

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:11.08.2017
Pronounced on: 23.08.2017

Coram

THE HON'BLE DR. JUSTICE G. JAYACHANDRAN

Second Appeal No.725 of 2001

1.Balakrishnan
2.Srinivasan
3.Indirani
4.Minor Swamidasan @ Ethiraj Sampath
rep.by Guardian Kasi @
Kanna Ramanuja Dasar

5.Amirthavalli
6.Bathulla
7.Thabussen
8.Aburar
9.Imtiaz
10.Minor Sumaiya
11.Minor Riaz
12.Minor Nizar
13.Minor Aisiya
14.Minor Shasiya
15.Minor Nazia
16.Minor Faiaz
17.Minor Ayisha
18.Minor Shabena
19.Minor Yasmin

Minors 10 to 19 rep.by guardian
mother 6th appellant .. Appellants/Respondents 6to25/
Defendants 6&7

सत्यमेव जयते
/versus/

1.Selvi
2.E.Venkatachari
3.E.Kulasekaran
4.E.Poovaragavan
5.E.Sarveswaran

..Respondents/Respondents 2to5
/Plaintiff

Second Appeal is filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 13.03.2001 and made in A.S.No.83 of 1998 on the file of Principal District Judge, Tiruvannamalai, reversing the judgment and decree dated 13.03.1998 and made in O.S.No.130 of 1993 on the file of the Subordinate Judge, Tiruvannamalai.

For Appellants :Mr.K.S.Kamatchi for
Mr.T.R.Rajaraman

For Respondents:Mr.V.Bhiman for
M/s Sampath Kumar Asso. R1 to R5

J U D G M E N T

This second Appeal is directed against the reversing judgment of the lower appellate court in the suit for partition and separate possession, decreed in favour of the plaintiff.

2. For the sake of brevity the parties are described as per their status and rank as found in the plaint.

3. The case of the plaintiff is that the suit properties are the ancestral properties of one Ethiraj Ramanuja Dasar, who is arrayed as the first defendant. The plaintiff is the daughter of the second wife viz., Andal ammal. She was not given any share in the suit property, when the defendants 1 to 5 divided the joint family properties among themselves on 28.09.1990. Even before the said partition, the first defendant has sold some of the suit properties to the defendants 6,7 and 8 through sale deeds particularly, the property in S.No.227/3C. Out of total 40 cents of land, 15 cents of land has been allotted to the first defendant through partition deed and from and out of the 15 cents, the first defendant has sold $4\frac{1}{2}$ cents of land to defendants 6,7 and 8, which does not bind the plaintiff. Hence, as one of the sharers of the ancestral property, she is entitled for $1/6^{th}$ share in the suit schedule property.

4. The defendants 1,6 to 8 have contested the suit whereas the defendants 3 to 5 remained ex-parte.

5. According to the written statement filed by the defendants, the first defendant married one Lakshmi ammal in the year 1942. Through her, he had three sons and two daughters. During the life time of Lakshmi ammal, the first defendant married Andal ammal on 17.06.1956. Through the second wife Andal ammal, the first defendant had two sons and four daughters. Since the second marriage was solemnised, after Hindu Marriage Act, 1955 came into force, the marriage of the first defendant with Andal ammal is a void marriage and the children born through her including the plaintiff are illegitimate children.

6. Further, it is stated that only 8.30 cents of land was devolved upon him from his father through partition deed dated 12.07.1954. The father of the first defendant bequeath 7.78 cents of land through a Will to the first defendant. The rest of the property were purchased by the first defendant from out of his own earning. The income from the property inherited

from his father is not sufficient to buy other properties. While so, the plaintiff, who is the illegitimate daughter born through the void marriage, has no right over the suit property to seek partition more so, when her father the first defendant is alive.

7. As far as the suit properties are concerned, the property in S.No.227/3c was purchased by the first defendant and his brother Govinda ramanuja Dasar jointly on 16.11.1961 from one Appvu pillai and others. Thereafter, 5 cents of land was sold to 8th defendant on 21.05.1973. As far as the properties under S.No.148/4 and 146/8 are concerned, they were improvised from the earning of the first defendant by digging well and fixing electric motor pump. As far as the property in S.No..94 is concerned, it is a poromboke land. During the partition between the first defendant and his children, one of his son viz, Srinivasan has relinquished his right over the property, after receiving a sum of Rs.25,000/-. The first defendant owns 10 cents of land in S.No.146/1 shown as item No.5 in the suit schedule property and the remaining 32 cents are with Krishnan, Arumugam and Padmavathy. Whereas the plaintiff has included in the property, which is not owned by the first defendant and without impleading the title holder of the suit property.

8. The persons, who have purchased from the first defendant namely, defendants 7 and 8 have put up construction in their respective portion and the plaintiff, who has no right over the property, can not object their title. Further, it was also contended by the defendants that when the plaintiff is not in possession of the suit property, the Court fee ought to have been fixed, which is not in accordance with the under Court Fees and Suit Valuation Act.

9. Based on the above pleadings, the trial Court has framed 10 issues; examined the plaintiff as PW1 and admitted 6 exhibits on behalf of the plaintiff and examined 6 witnesses on behalf of the defendants and 74 documents were marked as exhibits B1 to B74 and has held that the plaintiff being an illegitimate child of the first defendant, she is not entitled to seek partition in the joint family property of her father, during the lifetime of her father.

10. Regarding the alienation of the properties by the first defendant in favour of the defendants 6,7 and 8, the trial Court has traced the title of those defendants through the first defendant and has held that the defendants 6,7, and 8 have purchased their respective properties for valuable consideration and they are in continuous possession of the property by putting up construction and availing amenities like electricity. Hence, the plaintiff cannot claim in the properties held by defendants 6,7 and 8.

11. Regarding the partition effected between the first defendant and his sons vide Ex.A2, the trial Court has left the issue open in the light of the fact that a separate suit between the parties was pending in O.S.No.170 of 1993 on that point of time. The trial Court after appreciating the evidence let in by the plaintiff and her deposition has held that the properties, which the first defendant inherited from his father through the Will dated 15.5.1955, the plaintiff has no claim or right over it and for non-joinder of necessary party, the suit is bad. Further, when the plaintiff has failed to prove her joint possession, she ought to have valued the suit under Section 37(1) of the Court Fees and Suit Valuation Act and not under Section 37(2).

12. On appeal, the lower appellate Court reversed the finding of the trial Court on the ground that after introduction of Section 29A under Tamil Nadu Act 1/1990, the plaintiff though an illegitimate daughter born through the void marriage, she has every right that of a legitimate daughters and sons of the first defendant. When the fact that the plaintiff is the daughter of the first defendant born through the void marriage, is not disputed, the plaintiff who was unmarried at the time of filing the suit, can have a right and share over her father's property.

13. Further, taking judicial note of the fact that the first defendant died pending the appeal, the lower appellate Court disagreed with the contention of the trial Court that the daughters cannot enforce partition during the lifetime of her father. Considering Section 16(3) of the Hindu Marriage Act, 1955, Section 29-A of the Hindu Succession Act, 1956 and in the light of the judgment rendered by the Hon'ble Supreme Court in Smt.Parayankandiyal Eravath Kanapraavan kalliani Amma and others v. K.Devi and others reported in AIR 1996 Supreme Court 1963, the lower appellate Court allowed the suit on the ground that after introduction of Section 29-A of the Hindu Succession Act, 1956, the alienation made by the first defendant is ab initio void and the Will dated 15.5.1955 said to have been executed by the father of the first defendant in favour of the first defendant is not at all an issue because the children born to the first defendant were effected partition only in the year 1990 as evidenced under Ex.B42. Further, relying upon Ex.B42, the lower appellate Court has treated the entire property as ancestral property and allowed the suit for partition.

14. Regarding the non-joinder of necessary party, the lower appellate Court has found fault with the finding of the trial Court on the premise that no suit should be dismissed on the ground of non-joinder of necessary party, which is the basic principle ignored by the trial Court and gone further to say, when the suit is bad for non-joinder of necessary party, without giving an opportunity to the plaintiff, dismissal of the suit on the ground of non-joinder of necessary party is

15. At the time of admission, this Court has formulated the following Substantial Questions of Law for consideration:

1. When it is admitted that the plaintiff is born to first defendant through a void marriage is the learned Principal District Judge right in holding that the plaintiff is entitled to file a suit for partition during the lifetime of the father?

2. When it is admitted that the properties are the joint family properties and that Sec.29-A of the Hindu Succession Act cannot be applied to the facts of the present case, still is the learned Principal District Judge, right in granting a decree for partition with reference to all the items belong to the joint family?

16. Heard the learned counsel appearing for the appellants and the learned counsel appearing for the respondents and perused the materials available on record.

17. While the learned counsel appearing for the appellants submitted that Section 16(3) of the Hindu Marriage Act, 1955 only gives a deeming fiction to the child born through the void marriage. It restricts her right of inheritance only to the property of the parents and not to any other person. Which means the illegitimate child can seek partition only after the death of the parent and not before that. Further, such a claim can be restricted only to the properties of the parents and not the properties of others.

18. The learned counsel for the appellants contended that it is specifically pleaded by the appellants that Swamy Ramanuja Dasar, his father Ethiraj Ramanuja Dasar and junior paternal uncle Govinda Ramanuja Dasar had a partition of the family property as early as 12.7.1954 vide Ex.A2 and the first defendant got about 8.30 cents of land through the Will of his father in the year 1955 and rest of the properties were purchased by the first defendant from out of his personal exertion. The lower appellate Court has erroneously arrived at a conclusion that all the properties are ancestors of the first defendant. Further, the lower appellate Court has wrongly applied to Section 29-A of the Hindu Succession Act, 1956 which is inapplicable to the facts of the present case.

19. Per contra, the learned counsel appearing for the respondents submitted that after amendment to the Hindu Marriage Act, 1955 by introducing Section 16(3) and amended to the Hindu Succession Act, 1956, illegitimate unmarried daughter can seek partition and separate possession of her

father's property, even during the lifetime of her father. Whether such an illegitimate child is entitled to share of self acquired property of her parent and not to Hindu Joint Family Property? is now subject matter pending before Larger Bench of the Hon'ble Supreme Court.

20. In view of the reference made by the Hon'ble Division Bench of the Supreme Court in *Revanasiddappa @ another v. Mallikarjun and others* reported in CDJ 2011 SC 342, supporting the lower appellate Court, the learned counsel appearing for the respondents pleaded that the first defendant has admitted that the plaintiff is his daughter. The defendants 1 and 2 are sisters. When the sons of the second wife were given share, he contended that the partition effected in the year 1990 excluding the daughter of the second wife from giving her share in the property, is contra to law of inheritance. Hence, there is an error in the finding of the lower appellate Court.

21. On considering the rival submissions made by the learned counsel on either side and perusing the materials available on record, this Court finds that when there is a specific plea raised by the defendants regarding nature of the suit property, which extent he possesses and extent possessed by the third parties and how and when he alienated the property to third parties, particularly the defendants 6,7 and 8, the lower appellate Court has not applied its mind to consider those pleadings and not recorded the reason to differ the finding of the trial Court. Regarding the nature of the property, there is a specific defence raised by the defendants, the properties are not ancestral properties, a portion of the property was inherited through his father and another portion of the property was allotted to him in the partition between him and his father along with junior paternal uncle before 1955 and some of the property was purchased by him out of his own earning. Therefore, it is erroneous to classify all the suit properties including the properties, which are not owned by the first defendant as ancestral properties and available for partition. So, granting a decree of partition on the face of record is erroneous and liable to be set aside

22. Further more, the lower appellate Court has found and formulated his own law of procedure by saying that the suit cannot be dismissed for non-joinder of necessary parties and opportunity should be given to the parties to implead the necessary parties. This observation is factually and legally erroneous

23. On facts, when the defendants has made know to the plaintiff that in respect of item No.5 of the suit schedule property in S.No.146/1, he owns only 10 cents of land on the northern portion, the rest of the land measuring 32 cents on the south is owned by Krishnan and Arumugam and Padmavathi and

in respect of 6th item of property bearing S.No.146/6, he has purchased only 15 cents of land falling on the east. The remaining 15 cents of land is owned by Rajuna Chetti and in respect of 7th item of suit property in S.No.129/3, he purchased only 81 cents of land on the northern portion, on the southern portion of 12 cents of land is owned by one Srinivasan. It is for the plaintiff either to implead those parties or ought to have deleted the portion of the suit property owned by them. When the plaintiff has failed to carry out necessary amendment to the pleadings, the lower appellate Court is wrong in holding that the plaintiff was not given opportunity by the trial Court to implead the necessary parties. At the least the lower appellate Court should have considered this and deleted the portion of land held by the third parties. Without applying his mind, he has passed a blanket order of partition as if the properties are ancestors properties of the first defendant and the plaintiff is entitled for 1/6th share in all the property. The lower appellate Court has also erred in holding that after the amendment to the Hindu Succession Act, 1956 inserting Section 29-A, the Section 16(3) of the Hindu Marriage Act, 1955 has become irrelevant and the plaintiff is entitled to seek share in the ancestral property of her father even during his life time. This legal error of the lower appellate Court is bound to be annulled for the following reasons:

(a) Section 16(3) of the Hindu Marriage Act, 1955, while conferring the status to the child born through the void marriage also incapacitate such children from claiming right to the property of any person other than the parent.

(b) When there is a specific restriction to claim right over the property other than the parents, by virtue of Section 29-A of the Hindu Succession Act, 1956 an illegitimate child cannot seek right over the properties as a co-parcener. The matter, what is now referred to the Larger Bench of the Hon'ble Supreme Court, is to determine whether an illegitimate child can seek right in the self acquired property of the parent alone or the joint family property also?

(c) The order of reference to reconsider the decision of the Hon'ble Supreme Court rendered in *Jinia Keotin and others v. Kumar Sitaram Manjhi and others* reported in (2003)1 SCC 730. Till any decision is rendered contra to these judgments by Larger Bench, verdict of the Hon'ble Supreme Court in these judgments alone holds the failed.

(d) Further, it is also to be pointed out that at the time of filing of the suit, the first defendant was alive. So, whatever right the illegitimate child can claim only be the property of the parent and nothing more. When father is alive, the question of inheritance does not arise.

24. Recently the judgment of the Hon'ble Supreme Court rendered in Uttam v. Saubhag Singh and others reported in (2016) 4 SCC 68 has said that after a partition of the joint family property by the members of the family, the property loses the character of the joint family property and Section 8 of the Hindu Succession Act, 1956 will apply and not Section 6.

25. In this case, there was a partition among the sharers as early as 1954 thereafter, the property allotted to the first defendant had been enjoyed by him as if it is his individual property. Later in the year 1955, his father has executed a Will in favour of the first defendant. On the death of his father, the property has been devolved upon the first defendant. No doubt, under Ex.B42, the first defendant and his sons have divided the property and one of the sons by name Srinivasan has relinquished his right, after receiving a sum of Rs.25,000/-. This does not mean that the properties were joint family property and the recital found in this deed marked as Ex.B42 has to be considered in the light of evidence given by one of its author DW1.

26. The first defendant in his evidence has categorically stated that the sons born through the second wife though are not having legitimate right to claim share in the property, since the Mediators negotiated and requested him to give some property to the sons of the second wife, he has given a portion of his property to them. This does not mean that the other children do have an automatic right over the properties. In any event, on the date of filing of the suit when the father is alive, the right of illegitimate children seeking right over the father's property or any other persons property through her father is pre-mature. There is a difference in law between right of legitimate and illegitimate children. That the difference is well spoken and pointed out in Section 16(3) of the Hindu Marriage Act, 1955.

27. The purpose of introducing Section 3 is to void ignominy faced by innocent children born through void marriage. Deeming fiction is not a fell loan right to stake claim on par with the legitimate children. If such a wider interpretation is given, then there is no necessity for Section 16(3) of the Hindu Marriage Act, 1955 which has purposeful meaning for its existence in the statute. This has been well explained by Bombay High Court in AIR 1983 Bombay 222, Laxmibai Nagappa matiwardar and others v. Limbabai Nagappa Matiwardar.

"It was held that the children born of void marriage is entitled to right in the property of their parents, as per Section 16 of the Hindu Marriage Act. It is appropriate to incorporate paragraph 6 of the said decision:

"6. The present section which is in three parts, has been substituted for the original Section 16 and sub-Section (10, which opens with non obstante clause, declares in no uncertain terms, that notwithstanding that such a marriage is null and void under Section 11, the off-spring of such marriage shall be legitimate whether such child was born before or after the commencement of the Marriage Laws (Amendment) Act, 1976, and whether or not a decree of nullity is granted in respect of that marriage under the Act and whether or not the marriage is held to be void otherwise than on a petition under the Act. The 1976 amendment and the substitution of Section 16(1) in this manner beyond doubt takes away and eclipses the general rule that the off-spring of a marriage, which is null and void ipso jure, is illegitimate. That was common law doctrine, inevitable resulting in the effect of bastardizing children. The same has been superseded and the matter is governed by the express declaration available in Section 16(1) of the Act to the effect that though because of the statute the marriage would be void, that would not lead to the inevitable result of bastardizing the children who are born out of such a void wedlock. Sub-section (3) of Section 16 is not doubt, restrictive in Character. It is however in furtherance of the legislative declaration available in sub-section (1) of Section 16 of the Act. Though couched in negative language, the provision itself is in two parts, one excluding the entitlement of such child of possessing or acquiring rights in or to the property of any person and recognising such rights in his favour with regard to the property of his parents. The effect of legitimacy recognised by Section 16 thus is to confer the rights in or to the property of the parents, the disablement or incapacity being enacted only with regard to the property of any other person. As far as the property of other person is concerned, sub-section (3) marks the

position clear that the legitimacy conferred by sub-section (1) and (2) would not clothe such a child with the capacity of possessing or acquiring any right which it did not so possess by reason of its not being the legitimate child of its parents. Section 16 thus enacts a complete Code with regard to the off-springs of void or voidable marriages. Firstly, it declares the status of such a child being one as legitimate. Secondly, it recognizes rights in the property of the parents. The provision itself this is for the benefit to the children and will have to be applied in full so as to confer status with interest in property. This provision thus removes the disability of such children as far as the property of their parents is concerned. Reading together, it follows that Hiralal and Ambubai would be the legitimate childrne notwithstanding the fact that Laxmibai's marriage is void and they would have rights in or to the property left by Naappa or laxmibai."

28. While upholding the constitutional validity of the Section 16, after its amendment in the year 1976, the Hon'ble Supreme Court in Smt.Parayankandiyal Eravath Kanapra van kalliani Amma and others v. K.Devi and others reported in AIR 1996 Supreme Court 1963 has clearly reiterated the purpose of Section 16 as well as limitation imposed under the said Section in the following words:

"79.In view of the legal fiction contained in Section 16, the illegitimate children, for all practical purpose, including succession to the properties of their parents, have to be treated as legitimate. They cannot, however, succeed to the properties of any other relation on the basis of this rule, which in its operation, is limited to the properties of the parents."

29. The lower appellate Court has miserably failed to understand Section 16(3) of the Hindu Marriage Act, 1955 and 29-A of the Hindu Succession Act, 1956 operates on different domine and these Sections cannot be telescope to each other.

30. The lower appellate Court has failed to note that on the date of filing the suit, there was no cause of action to claim partition of the suit property held by the first defendant. In view of the fact that the illegitimate children can claim right over the parent property only after the demise

of the parent and not before that, even subsequent amendment to the Hindu Succession Act, 1956 by introduction of Section 29-A does not gives such right to illegitimate children.

31. The lower appellate Court on three counts erred in appreciating the law governing the facts of the case:

Firstly, holding entire suit properties has ancestral properties without any materials.

Secondly, While it has been pleaded and established that some of the suit properties are not properties of the first defendant and even after disclosure of the persons, who own those properties, the plaintiff has failed to make necessary amendment in the prayer. Despite such failure, the trial Court has mechanically allowed the suit for partition in respect of entire suit property, without impleading some of the owners of the suit property.

Thirdly, the spirit of introduction Section 16 (3) of Hindu Marriage Act, 1955 for conferring legitimacy through legal fiction to the children otherwise illegitimate and the spirit of introduction of Section 29-A of the Hindu Succession Act, 1956 accepting the right of legitimate daughter on par with male co-parcener has not been properly understood by the lower appellate Court

32. For all these reasons, this Court is constrained to allow the second appeal holding the substantial questions of law in favour of the appellant.

33. Accordingly, the second appeal is allowed. No costs.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

1. The Principal District Judge,
Tiruvannamalai.

2.The Sub Judge, Tiruvannamalai.

+ 1 cc to Mr. T.R. Rajaraman, Advocate SR.60925

+ 1 cc to Mr. V. Bhiman, Advocate SR.60782

S.A.No.725 of 2001

SJ(CO)

EU (28/10/2017)

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