

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.08.2017

CORAM

THE HON'BLE MR. JUSTICE R.SUBRAMANIAN

A.S.No.983 of 2007, M.P.No.1 of 2007
and
C.M.P.No.1497 of 2017

- 1.V.Mani (Deceased)
- 2.Komaleeswari
- 3.M.Jayasree
- 4.M.Pradeep Kumar

(Appellants 2 to 4 brought on record as LR's of the deceased sole appellant and 4th Appellant was declared as Major vide order dated 11.07.2017 in M.Ps.1 to 4 of 2010 in A.S.No.983 of 2007)

... Appellants & Lrs of 1st Appellant
(1st Defendant & Lrs of 1st Defendant)

Vs.

- 1.Suriya @ Baby
 - 2.Chandra prabha
 - 3.Govindammal @ Duraiammal
 - 4.V.Devadass
 - 5.Theyagaraya Nagar Benefit fund Ltd.,
No.22, Sarojini Street, T.Nagar,
Chennai - 600 017
- (R3 to R5 set exparte in the Lower Court)

... 1st Respondent (Plaintiff)

... Respondents 2 to 5 (Defendants 2 to 5)

Appeal Suit is filed under section 96 of the Civil Procedure Code to set aside the judgment and decree in the form of the preliminary decree dated 31.10.2006 made in O.S.No.3511 of 2004 on the file of the learned Additional District and Sessions Judge, Fast Track Court No.V, Chennai.

For Appellants : Mr.V.Murali

For Respondents : Mr.R.Venkata Varathan for R1.

J U D G M E N T

The appeal is at the instance of the first defendant in O.S.No.3511 of 2004 on the file of the Fast Track Court V (Additional District and Sessions Judge), Chennai. The said suit was filed by the first respondent/ plaintiff claiming partition and separate possession of her 1/3 share in the suit

'A' and 'B' Schedule properties and 1/6 share in the C Schedule property.

2. According to the plaintiff, the suit 'A' and 'B' Schedule properties belonged to her father Vishwanatha Naicker who died on 10.04.1981. Dhanalakshmi Ammal, her mother and wife of Viswanatha Naicker also died on 14.06.1999. Therefore, the plaintiff and defendants 1 and 2 are the legal representatives of the deceased Vishwanatha Naicker and as class 1 heirs they would be entitled to 1/3 share each in the suit 'A' and 'B' Schedule properties.

3. Insofar as 'C' Schedule property is concerned, the claim of the plaintiff is that the suit 'C' Schedule property belonged to Dhanalakshmi Ammal and her sister Govindammal @ Duraiammal and Dhanalakshmi Ammal is entitled to 1/2 share in the suit property. The plaintiff being the daughter of Dhanalakshmi Ammal would be entitled to 1/3 share in the 1/2 share of Dhanalakshmi Ammal. Therefore, she sought for decree of 1/6 share in respect of 'C' Schedule property, which is agricultural land situated at Neelamangalam Village.

4. The said suit was resisted by the first defendant contending that the suit 'A' Schedule property is ancestral property of the family of Viswanathan Naicker and therefore, he is entitled to 1/2 share as co-parcener and another 1/6 share as class 1 heir under section 8 of the Hindu Succession Act. In the alternative it is also contended that the property that was owned by the family situated at St. Thomas Mount was sold and the entire sale proceeds of the same was distributed among the daughters i.e., plaintiff and second defendant on understanding that they would not claim share in suit A Schedule property.

5. So far as 'B' Schedule Property is concerned, it was contended that 'B' Schedule property is a poramboke land and was occupied by the first defendant and he had put up construction and is living there and hence there cannot be partition of poramboke land. In respect of 'C' Schedule property, the shares have been admitted and there is no dispute as admittedly, it belongs to the mother.

6. The second defendant filed a separate written statement claiming that 'B' Schedule property belongs to her mother Dhanalakshmi Ammal and not Vishwanathan Naicker as contended by the plaintiff. It is also claimed that 'B' Schedule property was divided into two portions and one portion was occupied by her in the year 1998 itself and retained by her. In respect of 'C' Schedule property, she had admitted the claim of the plaintiff.

7. On hearing the rival pleadings, the learned trial Judge framed the following issues for determination of the suit :-

1. Whether the Plaintiff is entitled to have 1/3rd share in A & B schedule property and 1/6 share in C schedule property as prayed for?

2. Whether the plaintiff further proves that she is entitled to have mesne profits at the rate of Rs.2,000/- per month from the date of suit till the passing of final decree?

3. Whether the first defendant proves that this defendant alone in exclusion of the plaintiff and the second defendant is entitled to have the entire A schedule property?

4. Whether the first defendant further proves that the suit item B schedule property is the personal property of this defendant and as such the plaintiff and the second defendant had no claim over that?

5. Whether the first defendant further proves that the suit schedule C property has been sold by the mother of this defendant, plaintiff and second defendant and as such the plaintiff has no claim over that?

6. Whether the 4th defendant is an unnecessary party to the suit proceedings and as such the suit is bad for misjoinder of parties?

7. To what relief the plaintiff is entitled to ?

8. On the side of the plaintiff, she has examined herself as PW1 and marked Exs. A1 to A6 and on the side of the defendants, DW1 to DW4 were examined and Exs.B1 to B16 were marked.

9. The learned trial Judge on consideration of the evidence on record, concluded that the suit 'A' Schedule property is admittedly an ancestral property and in view of Section 8 of the Hindu Succession Act, the plaintiff and the defendants are entitled to equal shares. So far as 'B' Schedule property is concerned, the learned trial Judge concluded that the same being poramboke land, there cannot be a decree for partition and dismissed the suit with regard to 'B' schedule property. So far as the 'C' Schedule property is concerned, there was no dispute and the learned trial Judge granted 1/6 share to the plaintiff as prayed by her in the plaint.

10. Aggrieved by the said decree with reference to the 'A' Schedule property, the first defendant is on appeal.

11. Heard Mr.V.Murali, learned counsel appearing for the first appellant and Mr.R.Venkata Varathan, learned counsel appearing for the first respondent/ plaintiff. Respondents 2 to 5 remained ex-parte in the trial Court and they have been given up in this appeal.

12. Mr. V.Murali, learned counsel for the appellant would contend that the learned trial Judge erred in granting equal

share in 'A' Schedule property to the daughters after having held that 'A' Schedule property is ancestral property of the family of Vishwanatha Naicker. He would also contend that the partition deed - Ex.A1 dated 20.07.1950 would clinch the issue regarding the character of 'A' Schedule property.

13. Mr.R.Venkata Varathan, learned counsel appearing for the first respondent /plaintiff would however contend that since there was a partition in the family of Vishwanathan Naicker and he was allotted the property under the partition in the year 1950, he should be presumed to be the absolute owner and therefore, under Section 8 of the Hindu Succession Act, the daughter is also entitled to get equal share.

14. Mr.R.Venkata Varathan, learned counsel would further submit that the trial Court erred in dismissing the suit in respect of 'B' Schedule property and though the first respondent/ plaintiff has not filed any appeal against the said conclusion of the trial Judge, he is entitled to canvas the correctness of the said finding. He would further submit that Ex.A2 enjoyment certificate would show that the 'B' Schedule property was in possession of the mother of the parties and therefore, it should be taken as the property of the mother and hence her daughter should be given 1/3rd share in the said property.

15. From the above contentions, the following questions arise for the determination of this appeal:

1. Whether the trial Court is right in granting equal share to the daughter in the suit 'A' Schedule property after having concluded that it is an ancestral property ?
2. Whether the trial Court was right in dismissing the suit with reference to 'B' Schedule property on the ground that it is a poramboke land?

Point No.1:

16. It is admitted by both the parties that the suit 'A' Schedule property is ancestral property and was allotted to Vishwanatha Naicker in the partition that took place on 20.07.1950 under Ex.A1. Insofar as the property which was allotted to the co-parcener in a partition is concerned, the co-parcener holds it as absolute owner thereof and once a son born to him, he namely the son becomes a co-parcener and get a right by birth. This position of Hindu Law cannot be disputed. Even Section 6 of the Hindu Succession Act provides that the interest of the male hindu in the co-parcenary will alone devolve under the provisions of the Hindu Succession Act.

17. Therefore, first the interest of the male hindu should be earmarked under explanation to Section 6 the interest of male hindu the co-parcener has been defined as the share that would have been allotted to him if a partition has taken place in the family just prior to his death. Therefore, we will have to see what is the interest of Vishwanatha

Naicker, if a partition has taken place between Vishwanatha Naicker and his son, the appellant herein, just prior to the death of Vishwanatha Naicker.

18. This is called a notional partition under Hindu Law. In such Notional partition Vishwanathan Naicker will get 1/2 share and his son gets 1/2 share. The 1/2 share of Viswanatha Naicker will devolve, as per Hindu Succession Act as his class 1 heirs under section 8 of the said Act. His class 1 heirs at his death were, wife, 1 son and 2 daughters. Wife died on 14.06.1999. Her share devolved on 3 children equally. However, an attempt is made by the first defendant to project a will said to have been executed by Dhanalakshmi Ammal on 14.4.1999. The said will has not been taken into account by the learned trial Judge since the same is not probated as required under section 213 of the Indian Succession Act.

19. Therefore, it should be taken that Dhanalakshmi Ammal has died intestate and hence the $\frac{1}{2}$ share of Viswanatha Naicker will devolve on the children equally, each getting 1/6 share. Therefore, the plaintiff being the daughter of Viswanatha Naicker and Viswanatha Naicker having died on 10.4.1981 prior to the Act coming into force of the Hindu Succession (Tamil Nadu Amendment Act 1989) Act 1 of 1990 of the Hindu Succession (Amendment) Act (39 of 2005), the plaintiff will not become co-parcener, and she would succeed to the assets of Viswanatha Naicker as class 1 heir alone. Therefore, the plaintiff would be entitled to only 1/6 share in the suit 'A' Schedule property. The trial Court was not right in granting 1/3 share in 'A' Schedule property relying upon section 8 of Hindu Succession Act without reference to section 6 of the Act.

Point No.2 :

20. Insofar as B Schedule property is concerned, the trial Court dismissed the suit on the ground that admittedly it is a Poramboke land and the first defendant had put up construction in the said land. The second defendant had contended that her mother gave her $\frac{1}{2}$ share property and therefore, the remaining $\frac{1}{2}$ share is with the first defendant. Admittedly, 'B' Schedule property is a poramboke land therefore, the trial court was right in dismissing the suit on the ground that it is a poramboke land and neither the plaintiff nor the defendant are entitled to claim any share in the said poramboke land. I do not see any reason to interfere with the said findings of the trial Court.

21. Though Mr.Venkata Varadhan, learned counsel rightly contended that he is entitled to canvas the correctness of the finding of the trial Court in relation to the rejection of relief in respect of 'B' Schedule Property, I do not find any reason to interfere with the said finding inasmuch as the 'B' Schedule property is admittedly a poramboke land. Therefore, the parties cannot claim any legal right over the said poramboke land.

22. Insofar as 'C' Schedule property is concerned, there is no dispute between the parties. Hence, 1/6 share granted by the trial court to the plaintiff is confirmed.

23. The appeal is partly allowed. The Judgment of the Trial Court stands modified. There will be a preliminary decree in favour of the plaintiff declaring her 1/6 share in A Schedule property and 1/6 share in C Schedule property. In respect of B Schedule property suit stands dismissed. Considering the relationship between the parties, there shall be no orders as to costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

dsa

To

The Additional District and Sessions Judge,
Fast Track Court No.V,
Chennai.

Copy To

The Section Officer,
V.R.Section,
High Court, Madras 104.

+1cc to Mr.V.Murali, Advocate, S.R.No.57344
+1cc to Mr.A.Murali, Advocate, S.R.No.57839

A.S.No.983 of 2007,
M.P.No.1 of 2007 and
C.M.P.No.1497 of 2017

SV(CO)
CA(15/11/2017)

WEB COPY