

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.08.2018

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

S.A.No.5 of 2012
and MP.No.1 of 2012

1.Kumarasamy
2.Ranjith Kumar ... Appellants/1st & 8th Defendant

-VS-

Sumathi ... Respondent/Plaintiff

PRAYER: Second appeal is filed under Section 100 of C.P.C., against the judgment and decree dated 23.08.2011 made in A.S.No.26 of 2010 on the file of the Sub Court, Sankagiri confirming the judgment and decree dated 19.08.2010 made in O.S.No.276 of 2006 on the file of the learned District Munsif, Sankagiri.

For appellants : Mr.T.Dhanya Kumar

For respondent : Mr.N.Manokaran.

JUDGMENT

The defendants 1 and 8 are the appellants herein. The plaintiff filed the suit for partition and preliminary decree.

2. The case of the plaintiff/respondent is that all the suit properties are originally belong to one Sitha Gounder who died long back. The Sitha Gounder had one son/Palaniappan Gounder and three daughters. Palaniappan Gounder married second defendant/Rajammal, through her he got one daughter/Perumayee/D3 and one son/Kumarasamy/D1. The first defendant/Kumarasamy married D7/Kaveriammal mother of the plaintiff. During the lifetime of Kaveriammal and the first marriage was in existence, Kumarasamy married one Sudha the mother of the 8th defendant as second wife. Since, the marriage with the first wife/Kaveriammal is in existence the marriage of Kumarasamy with Sudha is void and therefore, the 8th defendant is not a legitimate child. The 8th defendant is not coparcener, during the lifetime of Kumarasamy. The said Palaniappan Gounder, father of the first defendant and husband of the second

defendant died on 29.12.2004. During the lifetime of Palaniappan Gounder he executed a Will in favour of the 8th defendant in respect of the "C" Schedule property. There was a dispute between the Kumarasamy/first defendant and Kaveriammal/7th defendant, thereafter, Palaniappan Gounder and Kumarasamy executed a sale deed in favour of the 7th defendant/Kaveriammal in respect of the "B" Schedule Property on 23.10.1986. Insofar as the "C" Schedule property is concerned, since it is an ancestral property the Palaniappan Gounder and Kumarasamy are each entitled to 1/2share. The plaintiff herein is the only daughter of the first defendant/Kumarasamy she is entitled to 1/4share in the "C" schedule property.

3. The case of the defendants 1 and 8/appellants is admitted that properties originally belongs to Sitha Gounder father of the Palaniappan Gounder died in 65years before, the Palaniappan Gounder has got one son/Kumarasamy/D1 and one daughter/Perumayee/D3. Kumarasamy married the 7th defendant/Kaveriammal as first wife and there was a dispute between the 1st defendant and the 7th defendant. The 1st defendant married Sudha as his second wife, through her 8th defendant/Ranjith Kumar was born. The dispute between the defendants 1 and 7 were settled in the presence of panchayatars, Palaniappan and Kumarasamy settled the "B" Schedule property in favour of the 7th defendant/first wife of Kumarasamy as final settlement and deposited a sum of Rs.50,000/- in favour of the plaintiff's on 07.05.1987, towards her marriage expenses. Since the Palaniappan Gounder and Kumarasamy settled the property in "B" schedule in favour of 7th defendant/Kaveriammal and the 7th defendant is in possession and enjoyment of the "B" Schedule property, therefore, the Palaniappan Gounder executed a Will in favour of the 8th defendant. Hence, the defendants prays that the plaintiff is not entitled to any partition.

4. After completion of the pleadings, the trial Court framed the following issues :-

(i)Whether the plaintiff is entitled to the relief of preliminary decree for partition as prayed for?

(ii)Whether the plaintiff is entitled to the relief of perpetual injunction as prayed for?

(iii)To what other relief the plaintiff is entitled to?

5. In order to prove their respective case, on the side of the plaintiff, the plaintiff was examined herself as PW1 and marked Exs.A1 to A10, on the side of the defendants 7 witnesses were examined as DW1 to DW7 on their behalf and two documents were marked as Exs.B1 and B2.

6. After hearing the arguments on either side the Trial Court passed preliminary decree in favour of the plaintiff.

7. Aggrieved against the preliminary decree passed by the Trial Court, the defendants 1 and 8 filed an appeal before the Sub Court, Sankagiri. The first appellate Court after hearing both sides dismissed the appeal and confirmed the judgment and decree passed by the District Munsif, Sankagiri.

8. Feeling aggrieved against the judgment and decree passed by the Sub Court, Sankagiri, the appellants have preferred the present second appeal before this Court.

9. Notice was sent on the respondent and after service of notice, at the time of admission this Court finds that there is no substantial questions of law is involved to decide the issue and inclined to dismiss the second appeal in the admission stage itself on the following reasons :-

(i) According to the appellants admittedly, the suit properties originally belongs to one Sitha Gounder and he died 65years before. He got one son Palaniappan and he succeeded the entire "A" schedule properties. The said Palaniappan married one Rajammal/2nd defendant they got one son the first defendant/Kumarasamy, father of the 8th defendant. Kaveriammal is the first wife of Kumarasamy the plaintiff is the daughter of them. There was a dispute between the first defendant/Kumarasamy and 7th defendant/Kaveriammal, at that time the first defendant married one Sudha as second wife, during the existence of first marriage with Kaveriammal. Therefore, the first defendant and Palaniappan settled "B" schedule properties in favour of 7th defendant vide sale deed dated 23.10.1986/Ex.A1 in the presence of the panchayatars. Since, the plaintiff and her mother/7th defendant were separated and "B" schedule properties were allotted to them and they are in possession and enjoyment of "B" schedule properties. They do not have any right in the "C" Schedule properties. Therefore, the Palaniappan executed a Will/Ex.B1 dated 19.09.1991 in favour of the 8th defendant. As per Ex.B1/Will the 8th defendant is entitled to entire properties of "C" schedule. Therefore, the plaintiff is not entitled to any share in the "C" share schedule properties. The trial Court failed to consider the fact that even during the lifetime of Palanaiappan Gounder, both himself and his son first defendant/Kumarasamy executed a sale deed dated 23.10.1986/Ex.A1 in favour of the mother of the plaintiff/first wife/Kaveriammal towards final settlement. The trial Court decreed the suit and passed preliminary decree, the first appellate Court also dismissed the appeal by confirming the judgment and decree of the trial Court.

(ii) The case of the respondent is that it is not in dispute with reference to the relationship of the parties, but regarding the execution of the sale deed Ex.A1 in favour of the 7th defendant/Kaveriammal is concerned, the plaintiff is not party to the sale deed. The Palaniappan and Kumarasamy executed the sale deed dated 23.10.1986/Ex.A1 in favour of the 7th defendant as one time settlement for her maintenance and it becomes absolute property of the 7th defendant, as per the Hindu Succession Act. Since, the plaintiff is not party to the sale deed the sale in favour of the 7th defendant will not bind the plaintiff. The plaintiff got married on 11.03.1993 and the "C" schedule properties were not divided between the Palaniappan and Kumarasamy since, it was kept as undivided ancestral properties on the date when the Act 1 of 1990 came into force. There was no partition has been effected in the ancestral property and the plaintiff as a coparcener she is entitled to partition, during the existence of first marriage, the marriage of Kumarasamy with the Sudha is not valid. Therefore, the 8th defendant is not legitimate child of Kumarasamy and the 8th defendant is not entitled to any share. However, the Palaniappan Gounder executed a Will under Ex.B1 dated 19.09.1991 in favour of the 8th defendant will not bind the share of the plaintiff, on the basis of Will 8th defendant is entitled to only 1/2 share in the "C" schedule property. Therefore, Kumarasamy father of the plaintiff is entitled to 1/2 share as coparcener. Thus the plaintiff is entitled to 1/4 share in the "C" schedule property.

10. It is not in dispute with reference to the relationship of the properties and not in dispute with reference to nature of the properties and not in dispute with the original owner of the property i.e, Sitha Gounder, admittedly who died prior to the Hindu Succession Act, 1956 came into effect. On the death of Sitha Gounder, Palaniappan Gounder succeeded the property, since, Palaniappan and Kumarasamy are the coparcener in the ancestral joint family properties. The marriage of the mother of the plaintiff with the Kumarasamy is not in dispute. As per the amendment of the Hindu Succession Act, 1956 (Act 1/1990), the plaintiff is the coparcener in the "C" schedule properties. Though, the Palaniappan Gounder and Kumarasamy executed the sale deed Ex.A1 in favour of the 7th defendant/first wife for maintenance and he married one Sudha/mother of the 8th defendant as second wife.

11. On a perusal of Ex.A1/sale deed, there is no reference about the plaintiff, since, the "B" schedule properties given to the 7th defendant/first wife and the "B" Schedule property is the

absolute property of 7th defendant. In the absence of recital in the sale deed/Ex.A1 will not bind the plaintiff. Since, the plaintiff is not married and "C" Schedule properties have not partitioned between Palaniappan Gounder and his son Kumarasamy, father of the plaintiff are coparcener on the date of amendment Act came into force. The Palaniappan Gounder executed a registered Will only on 19.09.1991/Ex.B1 in favour of the 8th defendant, who born to the second wife of Kumarasamy. Since, the first wife is alive and the marriage is not dissolved between the 1st defendant and 7th defendant, the second marriage is not valid. The 8th defendant being illegitimate child is not coparcener in the ancestral property. Further, the Palaniappan Gounder executed the Will dated 19.09.1991 only after the amendment of the Act 1/1990 came into force. Already, the plaintiff has become coparcener, therefore, the Will executed by the Palaniappan Gounder will not bind the share of the plaintiff. Prior to the amendment of the of Act 1/1990 came into force, Ex.A1/sale deed was executed in favour of the 7th defendant/first wife of first defendant/Kumarasamy, thus the 7th defendant has become absolute owner of the "B" Schedule property. Therefore, the plaintiff cannot claim any right in the "B" Schedule properties. With reference to the "C" schedule property, it is joint family property, from the "C" schedule property Palaniappan is entitled to 1/2share and his son Kumarasamy/first defendant is entitled to 1/2share, from the 1/2share of Kumarasamy his daughter/plaintiff is entitled to 1/2share as a coparcener i.e., 1/4share from "C" Schedule properties as per amendment Act 1/1990. The Palaniappan Gounder had no power to execute the Registered Will dated 19.09.1991/Ex.B1 in favour of the 8th defendant in respect of entire "C" schedule properties and the execution of Will is not valid in respect of half share in the "C" Schedule properties.

12. The relationship between the parties are not disputed, as on the date of execution of the Will dated 19.09.1991/Ex.B1 Palaniappan has no power to execute the Will in favour of the 8th defendant in respect of entire "C" Schedule properties. This Court finds, there is no substantial question of law involved in the second appeal, there is no reason to interfere with the judgment and decree passed by both the trial Court and the first appellate Court. Insofar as the factual position is concerned, the first appellate Court is the fact finding Court had considered the entire fact and law involved in this case and reappreciated the oral and documentary evidences and decided the issue in accordance with law. Since, no substantial questions of law are involved in this second appeal, this Court is inclined to dismiss the second appeal.

13. In the result, the second appeal is dismissed by confirming the judgment and decree passed by both the Court below. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

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To

- 1.The Sub Court,
Sankagiri.
- 2.The District Munsif,
Sankagiri.
- 3.The Section Officer,
VR Section,
High Court, Madras.(2copies)

+2ccs to Mr.T.Dhanyakumar, Advocate Sr.55539, 55159
+1cc to Mr.N.Manokaran, Advocate Sr.55264

S.A.No.5 of 2012

srg 17/09/2018

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