.Vadivel Gounder, the defendants have been in exclusive possession and enjoyment of the suit property to the exclusion of the plaintiffs. Mr.Vadivel Gounder died somewhere in the year 1988. Thus, according to the defendants, the plaintiffs have got no right whatsoever over the suit property for partition of the same.

4.Based on the above pleadings, the trial Court framed appropriate issues. On the side of the plaintiffs, the second plaintiff was examined as P.W.1 and as many as 6 documents were exhibited. On the side of the defendants, the second defendant was examined as D.W.1 and as many as 2 documents were exhibited.

5.Having considered all the above, the trial Court dismissed the suit holding that the plaintiffs had been excluded from the possession of the property and therefore, they are not entitled for any share in the suit property. But, the First Appellate Court found that the contention of the plaintiffs that the suit properties are the self acquired properties of Mr.Vadivel Gounder is not correct and instead, the suit properties are the ancestral properties of Mr.Vadivel Gounder. The First Appellate Court further found that all the three daughters of Mr.Vadivel Gounder had got married before the year 1989 and therefore, they are entitled only for 1/35th share each in the suit properties. The plaintiffs are not satisfied with the said quantum of share allotted and according to the plaintiffs, they ought to have been allotted the 1/7th share each in the suit properties. With this grievance, they have come up with this second appeal.

6.While admitting this second appeal, this Court has framed the following substantial question of law:-

"Whether the learned Subordinate Judge ought to have under Section 6 of Hindu Succession (Amendment) Act, 2005 and Section 29-A of the Hindu Succession (Tamil Nadu Amendment) Act, held that the daughters becomes the co-owner and entitled to an equal share like a son ?"

7.I have heard the learned counsel for the appellants and the learned counsel for the respondents 1 to 4 and I have also perused the records carefully.

8.From the evidence which has been duly appreciated by the Courts below, it is crystal clear that the plaintiffs 2 and 3 got married admittedly, prior to the year 1988. So far as the third plaintiff Ms.Loganayaki is concerned, it is the contention of the learned counsel for the appellants that she got married only on 27.05.1994 and therefore, she is entitled for equal share like a son.

9.In my considered view, the question as to whether the third plaintiff got married prior to the coming into force of the Hindu Succession Amendment Act or not, is a pure question of fact. A perusal of the plaint would go to show that there is no pleading at all that the third plaintiff has got married after coming into force of the said Act. Absolutely, there is no evidence at all that the third plaintiff got married on 27.05.1994. The third plaintiff has also not given any oral evidence in respect of her date of marriage. There was no issue also framed in respect of the date of marriage of the third plaintiff. Per contra, there is admission by P.W.1 that the marriage of the third plaintiff took place 11 years prior to the date of her deposition. सत्यमेव जयते

10.Based on the said evidence and other materials, the First Appellate Court has held that the third plaintiff got married prior to the coming into force of the Hindu Succession Amendment Act. In my considered view, in the absence of positive pleading regarding the date of marriage of the third plaintiff, any amount of evidence would be of no use. Here, in this case, a perusal of the plaint would go to show that there is no pleading regarding the date of marriage of the third plaintiff. But, there is only evidence of P.W.1 that the marriage of the third plaintiff took place 11 years prior to the date of her deposition. In the absence of any pleading, it is not open for the plaintiffs now to contend that the third plaintiff married after coming into force of the Hindu Succession Amendment Act.

11.The plaintiffs have filed M.P.No.1 of 2012 to receive the marriage invitation card dated 27.05.1994 of Loganayagi, the second appellant/second petitioner in M.P.No.1 of 2012, as an additional document in the above second appeal. In my

considered view, this miscellaneous petition deserves to be dismissed because, the plaintiffs cannot be allowed to be lead evidence in the absence of any pleading. In such view of the matter, M.P.No.1 of 2012 is liable to be dismissed.

12.Since, the Courts below have held that the third plaintiff got married prior into the Amendment Act, the First Appellate Court was right in granting decree allotting her only 1/35th share. Thus, I do not find any merit at all in the second appeal. Further, there is no question of law, much less a substantial question of law warranting admission of this second appeal.

13.In the result, the second appeal fails and accordingly, the same is dismissed and the decree and judgment of the First Appellate Court is confirmed. Consequently, connected miscellaneous petitions in M.P.No.1 of 2011 and M.P.No.1 of 2012 are also dismissed. There shall be no order as to cost.

jbm

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

To

1.The Subordinate Judge, Pollachi.

2.The District Munsif, Pollachi.

+ 1 cc to Mr.M.V.Krishnan, Advocate Sr 64031.

+ 1 cc to Mr.S.Gunalan, Advocate Sr 64114.

EV/CO
KR/11/1/16

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