



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on: 30.01.2017
Delivered on: 01.03.2017

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CORAM :

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

Second Appeal (MD) No.552 of 2011
and
C.M.P.(MD) No.4044 of 2016

Mebal Kumari : Appellant / Appellant / Plaintiff

-Vs-.

1.Thanka Nadar
2.Jayan Kumar : Respondents/Respondents/Defendants

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 30.09.2009 made in A.S.No.51 of 2008 on the file of the Subordinate Judge, Kuzhithurai in confirming the judgment and decreed dated 27.06.2008 made in O.S.No.51 of 2006, on the file of the Principal District Munsif, Kuzhithurai.

For Appellants : Ms.J.Anandhavalli
For Respondents : Mr.V.M.Balamohan Thampi

JUDGMENT

The plaintiff in the suit in O.S.No.51 of 2006 on the file of the Principal District Munsif Court, Kuzhithurai, is the appellant in the above Second Appeal. The plaintiff filed the suit in O.S.No.51 of 2006 for partition and separate possession of her 1/3rd share in the suit properties.

2.The case of the plaintiff is that the first defendant is her father and the second defendant is her brother and that they constitute a Hindu co-parcenary. According to the plaintiff, the suit properties are the ancestral properties of plaintiff and defendants and that the first defendant got the suit properties under a partition deed dated 18.10.1988 for himself and on behalf of the other co-parceners namely the plaintiff and the second defendant. Since the plaintiff remained unmarried as on the date of came into force of the Tamil Nadu Act 1 of 1990, the plaintiff contended that she is entitled to 1/3rd share in the suit properties as a member of the joint family. It was also contended that the plaintiff and the defendants are in joint possession. It was further contended by the plaintiff that the defendants were

not willing for an amicable partition despite a demand on 07.02.2006 and that therefore, she was constrained to file a suit for partition.

3.The suit was contested by the defendants by filing a detailed written statement specifically denying the averments in the plaint. It is the specific case of the defendants that the plaintiff and the defendants are not Hindus nor they constitute a Hindu co-parcenary. According to the defendants, both the plaintiff and the defendants are born Christians and they are the followers of the Christianity. Since the parties are living as Christians, it was contended by the defendants that they are governed only by Indian Succession Act, 1925 and that the Hindu Succession Act, 1956 is not applicable to them.

4.The defendants came forward with a specific plea that the suit properties are not ancestral properties of the plaintiff and the defendants, but the exclusive properties of the first defendant. Though the defendants admitted that the first defendant got the suit properties under a partition deed dated 18.10.1988, the defendants reiterated that the suit properties were enjoyed by the first defendant alone as his exclusive properties by effecting mutation of records and paying tax proving his separate possession of the plaint schedule properties. The defendants referring to the sale deed executed by the first defendant on 20.07.2005 which is in respect of item No.4 in the suit schedule in favour of one Jeba contended that the first defendant is in enjoyment of the suit properties as his exclusive properties. The defendants further stated that the first defendant has executed a registered Will on 21.07.2005 bequeathing all his properties in favour of the second defendant. It was alleged by the defendants that thereafter, the first defendant has executed two settlement deeds in favour of the second defendant by document dated 01.03.2006 and 02.03.2006 settling the right over the plaint items 1, 2 and 3 in favour of the second defendant. Since the second defendant is in exclusive possession and enjoyment of the suit properties pursuant to the settlement deeds, the defendants contended that the suit schedule items 1, 2 and 3 became the exclusive properties of the second defendant. Since Hindu Succession Act has no application, it was further contended by the defendants that the amendment by way of Tamil Nadu Act, 1 of 1990 has no legal consequences so as to confer any right on the plaintiff. The defendants also contended that the plaintiff was given jewels worth Rs.2,00,000/- apart from a sum of Rs.10,000/- and other kinds and a further sum of Rs.85,000/- from and out of the redemption benefit of first respondent / defendant. It is also pleaded by the defendants that the husband of the plaintiff is the brain behind all the activities of plaintiff and that the suit has been filed vexatiously only to harass the defendants. The defendants also pleaded that the plaintiff is having full knowledge about the religion of the family members of the first



defendant who are born and brought up as Christians and that the first defendant is a member of "South India Assemblies of God Church of Planthope". It was further contended that the first defendant got baptized on 12.05.1959.

5.The trial Court after framing necessary issues dismissed the suit specifically holding that the first defendant is a Christian and that the plaintiff is not entitled to claim any right invoking the provisions of Hindu Succession Act or the Tamil Nadu Amendment Act enabling the female member of the joint family to claim equal share as that of a son in all the joint family properties. Aggrieved by the dismissal of the suit by the trial Court, the plaintiff preferred an appeal in A.S.No.51 of 2008 on the file of the Sub Court, Kuzhithurai. Before the appellate Court, the plaintiff filed an interlocutory petition in I.A.No.128 of 2009 under Order 41, Rule 27 to receive a transfer certificate, a xerox copy of which was already marked as Ex.A2 before the trial Court. The appellate Court also after framing points for consideration which really arose in the appeal confirmed the findings of the trial Court and held that the suit for partition is not maintainable. Aggrieved by the dismissal of the appeal, the above Second Appeal has been filed.

6.At the time of admitting the Second Appeal, the following questions of law have been framed:-

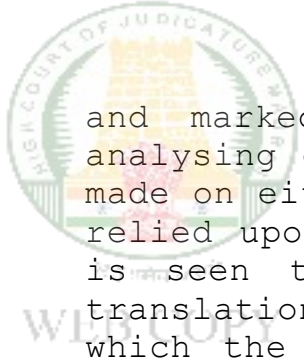
(a) Whether the Courts below were right in holding that the parties are Christians when there is no substantial evidence produced by the defendants to prove that the parties are Christians?

(b) Whether the Courts below were right in dismissing the suit when the properties are ancestral properties of Hindu ancestors of the parties and the appellants has filed documents to show that the properties are Hindu ancestral properties?

7.Though the above questions of law do not appear to be pure questions of law, the learned counsel for the appellant submitted that the Courts below have rendered findings after misreading of evidence and misconstruing the documents and that therefore, this Court need to interfere with the findings of the Courts below.

8.As against the concurrent findings rendered by the Courts below, the learned counsel for the appellant drew the attention of this Court to almost all the documents filed on behalf of the plaintiff to prove the case of the plaintiff that the parties are Hindus and governed by the provisions of the Hindu Succession Act.

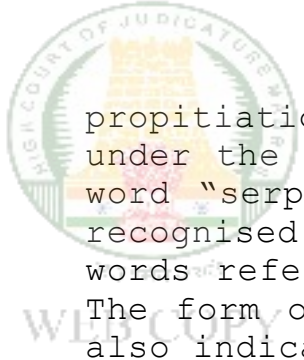
9.From the reading of the judgment of the Courts below, the Courts below have considered all the documents that were filed



and marked by both sides and came to the conclusion after analysing each and every document in the light of the submissions made on either side. It is to be noted that the Courts below have relied upon the documents Exs.B1 and B2 dated 06.09.1119 ME. It is seen that Ex.B1 is a document in Malayalam. Hence, the translation of Ex.B1 is marked as Ex.B2. Ex.B1 is a sale deed by which the grand father of the plaintiff by name Kochappi Nadar purchased a property. In this document, Kochappi Nadar, the grand father of the plaintiff, has described himself as a Christian. It is to be pointed out that in the sale transaction, the purchaser is one who makes arrangement to draft the sale deed after collecting the particulars from the vendor. The Courts below considered the document Ex.A1 and A4. Ex.A1 dated 18.10.1988 is a partition deed and Ex.A4, dated 02.05.1122 M.E. Ex.A1 is a partition deed between Kochappi Nadar and his collateral. Similarly, Ex.A4 is the translated contents of Ex.A3 which evidence an earlier partition that was effected on 02.05.1122 M.E.. The Courts below pointed out that the parties to the partition deed above stated have not mentioned the properties as the properties of Hindu joint family. It was also noted by the Courts below that the parties did not acknowledge them as members of the joint family. The Baptism Certificate issued to the second defendant under Ex.B14 shows that he was given Baptism in the year 2005. Again, the Courts below have relied upon the document Ex.B15 namely the marriage certificate of the second defendant showing that the marriage of the second defendant was performed in a church (CSI). Similarly, baptism certificate given to the first defendant on 12.05.1959 was marked as Ex.B16. After referring to Section 114 (g) of Indian Evidence Act, the Courts below came to the conclusion that the parties are Christians. The Courts below have also considered the documents filed on the side of plaintiff to prove her case. The plaintiff / appellant relied upon Ex.A1 to show that the parties are Hindus. Even before this Court, the learned counsel for the appellant relied upon the said document and submitted that a portion of the property of the family has been described as "Kavu". The learned counsel for the appellant submitted that "Kavu" is a common place for worship associated with Hindu temple / religion.

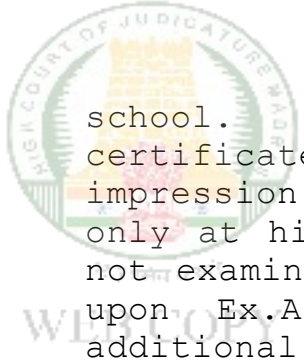
10. On the other hand, the learned counsel for the respondents pointed out that the parties to the document Ex.A1 have kept a small piece of land in common for being enjoyed by all the sharers. He further submitted that the word "எங்கள் முன்சாமிக்குடைய சைத்திரியாக (Cemetery) வாதுவில் உபயோகித்துக் கொள்ள வேண்டும்" indicates that parties are Christian and that the word Cemetery is recognised as the burial ground for Christians. As between the submission of the learned counsel for the appellant and respondents it is to be seen that the religion of the parties cannot be concluded on the basis of the stray expressions found in the documents without other evidence corroborating the recitals. Hence, the Courts below have not given much importance to their respective

contentions on either side. However, one significant aspect of the matter escaped in the notice of the Courts below. The document Ex.A1 was executed in the year 1988. The parties to the documents are the first defendant and his brother one Selvanayagam. As the sons of Kochappi Nadar, they have entered into this partition deed. In the partition deed, they have described the properties as the absolute properties of Kochappi Nadar. The parties have cautiously acknowledged the absolute right of Kochappi Nadar though it was stated that the properties were obtained by Kochappi Nadar in earlier partition and the subsequent sale deeds obtained by Kochappi Nadar. This document indicates that the parties have entered into a partition not as members of joint family. It is to be noted that the concept of joint family, property purchased out of joint family funds being treated as joint family property, co-parcenary, nucleus and right by birth are all unknown to Christianity. If the sons of Kochappi Nadar are Hindus, the recitals of document Ex.A1 would have been different. This document Ex.A1 is therefore, gives a clear indication that the first defendant got right only as a son of his father Kochappi Nadar after his life time. Therefore, the document Ex.A1 clearly disproves the case of the plaintiff that the first defendant is a Hindu especially when there was no attempt by the plaintiff to explain the recitals of Ex.A1. The learned counsel for the appellant relied upon the document Ex.A2 which is only a xerox copy of the plaintiff's school transfer certificate. However, the plaintiff filed I.A.No.128 of 2009 to receive the original transfer certificate. The document Ex.A2 appears to have been issued by the Government Higher Secondary School, Mathicode. In this document, the religion of the plaintiff is mentioned as Hindu. The date of joining is mentioned as 10.12.1993. It is admitted that the plaintiff got married on 01.10.1992. It is also admitted that the husband of plaintiff is a Hindu. In such circumstances, the actual religion of the plaintiff before her marriage cannot be confirmed by this document. The document Ex.A2 was in the year 2002. However, certain columns were attested by the Headmaster of the institution in 2006. Hence, the genuineness of the document is doubtful. The next document relied upon is Ex.A4. Ex.A4 is an earlier partition in which Kochappi Nadar was a party. This document also was not appeared to be a document which was among the members of a Hindu undivided joint family. In this document, there is reference to "Kavu" and "Aarathana Sthala". The learned counsel for the appellant vehemently contended that the word "Kavu" denotes a place of worship for Hindus. The learned counsel has collected information from Wikipedia, a resourceful internet web-site. Here the word "Kavu" has been described as the traditional name given for sacred groves across the Malabar Coast in Kerala, South India. "Kavus" has been defined as notable for Theyyam, the centuries-old ritual dance. The learned counsel appearing for the appellant further relied upon The Travancore State Manual wherein "Serpent Kavus" which has been referred to as the object of worship and



propitiation from early times. The material that was furnished under the title "serpent kavus" gives a clear indication that the word "serpent kavus" is something related to serpent (snake) and recognised other materials indicate that the culmination of these words refer to the Serpent God which has its mythological origin. The form of worship recognised in the Southern part of Kerala is also indicated. However, there is a reference to "Kavu" which has been described by a limited meaning as grove. As stated earlier, it is not possible to decide the religion of a person on the basis of words used to describe a place or piece of land. It is highly risky and may lead to unfavourable situation while dispensing with justice. In the absence of any other evidence by an expert to prove the expressions found in this document, peculiar to the locality connecting to the religion, it is not desirable to jump into conclusions. A similar contention was raised by the learned counsel for the respondents by referring to the word Aarathana Sthala found in this document Ex.A2. The reasons stated above, equally applies to reject the contention of the respondents.

11. The learned counsel for the appellant relied upon the community certificate of the appellant marked as Ex.A5. This shows that this certificate was obtained in the year 2002. The Courts below have noticed that the plaintiff has admitted in the course of her evidence that previously she obtained a "Community Certificate" and had given the same to the school. The previous certificate was not produced. Since the document Ex.A5 was obtained after the marriage, the Courts below have doubted the genuineness of the document and observed that this document could have obtained only because the plaintiff changed her religion after marriage. I find that the conclusions of the Courts below on this document are justified. The appellant has relied upon Ex.A6, a certificate issued to her by the Headmaster of Government Middle School, Vencodu North. This Certificate has been given in a piece of paper by stating that this is issued after verification of school records. No one was examined to vouch the records on the basis of which the said certificate was issued. Hence, this Court does not find fault with the conclusion of the Courts below to reject this document. Similarly, the learned counsel for the appellant relied upon the transfer certificate of the first defendant which was issued on 07.12.2007. It is to be seen that this certificate has been originally issued on 21.11.1963. However, it is only a xerox copy of the original attested by the Headmaster of the school on 07.12.2007. Without examining any one, this document cannot be accepted as a genuine document to prove the religion of the first defendant. Similarly, another certificate has been filed by the appellant as Ex.A8 which is nothing but a certificate given in the letterhead of a higher secondary school in Ireneapuram. In this letterhead, the date of birth of the first defendant has been given as 23.12.1942 and the date of going on from the school is mentioned as 17.06.1963. This certificate was issued on 07.12.2007 by the Headmaster of the



school. It is surprising to note that the school has given such certificate nearly after 45 years. This certificate also gives an impression that the first defendant has completed his schooling only at his 21st year. The person who issued the certificate is not examined. The learned counsel for the appellant then relied upon Ex.A10 which was produced before the trial Court as additional evidence. This document clearly shows that the document Ex.A2 is not the true copy of this as the back side of this document when compared with Ex.A2 is not similar.

12.As against these documents, the learned counsel for the respondents has referred to the other document filed by the defendants in the trial Court in support of their stand. The Courts below have considered the documents filed by the plaintiff particularly the document Exs.B1 and B2, marriage certificate of second defendant, baptism certificate of the defendants 1 and 2 which were obtained long back prior to the institution of this suit. After considering the documents and the evidence of parties, the Courts below have arrived at a definite conclusion that the first defendant is a Christian and that the properties are not the properties of a Hindu joint family so as to claim right under the provisions of the Hindu Succession Act read with Tamil Nadu Act 1 of 1990. I find that the Courts below have taken great pain in considering the documents in the light of the objections of either side on the admissibility, relevance and evidentiary value. It is to be pointed out that the trial Court has relied upon a judgment of Karnataka High Court wherein the evidentiary value of entries in birth register and school admission register, etc, was considered and held that in the absence of examination of testimony by some other persons competent to speak either as to their knowledge or as to source of the information or statement on which the said recitals came to be incorporated in the said documents, the recitals themselves found in the document cannot be treated as substantive evidence as admissible on the question concerning paternity. The same principle can also be applied when the matter is about the religion of a person. The documents produced on either side would clearly establish that the first defendant belongs to Christianity. Some of the documents produced by the plaintiff describing her as a Hindu are all after her marriage with a Hindu husband and hence, the document produced by the appellants cannot be relied upon. Various circumstances and nature of evidence adduced by the plaintiff have been elaborately discussed by the Courts below so as to come to a definite conclusion as to the religion of first defendant and his father Kochappi Nadar. Having regard to the concurrent findings of the Courts below, this Court sitting in Second Appeal with limited jurisdiction cannot interfere with the concurrent findings of fact.

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13.The learned counsel for the appellant relied upon the judgment of the Hon'ble Supreme Court in the case of **Municipal**



Committee, Hoshiarpur v. Punjab State Electricity Board and others reported in **2011-1-L.W. 525** wherein the Hon'ble Supreme Court has dealt with the power of High Court under Section 103 C.P.C and the relevant portion is extracted from paragraphs 21 and 24 of this judgment as under:

"21. Powers under Section 103 C.P.C. can be exercised by the High Court only if the core issue involved in the case is not decided by the trial Court or the appellate Court and the relevant material is available on record to adjudicate upon the said issue. (See: Haryana State Electronics Development Corporation Ltd., & Ors. v. Seema Sharma & Ors., (2009) 7 SCC 311.)

24. If a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in the eyes of law. If the findings of the Court are based on no evidence or evidence which is thoroughly unreliable or evidence that suffers from the vice of procedural irregularity or the findings are such that no reasonable person would have arrived at those findings, then the findings may be said to be perverse. Further, if the findings are either ipse dixit of the Court or based on conjecture and surmises, the judgment suffers from the additional infirmity of non-application of mind and thus, stands vitiated. (Vide: Bharatha Matha & Anr. v. R. Vijaya Renganathan & Ors., AIR 2010 SC 2685 = 2010-4-L.W.791)."

Further, in the same judgment, the Hon'ble Supreme Court has dealt with the scope of Section 100 C.P.C. in paragraphs 13 which reads as follows:

"13. Thus, it is evident from the above that the right to appeal is a creation of Statute and it cannot be created by acquiescence of the parties or by the order of the Court. Jurisdiction cannot be conferred by mere acceptance, acquiescence, consent or by any other means as it can be conferred only by the legislature and conferring a Court or Authority with jurisdiction, is a legislative function. Thus, being a substantive statutory right, it has to be regulated in accordance with the law in force, ensuring full compliance of the conditions mentioned in the provision that creates it. Therefore, the Court has no power to enlarge the scope of those grounds mentioned in the statutory provisions. A second appeal cannot be decided merely on equitable grounds as it lies only on a substantial question of law, which is something distinct from a substantial question of fact. The Court cannot entertain a second appeal



unless a substantial question of law is involved, as the second appeal does not lie on the ground of erroneous findings of fact based on an appreciation of the relevant evidence. The existence of a substantial question of law is a condition precedent for entertaining the second appeal, on failure to do so, the judgment cannot be maintained. The existence of a substantial question of law is a sine qua non for the exercise of jurisdiction under the provision of Section 100 C.P.C. It is the obligation on the Court to further the clear intent of the Legislature and not to frustrate it by ignoring the same. (Vide: Santosh Hazari v. Purshottam Tiwari (dead) by Lrs. AIR 2001 SC 965 = 2001-3-L.W. 308; Sarjas Rai & Ors. v. Bakshi Inderjeet Singh, (2005 1 SCC 598; Manicka Poosali (Deceased by LRs.) & Ors. v. Anjalai Ammal & Anr., AIR 2005 SC 1777 = 2005-4-L.W.467; Mst. Sugani v. Rameshwar Das & Anr., AIR 2006 SC 2172; Hero Vinoth (Minor) v. Seshammal, AIR 2006 SC 2234 = 2007-2-L.W.945; P.Chandrasekharan & Ors. v. S.Kanakarajan & Ors., (2007) 5 SCC 669 = 2007-3-L.W.1090; Kashmir Shigh v. Harnam Singh & Anr., AIR 2008 SC 1749; V.Ramaswamy v. Ramachandran & Anr., (2009) 14 SCC 216; and Bhag Singh v. Jaskirat Singh & Ors., (2010) 2 SCC 250).

14.The learned counsel for the respondents relied upon a decision of this Court in the case of **Pravin Kumar v. P.Rajeswaran and others** reported in **AIR 1988 Madras 132** wherein this Court in similar case has held as follows:

"10. ... I am of the opinion that it is not open to the plaintiff to rise such an argument. The plaintiff came to court with a definite case that Jimmarammal was a Hindu. The burden is on him to prove the same. If he fails to do so, he cannot abandon his own case and turn round to adopt that of the defendant for claiming the relief. (Vide Govindaraj v. Kandaswamy Gounder, (1956) 2 Mad LJ 578 : (AIR 1957 Mad 186) and Subramania Mudaliar v. Ammapet Cooperative Weaver's Production and Sales Socy., (1960) 2 Mad LJ 477 : (AIR 1961 Mad 289)."

15.In this case, the only question that arise for consideration is about the religion of first defendant. The Courts below have concurrently found that the first defendant is a Christian and that the plaintiff is not entitled to claim any share in the suit properties. The Courts below have applied their mind independently and after framing necessary issues / points for consideration have given a reasoned judgment. This Court sitting in the Second Appeal cannot re-appreciate the evidence normally. Even after considering the evidence on both sides, I am not able to take a different view. In view of the circumstances of the case, I find that there is no question of law involved in this Second Appeal and the Second Appeal is therefore liable to be



dismissed and accordingly, the same is dismissed. However, there is no order as to costs. Consequently, the connected miscellaneous petition is closed.

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Sd/-
Assistant Registrar(c)

Sub Assistant Registrar

To

- 1.The Subordinate Judge,
Kuzhithurai.
- 2.The Principal District Munsif,
Kuzhithurai.

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+1cc to Mr.V.M.Bala Mohan Thampi, Advocate SR.No.11719

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Judgment made in
Second Appeal (MD) No.552 of 2011
01.03.2017