

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.07.2017

CORAM

THE HONOURABLE MR.JUSTICE R. SUBRAMANIAN

A.S.No.223 of 2009

&

C.M.P.No.15728 of 2016

Pukhazhendhi

... Appellant

..Vs..

1. Poongodi

2. Elango

3. Tamil Nadu Industrial Investment Corporation,
Door No.337, Kings Complex,
Dr.Nanjappa Road,
Coimbatore.

4. Pollachi Town Co-operative Building Society,
Represented by its Secretary,
Thanthai Periyar Maligai,
Pollachi Town,
Pollachi Taluk.

5. Sivabhakiyam

... Respondents

Prayer:- Appeal filed Under Section 96 of Civil Procedure Code against the Preliminary Judgement and Decree dated 20.02.2008 passed in O.S.No.935 of 2004 on the file of the learned Additional District and Sessions Judge-cum-Fast Track Court No.2, Coimbatore.

For Appellant : Mr.L.Mouli

For R-1 : Mrr.S.Arjun
for Mr.S.Gunalan

For R-3 : Ms.R.Rohini
for Mr.A.Ramesh Kumar

For R-4 : S.Makesh

JUDGEMENT

The second defendant in O.S.No.935/2004 is the appellant. The suit was originally filed on 27.01.1998 before the Sub Court, Pollachi and it was transferred to the Fast Track Court-II, Coimbatore and re-numbered as O.S.No.935/2004. The said suit was filed by the first respondent seeking partition and separate possession of her 1/4th share in the suit properties.

2. According to the plaintiff, the suit properties belonged to the joint family consisting of the first defendant who is the father of the defendants 2 and 3 and herself. She would claim that she got married on 29.05.1994. Therefore, in view of the provisions of the Hindu Succession (Amendment) Act 1989, (Act 1 of 1990) she would be entitled to a equal share along with her father and brothers namely, the defendants 2 and 3. Pending suit, her father died on 17.03.2003. The first defendant's wife Sivabhakiyam was impleaded as his legal representative as the 6th defendant in the suit. The defendants 4 and 5 are the creditors of the first defendant. It is not in dispute that the loans have been discharged now.

3. The appellant/2nd defendant has filed a written statement contending that the interest in the joint family would only devolve only by survivorship on the surviving members of the coparcenary and not in accordance with the Hindu Succession Act. Therefore, he would claim that the plaintiff, being a daughter, is not entitled to claim a share equal to that of the sons as a coparcener. It is also claimed that there is no cause of action for the suit.

4. An application under Order VII Rule 11 of Civil Procedure Code was also filed by the second defendant seeking rejection of the plaint. It is also contended that the plaintiff was liable for the amounts borrowed by the first defendant. On the above contentions, the second defendant sought for dismissal of the suit. Though the defendants 3 and 6 originally filed their written statements disputing the claims of the plaintiff, it is seen that they had paid the Court Fee and sought for partition of their shares also.

5. On the above pleadings, the learned Trial Judge framed the following issues for determination in the suit.

- 1) Whether the plaintiff is entitled to partition as prayed for?
- 2) To what relief the plaintiff is entitled to?

6. The plaintiff was examined as PW-1 and Ex.A-1 and Ex.A-2 were marked. No oral and documentary evidence was let it

by the defendants. Upon consideration of the evidence on record, the learned Trial Judge came to the conclusion that the suit properties are joint family properties and in view of the introduction of Section 29(A) by the Hindu Succession Amendment Act (Act 1 of 1990), the plaintiff would be entitled to claim a share as a coparcener. Though, the second defendant/appellant would claim that he discharged the loan borrowed by the first defendant he has not chosen to let in any evidence to prove the same. Nor has he claimed that the plaintiff and the defendants 3 and 6 are bound to pay their shares of the debts.

7. The learned Trial Judge found that the plaintiff has been married only in the year 1994, and she is entitled to the benefits of the Amendment Act introduced in the year 1989. Therefore, the learned Trial Judge decreed the suit granting 5/16th share to the plaintiff, 5/16th share to the third defendant, and 1/6th share to the sixth defendant with reference to the properties which remained unsold. It is this decree of the Trial Judge which is now challenged in this appeal.

8. I have heard Mr.L.Mouli, learned counsel appearing for the appellant, Mr.S.Arjun for Mr.S.Gunalan, learned counsel appearing for the first respondent. Ms.R.Rohini for Mr.A.Ramesh Kumar, learned counsel appearing for the third respondent and Mr.S.Makesh, learned counsel appearing for the fourth respondent. The 5th respondent has not been served. Since the fifth respondent remained ex-parte before the Trial Court, notice to the fifth respondent is dispensed with under Order 41 Rule 14 (4) Madras Amendment.

9. Mr.L.Mouli, learned counsel for the appellant would contend that the Trial Court erred in granting a decree as prayed for in favour of the plaintiff without making any provision for payments of the debts. The learned counsel would also contend that the Trial Court erred in granting mesne profits in the absence of any specific prayer.

10. Per contra, Mr.S.Arjun, learned counsel for the first respondent /plaintiff would contend that a suit for partition is deemed to include a relief of mesne profits also. Even if it is not expressly granted in the decree the plaintiff would be entitled to claim mesne profits.

11. From the above arguments, the following point arise for determination in the appeal.

1) Whether the Trial Court was right in granting a decree as prayed for along with the mesne profits?

12.The fact that the property belonged to a joint family is not in dispute. It is also admitted that the plaintiff was married in the year 1994, that is after coming into force of Hindu Succession (Amendment) (Act 1 of 1990). Therefore, it is clear that the plaintiff would be entitled to the benefits of Section 29(A) introduced by the said Amendment Act. As per the same, the plaintiff is entitled to a share as a coparcener equal to that of as son. Therefore, there is no difficulty in upholding the decree for partition granted by the Trial Court. Though the plaintiff claimed 1/4th share, in view of the death of the 1st defendant/father during the pendency of the suit, his 1/4th share would devolve on his three children and his widow. Therefore, the plaintiff and the two sons of Marimuthu Gounder would be entitled to 5/16th share, Sivabhakiyam, W/o.Marimuthu Gounder will get 1/16th share.

13.The plaintiff has been examined as P.W-1 and there is no contra evidence on the side of the defendants. The second defendant who has come up on appeal, not chosen to examine himself as a witness.

14.Therefore, I do not see any reason to interfere with the judgement and decree of the Trial Court. As far as the decree for mesne profits is concerned, as rightly contended by the learned counsel for the respondent, mesne profits will automatically form part and parcel of the prayer for partition, and this Court has repeatedly held that even in the absence of the decree specifically granting mesne profits a decree holder in a partition suit is entitled to claim the mesne profits by invoking Order 20 Rule 12 of Civil Procedure Code. Hence, I do not see any reason to disturb the said decree granting mesne profits also.

15.In fine, the appeal is dismissed, confirming the judgement and decree of the Trial Court. However, considering the relationship between the parties, there will be no order as to costs. Consequently the Civil Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

KP

To

1.The Additional District & Sessions Judge,
Fast Track Court No.2,
Coimbatore.

2.The Section Officer,
V.R.Section,
High Court, Madras.

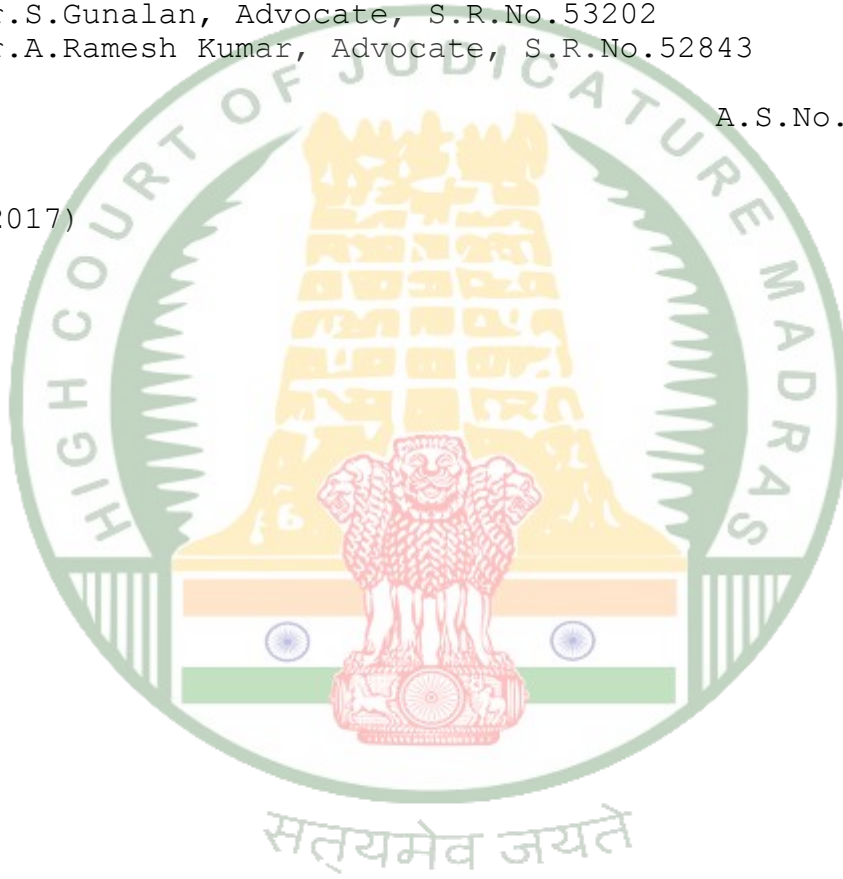
+1cc to Mr.L.Mouli, Advocate, S.R.No.53474

+1cc to Mr.S.Gunalan, Advocate, S.R.No.53202

+1cc to Mr.A.Ramesh Kumar, Advocate, S.R.No.52843

A.S.No.223 of 2009

GP(CO)
CA(23/08/2017)



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