

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 04.04.2017

CORAM:

THE HONOURABLE MR. JUSTICE M.SATHYANARAYANAN

S.A.No.1089 of 2015

Sampoornam ... Appellant/Plaintiff
Vs.

1.Karuppanna Gounder
2.Nachimuthu
3.Murugeswari
4.Rajeswari ... Respondents/Defendants 1,3 to 5

Second Appeal filed under Section 100 of the Civil Procedure Code, 1908, against the decree and judgment dated 15.02.2010 in A.S.No.55 of 2009 on the file of the Principal Sub Court, Erode, Erode District confirming the Decree and judgment dated 30.07.2009 in O.S.No.76 of 2007 on the file of the District Munsif-cum-Judicial Magistrate Court, Kodumudi, Erode District.

For Appellant : Mr.V.Jeevagiridharan

For Respondents: Ms.P.T.Ramadevi for R1
No Appearance for R2 to R4

JUDGMENT

The appellant is the plaintiff in O.S.No.76 of 2007 on the file of the Court of District Munsif-cum-Judicial Magistrate, Kodumudi, Erode District and aggrieved by the dismissal of the suit filed for partition and separate possession, vide judgment and decree dated 30.07.2009, filed an appeal in A.S.No.55 of 2009 on the file of the Principal Sub Court, Erode, Erode District and lost it and challenging the legality of the same, has filed this second appeal.

2. The facts, leading to the filing of this second appeal, briefly narrated as follows. For the sake of convenience the array/nomenclature of parties adopted by the trial Court is adopted in this second appeal also.

3. The first defendant is the father of the appellant/plaintiff and her sister was arrayed as the second defendant and pendency of the suit, she died on 12.11.2007 and her legal representatives were added as defendants 3 to 5. It is the case of the appellant/plaintiff that the suit property, measuring to an extent of 12 cents and the thatched shed put up thereon along with pathway in New S.No.318/15, Old

S.No.275, Chennasamuthiram Village, Erode District, is a joint family property and the plaintiff and the defendants are in joint possession and as such, the appellant/plaintiff is entitled to 1/3rd share, the first defendant is entitled to 1/3rd share and the legal representatives of the deceased second defendant are entitled to 1/3rd share each. The appellant/plaintiff would further aver that since all of them are in joint possession, some difference of opinion arose between them and therefore, the appellant/plaintiff prayed for partition and separate possession and despite requests made, the first defendant did not come forward to partition and give separate possession of the property. Therefore, came forward to file the said suit.

4. The first defendant-father of the appellant/plaintiff filed a written statement refuting the averments made in the plaint and would contend that the plaintiff got married about 35 years back and the second defendant got married about 25 years back and both of them are living separately and the suit property stands in his name and the revenue documents pertain to superstructure also stands in his name and he is in possession and enjoyment of the same. The first defendant would further aver that the plaintiff and the second defendant were born through his first wife viz., Chellammal and after her demise in the year 1986, he married one Lakshmi in the year 1990 and she is living with her and since the plaintiff as well as the second defendant attempted to interfere with his peaceful possession and enjoyment of the same, he filed a suit in O.S.No.20 of 1998 before the same Court for permanent injunction and it was decreed on 21.04.1999 and no further challenge has been made to the said judgment and therefore, the findings rendered in the said judgment would operate as res judicata in respect of the claim made by the plaintiff. The first defendant would further state that in respect of the suit property, he executed a registered Will dated 11.11.2005 in favour of his second wife and after his life time, she will succeed to her estate and therefore, prayed for dismissal of the suit. The third defendant had filed the written statement, which was adopted by defendants 4 and 5, wherein they supported the case of the plaintiff.

5. The trial Court, on consideration of pleadings, has framed the following issues:

- i) whether the suit property is the ancestral property of the plaintiff and defendants?
- ii) whether the plaintiff is entitled to 1/3rd share in the suit property?
- iii) to what other relief the plaintiff is entitled?

6. The trial Court on 30.07.2009 has framed the additional issue i.e., whether the present suit is barred by res judicata?

7. During the course of trial, the plaintiff examined herself as P.W.1 and also examined one Subramani as P.W.2 and Jeganathan as P.W.3 and marked Exs.A1 and A2. The first defendant examined himself as D.W.1 and also examined one Kuppusamy as D.W.2 and marked Exs.B1 to B4.

8. The trial Court, on consideration of pleadings and on appreciation of oral and documentary evidence, has held that the judgment and decree in O.S.No.20 of 1998 marked as Ex.B4 would not operate as res judicata and therefore, the suit for partition and separate possession is maintainable. While answering the other issues, the trial Court found that the suit property is a joint family property and in the light of the fact that the first defendant is still alive, only after his demise, the plaintiff as well as the legal heirs of the second defendant are entitled to claim partition and since the first defendant has bequeathed the suit property through a Will marked as Ex.B3 dated 11.11.2005 in favour of his second wife and unless the Will is canceled during his life time, the plaintiff and the legal heirs of the second defendant cannot make a claim for partition and separate possession and citing the said reasons had dismissed the suit vide judgment and decree dated 30.07.2009.

9. The plaintiff, aggrieved by the dismissal of the suit, filed an appeal in A.S.No.55 of 2009 on the file of the Principal Subordinate Court at Erode. The lower Appellate Court on consideration of grounds, had formulated the following points for determination:

Whether the appeal is to be allowed based on the ground raised in the memorandum of appeal?
The lower appellate Court has confirmed the finding rendered by the trial Court that the property are ancestral in nature and so far as the partition and separate possession is concerned, has taken note of the Central Amendment Act 39 of 2005, made to Hindu Succession Act, 1956 as well as the prior amendment made by the Tamil Nadu Amendment Act 1 of 1990 under Section 29-A and held that since the plaintiff got married about 35 years back and that she was not in joint possession along with the first defendant and further that the first defendant was also having a prescriptive right by way of adverse possession, had dismissed the appeal vide impugned judgment and decree dated 15.02.2010 and challenging the legality of the same, the present second appeal is filed by the plaintiff.

10. In the memorandum of grounds of second appeal, the following substantial questions of law are raised:

"1.Under Section 6 of the Hindu Succession (Amendment) Act, 2005, whether a female coparcener married before 1980 is entitled for a share in the undivided ancestral property or not?

2. Whether a coparcener can be excluded of her right over the ancestral property on the ground of adverse possession and prescription by another coparcener?"

11. The learned counsel appearing for the appellant has drawn the attention of this Court to Section 6 of the Hindu Succession Act, 1956 and would submit that by virtue of the Hind Succession Amendment Act, 1956 (Central Amendment Act 39 of 2005, which came into force with effect from 09.09.2005), the first defendant by virtue of becoming coparcener in his own right in same manner as son and whether she married or not, her marriage relate to the said amendment has no significance with regard to her right and as per the proviso to Section 6 of the Hindu Succession Act, 1956 her father viz., the first respondent/first defendant has bequeathed the suit property in favour of his second wife through a Will, marked as Ex.B3- dated 11.11.2005 and since the said testamentary disposition of the property had taken place after 20.12.2004, the Act bind her and therefore, the lower appellate Court has committed a grave error in applying Section 29-A of the Tamil Nadu Amendment Act. It is the further submission of the learned counsel appearing for the petitioner that neither the trial Court nor the lower appellate Court has framed any issues with regard to the ouster in the form of prescriptive right on the part of the first defendant and merely, the lower appellate Court has recorded the findings in the absence of pleading and evidence and such a finding rendered by the lower appellate Court is perverse and unsustainable in law and prays for interference.

12. Per contra, the learned counsel appearing for the first defendant would submit that the Courts below, on proper appreciation of oral and documentary evidence, had rightly reached the conclusion to negative the claim made by the appellant/plaintiff and since the said findings are concurrent in nature, this Court in exercise of its jurisdiction under Section 100 of the Civil Procedure Code, 1908, may not interfere with the same and prays for dismissal of this second appeal with costs.

13. This Court bestowed it's best attention to the rival submissions and also perused the materials placed before it.

14. Under Section 29-A which came to be introduced by virtue of Tamil Nadu Act 1 of 1990, equal rights to daughter in the coparcenary property have been made and one of the conditions is that a daughter to become coparcener, should not have been married prior to the cut off date i.e. 25.03.1989. However, the Central Act has introduced an amendment by way of Hindu Succession Amendment Act, 2005 (Central Act 39 of 2005) and the relevant portion of the said provision is extracted hereunder:

"29-A. Equal rights to daughter in coparcenary property: Notwithstanding anything contained in Section 6 of this Act,

(i) in a joint Hindu family governed by the mistakshara law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son and have the same rights in the coparcenary property as she would have had if she had been a son, inclusive of the right to claim by survivorship; and shall be subject to the same liabilities and disabilities in respect thereto as the son;

(ii) at a partition in such a joint Hindu family the coparcenary property shall be so divided as to allot to a daughter the same share as is allottable to a son;

Provided that the share which a pre-deceased son or a pre-deceased daughter would have got at the partition if he or she had been alive at the time of the partition shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter:

Provided further that the share allottable to the pre-deceased child of pre-deceased son or a pre-deceased daughter, if such child had been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or of the pre-deceased daughter, as the case may be;

(iii) any property to which a female Hindu becomes entitled by virtue of the provisions of clause (i) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force, as property capable of being disposed of by her by Will or other testamentary disposition;

iv) nothing in this Chapter shall apply to a daughter married before the date of the commencement of the Hindu Succession (Tamil Nadu Amendment) Act, 1989:

v) nothing in clause (ii) shall apply to a partition which had been effected before the date of the commencement of the Hindu Succession (Tamil Nadu Amendment) Act, 1989."

15. Section 29-A of the Hindu Succession Tamil Nadu Amendment Act 1 of 1990 as well as Central Amendment Act 39 of 2005 came up for consideration before the Single Bench of this Court reported in (2014) 4 MLJ 42 [Dhanalakshmi and others Vs. Janaki Ammal and other]. The learned judge, after taking note of both the provisions, has held that "for availing the benefit of the amendment either under the Tamil

Nadu Amendment Act or under the Central Amendment, the father of the female who claims to have become coparcener should have been alive.

Act 39 of 2005 makes the daughters of a coparcener as coparceners irrespective of their marital status as distinguished from the amendment introduced by the Tamil Nadu Act 1 of 1990. It does not prescribe any qualification for the daughter to become a coparcener that she should have remained unmarried on the date on which the central amendment came into force."

16. A Full Bench of Bombay High Court in the decision reported in 2014 (5) CTC 353 [Shri Badrinarayan Shankar Bhandari and others Vs. Omprakash Shankar Bhandari and others] has also considered the said issue and in paragraph 25 held that "the Amendment Act 2005 (Central Amendment Act 39 of 2005) did away with exclusion of married daughter from getting the benefit of the amendment and also added a proviso to Section 6(1) of the Principal Act saving partitions done prior to 20.12.2004 and further held, the Central Amendment Act is retroactive in nature and thereby the rights under Section 6 (1)(b) & (c) and under sub-rule(2) were available to all daughters living on the date of coming into force of the 2005 Amendment Act i.e., on 09.09.2005, though born prior to 9th September 2005.

17. The said amendment is prospective in nature. This Court, keeping in mind the purport of the Central Amendment Act 39 of 2005 and coupled with the facts of the case, is of the considered view that the findings rendered by the Courts below in that regard warrants interference.

18. No doubt, under Section 29-A of Hindu Succession Tamil Nadu Amendment Act 1 of 1990, a condition has been put forth to effect that the daughter to become a coparcener should not have been married prior to the cut off date of 25.03.1989. However, the said amendment has been superseded by the Central Amendment Act 39 of 2005 giving daughters, equal rights along with sons in coparcenary property.

19. A further condition has also been put forth to the effect that the succession, which had opened prior to the coming into force of the Hindu Succession Amendment Act, 2005, would have been no application at all. In the case on hand, the succession is yet to be opened for the reason that the first defendant is still alive and the condition put forth in the Tamil Nadu Act 1 of 1990 has been taken by virtue of the Central amended Act 39 of 2005 and therefore, the marriage of the plaintiff prior to 35 years is no bar to claim her right as a coparcener in the suit property.

20. The above cited decisions also confirm that the said right accrued in favour of the appellant/plaintiff.

21. Therefore, substantial question of law No.1 is answered in affirmative in favour of the appellant/plaintiff.

Question of law No.2

22. The lower appellate Court proceeded to hold that the first defendant also acquired prescriptive right by adverse possession. In the considered opinion of this Court, the said finding is perverse for the reason that the first defendant did not raise any specific claim of such a prescriptive right and no issue has been framed in that regard either by the trial Court or by the lower appellate Court and no evidence has been let in with regard to such a right.

Therefore, the question of law No.2 is also answered in affirmative in favour of the appellant/plaintiff.

23. The learned counsel appearing for the appellant/plaintiff would contend that in the light of proviso to Section 6 of Hindu Succession Act, 1956, the Will under Ex.D3 dated 11.11.2005 executed by the first defendant in favour of his second wife in respect of the suit property cannot be sustained and in response to the said submission, the learned counsel appearing for the first respondent/first defendant would submit that the remedy open to the appellant/plaintiff, if any, subject to law of limitation, is to challenge the said Will in the manner known to law before the competent forum.

24. This Court has considered the submission made by the respective learned counsel appearing for the parties.

25. As per the proviso to Section 6 of Hindu Succession Act 1956, "provided that nothing contain in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before 20.12.2004." Admittedly, Ex.B3 Will came into force on 11.11.2005 i.e., after 20.12.2004 and if at all, the first respondent can bequeath his right in respect of his share only and he cannot bequeath entire suit property in favour of his wife.

26. In the result, the second appeal is allowed and the judgment and decree dated 15.02.2010 passed by the learned Principal Subordinate Judge, Erode, Erode District in A.S.No.55 of 2009, confirming the judgment and decree dated 30.07.2009 passed by the learned District Munsif-cum-Judicial Magistrate, Kodumudi, Erode District in O.S.No.76 of 2007 are

set aside and the appellant/plaintiff and the defendants 3 to 5 are entitled to claim partition and separate possession of their share in the suit property, after the life time of the first defendant. However, this court taking into consideration the relationship between the parties, is not inclined to award costs.

Sd/-
Asst.Registrar (CS III)

/true copy/

Sub Asst. Registrar

vsm

To

- 1.The Principal Subordinate Judge,
The Principal Sub-Court, Erode,
Erode District.
 - 2.The District Munsif-cum-Judicial Magistrate,
The District Munsif-cum-Judicial Magistrate Court,
Kodumudi, Erode District.
- +1cc to M/s.P.T.Ramadevi,Advocate sr.20064
+1cc to M/s.V.Jeevagiridharan,Advocate sr.20015

S.A.No.1089 of 2015

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