

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on	Orders Pronounced on
22.09.2017	15.12.2017

CORAM

THE HON'BLE MR.JUSTICE D.KRISHNAKUMAR
S.A.No.541 of 2017

1 Sundarammal
2 R.Dhakshinamurthy
3 R.Manickaraj ... Appellants/Defendants 2 to 4

Vs.

1 Rangammal
2 Andalammal
3 Muthulakshmi Respondents 1 to 3/Plaintiffs
4 Poovathal
5 R.Duraikanth
V.Nagaraj (Died)
6 Mahalakshmi
7 N.Brindha
8 Minor Tamlarasan
rep. by his mother & guardian
Mahalakshmi
9 L.Padmavathi Respondents 4 to 9/Defendants
1, 5, 7 to 10

Second appeal filed under Section 100 of the Civil Procedure Code to set aside the judgment and decree of the I Additional District Judge, Coimbatore, dated 22.02.2013 made in A.S.No.124 of 2010 confirming the Judgment and Decree of the III Additional Sub Judge, Coimbatore, dated 29.7.2010 made in O.S.No.695 of 2007.

For Appellants : Mr.G.Karthikeyan
For Respondents 1 to 3: Mr.L.Mouli
For Respondents 4,6&9 : Mr.P.Ravishankar Rao
For Respondent No.5 : Mr.V.Venkatasamy

JUDGMENT

The brief facts of the case as follows:

The respondents 1 to 3 herein filed suit for division of suit property into 10 equal shares and allotment of 2 such shares to the first and 2nd plaintiff each and one such share to the 3rd plaintiff. According to the plaintiffs, Maranna Gowder who acquired the properties by virtue of a partition deed and sale deeds and had been in possession and enjoyment of the same till his life time and died intestate on 14.6.1992 leaving behind one son namely Ramasamy Gowder and four daughters namely Rangammal, Andalammal (plaintiffs 1 and

2), Pappathi @ Rangammal and Subbulakshmi. Pappathi and Rangammal are no more. The 5th defendant is the only son of Rangammal. The third plaintiff and 6th defendant are the legal heirs of another daughter Subbulakshmi. The first defendant is the senior wife of Ramasamy Gowder and the 2nd defendant is the junior wife. The defendants 3 and 4 are children of Ramasamy Gowder through the 2nd defendant. After the death of wife of Maranna Gowder namely Markkal on 4.9.1995 the son and daughters of Maranna Gowder and Markkal are each entitled to 1/5th share in the suit property and all are in joint possession and common enjoyment of the suit property. In spite of repeated representation for amicable partition, the defendants are not cooperating and the defendants 3 and 4 are trying to alienate the suit property which necessitate the plaintiffs to file the suit for partition. The defendants 2 to 4 filed their written statement refuting the allegations made in the plaint. It was contended by the defendants that the suit properties are ancestral coparcenary properties of Maranna Gowder and his only son Ramasamy Gowder. The suit properties items 2 to 6 were purchased by Maranna Gowder from and out of the joint family nucleus and the daughters of Maranna Gowder are not entitled to any share in the suit property and the Hindu Succession Tamilnadu Amendment Act and Hindu Succession Amended Act 2005 are also not applicable to the daughters as succession was opened on the death of Maranna Gowder long prior to coming into force of the said Act. It is further contended by the defendants 2 to 4 that the only son of Maranna Gowder namely Gowder excluded the other daughters of Maranna Gowder by ouster and the wife of Maranna Gowder, Markkal had some independent properties and she bequeathed them to her son Ramasamy Gowder through a registered Will, dated 16.7.1993 and the plaintiffs are not in joint possession of the suit property and the defendants 2 to 4 prayed for the dismissal of the suit. The 5th defendant and defendants 7 to 10 who are impleaded as legal heirs of the deceased 6th defendant during pendency of the suit and the first defendant are all almost sailing with the plaintiffs and prayed for the allotment of their respective shares and as such the defendants 2 to 4 are alone have strongly contested the case. The trial Court after examining the oral and documentary evidence and the submissions made by both sides, passed preliminary decree for partition, declaring that the plaintiffs 1, 2 and the 5th defendant are entitled to 6/30 share each, the 3rd plaintiff is entitled to 3/30 share, the first defendant is entitled to 2/30 share and the defendants 7 to 9 are entitled to 3/30 share (1/30 each) in the entire suit properties except the second property in the 1st item of the suit schedule (SF No.151/2). Challenging the preliminary decree, dated 29.7.2010, the defendants 2 to 4 preferred an appeal in A.S.No.124 of 2010 against the plaintiffs and other defendants. The first defendant filed Cross appeal before the lower appellate court. The appellate court while dismissing the appeal modified the decree and allowed the Cross appeal filed by the first defendant.

2. Challenging the modified decree passed by the appellate court, the defendants 2 to 4 have preferred the Second Appeal. The case of the appellants is that the second defendant's marriage took place prior to Tamil Nadu Hindu Bigamy Prevention Act and as such she is a legally wedded wife and she is also entitled to shares in the property. It is also stated that Maranna Gowder obtained one item of property under a partition deed, dated 23.5.1926 and only from the income of this property, he generated income and purchased the other five items of the suit properties and as such all the properties are to be considered as ancestral properties. Moreover, as all the four daughters were given in marriage before 25.3.1989 and the benefit of Tamilnadu Act 1/1990 will not be available to them and as such they are not entitled for any share in the property. The appellants have also specifically denied the averments that the suit properties were in joint possession. The case put up by the appellants is that Maranna Gowder's wife Marakkal had executed a registered Will dated 16.7.1993 bequeathing the entire property to Ramasamy Gowder i.e. her husband, the only son of Maranna Gowder and Marakkal.

3. The grounds raised by the appellants in the Second Appeal are as under:

The lower appellate court erred in not allotting any share to the 10th defendant although she is a party to the proceedings and is also entitled to a share in the property. The lower appellate court while passing judgment not even discussed about the status of the 10th defendant. The finding of the lower appellate court is not correct in holding that the Will is not proved. The reasons given by the lower appellate court in holding that the execution of the Will is not proved is not within the purview of law. The lower appellate court ought to have held that the long, continuous and hostile possession of the suit property by Ramasamy Gowder has shut the doors of the respondents to the proceedings from claiming the property. The lower appellate court is not correct in holding that the first appellant is illegitimate wife, when the contra has not been proved by the respondents herein. The lower appellate court failed to consider the vital fact that mortgaging of property and obtaining a loan from the bank to prove that the appellants herein were in separate possession of the properties and also had absolute and proper title to the properties and others will not have any right.

4. The following substantial questions of law have been raised by the appellants:

- (1) Whether the Judgment and Decree is legal, when the share of one of the contesting defendant is not even discussed and no finding is given whether she is entitled for a share or not ?

- (2) Whether the reason given by the appellate court to disbelieve the Will is legal ?
- (3) Whether the reason given by the appellate court for disbelieving the marriage of the 1st defendant took place prior to Tamil Nadu Bigamy Abolition Act and Hindu Marriage Act, 1955 is legally acceptable ?

5 The learned counsel for the appellants would submit that the appellate court dismissed the appeal filed by the appellants/defendants 2 to 4 and allowed the Cross appeal filed by the 4th respondent without considering the marriage of the first defendant took place prior to Tamilnadu Bigamy Abolition Act and Hindu Marriage Act, 1955 and also disbelieved the Will executed by Marakkal. According to the learned counsel for the appellants, the Court below has passed the preliminary decree for partition in respect of the entire suit properties except the second property in the first item of suit schedule property in S.No.151/2. Challenging the aforesaid judgment and decree, defendants 2 to 4 have filed an appeal and the first defendant has filed Cross appeal before the first Appellate court. Before the first appellate court, the appellants have raised specific plea of ouster by stating that the trial court has failed to frame the issue of ouster. The learned counsel for the appellants also contended that Ramasamy Gowder was born to Maranna Gowder prior to Tamil Nadu Bigamy Abolition Act and Hindu Marriage Act, 1955 coming into force. Therefore, after death of Maranna Gowder in the year 1992, half share alone is divisible into six equal shares to his wife, one son and four daughters. The four daughters of the deceased Maranna Gowder will get 1/10th share each in the suit property. Even according to the learned counsel for the appellants, share is also lost to them by ouster by Ramasamy Gowder. The documents marked by the appellants have not been appreciated by the appellate Court. The appellate court has not considered the aforesaid questions of law in proper perspective. The appellate court has failed to consider the Will executed by the Marakkal which was established through necessary documents and the same is valid in law.

6 On the side of plaintiffs, P.W.1 and P.W.2 were examined and Ex.A1 to A10 were marked and on the side of defendants D.W.1 to D.W.4 were examined and Ex.B1 to B28 were marked before the trial court. The deceased Maranna Gowder died leaving behind his wife Marakkal, son and four daughters as class I legal heirs to succeed his estate. After the death of Maranna Gowder who died intestate, the Hindu Succession Act will apply to the parties concerned to get shares in the suit properties. Therefore, findings of the trial court with regard to Issue No.1 and 2 that the suit properties are separate and self acquired properties of the deceased Maranna Gowder and the Will executed by Marakkal on 16.7.1993 is not valid and binding on the other legal heirs of the Maranna Gowder. After answering the issues 1 and 2 in favour of the plaintiffs, the trial court has passed preliminary

decree by holding that the suit properties are separate and self acquired properties of Maranna Gowder and not ancestral coparcenary property. Therefore, the trial court has allotted the shares to the parties as follows:

Parties	Shares
1st Plaintiff	6/30 = 3/15
2nd Plaintiff	6/30 = 3/15
3rd Plaintiff	3/30 = 1/10
5th Defendant	6/30 = 3/15
1st Defendant	2/30 = 1/15
3rd & 4th Defendant	4/30 = 2/15 each
Defendants 7 to 9	3/30 = 1/30 each

7. To sum up, as per the preliminary decree passed, plaintiffs 1 and 2 and 5th defendant are entitled to 6/30 shares each, 3rd plaintiff is entitled to 3/30 shares, first defendant is entitled to 2/30 shares, defendants 3 and 4 are entitled to 4/30 shares (2/15 each) and the defendants 7 to 9 are entitled to 3/30 shares (1/30 each) in the entire suit properties except the second property in the first item of suit schedule property.

8. The appellate court has considered the grounds raised by the appellants in the appeal and also the grounds raised in the Cross appeal filed by the respondents/plaintiffs. The appellate court in its findings by holding that the first item of property is ancestral property of the Maranna Gowder and whereby Ramasamy Gowder inherited half share by birth. In so far as item 2 to 6, the properties were purchased under Ex.A2 to A6, it is ancestral properties in the hands of the Maranna Gowder. After discussing the evidence adduced by the parties, items 2, 4 to 6 are separate/self acquired properties of Maranna Gowder. Further, Will executed by Marakkal under Ex.B5, B26 have been elaborately considered by the Appellate court and found that the Will was executed under suspicious circumstances. Therefore, the appellate court was not satisfied that the Will was executed by Marakkal in conscious perspective. The plaintiffs are entitled to get shares in the suit properties on the basis of the shares allotted to the parties by the trial court. Both the Courts below have concurrently held that the plaintiffs are entitled to shares in the suit properties. In the Cross appeal filed by the first defendant, the appellate court also granted relief in so far as item 1, 2, 4 to 6 of the suit schedule properties. Accordingly, the appellate court modified the decree passed by the trial court as under:

Share allotted to	Item 1	Item 2, 4 to 6
1st Plaintiff	1/10th	1/5th

Share allotted to	Item 1	Item 2, 4 to 6
2nd Plaintiff	1/10th	1/5th
3rd Plaintiff	2/20th	1/10th
1st Defendant	16/30th	1/15th
5th Defendant	1/10th	1/5th
Defendants 7 to 9	2/20th	1/10th

9. Further, the appellants have not established before the appellate court to prove that the marriage of the first defendant took place prior to Tamilnadu Bigamy Abolition and Hindu Marriage Act, 1955. In the absence of any evidence on the side of the appellants, both the Courts have rightly held that there is no evidence adduced on the side of the appellants that Ramasamy Gowder married the second defendant/4th respondent prior to The Hindu Marriage Act, 1955 and Hindu Succession Act, 1956.

10. In view of the above, this Court is of the view that the appellate court has rightly confirmed the judgment of the trial court with modification of allotment of shares. Therefore, there is no question of law involved in the Second appeal and that the judgment of the First Appellate Court is confirmed.

11. In the result, the Second appeal fails and the same is dismissed accordingly. No costs.

Sd/-
Assistant Registrar(CCC)

//True Copy// सत्यमेव जयते

Sub Assistant Registrar

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To

1 The I Additional District Judge, Coimbatore

2 The III Additional Sub Judge, Coimbatore

+1cc to Mr.G.Karthikeyan, Advocate Sr.No.89344

+1cc to Mr.L.Mouli, Advocate Sr.No.89965/17

GJ(CO)

sm:7.2.2018

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