

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 22.03.2017

CORAM

THE HONOURABLE MR. JUSTICE M.SATHYNARAYANAN

SA.No.222/2017

1.Gunavathi
2.Prabakaran
3.Saranya

Appellants /
Defendants 4 to 6

Versus

1.Kavitha

R1/ Plaintiff

2.J.Dhanalakshmi

3.J.Vasudevan

RR 2 & 3/
Defendants 1 and 3

Prayer: Second Appeal filed under section 100 of the Code of Civil Procedure against the judgment and decree dated 23.08.2016 in AS.No.39/2016 on the file of the learned III Additional District Judge, Salem, confirming the judgment and decree dated 27.04.2015 in OS.No.359/2010 on the file of the learned I Additional Subordinate Judge, Salem.

For Appellants : Mr.P.Jagadeesan

JUDGMENT

The defendants 4 to 6 in OS.No.359/2010 on the file of the Court of I Additional Subordinate Judge, Salem, aggrieved by the granting of Preliminary decree by the Trial Court, vide Judgment and decree dated 27.04.2015, which has been confirmed by the Impugned Judgment and Decree dated 23.08.2016 in AS.NO.39/2016, on the file of the Court of the III Additional District Judge, Salem, had filed the present Second Appeal.

2.The facts leading to the filing of this Second Appeal, briefly narrated, are as follows:-

[a]The 1st respondent / plaintiff is the daughter of the 1st defendant, viz., J.Dhanalakshmi and Jaganathan. Defendants 2 and 3 are her brothers. It is the claim of the plaintiff that

the suit property and other properties originally belonged to her father Jaganathan ancestrally and also by acquisition and he was enjoying the same in that capacity and during his life time, had sold certain items of properties for the upkeep and maintenance and the remaining properties [suit property] was enjoyed by him. Jaganathan died on 01.06.1996 and thereafter, the suit property came to be enjoyed by the plaintiff and the defendants jointly. The plaintiff would further aver that though she had made request for partitioning and give her separate possession of 1/4th share in the suit property, the defendants had ignored the said rightful claim and it appears that they have created Partition Release Deeds among themselves on 19.02.2004 and 25.02.2004 [Exs.A1 and A2] respectively. The recitals of those documents would disclose that there was no oral partition, in and by which, the plaintiff was allotted her share and it was sold to meet out her marriage expenses. It is the specific case of the plaintiff that no such oral partition took place and the recitals have been made in those documents, only for the purpose of not giving her due share in the suit item of property and she has also not a signatory to the said documents. The plaintiff, through her Lawyer, issued a Legal Notice dated 27.03.2009 [Ex.A3], demanding partition and to solve the problem amicably and a panchayat was also convened on 01.12.2009 ; but the defendants did not participate to find out the possibility of an amicable settlement.

[b]Hence, the plaintiff filed a suit for partition and pendency of the same, the 2nd defendant died and his legal heirs, viz., defendants 4 to 6, were brought on record. It is also the claim of the plaintiff that the defendants are also getting monthly income at the rate of Rs.20,000/- from the tenants and appropriating rent to themselves and therefore, she is also entitled to 1/4th share in the rental income also.

[c]The 2nd defendant had filed written statement, which was adopted by the 3rd defendant and apart from denying the averments made in the plaint, it has been averred that the suit property belongs to Jaganathan ancestrally and also by acquisition and during his lifetime, it was enjoyed by him ; but denied the averment that the suit property was enjoyed as a joint family property. It is further averred by the 2nd defendant that the plaintiff was given in marriage in the year 1994 to one Sugumar and she was given all "Seers [rPh;]" by the family befitting of their status and since their father, viz., Jaganathan, is no more, the defendants 2 and 3, with great difficulty, managed to celebrate the marriage function in a grand manner and after marriage, the property was divided between the 2nd defendant, his mother and brother separately in their own right by carrying out mutations in the revenue records and by virtue of the Hindu Succession Central Amendment Act, 2005, the plaintiff is not

entitled to any share and prays for dismissal of the suit.

[d]The 4th defendant has filed the written statement, which was adopted by the defendants 5 and 6 and it is averred among other things that the male members of the family, who are defendants 1 and 2, had a right as the property is ancestral in nature, by birth and their father, at the time of death, had 1/3rd share and if at all the plaintiff is entitled to any relief, she can claim only 1/12th share. It is further averred that the patta stand in the names of the defendants 2 and 3 and it is also an added fact that to prove and substantiate that the plaintiff has no right in respect of the suit property and would also contend that the suit cannot be valued under section 37[2] of the Court Fees Act and it should have been valued under section 37[1] of the Court Fees Act and hence, prays for dismissal of the suit.

[e]The Trial Court, on a consideration of the pleadings, had framed the following issues:-

[a]Whether the plaintiff is entitled for partition as prayed for?

[b] To what other reliefs the plaintiff is entitled to?

[f]During the course of trial, the plaintiff examined herself as P.W.1 and Exs.A1 to A5 were marked. On behalf of the defendants, DW1 was examined and Exs.B1 to B2 were marked.

[g]The Trial Court, on a consideration of pleadings and on appreciation of oral and documentary evidences, has sustained the case of the plaintiff and granted preliminary decree as prayed for vide judgment and decree dated 27.04.2015 and challenging the legality of the same, the defendants 1 to 3 had filed AS.No.39/2016 on the file of the Court of the III Additional District Judge, Salem.

[h]The Lower Appellate Court, on a consideration of the Memorandum of Grounds and materials placed before it, had formulated the following points for consideration:-

[i] Whether the finding of the trial court that the plaintiff is entitled to $\frac{1}{4}$ share in the suit property as a coparcener in view of the Tamil Nadu Amendment Act 1/1990 is not correct?

[ii] Whether the judgment and decree of the Trial Court is not sustainable in law and facts and the same is liable to be set aside? ; and

[iii]To what other relief?

[i]The Lower Appellate Court found that in Exs.A1 and A2, [Partition Release Deeds], the plaintiff, in whose favour a share was given, was not added as a party and there are recitals to the effect that the property belong to the father of the plaintiff as per the Partition Deed dated 19.07.1967 and the Sale Deed dated 24.05.1974 and the said property was also sold for marriage expenses of the plaintiff and necessary gifts [rPh;] had also been given to her.

[j]The Lower Appellate Court also found that under Ex.A5 dated 17.02.1995, the plaintiff and her father Jaganathan, and her brothers Mahadevan and Vasudevan [Defendants 2 and 3] had also executed a Power of Attorney in favour of one Abimanyu in respect of the property belonged to them, wherein it has been recited that the property covered under the said document belong to the plaintiff and her brothers ancestrally and the Power of Attorney, in turn, had sold the property and the registration copy is also marked as Ex.A4.

[k]Insofar as the plea aken by the defendants that by virtue of the Hindu Succession Central Amendment Act, 2005, the plaintiff is not entitled to any share, the Lower Appellate Court found that during the relevant period, the Hindu Succession Tamil Nadu Amendment Act 1/1990 was prevailing and as per the said Amendment Act, the daughter of a coparcener should have remained unmarried as on 25.03.1989 and his/her father should have been alive on the above said date. Admittedly, the marriage of the plaintiff was performed in the year 1994 and her father died on 01.06.1996 and as such, she is entitled to claim the benefit of the said Act.

[l]Insofar as the Release Deeds, the defence put up by the contesting defendants under the Release Deeds marked as Exs.A1 and A2 are concerned, the Lower Appellate Court found that the plaintiff is not a party and therefore, it would not bind her and except the self-serving testimony of DW1 with regard to the oral partition, nothing is placed on record to substantiate the same and applying the well settled legal principle that the possession of one co-heir is considered in law as possession of all co-heirs, found that the reasons assigned by the trial court are sustainable and therefore, dismissed the Appeal Suit in AS.No.39/2016 vide impugned Judgment and decree dated 23.08.2016 and aggrieved by the same, the defendants 4 to 6 have filed the Second Appeal.

3.In the Memorandum Grounds of Second Appeal, the following Substantial Questions of law are raised:-

- Whether the lower Courts right in holding that the plaintiff is the Coparcener and accordingly granted a decree for 1/4th share in the suit property, ignoring that as on the date of introduction of Hindu Succession Amendment Act 2005, the plaintiff was married and cannot claim to be a coparcener?
- Whether the Lower Courts right in holding that the plaintiff should be treated as a coparcener entitled to a share equivalent to her brothers, ignoring the decision of this Hon'ble Court reported in 2014 [4] MLJ page 42 [Dhanalakshmi and others Vs. Janakiammal and others] ?
- Whether the plaintiff is entitled to maintain the suit for partition when there was an oral partition in the family in respect of the suit property and subsequently, the parties executed the Release deeds also under Ex.A1 and A2?

4.Mr.P.Jagadeesan, learned counsel for the appellants/defendants 4 to 6 has invited the attention of this Court to the judgments rendered by the Courts below and would vehemently contend that under Exs.A1 and A2, the recitals are to the effect that there was an oral partition in and by which, the 1st respondent / plaintiff was allotted a share and admittedly, at the time of her marriage, their father, viz., Jaganathan, was not alive and the defendants with considerable difficulty had performed her marriage and in the light of the Sreedhana articles given to her, she is not entitled to claim any right in respect of the suit property. It is the further submission that in pursuant to Exs.A1 and A2, mutation of revenue records had also taken place and it also evidenced the fact that the plaintiff is not at all having any right in respect of the property and would further contend that the suit has been filed long after the demise of their father and at the time of the institution of the suit, the Hindu Succession Central Amendment Act, 2005, is in force and therefore, the Courts below had committed grave error in applying the provisions of Hindu Succession Tamil Nadu Amendment Act and prays for interference.

5.This Court paid it's anxious consideration and best attention to the submissions made by the learned counsel for the appellants/defendants 4 to 6.

6.It is not in dispute that the marriage of the plaintiff / 1st respondent was performed during the year 1994 and the father of the plaintiff died on 01.06.1996 and at the relevant point of time, the Hindu Succession Tamil Nadu Amendment Act 1/1990 was prevailing and the plaintiff remained unmarried as on 25.03.1989

as per the said Amendment Act and her father was also alive at that point of time. It is the primordial submission of the learned counsel for the appellants/defendants 4 to 6 that since the suit was instituted on 12.10.2009, the Hindu Succession Central Amendment Act, 2005 would prevail over. It is to be pointed out at this juncture, that the Hindu Succession Tamil Nadu Amendment Act 1/1990 is a benevolent provision and the right of the plaintiff got accrued by virtue of the said Act and since had fulfilled both the conditions of remaining unmarried as on 25.03.1989 and that her father was alive at that relevant point of time, this Court is of the considered view that the 1st respondent / plaintiff is entitled to avail the benefit of the said Act and the Courts below have also taken into consideration this legal aspect and rightly reached the conclusion to that effect.

7.It is also the submission of the learned counsel for the appellants/defendants 4 to 6 that under Exs.A1 and A2, there are recitals about the oral partition, in and by which, the plaintiff/1st respondent was allotted a share and to meet out her marriage expenses, it was sold. Admittedly, the signatures of the plaintiff/1st respondent have not been obtained in Exs.A1 and A2 and even for the sake of argument, she has been allotted a share, according to the contesting defendants, the suit property itself was sold to meet out the marriage expenses of the plaintiff and by applying common sense also, this plea cannot be sustainable or believable.

8.Insofar as the plea of Court Fees is concerned, the Trial Court in paragraph No.23 of the Judgment found that the defendants have failed to prove the actual value of the suit property and it is their claim that the suit property is worth about a Crore and however, there was nothing on record to substantiate the contention and therefore, held that the Court Fees paid under section 37[2] of the Court Fees Act is correct and as a consequence, the Trial Court had jurisdiction to try the said suit and the said findings were also confirmed by the Lower Appellate Court.

9.This Court, on an independent application of mind to the entire materials, is of the view that there is no perversity attached to the findings rendered by the Courts below and the substantial questions of law formulated by the appellants / defendants 4 to 6 in the Memorandum of Grounds have been answered by the Courts below and as such, there are no substantial questions of law arise for consideration in the Second Appeal.

10 In the result, the Second Appeal is dismissed at the admission stage itself, confirming the judgment and decree

passed by the learned III Additional District Judge, Salem, in AS.No.39/2016 dated 23.08.2016. However, there shall be no order as to costs. Consequently, the connected miscellaneous petition is also dismissed.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

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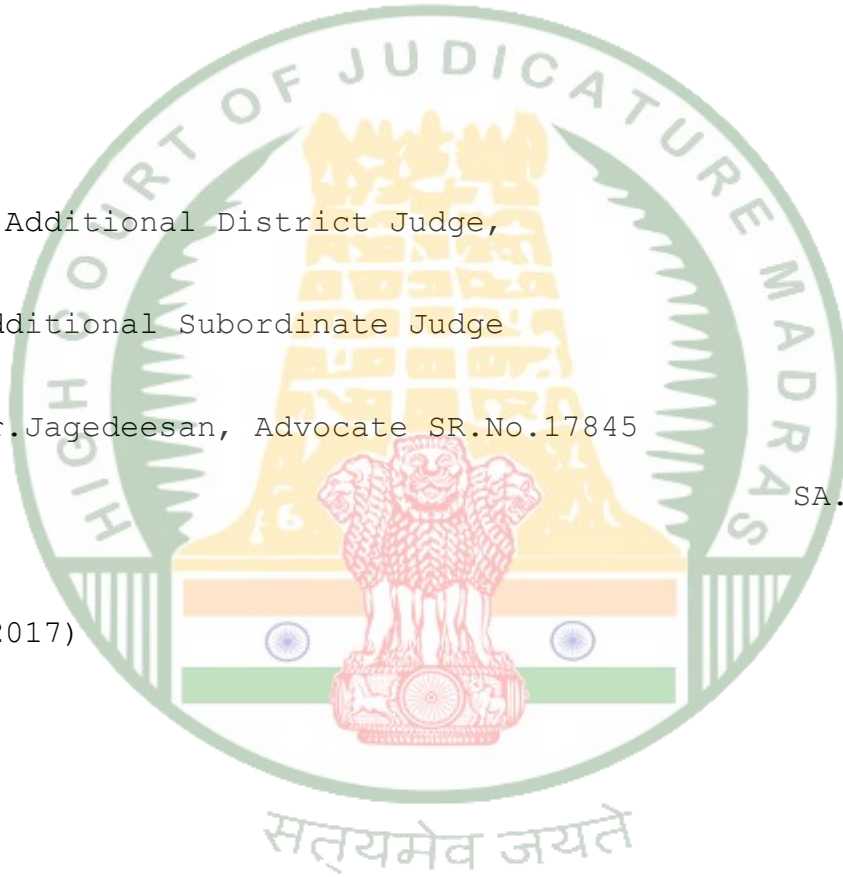
1.The III Additional District Judge,
Salem.

2.The I Additional Subordinate Judge
Salem.

+lcc to Mr.Jagedeesan, Advocate SR.No.17845

SA.No.222/2017

TM(CO)
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