

THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 02.01.2017

PRONOUNCED ON : 05.01.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.467 of 2011

and

M.P.No.1 of 2011

V.Shanthi

..

Appellant

Vs.

1.M.Ponnayal

2.K.M.Moorthy

3.R.Loganathan

..

Respondents

(Notice to the third respondent
may be dispensed with since he
was set exparte before the court
below)

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 30.11.2010 passed in A.S.No.20/2010 on the file of the 1st Additional Sub Court, Erode District reversing the decree and judgment dated 28.01.2010 passed in O.S.No.99 of 2006 on the file of the Principal District Munsif Court, Erode District.

For Appellant : Mr.I.C.Vasudevan

For Respondents : Mr.R.Marudhachalamoorthy

JUDGMENT

The plaintiff, in the second appeal, has impugned the judgement and decree dated 30.11.2010 passed in A.S.No.20/2010 on the file of the First Additional Sub-Court, Erode, reversing the judgment and decree dated 28.01.2010 passed in O.S.No.99 of 2006 on the file of the Principal District Munsif Court, Erode.

2. The second appeal has been admitted and the following substantial question of law is formulated for consideration in the second appeal.

" Whether the court below is correct in holding that the appellant is not entitled to get benefit of the Hindu Succession Act, 1956 as amended by Tamil Nadu Act 1 of 1990 since the factum of marriage of the appellant after the enforcement of the said Act was not denied by the respondents."

3. The suit has been laid by the plaintiff for partition and permanent injunction.

4. Claiming that the suit properties are the joint family properties

of the plaintiff, the second defendant and their father Marimuthu and pleading that Marimuthu died intestate on 23.01.2005, leaving behind the plaintiff and the defendants 1 & 2 as his legal heirs, according to the plaintiff, she is entitled to obtain 4/9 th share in the suit properties and inasmuch as the defendants had denied her share, she has been necessitated to lay the suit for partition.

5. The defendants 1 & 2 have resisting the case of the plaintiff by contending that a partition had already been effected between the deceased Marimuthu and the second defendant on 15.10.1977 and subsequently, there has been a family arrangement between the deceased Marimuthu and his grandmother on 16.03.1990 and pursuant to the same, according to the defendants, the deceased Marimuthu had settled his properties to the second defendant on 23.05.1990 and accordingly, the second defendant had been enjoying the suit properties absolutely as full owner thereof and it is further stated that there has been a sale agreement in respect of the properties dated 25.04.2005 between the second defendant and the third defendant and therefore, according to the defendants, the suit properties are not the joint family properties of the deceased Marimuthu, the plaintiff and the second defendant as put forth by the plaintiff and as such, the plaintiff is not entitled to seek any partition in

the suit properties.

6. The plaintiff and the second defendant are the daughter and son of the deceased Marimuthu and the first defendant is the wife of the deceased Marimuthu. The above said relationship is not disputed. The plea put forth by the defendants that there has been a partition between the deceased Marimuthu and the second defendant on 15.10.1977 and subsequent to the same, there has been a family arrangement between the deceased Marimuthu and his grandmother on 16.03.1990 and pursuant to the same, the deceased Marimuthu had settled his properties in favour of the second defendant on 23.05.1990 and thus, accordingly, the suit properties are the absolute properties of the second defendant have been negated by the Courts below, based upon the appreciation of the evidence, both oral and documentary, adduced by the respective parties. No exception could be taken by the findings of the Courts below as regards the above defence set forth by the defendants. Even in this second appeal, the counsel for the defendants did not put forth any argument as regards the defence set out by them in the written statement above stated.

7. It appears that during the cross examination of DW1, a

partition deed dated 10.02.1995 has been projected and accordingly, it is contended that inasmuch the plaintiff is entitled to a share in the suit properties belonging to the deceased Marimuthu, they being the joint family properties and since the plaintiff has not been added as a party to the above said partition deed, it is contended that as per the Hindu Succession (Tamil Nadu Amendment) Act, 1989 (Tamil Nadu Act 1 of 1990), the plaintiff is entitled to a share in the suit properties. Accordingly, it is argued that the Court below has erred in negating the claim of the partition of the suit properties as claimed by the plaintiff.

8. In the plaint, it has not been specifically pleaded that the plaintiff is entitled to claim partition in the suit properties by virtue of the Hindu Succession (Tamil Nadu Amendment) Act, 1989 (Tamil Nadu Act 1 of 1990). That apart, it has also not been pleaded in the plaint that since the plaintiff has married subsequent to coming into force of the above said amendment Act, she is entitled to claim share in the suit properties. It is found that only during the course of cross examination of the plaintiff examined as PW1, she has come out with the case that she was married during the year 1990. Accordingly, a claim has been put forth before the Courts below that inasmuch as the

deceased Marimuthu was alive on 25.03.1989, the date of coming into force of the amendment Act and as the plaintiff was unmarried on that stipulated date, the plaintiff being a co-parcener, is entitled to claim a share in the suit properties.

9. If really, the plaintiff was unmarried on 25.03.1989, as now put forth during the course of cross examination of the plaintiff and if by virtue of the same, the plaintiff had claimed share in the suit properties on the footing that she is also a co-parcener, as on that date, by virtue of the above said amendment Act, it could be seen that necessary pleas to that effect would have been raised in the plaint. However, as regards the above case of the plaintiff, there is absolutely no pleadings put forth in the plaint. For the first time, only during the cross examination of PW1, the plaintiff has stated that she got married during the year 1990. However, as per the case of the defendants, the plaintiff got married long back about 25 years ago and her marriage did not take place in the year 1990. Therefore, it could be seen that the claim of the plaintiff during the cross examination that she got married during the year 1990 has been challenged by the defendants. In such view of the matter, as rightly held by the first appellate court, the plaintiff having come forward with the claim of the

partition, should establish that she is entitled to claim partition in the suit properties by virtue of the above said amendment Act. In such view of the matter, when the plaintiff has not set forth any pleas with reference to her claim in the plaint and also, not deposed anything during her chief-examination and only during cross-examination, when she has set out the case that she got married during the year 1990 and when that case of the plaintiff has not been accepted by the defendants and when it is found that the defendants have taken a plea that the plaintiff's marriage did not take place during the year 1990 and that she got married 25 years ago, as rightly held by the first appellate court, the plaintiff should have established her case by adducing acceptable and reliable evidence. Therefore, to argue that the defendants has not disputed the entitlement of the plaintiff to claim partition by virtue of the above said amendment Act, 1 of 1990 in the written statement, the plaintiff's case should be accepted as such, cannot be accepted. As adverted to earlier, the plaintiff has not specifically pleaded that she is claiming partition in the suit properties by virtue of the above said amendment Act and therefore, the question of the defendants repudiating the same in the written statement does not arise. On the other hand, when the plaintiff has come forward for the first time during the cross examination that she got married during

the year 1990 and when the same has not been accepted by the defendants and the defendants have claimed that the plaintiff got married 25 years ago and not during the year 1990, as rightly found by the first appellate court, in the absence of the pleadings and based on the ***ipse dixit*** evidence on the part of the plaintiff as regards the above facts, the plaintiff cannot be granted the relief sought for. Therefore, as rightly argued by the defendants' counsel, the trial court has accepted the case of the plaintiff by erroneously shifting the burden on the defendants, to establish that the plaintiff got married 25 years ago. As rightly found by the first appellate court, the plaintiff has to stand or fall on the strength of her own case and not try to succeed in her case based upon the loopholes found in the defendants case. In such view of the matter, it could be seen that the plaintiff has miserably failed to establish that she is entitled to claim partition in the suit properties as a coparcener by virtue of the Hindu Succession (Tamil Nadu Amendment) Act, 1989 (Tamil Nadu Act 1 of 1990) and consequently, the substantial question of law formulated in this second appeal is answered against the plaintiff and in favour of the defendants.

At the end, the second appeal fails and accordingly, the same is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

05.01.2017

Index : Yes/No
Internet: Yes/No
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To

1. The 1st Additional Sub Court,
Erode District.
2. The Principal District Munsif Court,
Erode District.

T.RAVINDRAN,J.

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Pre-delivery order in
S. A.No.467 of 2011
and
M.P.No.1 of 2011

