

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.07.2017

PRONOUNCED ON : 26.07.2017

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.1813 of 2000 and
C.M.P.No.18965 of 2004

1.Minor Suresh
Rep. By Guardian/mother,
Indrani Ammal.

2.Indrani Ammal ...Appellants/
1st & 2nd Defendant

Vs

1.Natarajan ...1st Respondent/Plaintiff
2.Pachaiyammal ... 2nd Respondent/3rd Defendant

Prayer:- Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree dated 20.07.2000 made in A.S.No.144 of 1999 on the file of the learned Principal District Judge, Tiruvannamalai reversing the judgment and decree dated 02.08.1999 made in O.S.No.250 of 1996 on the file of the learned Principal District Munsif, Tiruvannamalai.

For Appellants : Mr.R.Siddharth
for Mr.T.R.Rajaraman

For R.1 : Mr.P.Dinesh Kumar
for M/s.Sarvabhauman Associates

For R.2 : No Appearance

JUDGMENT

The defendants in the suit are the appellants before this Court. The suit is in respect of declaration of title in respect of the suit property and injunction or in alternate, partition of the suit properties into two equal parts and allot one share to the plaintiff.

2.The plaint averments in brief is that, the plaintiff - Natarajan had two wives. The first defendant is his son born

through the second wife. According to the plaintiff, his father Rajamanickam had inherited the suit properties from his ancestor which were divided among his father Rajamanickam and paternal uncle in the year 1969. Thereafter, from out of the ancestral properties, his father Rajamanickam purchased several properties and the suit properties viz., Item Nos.1 to 6 were purchased by him from one Mrs.Padmavathi Ammal on 01.09.1974 vide Ex.A.1 and Item No.7 of the suit properties was purchased by the father of the plaintiff, Rajamanickam from one Mrs.Padmavathi Ammal vide Ex.A.2 on 30.09.1986.

3.While so, the second defendant, with whom the plaintiff had illicit intimacy had begotten the first defendant. The defendants are claiming title over the suit items of the properties, through an alleged Will of Rajamanickam, marked as Ex.B.1 dated 17.01.1991. Since the Will is not a valid and genuine document. Hence declaration that the suit properties belong to the plaintiff and the third defendant who is his sister and also for an injunction restraining the defendants 1 & 2 from interfering with his peaceful possession and enjoyment of the suit properties. In addition, the plaintiff has also sought for division of suit properties into two equal shares and allot one share to him.

4.The defendants and contested the suit on the ground that the second defendant was not a concubine as alleged by the plaintiff the marriage was solemnized between the plaintiff and the second defendant in a temple at Kil Tirupathi on 17.06.1981 as per the Hindu rites and customs. Since, first wife became physically invalid due to her ill health, the second defendant who is none other than the plaintiff's paternal Aunt's daughter was given marriage to the plaintiff as second wife and through the said marriage, the first defendant was born. Due to misunderstanding, the plaintiff parted from the company of the defendants 1 and 2. Therefore, Rajamanickam who is the father of the plaintiff and grand father of the first defendant thought it fit to bequeath the suit properties in favour of the first defendant. Therefore, he has executed a Will duly executed on 17.01.1991 and registered. Immediately after the death of Rajamanickam, on 20.02.1993, the Will has come into force and the properties are in possession and enjoyment of the defendants 1 and 2. According to the defendants, due to ill-advice of his first wife's father, the plaintiff has come out with the present suit challenging the validity of the Will and the capacity of his father Rajamanickam to execute the Will in favour of the defendants 1 & 2.

5.During trial, the trial Court has framed the following issues:-

"1.Whether the plaintiff is entitled for declaration ?;

2.Whether the Will dated 17.01.1991 is true ?;

3.Whether the marriage between the plaintiff and second defendant is true and valid ?;

4.Whether the plaintiff is entitled for partition ?;

5.Whether the plaintiff is entitled for partition alternatively ?;

6.Whether the valuation of suit and court fee paid therein is correct?;

7.Whether the suit is bad for partial partition ? And

8.To what relief the plaintiff is entitled ?"

6.After examination of witnesses and documents relied on by the plaintiff as well as the defendants, the trial Court dismissed the suit observing that the Will executed by Rajamanickam is true, valid and genuine. Also, held that the suit properties were purchased by Rajamanickam from out of the income arrived through the ancestor properties therefore, he is entitled to bequeath through a Will only in respect of his share and not in entirety. The trial Court has further held that the prayer of dividing the property into two shares and to allot one share to the plaintiff is not maintainable since, the plaintiff has not included all the properties of Rajamanickam for the relief of partition. Hence, the suit is bad for partial partition.

7.Aggrieved by this, the plaintiff preferred an appeal wherein, the First Appellate Court re-considered the evidences and has held that the Will of Rajamanickam Ex.B.1 was not properly proved in the manner known to law and the mental capacity of the testator at the time of executing the Will not been proved by the defendants for the said reasons, the First Appellate Court allowed the appeal thereby setting aside the judgment and decree of the trial Court and passed a preliminary decree in favour of the plaintiff in respect of half share in

the suit properties with costs. Aggrieved by the said decree and judgment of the First Appellate Court, the defendants are before this Court with this Second Appeal.

8. At the time of admitting this second appeal, this Court has formulated the following substantial questions of law:-

"i) Is the learned Principal District Judge right in granting a decree in the suit when the evidence of the defendants substantiates the fact that Ex.B-1 dated 17.01.1990 has been executed, attested and proved as per the provisions of Section 68 of the Indian Evidence Act?

ii) Is the learned Principal District Judge right in stating that the first appellant/ defendant is an illegitimate son when the respondent/ plaintiff had himself admitted the paternity of the first appellant/ defendant and as per Section 16 (1) of the Hindu Marriage Act (Amendment Act 68 of 1976) any issue born out of a void marriage would be a legitimate heir ?

iii) Is the learned Principal District Judge right in holding that the properties are the joint family properties when there is no evidence to prove that there was sufficient nucleus by surplus income to purchase the suit properties and therefore the first appellant/ defendant is entitled to the properties in its entirety ?"

9. Heard the learned counsel for the appellants and the learned counsel for the respondents.

10. According to the learned counsel for the appellants, execution of Ex.B.1 a registered Will has been spoken by the Scribe - D.W.3 and two witnesses D.Ws.4 & 5. They have spoken about the due execution of the Will and they have identified the signature of the testator. Ex.B.1-Will has also been duly registered subsequently. While so, the observation of the First Appellate Court that Ex.B.1 was not proved in accordance with Section 68 of the Indian Evidence Act, is totally perverse and contra to the evidence. The First Appellate Court has also relied upon an unproved imaginary plea of lack of mental capacity of the testator of the alleged Will and has disbelieved Ex.B.1. To emphasis his submission, the learned counsel has also pointed out the testimony of D.Ws.3, 5 & 6 who are Scribe and

witnesses respectively, who have cogently narrated the manner Ex.B.1 was executed by the testator and thereafter attested by the witnesses present.

11.A perusal of the testimonies of the Scribe as well as the attesting witnesses this Court finds no contradiction in their evidence. They are cogent and properly proved as contemplated under Section 68 of the Indian Evidence Act. The Will is not shrouded with any suspicious. Unfortunately, the First Appellate alone has failed to apply the law properly to the fact of the case and has held that the execution of the Will - Ex.B.1 not properly proved. It is also surprise to note that the First Appellate Court has shifted the burden of proof on the defendants to establish that the testator Rajamanickam was conscious and in a good state of mind at the time of execution of the Will. In fact, though the plaintiff has pleaded that before death his father was not in good state of mind for quite some time. However, in his deposition, the plaintiff admits that his father was hale and healthy except minor ailments at the age of 72 years. Therefore, this Court hold that the finding of the First Appellate Court regarding the genuineness and validity of the Will - Ex.B.1 is perverse and not in consonance with the law and facts. The first substantial question of law is in favour of the appellants/ defendants and hold that Ex.B.1 Will dated 17.01.1991 has been executed attested and proved as per the provisions of Section 68 of the Indian Evidence Act and there is no suspicious circumstances seen from the evidence.

12.Regarding the validity of the marriage between the plaintiff and the second defendant, the First Appellate Court has observed that neither the plaintiff nor D.Ws.2 & 6 were able to throw light on what form of marriage, the plaintiff and the second defendant underwent. Therefore, the alleged marriage between the plaintiff and the second defendant, has not been properly established as known to law. Hence, it is a void marriage. With this observation, the First Appellate Court has concluded that any child born through a void marriage cannot be considered as a legitimate child of the plaintiff and therefore, first defendant is not entitled for any right in the property.

13.Thus, the reversed appellate Court has the finding of the trial Court on two grounds viz., one the Will - Ex.B.1 not proved as per law and the second one is, the second defendant is only a concubine to the plaintiff and therefore, the first defendant can have no right over his father's property. According to the lower appellate Court, being born to a concubine, he cannot even considered as a illegitimate child in the absence of evidence to marriage.

14. In this regard, the learned counsel for the appellants pointing out the plaint averments wherein, the plaintiff himself admits that the first defendant was born to him through the second defendant and the factum of marriage being spoken by D.W.4 & 6 who have witnessed the marriage and submitted that the First Appellate Court ought not to have come to the conclusion that the marriage was not properly established.

15. In addition, the learned counsel for the appellants has also draw the attention of this Court to the Will - Ex.B.1 wherein, Rajamanickam who is the father of the plaintiff has specifically stated that the first defendant is the minor son of the plaintiff and the second defendant is the wife of the plaintiff. The First Appellate Court has miserably failed to understand Section 16 of the Hindu Marriage Act 1955 which has undergone a sea change after the amendment with effect from 27.05.1976.

16. For the sake of better understanding Section 16 of the Hindu Marriage Act is extracted below:-

"16. Legitimacy of children of void and voidable marriages.-

(1) Notwithstanding that a marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such a child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976, and whether or not a decree of nullity is granted in respect of the marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under Section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under Section 12, any

rights in or to the property of any person, other than the parents, in any case, where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents."

17. Intend of the said amendment is to bring social reform viz., confirmation of social status of legitimacy of the innocent children born through the relationship which declared to be void or voidable due to statute. To prevent children being treated as illegitimate, an amendment to Hindu Marriage Act has been brought into in the year 1976. While so, the First Appellate Court despite the father admitting the paternity of the first plaintiff and overwhelming evidence both oral as well as documentary evidence to show that there was marriage between the plaintiff and the second defendant solemnized as per the Hindu customs and rites, has held that the marriage is void and not proved to have been solemnized. In the course of such an erroneous finding, the First Appellate Court has also overlooked the plea of division to suit schedule properties alone excluding other properties could not be entertained on the ground of partial partition. This has resulted in allowing the suit reversing the well considered judgment of the trial Court.

18. The learned counsel for the respondents pointing out the fact that the appellants have not challenged the observation of the trial Court regarding the ancestral nature of the properties and accepted the finding of the trial Court that the suit properties are properties acquired by Rajamanickam from out of the income accrued from the ancestral properties, even if the Will of Rajamanickam (Ex.B.1) is found to be genuine, Rajamanickam had no absolute right over the suit schedule properties and at the most, he can only bequeath his share. Therefore, to that extent, the right of the plaintiff has to be protected. No doubt, there is no cross appeal in respect of the observation made by the trial Court regarding the ancestral nature of the property.

19. The trial Court has considered Exs.A.3 to A.9, which are patta passbook which stood in the name of Padmavathy ammal or in the name of the Rajamanickam. Solely or firmly to arrive at the conclusion that Rajamanickam has inherited ancestral property and from out of the income accrued from ancestral property he has purchased the suit property.

20. A perusal of patta passbooks marked as Ex.A.3 to A.9 and the partition deed Ex.A.10 dated 07.01.1969 between Rajamanickam

and Narayanasami indicates that a substantial extent of property was inherited by both of them from their ancestor and those properties were divided vide Ex.A.10. The patta for those properties still stands jointly in the name of Rajamanickam and Narayanasami as per Ex.A.3, 8 & 9. The patta for the suit properties which were purchased from Padmavathi ammal is still in the name of Padmavathi ammal and they are Exs.A.4 & 5. Though in his Will marked as Ex.B.1, Rajamanickam has mentioned the suit schedule properties are his self acquired property, the trial Court has arrived at a conclusion that the suit properties were purchased by Rajamanickam from out of the ancestor nucleus. The said finding has attained finality and no appeal is preferred.

21. The learned counsel for the respondent has relied upon the judgment of the Hon'ble Supreme Court reported in 2016 4 SCC 306 in the matter of Uttam v. Saubhag Singh and others wherein the Hon'ble Supreme Court has summarised, the effect of Sections 4, 8 and 19 of the Hindu Succession Act insofar as it applies to joint family property prior to Amendment of 2005, as follows:-

"(i) When a male Hindu dies after the commencement of the Hindu Succession Act, 1956, having at the time of his death an interest in Mitakshara coparcenary property, his interest in the property will devolve by survivorship upon the surviving members of the coparcenary (vide Section 6).

(ii) To proposition (i), an exception is contained in Section 30 Explanation of the Act, making it clear that notwithstanding anything contained in the Act, the interest of a male Hindu in Mitakshara coparcenary property is property that can be disposed of by him by will or other testamentary disposition.

(iii) A second exception engrafted on proposition (i) is contained in the proviso to Section 6, which states that if such a male Hindu had died leaving behind a female relative specified in Class I of the Schedule or a male relative specified in that Class who claims through such female relative surviving him, then the interest of the deceased in the coparcenary property would devolve by testamentary or intestate succession, and not by survivorship.

(iv) In order to determine the share of the Hindu male coparcener who is governed by Section 6 proviso, a partition is effected by operation of law immediately before his death. In this partition, all the coparceners and the male Hindu's widow get a share in the joint family property.

(v) On the application of Section 8 of the Act, either by reason of the death of a male Hindu leaving self-acquired property or by the application of Section 6 proviso, such property would devolve only by intestacy and not survivorship.

(vi) On a conjoint reading of Sections 4, 8 and 19 of the Act, after joint family property has been distributed in accordance with section 8 on principles of intestacy, the joint family property ceases to be joint family property in the hands of the various persons who have succeeded to it as they hold the property as tenants in common and not as joint tenants."

22. Whereas the learned counsel for the appellant relies upon the judgment of the Madras High Court in M. Krishnamoorthy v. K. Pondeepankar (2017(3) CTC 170) in which the learned Judge has held that if the legislatures' intention in the year 1956, was to put an end to coparcenery by saying that the son born after 1956 will not become a coparcener, there was no need for several State enactments and the Central enactment which intended to place daughters on a equal footing with the son. If the interpretation to the effect that the son/daughter born after 1956 would not become a coparcener, is accepted the provisions of the amending Acts, particularly Act 39 of 2005 would be rendered otiose.

23. According to the learned counsel for the appellants, the judgment of the Hon'ble Supreme Court cited supra factually will not apply of the facts of the case. The Hon'ble High Court in M. Krishnamoorthy v. K. Pondeepankar (cited supra) considering the Hon'ble Supreme Court judgment in Utham's case cited supra has clarified the legal position and therefore, the property allotted to Rajamanickam in partition in his capacity as coparcener is to be held by him with all incidence of coparcenery and on birth of his son Natarajan, he becomes a coparcener and gets right by birth in the property. Therefore, Rajamanickam bequeathing the entire suit schedule property acquired by him from and out of coparcenery nucleus, will not bind the son, the plaintiff who by birth has acquired the right in the said property as coparcener.

24.The facts of both the cases cited above, is different to the facts of the present case, though it has discussed about the devolution of a property held by a Hindu coparcener in the light of amendment to Hindu Succession Act in the year 2005. In so far as the present case is concerned, the pleadings and the evidence let in by the parties including the issues framed by the trial Court and point for consideration casted by the First Appellate Court, the focus was whether the Will executed by Rajamanickam is valid and whether the alternate relief sought by the plaintiff for division of the suit properties alone between him and his sister, on the premise that the said Rajamanickam died in testate is sustainable.

25.As discussed above, from the evidence the trial Court has held that the Will executed by Rajamanickam is found to be true and valid. It is properly proved in the manner known to law. This Court confirms the finding of the trial Court in this regard. Also hold that the finding of the First Appellate Court is not in consonance to the spirit of Section 68 of the Indian Evidence Act.

26.The other point remains is, "Whether Rajamanickam is entitled to bequeath the suit schedule properties in toto ?" or "Whether his right over the suit schedule properties is restricted ? This point was though discussed incidentally, it was not an issue substantially decided. The trial Court has rejected the plea of division of the suit properties on the ground that the plea suffers from partial partition.

27.The issue, "Whether Rajamanickam is entitled to bequeath the suit schedule properties in entirety, or only restricted portion ?" can be decided only after proper adjudication of the issue specifically framed and decided. Since, there is no specific issue framed by the trial Court, this Court is of the opinion that while allowing the second appeal and restoring the decree and judgment of the trial Court liberty should be given to the parties to agitate their respective right over the estate of Rajamanickam accepting the fact that the Will executed by him on 17.01.1991 which is marked as Ex.B.1 is valid and genuine Will duly executed and duly proved before the Court of law.

28.In the result, the Second Appeal is allowed and the decree and judgment passed by the First Appellate Court in A.S.No.144 of 1999 dated 20.07.2000 is set aside and the decree and judgment passed by the trial Court in O.S.No.250 of 1996 dated 02.08.1999 is restored. The parties are at liberty to agitate their respective share over the estate of Rajamanickam subject to the proven fact that the Will executed by him on 17.01.1991 which is marked as Ex.B.1 is valid and genuine Will

duly executed and registered. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Asst.Registrar (CS II)

/true copy/

Sub Asst. Registrar

jbm

To

- 1.The Principal District Judge,
Tiruvannamalai.
- 2.The Principal District Munsif,
Tiruvannamalai.
- 3.The Section Officer,
V.R.Section,
High Court, Madras.

Pre Delivery Judgment made in
Second Appeal No.1813 of 2000

NRI (CO)
VR(08/09/2017)

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