

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.06.2015

CORAM :

THE HONOURABLE Ms.JUSTICE K.B.K.VASUKI

C.R.P.No.2488 of 2007
and MP.No.1 of 2007

D.Vasanthi

... Petitioner

Vs.

1.M.Saralavathi
2.Madurai Naicker
3.M.Elumalai
4.Vijaya
5.M.Padmavathy

... Respondents

Prayer: Petition filed under Section 227 of the Constitution of India against the order dated 20.02.2007 made in IA.No.374 of 2005 in OS.No.7 of 2005 on the file of the Subordinate Judge, Ponneri.

For Petitioner : Mr.K.Bijai Sundar
For Respondents : Mr.K.Radhakrishnan for R1.
R2 and R3 - Served.
R4 and R5-Dismissed as not pressed.

O R D E R

The 5th defendant in OS.No.7 of 2005 and the applicant in IA.No.374 of 2005 is the revision petitioner herein.

2.The suit was filed by first respondent/Saralavathy against the respondents 2 to 5 and the petitioner herein for declaring the sale deed dated 16.11.1988 executed in favour of the 5th defendant as not binding on the plaintiff and for partition of the plaintiff's 1/5th share and for consequential injunction restraining the defendants, their men and agents from interfering with the plaintiff's peaceful possession and enjoyment of the suit property and from alienating the suit property.

3.The suit property admittedly belonged to one Murugappa Naicker and he died leaving behind his five sons by names Chellappa Naicker, Govinda Naicker, Rama Naicker, Lakshmana Naicker and Mariappa Naicker. The five sons while the original owner was alive effected a

family partition on 06.01.1912 in and under the suit property measuring 77cents was allotted to Chellappa Naicker and Mariappa Naicker was allotted another 77cents in the same survey number. Chellappa Naicker sold his property obtained under partition to one Dhanammal w/o.Mariappa Naicker under a registered sale deed dated 10.02.1913 and thus Mariappa Naicker and Dhanammal became the absolute owners of each 77cents in Survey No.924/3, Mariappa Naicker and Dhanammal had two sons namely Madurai Naicker and Munusamy Naicker and after the death of Mariappa Naicker in 1946 and Dhanammal during 1963 Madurai Naicker and Munusamy Naicker succeeded to the property left by their parents. Both Madurai Naicker and Munusamy Naicker had a family partition on 15.12.1966 under registered document in which the suit property was allotted to Madurai Naicker and his family. The plaintiff and the defendants 2 to 4 are the son and daughters of the first defendant/Madurai Naicker. According to the plaintiff, the suit property is the ancestral and joint family property of the plaintiff and the defendants 1 to 4 and the suit property was under registered sale deed dated 16.11.1988 sold to the fifth defendant/Vasanthi by the defendants 1 and 2 and the plaintiff is entitled to 1/5th share and the sale by the defendants 1 and 2 in favour of the fifth defendant is not binding on the plaintiff and it is the plaintiff who has been in possession and enjoyment of the property and her possession and enjoyment of the property is sought to be interfered with by the defendants 1 to 5 who had been making attempts to alienate the same to third parties.

4.The suit was seriously contested by the fifth defendant who came forward with IA.No.374 of 2005 under Order VII Rule II(d) of the CPC for rejecting the plaint on the following grounds : (1)The plaintiff should have valued the suit property for the purpose of Court fee under Section 25(b) of the Tamil Nadu Court Fee and suit Valuation Act and not under Section 25(d) and (2)the suit property was sold to the fifth defendant on 16.11.1988 by the defendants 1 and 2 and the plaintiff is the daughter of the first defendant and Tamil Nadu Act I of 1990 conferring equal status on the daughter in coparcenary property under Sections 29(A), 29(B) and 29(C) was introduced only with effect from 25.03.1989 and as the Act did not give any retrospective effect for its operation, the validity of the sale deed executed in favour of the fifth defendant on 16.11.1988 much prior to the enactment is not affected and the suit is not maintainable and the plaint has to be summarily rejected.

5.The relief sought for in the IA was resisted by the plaintiff as the first respondent in the IA. According to the plaintiff/first respondent as the first respondent is not party to the alleged sale deed, the Court fee paid under Section 25(d) is proper. It is contended by the plaintiff insofar as the other ground is concerned, that though the plaintiff is not co-parcener, the plaintiff is entitled for maintenance and the sale by the defendants 1 and 2 in favour of fifth defendant is not for the benefit of the family and is not binding on the plaintiff who was not married on the date of the

sale deed.

6.The trial court by relying on the following judgments reported in 2006 (5) SCC 658 - (Balasaraia Construction (p) ltd V. Hanuman Seva Trust) 2004 (9) SCC 512 - (Liverpool and London SP C. Mv Sea success) rejected the application on the ground that the suit cannot be dismissed as barred by limitation before taking evidence and the coparcenery nature of the property and the entitlement of the plaintiff to any share in the property has to be decided in the original suit. Aggrieved against the same the fifth defendant has come forward with the present civil revision petition before this court.

7.Heard the rival submissions made on both sides and perused the records.

8.The revision petitioner/5th defendant has in this revision questioned the correctness of the impugned order on the ground that but for the amendment introduced on 25.03.1989, the daughter cannot claim any equal right in the coparcenery property and as on the date of the sale deed the first defendant/father and the second defendant/son who were the two coparceneries were entitled to the suit ancestral property, in equal shares and the petitioner/5th defendant was conveyed their right in the property by way of sale deed dated 16.11.1988, which was duly and validly executed by the defendants 1 and 2 in favour of the fifth defendant and the right so vested on her under the then existing law can not be retrospectively taken away, by virtue of the amendment, which was introduced without any retrospective operation much after the date of execution of the sale deed. The new point, which is according to the petitioner purely a question of law, raised before this Court is that the suit for partial partition in the absence of inclusion of other family property is not maintainable.

9.The learned counsel for the petitioner in support of his contention raised herein cited the following authorities

1. AIR 1965 SC 913 - The State of Rajasthan and another V. M/s.Karamchand Thappar and Bros.
2. 1970 (3) SCC 891 - Mohammad Mustafa v. Sri Abu Bakar and others
3. AIR 1979 SC 1165 - Tarinikamal Pandit and others V. Perfulla Kumar Chatterjee (dead) by L.Rs.
4. 1994 1 MLJ 111 (Supreme Court) - Kenchegowda (since deceased) by legal representatives v. Siddegowda alias Motegowda.
5. AIR 2005 SC 137 - Virender Singh Hooda and others V. State of Haryana and another.
6. (2006) 2 SCC 740 - S.L.Srinivasa Jute Twine Mills (P) Ltd V. Union of India and another.

7. 2008 (4) CTC 374 - Bagirathi and 5 others V. S.Manivannan and another.
8. 1991 1 LW 97 - Sundrambal and others V. Deivanayagam and others.

10. Whereas, the contention so raised herein is seriously opposed by the contesting respondent/plaintiff by reiterating the same ground as raised before the trial Court and as accepted by the trial Court and in support of such contention, cited the following judgments before this Court.

1. 2008 (1) MLJ 1278 SC - C.Natarjan V. Ashim Bai and another.
2. 2014 (2) CTC 199 SC - Surjit Kaur Gill and another V. Adarsh Kaur Gill and another.
3. 2004 (3) MLJ 620 - Alamelu Ammal and others V. Tamizh Chelvi and others.
4. 2014 (1) CTC 160 - M.Prince Manohar and others V. Bhima Lakshmi Narasammah and others.
5. AIR 2010 Karnataka 1241 - Pushpalatha N.V. v. V.Padma.

11. As far as the first contention raised on the side of the petitioner regarding retrospective operation of the amendment, it is no doubt true that the daughters are conferred equal right in the coparcenary property alongwith male only through Section 29 (A) (B) and (C) introduced with effect from 25.03.1989, in and under which, the daughter, who remained unmarried before the date of commencement of Hindu Succession amendment Tamil Nadu Act 1989, shall by birth become coparcener in own right in the same manner as the son. It is equally true that the amendment was introduced only with effect from 25.03.1989 prospective and not retrospective in effect.

12. The Hon'ble Supreme Court in the decision reported in (2006) 2 SCC 740 - S.L.Srinivasa Jute Twine Mills (P) Ltd V. Union of India and another has from para 12 onwards gone into the question as to what is the effect of amendment on the existing rights. The Supreme Court in the relevant paragraphs referred to various earlier judgments -

1. AIR 1971 SC 1193 - Jayantilal Amrathlal V. Union of India.
2. AIR 1977 SC 552 - Govind Das V. ITO.
3. AIR 1951 SC 128 - Keshavan Madhava Menon V. State of Bombay.
4. AIR 1927 PC 242 - Delhi Cloth & General Mills Co. Ltd V. CIT.
5. AIR 1965 SC 1970 Amireddi Rajagopala Rao V. Amireddi Sitharamamma.
6. (1974) 1 SCC 19 - State of J&K V. Triloki Nath Khosa
7. (1997) 6 SCC 623 - Chairman, Railway Board V. C.R.Rangadhamaiah.

In all the judgments above referred to the principle laid down is that retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability or attaches a new disability in respect of transactions already past and it must be presumed to be intended not to have a retrospective effect and all statutes other than those which are merely declaratory or which relate to matters of procedure or of evidence are prima facie prospective and retrospective operation should not be given to a statute so as to effect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment.

13. The learned brother judge of our High Court in the judgment reported in 1991 1 LW 97 - Sundrambal and others V. Deivanayagam and others, while dealing with the right of unmarried daughter in the coparcenary property in the same manner as a son on the strength of amendment to Hindu Succession Act, has clearly laid down that the amendment act has prescribed the date of commencement on 25.03.1989 and the prospective effect will come into effect only from 25.03.1989. The Division Bench of our High Court in the judgment reported in 2008 (4) CTC 374 - Bagirathi and 5 others V. S. Manivannan and another while dealing with the effect of Section 6(1) r/w 6(3) of the Hindu Succession amendment Act 2005, again dealt with the right of the daughters and has held that Section 6(1) is prospective in the sense that a daughter is being treated as coparcener on and from the commencement of the Hindu Succession Act 2005. Even though the intention of the amended provisions is to confer better rights on the daughters, it cannot be stretched to the extent of holding that the succession which had opened prior to coming into force of the amended Act are also required to be reopened.

14. The learned counsel for the respondent/plaintiff has sought to give a retrospective effect to such amendment by relying on the judgment of the Division Bench of this Court reported in 2004 (3) MLJ 620 - Alamelu Ammal and others V. Tamizh Chelvi and others wherein the Division Bench of our High Court is of the view that though the section is prospective in operation it treats an unmarried daughter of a Hindu as a coparcener from the date of her birth in the family and the section does not treat her as a coparcener only from the date of insertion of Section 29-A of the Hindu Succession Act.

15. In my considered view, the judgment of the Division Bench is factually distinguishable more in favour of the petitioner herein for the following reason : In the case decided by the Division Bench, unlike the case in hand, there is no prior sale transaction effected by the third party. The property remains in the hands of the family members and the right of the parties was accordingly decided by invoking provisions of Section 29A of the Hindu Succession Act. The Division Bench has in the same judgment while discussing the nature of operation of the amendment dealt with the effect of the amendment

insofar as the alienation or gift of immovable property made either by the sole surviving coparcener or the Kartha of the family during the interregnum period from the date of birth of a daughter till the date of commencement of the Tamil Nadu Amendment Act, 1989. It is observed by the Division Bench that though such alienation or gift of the family property is liable to be questioned by an unmarried daughter as if she is a coparcener, the ground of challenge would be limited and the Court would be considering the question of any alienation or transfer made by the said coparcener in the light of the provisions of Section 29-A of the Act that the daughter became a coparcener only by virtue of that Section which was inserted subsequent to such alienation or transfer. The Division Bench is in other words of the view that insofar as the challenge made to alienation prior to the introduction of the amendment is concerned the same can be decided only in the light of the prospective effect of the amendment and not otherwise.

16.The principle laid down by the the Supreme Court and the Division bench of this Court cited on the side of the petitioner, if viewed in the light of the view expressed by the Division Bench cited on the side of the respondent, it will lead to an inference that insofar as the validity of the alienation effected much prior to the commencement of the amendment is concerned, the same shall be decided only by treating the amendment as prospective in nature and not retrospective in nature.

17.The legal principle as stated above, if applied to the sale in favour of the petitioner which is much prior to coming into force of the amendment on 25.03.1989, the same is not affected by virtue of the amendment and the plaintiff is hence not entitled to claim 1/5th share in the suit property, which is already sold.

18.Regarding the second legal objection raised herein that the suit is not maintainable for partial partition, though such plea is raised for the first time before this court, the same being question of law in the view of the Hon'ble Supreme Court in the judgment reported in AIR 1979 SC 1165 - Tarinikamal Pandit and others V. Perfulla Kumar Chatterjee (dead) by L.Rs can be permitted to be taken at this stage. In the judgment above cited, the defendant at the civil appeal stage raised a substantial question of law, as if title of the property vested on the defendant by confirmation of court sale and by registered conveyance and the plaintiff cannot seek relief on the strength of unregistered agreement. The Hon'ble Apex Court though found that the point was not taken in any of the courts below, permitted the same to be raised before the Apex Court by relying on earlier judgments of the Supreme Court referred to in para 15 of its order. The Hon'ble Supreme Court is of the view that as it is a pure question of law without involving any investigation of the facts, the same may be permitted to be raised for the first time before the Apex Court.

19.The legal objection raised herein is non-maintainability of the suit for partial partition. The parents of the first defendant Madurai Naicker died prior to 1963 and the first defendant Madurai Naicker and his brother partitioned the properties left behind by their parents by way of registered partition deed dated 15.12.1966. The reading of the partition deed, the copy of which is enclosed in the typed set of papers would reveal that the first defendant/Madurai Naicker was allotted "A" schedule property consisting of four items and Munusamy Naicker was allotted "B" schedule property consisting of four items in the partition.

20.Whereas the suit is filed only for one of the items and for the other property measuring 77cents in S.No.712. The plaint averments do not refer to the other items allotted to the first defendant in the earlier partition and no claim for any share is made in respect of other items. It is not the case of the plaintiff that other items are not available for partition. That being so, the suit filed for partition for only two items out of four items is bad for partial partition and is an abuse of process of Court and is not maintainable as held by the Hon'ble Supreme Court in the judgments reported in (i) 1994 (II) MLJ 111 - Kenchegowda (since deceased) by legal representatives v. Siddegowda alias Motegowda (ii) Indian Law Reports (vol.XVIII) 1904 - Abdul Karim Sahib and others v. Babrudeen Sahib and others and (iii) 1970 (3) SCC 891 - Mohammad Mustafa v. Sri Abu Bakar and others. The Supreme Court has in the judgment reported in (1998) 3 SCC 573 - K.K.Modi V. K.N.Modi and others in paragraphs 42 and 43 explained the phrase abuse of process of the court which reads as follows :-

42. Under Order 6 Rule 16, the court may, at any stage of the proceeding, order to be struck out, inter alia, any matter in any pleading which is otherwise an abuse of the process of the court. Mulla in his treatise on the Code of Civil Procedure, (15th Edn., Vol. II, p. 1179, note 7) has stated that power under clause (c) of Order 6 Rule 16 of the Code is confined to cases where the abuse of the process of the court is manifest from the pleadings; and that this power is unlike the power under Section 151 whereunder courts have inherent power to strike out pleadings or to stay or dismiss proceedings which are an abuse of their process. In the present case the High Court has held the suit to be an abuse of the process of the court on the basis of what is stated in the plaint.

43. The Supreme Court Practice 1995 published by Sweet & Maxwell in paragraphs 18/19/33 (p. 344) explains the phrase "abuse of the process of the court" thus:

"This term connotes that the process of the court must be used bona fide and properly and must not be abused. The court will prevent improper use of

its machinery and will in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation. ... The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances. And for this purpose considerations of public policy and the interests of justice may be very material."

21.It is also observed in paragraph 44 of the same decision that a proceeding being filed for a collateral purpose, or a spurious claim being made in litigation may also in a given set of facts amount to an abuse of the process of the court. Frivolous or vexatious proceedings may also amount to an abuse of the process of the court especially where the proceedings are absolutely groundless. The court then has the power to stop such proceedings summarily and prevent the time of the public and the court from being wasted.

22.By applying the same view herein, this court feels the proceedings of the present case being groundless and bad for partial partition has to be stopped summarily and the plaint is to be rejected and the order of the trial Court without duly considering the legal aspects involved in the present case, warrants interference by this Court.

23.In the result, the civil revision petition is allowed by setting aside the impugned order and the plaint in OS.No.7 of 2005 on the file of Sub Judge, Ponneri stands rejected.

Sd/-

Assistant Registrar

True Copy

Sub Assistant Registrar

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To

The Subordinate Judge, Ponneri.

1 cc to Mr. K.Radhakrishnan, Advocate Sr.No.28869

1 cc to Mr.K.Bijai Sundar, Advocate Sr.No.28855

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