

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.03.2017

CORAM:

THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN

S.A.No.109 of 2017

R. Salammal .. Appellant/1st Respondent/
Plaintiff

Vs.

1.S.Tamilventhan 1st Respondent/Appellant/3rd
Defendant

2.Kanaghu 2nd Respondents 2 to 5/
Respondents 2 to 5/Defendants
1,2 4 & 5

3.Muthu

4.Tamizha

5.Kanthasamy .. Respondents

Prayer : Second Appeal filed under Section 100 of CPC against the decree and judgment dated 17.03.2015 passed in A.S.No.19/2013, on the file of the Additional District Judge, Dharmapuri reversing the decree and judgment dated 07.10.2013 passed in O.S.No.62/2011 on the file of the Sub-ordinate Court, Harur.

For Appellant : M/s.D.Kanagasundaram
For RR1 : Mr. P.Valliappan

JUDGMENT

The Appellant/1st respondent/plaintiff was successful before the trial court and lost her case before the lower appellate court in the appeal in A.S.No.19/2013 filed by the 1st respondent/Appellant/3rd defendant. Hence, this Second Appeal.

2. This court, for the sake of convenience, has adopted the nomenclature/array of parties as adopted by the trial court.

3. The plaint averments read among the things shows that the suit schedule property belongs to the plaintiff and her brother first defendant, Andiappan. They were jointly owning and enjoying it and the revenue records relating to the suit schedule mentioned property stands in the name of the first defendant and as the Karta, he is looking after and administering the said property. The first defendant, taking

advantage of the fact that the plaintiff is a woman, is taking steps to alter the revenue records and also trying to alienate the property. The plaintiff would further submit that her father namely, S.Vediappa Gounder, while he was alive had partitioned some property in favour of the second defendant, 21 years back and the second defendant is not entitled to claim any right over the said property. The plaintiff in this regard, has also sent a legal notice dated 30.06.2011 (Ex.A1) calling upon defendants 1 and 3 to partition suit schedule property and give separate possession of the property and despite receipt of acknowledgment, they did not send any reply and all of them joining together are trying to alienate the property and due to timely intervention, it was prevented by the plaintiff in the suit. Further the defendants 4 and 5 are trying to draw water from well in the suit schedule property. Therefore, they should be injuncted. Hence, the plaintiff had filed the said suit for partition, for separate possession as well as for permanent injunction restraining the defendants 4 and 5 from drawing water from the well.

4. The defendants 1 & 2 and 4 & 5, though served with summon in the suit, did not enter appearance and they were called absent and set exparte. The third defendant has filed the written statement denying the averments made in the plaint and took a stand that the father of the plaintiff namely Vediapaa Gounder, about 21 years back, had partitioned and gave separate possession of the property in favour of the second defendant and as such, he is not a necessary party in the suit and denied the allegation that the first defendant is trying to alienate the property in favour of the third defendant. He further averred that the first defendant got patta in respect of properties and conveyed the extent of 2.10 acres in menace of SR.No.196/9 as well as lands in SR.No.201/2 by way of registered sale deed dated 19.08.2006 (Ex.B1) for a sale consideration Rs.2,78,000/- in his favour and thereafter, the third defendant has also got patta in respect of the said properties and it was not objected by the plaintiff as well as other defendants. The other defendants also took a stand that other sharers in respect of the property were not made as parties in the partition suit and as such, the suit is barred for non-joinder of necessary parties and prayed for dismissal of the suit.

5. During the course of trial, the plaintiff examined herself as PW2 and marked Exs.A1 to A9. The third defendant examined himself as DW1 and examined two more witnesses and marked Ex.D1 to D7. The trial court, on a consideration of pleadings and appreciation of oral and documentary evidence, found that the first defendant based on the patta though had a limited share, conveyed the entire extent in favour of the third defendant and since it is an ancestral property, conveyance of

the property by way of sale to the third defendant is not valid and as such, the plaintiff is entitled to one-half ($\frac{1}{2}$) share and accordingly, granted preliminary decree vide judgment and decree dated 07.10.2013. The third defendant, aggrieved by granting of preliminary decree, filed an Appeal in A.S.No.19/2013 on the file of the Subordinate Court (Additional District Judge), Dharmapuri.

6. The lower Appellate Court found that the plaintiff has failed to implead one of her sisters, namely Chinnakannu, as a party to the said suit and failed to offer any explanation as to the non-impleadment. It is further found that the plaintiff has failed to prove that she has got married prior to 25.03.1989 and in the light of the Tamil Nadu Amendment to Hindu Succession Act as well as Central Amendment Act, 2005, the concerned female should have been married on 20.12.2004 or not married on that date and in the absence of any pleadings as to when the plaintiff got married and further taking into consideration the fact that during 1989, when the Tamilnadu Amendment Act was given effect, she was aged about 41 years and at that time, she would not have remained unmarried held that she is not entitled to the benefits of Tamilnadu Amendment Act or Central Amendment Act to the Hindu Succession Act. The lower appellate court further found that when her father died about 20 years back and at that time, she is not entitled to any share and therefore, reversed the judgment and decree passed by the trial court and allowed the appeal and thereby dismissed the suit vide judgment and decree dated 17.03.2015.

7. The plaintiff, aggrieved by the impugned judgment and decree passed by the lower appellate court, filed this Second Appeal.

8. In the memorandum of grounds of Second Appeal, the following substantial question of law are raised :

(i) Whether the findings of the 1st Appellate Court that the suit filed by the Appellant/Plaintiff is not maintainable in view of Tamil Nadu Amendment Act, 2005 in respect of Section 6 of Hindu Succession Act is tenable?

(ii) Whether the findings of the First Appellate Court in holding that the suit schedule described properties is of ancestral in nature is legally valid?

(iii) Whether the findings of the First Appellate Court in respect of the Sale Deed marked as Exhibits A2 to A7 is legally tenable?

(iv) Whether the findings of the First

Appellate Court in respect of non-joinder of necessary parties are legally valid?

(v) Whether the findings of the First Appellate Court are valid in view of the provisions governing rule of succession for a Hindu male died intestate?

(vi) Whether the suit schedule described property is an ancestral property in the hands of the 2nd defendant and the findings that the Appellant got married much prior to the State Amendment Act, 2005 thereby she not entitled for any share is valid?

9. Learned counsel appearing for the plaintiff invites the attention of this court to the contents of typed set of documents would submit that the trial court, on consideration of the pleadings and proper appreciation of oral and documentary evidence, has rightly arrived at a conclusion that the first defendant, merely based on the patta, has conveyed the entire extent of the property, though he is entitled only to a limited share and above, on appeal by the third defendant, the lower Appellate Court, without properly appreciating the fact and on an incorrect application of law, chose to reverse the well considered findings rendered by the trial court. It is the further submission of the learned counsel for the plaintiff/appellant that the third defendant has conceded that he has restricted his claim only in respect of item Nos.1 and 4 of the suit schedule property and he has filed an appeal for all the suit items in the said material facts which have been completely overlooked by the trial court while allowing the appeal. Therefore, the plaintiff prays for interference of this court.

10. Per contra, learned counsel for the 3rd defendant/1st respondent would submit that even as per the admission of the plaintiff, her father died about 21 years back and at that point of time, the first defendant alone is entitled to succeed his share.

11. It is the further submission of the learned counsel appearing for the first respondent that even for the sake of arguments and assuming that the plaintiff is entitled to the benefit of Tamilnadu Amendment Act as well as the Central Amendment Act as per Hindu Succession Act, she has miserably failed to prove as to when she got married and further that she has failed to array one of her sisters as a party to the said suit and on that aspect also, the lower appellate court has correctly applied the relevant provision of law.

12. It is further contended that the appellate Court has rightly arrived at a decision to allow the appeal and thereby dismissed the suit and therefore, the respondent prays for dismissal of the second appeal.

13. This court also had considered the rival submissions of both learned counsels and also perused typed set of documents.

14. It is the case of the appellant/plaintiff that the suit properties are ancestral in nature and the first defendant and the plaintiff are jointly enjoying the same and the revenue records relating to the suit property stand in the name of the first defendant and he is managing and administering the affairs relating to the suit properties as a Karta. The first defendant, taking advantage of the fact that the plaintiff is a woman, is trying to alienate the property and convey the same in favour of the third defendant and taking advantage of the situation, defendants 4 and 5 are also trying to withdraw water from the well located in one of the items of the suit property and filed a suit for partition as well as permanent injunction.

15. It is to be pointed out that at this juncture that admittedly one of the sisters, Chinnkannu, has not been arrayed as a party and according to the learned counsel for the plaintiff, she died long back. However, it is not clear from the pleadings/plaint as to whether she is survived by any legal heirs or not. If so, the legal heirs ought to have been impleaded/arrayed as parties to the said suit and however the plaintiff/appellant did not choose to implead anybody as a party to the said suit. The trial court recorded the findings that based on the patta, the first defendant has conveyed the entire items of the suit property though he got only a limited share.

16. Learned counsel for the appellant has drawn the attention of this court to paragraph-15 of the impugned judgment passed by the lower appellate court that it is the case of the third defendant that her husband along with the legal heirs, had conveyed the property and the same has been marked as Ex.P5.

17. As already pointed out by the learned counsel for the third defendant, immediately after filing of the written statement or as and when the plaintiff became aware of the same ought to have taken steps to implead the husband as well as the legal heirs of the deceased as parties to the suit or atleast in the appeal but it has not been done.

18. Be that as it may, the fact remains that the father of

the plaintiff as well as the first defendant died about 20 years back and at that point of time, as per the statutory provisions, the first defendant alone is entitled to succeed the estate of his father.

19. It is also pertinent to note at this juncture, as per the Tamilnadu Amendment Act made to Hindu Succession Act as well as Central Amendment Act made to the Hindu Succession Act, a female should have been married after 25.03.1996 or 20.12.2004. The lower appellate court had recorded a finding that at the time of presenting the plaint, the appellant/plaintiff aged about 64 years and when the Tamil Nadu Amendment Act came into being, she would have crossed 41 years and she would not have remain unmarried at that age and that her sons were also married and that apart, also partitioned the property, which is evident from her own evidence. Thus, lower appellate court recorded the findings that the appellant/plaintiff is not entitled to the benefits of Tamil Nadu Amendment Act and also Central Amendment Act, 2005 only in the event of the petitioner succeeding in her endeavour on the basis of the said amendment only, she have a right to claim partition and unfortunately she has failed to substantiate the same.

20. The trial court has not taken into consideration the Hindu Succession Act, the Tamil Nadu Amendment Act as well as Central Amendment Act. However, the lower appellate court has taken into consideration the legal position and rightly concluded that the appellant/plaintiff is not entitled to any relief and therefore, set aside the judgment and decree passed by the trial court and allowed the appeal.

21. The substantial questions of law raised by the appellant in this appeal, have been already answered by the lower appellate court and therefore, nothing remains to be adjudicated in this Second Appeal. This court, on an independent application of mind, is of the considered opinion that there is no infirmity or error in the impugned judgment passed by the lower appellate court and finds no merit in this appeal. Therefore, the Second Appeal is dismissed. No costs.

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22. It is also made clear that the third defendant is claiming his right only in respect of Item Nos.1 and 4 and the appellant/plaintiff is at liberty to work out her remedy in respect of Item Nos.2 and 3, in accordance with law.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To:

- 1.The Additional District Judge, Dharmapuri
- 2.The Sub-ordinate Court, Harur.
3. The Section Officer
VR Section, High Court, Madras.

+1cc to Mr.P. Valliappan, Advocate, S.R.No.14821
+1cc to Mr.D. Kanagasundaram, Advocate, S.R.No.14813

cnr(CO)
md(07/04/2017)

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