

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.04.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

S.A.No.162 of 2011

and

M.P.Nos.1 of 2011 and 1 of 2014

Samandhi

.. Appellant/Plaintiff

Vs.

1. Arumugam

2. Padma

3. Vimala

.. Respondents/Defendants

Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 30.09.2010 in A.S.No.17 of 2008 on the file of the Subordinate Court, Gingee, against the judgment and decree dated 06.12.2006 in O.S.No.172 of 2000 on the file of the Additional District Munsif, Gingee.

For appellant : Mr.G.Rajan

For respondents: R-1 died

Mr.P.Gopiraja for RR-2 and 3

JUDGMENT

The plaintiff is the appellant before this Court. She has filed the suit for partition contending that the first defendant is her father, the second defendant is the concubine of the first defendant and the third defendant was born to her father-D1 through D-2-concubine. It is alleged by her that the third defendant is an illegitimate child. The suit properties are ancestral agricultural properties inherited by the first defendant, being Kartha of the joint family and that as the ancestral properties are not in dispute, the plaintiff would be entitled to the relief of partition on the ancestral properties. It is also further contended that the plaintiff was born to the first defendant through Ranganayaki, who is alleged to be the wife of the first defendant. The plaintiff got married in September 1989 and became co-parcener to the properties and hence, the plaintiff filed the suit for partition.

2. The defendants, who are the respondents herein, took a stand that the appellant/plaintiff had no inclination to give a share of her properties to the defendnats, as they are separate

properties and the plaintiff was born out of the illegal relationship between Ranganayaki and Annamalai. Even assuming for the sake of argument without admitting that she was born to the first defendant, her marriage has not taken place prior to the coming into force of the Act 1 of 1990 (Hindu Succession Act, 1989) and only after amendment, the marriage has taken place and the plaintiff has not established the date of marriage and that the defendants have contended and established before the trial Court that the marriage has taken place as early as in 1989. It is the contention of the plaintiff that the marriage had taken place only after the amendment of the Act 1 of 1990 (The Hindu Succession Act, 1989). The property being separate properties, the plaintiff would not be entitled to any relief.

3. The trial Court held that the plaintiff is not the daughter of the first defendant and that the plaintiff failed to prove that she was born to Ranganayaki and the first defendant and she also failed to prove the date of marriage. On these findings, the trial Court non-suited the plaintiff from getting the relief, thereby, the suit was dismissed. As against the judgment and decree of the trial Court, the unsuccessful plaintiff preferred appeal before the lower appellate Court, which reversed a finding with regard to the aspect that she is the daughter born to Ranganayaki and the first defendant in the suit. The first appellate Court held that the plaintiff was born to the first defendant. However, the lower appellate Court has held that the plaintiff has not produced evidence to show that she has married only after 1989. It was further observed that the plaintiff loses her right to the properties, as she got married prior to 1989, i.e. after enactment of the said Act, 1956 and that the character of ancestral properties ceased to exist. The lower appellate Court further held that the properties, though, in the name of the father of the first defendant, when there is a partition among the sons, including the first defendant and his brother, it becomes self-acquired / separate properties of the first defendant and not the ancestral properties. The lower appellate Court further held that the right of the first defendant to the properties becomes absolute and the plaintiff loses her right as she has married even prior to 1989. It was further observed by the lower appellate Court that the plaintiff cannot have right over the suit properties, as the subject matter of the properties, is ancestral properties and that the suit properties are separate properties of the first defendant. Aggrieved by the above findings of the lower appellate Court, i.e. the concurrent findings of the Courts below, the present Second Appeal has been preferred by the plaintiff.

4. The following substantial questions of law arise for

consideration in this Second Appeal:

(i) Is not the appellate Court wrong in dismissing the suit for partition filed by the plaintiff without considering the applicability of the Hindu Succession (amendment) Act, 2005 to the present case, which is applicable even to the pending proceedings ?

(ii) Whether the first appellate Court is correct by finding that the suit properties are the separate properties of the first defendant after the partition, when in fact, by virtue of the Tamil Nadu Act 1 of 1990 and the Hindu Succession (Amendment) Act, 2005, the plaintiff becomes a statutory co-parcener and taken interest in it by birth ? and

(iii) Is not the first appellate Court wrong in observing that the plaintiff failed to prove that the marriage had taken place before the advent of the Tamil Nadu Act 1 of 1990 in the teeth of oral and documentary evidence ?

5. The aforesaid narration of facts is not in dispute. The appellant/plaintiff took a plea that in view of the amendment of the Hindu Succession Act in 2005, in terms of Section 6 read with Section 8 therein, even assuming for the sake of argument without admitting that the suit properties are separate properties, the plaintiff will be entitled to a share in the properties with regard to the share of the first defendant who died on 30.11.2011.

6. For better appreciation, it is worthwhile to quote Sections 6 and 8 of the Hindu Succession Act, before and after amendment in 2005. As far as Section 8 of the Hindu Succession Act, 1956 is concerned, there is no amendment in the Act 2005. Section 8 reads as follows:

"Section 8. General rules of succession in the case of males---The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter -

(a) firstly, upon the heirs, being the relatives specified in class I of the Schedule.

(b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in Class II of the schedule.

(c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and

(d) lastly, if there is no agnate, then upon

the cognated of the deceased."

7. Section 6 of the Hindu Succession Act, before and after amendment, reads as follows:

(before amendment - 1956 Act):-

"Section 6:- Devolution of interest in coparcenary property:-

When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:-

Provided that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1--For the purposes of this Section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation 2--Nothing contained in the proviso to this Section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein."

(after amendment) (in 2005):-

"Section 6: Devolution of interest in coparcenary property-- (1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,--

(a) by birth become coparcener in her own right in the same manner as the son;

(b) have the same rights in the coparcenary property as she would have had if she had been a son;

(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained 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 the 20th day of December, 2004.

(2) Any property to which a female Hindu becomes entitled by virtue of sub-section(1) 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 testamentary disposition.

(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and, --

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and

(c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she 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 a pre-deceased daughter, as the case may be.

Explanation: For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

(4) After the commencement of the Hindu Succession (Amendment) Act, 2005, no Court shall recognise any right to proceed against a son, grandson or great grand son for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grand son or great grandson to discharge any such debt:

Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-section shall affect--

(a) the right of any creditor to proceed against the son, grandson or great- grand son, as the case may be ; or

(b) any alienation made in the respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.

Explanation:- For the purposes of clause (a), the expression "son", "grandson" or "great grand son" shall be deemed to refer to the son, grandson, great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005.

(5) Nothing contained in this Section shall apply to the partition, which has been effected before the 20th day of December, 2004.

Explanation:--For the purposes of this Section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by the decree of a Court."

8. It is admitted fact that after 1956, the property derived from the father, could be treated as separate property and not as joint family property. After the promulgation of the Act in 1956, a person is not taking a share of his property as Kartha of his own undivided property, but taking it as a separate

property in individual capacity, and hence, it cannot be treated as joint family property along with others.

9. Even after coming into force of the Act 2005, the plaintiff will be having only a share in the ancestral properties, but in this case on hand, it has not been established that the properties are ancestral properties, and the Courts below have clearly held that the properties are separate properties having been vested with the first defendant in the suit.

10. The contention of the learned counsel for the appellant/plaintiff is that in terms of Section 8 of the Hindu Marriage Act (new Act 2005), the appellant/plaintiff is entitled to a share in the suit properties. It is not in dispute that in terms of Section 8 of the new Act 2005, the property of a male Hindu dying intestate, shall devolve upon Class-1 or Class-2 heirs as specified in the said provision, even though it has been contended by the learned counsel for the appellant/plaintiff that some of the properties have been alienated during the pendency of the suit.

11. It is pointed out by the learned counsel for the respondents/defendants that the suit properties in item Nos.1 to 6, have already been disposed of even prior to the institution of the suit and item No.8 of the suit properties has already been sold by the first defendant to his daughter, namely the third respondent and her husband. Since the suit properties are separate properties, there is no bar in selling the properties to any person, as the plaintiff will get a right over the properties, if it is not sold during the lifetime of the first defendant. It is submitted by the learned counsel for the respondents/defendants that he is not aware as to the status of the suit properties in item No.7. Even if it is already sold out prior to the date of demise of a person, namely the first defendant, the appellant/plaintiff will have no right over the properties.

12. It is contended by the learned counsel for the appellant/plaintiff that the rights already accrued, cannot be watered down by means of the amendment provisions of the new Act in 2005. In this regard, learned counsel for the appellant/plaintiff relied upon a decision of the Supreme Court reported in 2009 (6) SCC 99 (G.Sekar Vs. Geetha). In that case, a Hindu male died intestate in the year 1996 leaving behind a dwelling house and the daughters claim partition of the suit properties therein by metes and bounds and that the dwelling house was occupied by joint family. The Supreme Court held that neither 1956 Act nor 2005 Act seeks to reopen the vesting of a

right where succession has already taken place. In the case on hand, the partition had already taken place between the parties and the first defendant acquired the right over the suit properties as separate properties and the first defendant died on 30.11.2011, i.e. only after coming into force of the Hindu Succession Act, 1956 and at no point of time, the suit properties were treated as joint family properties, except by virtue of the contention of the appellant/plaintiff, which was disputed by the respondents/defendants. The trial Court having accepted the version of the defendants, rendered a fact finding based on the contention with regard to the properties and this Court cannot dwell into these questions of fact to come to a different conclusion taken by both the Courts below.

13. Learned counsel for the appellant/plaintiff also relied on a decision of this Court reported in AIR 2009 Madras 86 = 2009 (2) CTC 130 (M.Revathi Vs. R.Alamelu), wherein this Court has considered the point as to whether pursuant to the amendment of the Hindu Succession Act in 2005, the Courts are right in directing the family heir to file fresh suit invoking the amendment Act and in that decision, this Court has considered that hyper-technicalities shall not stand in the way of a family heir getting the relief in seeking a partition and that Section 23 of the Amendment Act would not be a bar for a family heir to seek a partition. There is no quarrel over the said proposition of law laid down by this Court. In the case on hand, there is no joint family property available for the appellant/plaintiff to seek for partition, more particularly, after the amendment Act 2005 has come into force. The first defendant was alive and he acquired the properties as separate properties by means of partition and it has devolved upon the defendants during his lifetime. When a property has devolved upon the other heirs even prior to the demise of the first defendant, more particularly the separate property, the appellant/plaintiff has no right to seek for partition in the separate properties of the first defendant (since deceased), which has already devolved upon the other two defendants.

14. Learned counsel for the appellant/plaintiff also relied on a decision of the Supreme Court reported in 1986 (3) SCC 567 (C.W.T. Vs. Chander Sen) to contend that when a son who has separated from his father and acquired property, he would acquire / inherit the father's estate in an individual capacity and not as a Kartha of the Hindu Undivided Family (HUF) by virtue of Section 8 of the old Act, 1956. In the case on hand, the facts reveal that the properties are separate properties.

15. Learned counsel for the respondents 2 and 3 / D2 and D3 relied upon a decision of this Court reported in 2015 (3) LW 554

(Purasawakum Permanent Fund Ltd. Vs. R.Kalaiselvi and others) , wherein this Court held that in a separate property, the son will not acquire a right by birth and unmarried daughters would not become co-parceners. Even after the amendment of Section 6 of the Hindu Succession Act in 2005, the said position continues the same. It is worthwhile to quote paragraph 13 of the said judgment reported in 2015 (3) L.W. 554, which reads as follows:

"13. It is an admitted fact that the property purchased under the original of Ex.A.4 was the self- acquisition and absolute property of Kanakasabhai Naicker. We have held that Kanakasabhai Naicker should have died only after the advent of the Hindu Succession Act, 1956. On 05.06.1974 his wife and sons have partitioned the property left by Kanakasabhai Naicker and in that partition, the suit property came to be allotted to the share of the first defendant Rangaramanujam. The first defendant Rangaramanujam, having got the suit property as a legal heir of Kanakasabhai Naicker under the rule of succession provided in the Hindu Succession Act, 1956 and not as a coparcener, the same shall be his separate property in which, his son would not have got a right to share by birth under the provisions of Hindu Succession Act, 1956 that stood before the amendment made by Tamil Nadu Act 1 of 1990. The daughters of the first defendant Rangaramanujam, who remained unmarried on 23.12.1989 also would not have become coparcener having a right to share by birth in the said property by virtue of the amendment introducing Section 29-A to the Hindu Succession Act, 1956. Even after the amendment of Section 6 of the Hindu Succession Act by Act 39 of 2005 (Central Act) the character of the property remained the same and the plaintiffs have not become coparceners with their father, namely the first defendant. Therefore, the claim of the plaintiffs that the suit property is the coparcenary property in which each of the plaintiffs, second and third defendants got a share equal to that of their father, namely the first defendant Rangaramanujam, cannot be countenanced and the same deserves to be rejected as untenable. Accordingly, this court holds that the respondents 1 and 2/plaintiffs are not entitled to 2/5th share in the suit property and in fact they are not entitled to any share in the suit property. The contrary finding rendered by the

trial court is discrepant and erroneous and the same is liable to be interfered with and set aside. Accordingly, Point Nos.1 and 2 are decided holding that the respondents 1 and 2 /plaintiffs are not entitled to any share in the suit property much less 2/5th share in the suit property as claimed by them. Accordingly, they are also not entitled to the relief of partition as prayed by them."

16. In yet another judgment relied on by the learned counsel for the respondents 2 and 3, reported in 2017 (1) MLJ 759 = LNIND 2016 MAD 3634 (Chinna Palanisamy Gounder Vs. Latha), this Court held that as per the Hindu Succession Act, 1956, considering the devolution of interest under Section 8 of the said Act amongst the Class-I heirs, the property derived from the deceased, would only be treated as a separate property and not as a joint family property. The relevant portion of the said judgment reported in 2017 (1) MLJ 759 (cited supra), reads as follows:

"24. As per the provisions of the Hindu Succession Act, 1956, considering the devolution of interest under section 8 of the Hindu Succession Act, 1956, amongst the class-I heirs, the properties derived by the first defendant from his father could only be treated as his separate properties and not as the joint family properties of the first defendant and his children viz. the plaintiff 2 and 3. With reference to the above position of law, there are ample authorities and in this connection, a useful reference may be made to the decisions reported in Additional Commissioner of Income-tax, Madras-1 Vs. P.L.Karuppan Chettiar (AIR 1979 MADRAS 1 : LNIND 1978 MAD 34), Commissioner of Income Tax Vs. P.L.Karuppan Chettiar (1933 Supp (1) SCC 580), Commissioner of Wealth Tax, Kanpur and Others Vs. Chander Sen and others (AIR 1986 SCC 1753 : 1986 (3) SCC 567 : LNIND 1986 SC 214), Bhanwar Singh Vs. Puran and others (AIR 2008 SC 1490 : 2008 (3) SCC 87 : LNIND 2008 SC 317 : 2008 (2) MLJ 1158) and the latest decision Uttam Vs. Saubhag Singh and Others (AIR 2016 SC 1169 : 2016 (4) SCC 68 : LNIND 2016 SC 101 : 2016 (2) MLJ 536). A perusal of the above said decisions would go to show that when the son inherits the property, as per Section 8 of the Hindu Succession Act, 1956, he does not take it as Kartha of his own undivided family, but take it in his individual capacity. Therefore, it could be seen that as per the authoritative

pronounced of the Apex court and our High Court, the suit properties derived by the first defendant under Ex.A.6 could only be treated as the separate properties of the first defendant and not the joint family properties of the first defendant and the plaintiff 2 and 3 as claimed by the plaintiffs. It could be seen that in toto, on a conjoint reading of Sections 4, 8, 19 and 30 of the Hindu Succession Act, 1956, if the self acquired property or joint family property, once they get devolved in accordance with Section 8 of the Hindu Succession Act, 1956, 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."

25. In the light of the above decisions, when it is found that as per law, the properties derived by the first defendant under Ex.A6 are his separate properties, the Courts below have erred in findings fault on the part of the defendant in describing the suit properties as his own properties in the sale transaction Ex.B1. Therefore, it could be seen that the first defendant has rightly described the suit properties as his own properties in Ex.B1 sale deed. So, when it could be seen that the suit properties are the separate properties of the first defendant and when there is no impediment on his part to alienate the same and when as found earlier, the first defendant is not shown to have been indulging in illegal/immoral activities or excluded the plaintiffs and discarded their interest and welfare, it could be seen that the first defendant is not required to seek sanction from the Court to convey his separate properties in favour of the second defendant. Further, it could be seen that when it is found that the suit properties are the separate properties of the first defendant."

17. With regard to the first substantial question of law, it is not in dispute that after the amendment of the Hindu Succession Act, 2005, the property of the Hindu male, either self-acquired or separate property, will devolve upon the successors-in-interest, provided the property is not being sold during the lifetime of a person. In this case, the properties in question being separate properties, and some of which has been disposed of prior to the demise of the first defendant. Hence,, the first substantial question of law is answered against the

appellant/plaintiff.

18. With regard to the second substantial question of law, it is to be noted that the suit properties are separate properties of the first defendant after partition and the plaintiff will not become a statutory co-parcener and take interest in it by birth. The second substantial question of law is also answered against the plaintiff/appellant.

19. Admittedly, the date of marriage has not been established before the Courts below. The burden is on the plaintiff to establish the same through necessary oral and documentary evidence. The third substantial question of law is answered against the plaintiff, as she failed to discharge the said burden.

20. Moreover, it is settled law by a catena of decisions of the Supreme Court that the concurrent findings of fact rendered by both the Courts below, need not be disturbed by this Court, unless there is perversity in the same. This Court finds no illegality or perversity in the concurrent findings of both the Courts below, and hence, they are liable to be confirmed.

21. Hence, for the foregoing reasonings and discussion, the Second Appeal is devoid of merits, and the same is accordingly dismissed. No costs. M.P.No.1 of 2011 is closed.

22. Since it is stated that the first defendant died during the pendency of the appeal, the learned counsel for the appellant/plaintiff has filed a petition in M.P.No.1 of 2014 to bring on record the legal heirs of the deceased first defendant. Now that the Second Appeal itself being dismissed, it is open for the appellant/plaintiff to work out her remedy in accordance with law, before appropriate forum, if so advised. M.P.No.1 of 2014 is accordingly closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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Copy to

1. The Subordinate Judge, Gingee.
2. The Additional District Munsif, Gingee.
3. The Section Officer, V.R. Section, High Court, Madras.

+1cc to Mr.G.Rajan, Advocate, S.R.No.23514

+1cc to Mr.P.Gopiraja, Advocate, S.R.No.23611

S.A.No.162 of 2011

VD(CO)

RS(10/05/2017)