

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :16.04.2018
PRONOUNCED ON:27.04.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.1374 of 2004
and
C.M.P.No.10663 of 2004

1.Periyasuppathal

2.Ramathal

3.Subbiyan

4.Devathal

5.Ganesan

6.Jothimani

7.Shanmugham

... Appellants/Defendants 2 to 8

Vs.

1.Chinnasuppathal (Deceased)

2.Karupathal

3.Visalakshi

[3rd respondent is brought on
record as legal representative
of the deceased 1st respondent
vide order of Court dated
11.01.2007 made in
C.M.P.No.20340 to 20342 of 2005]

... Respondents/1st Plaintiff/9th Defendant

Prayer:

Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree dated 30.10.2001 passed in A.S.No.99 of 2001 on the file of the Principal District Judge, Coimbatore confirming the judgment and decree dated 30.11.2000 passed in O.S.No.269 of 1989 on the file of the learned Subordinate Judge, Tirupur.

For Appellants : Mr.Kingston Jerold
for M/s.S.K.Rakhunathan

For RR2 : No appearance
Set exparte
Vide order dated 16.04.2018

For RR3 :Mr.S.Gunalan

J U D G M E N T

This second appeal is directed against the judgment and Decree dated 30.10.2001 passed in A.S.No.99 of 2001 on the file of the Principal District Court, Coimbatore confirming the judgment and decree dated 30.11.2000 passed in O.S.No.269 of 1989 on the file of the Subordinate Court, Tirupur.

The second appeal has been admitted on the following substantial questions of law.

i. Whether the judgment and decree of the court below are vitiated by its failure to consider the absence of pleadings with regard to the date of death of Karuppanna Gounder and basing its finding only on oral evidence in the absence of pleadings with regard to the date of death of Karuppanna Gounder?

ii. Whether the procedure adopted by the lower appellate Court in the matter of recording evidence of P.W.2 the attesor of the will vitiates the judgment of the Courts below?

iii. Whether the findings of the lower appellate Court with regard to ouster pleaded and proved by the appellants as acceptable to non-suit the first plaintiff?

3.The defendants 2 to 8 are the appellants in the second appeal. The first plaintiff is the first respondent in second appeal and the 9th defendant is the second respondent in the second appeal.

4.The suit has come to be laid by the plaintiffs for partition. The relationship between the parties is not in dispute. It is found that admittedly, the suit properties originally belonged to Karuppa Gounder, the husband of the deceased second plaintiff and the father of the first plaintiff

and the defendants 1 and 2. Accordingly, claiming share in the suit properties, the suit has come to be levied by the plaintiffs and it is further stated by the plaintiffs that the second plaintiff has executed a registered Will bequeathing her $\frac{1}{4}$ share in the suit properties in favour of the first plaintiff and accordingly, the first plaintiff is entitled to $\frac{1}{2}$ share in the suit properties. It is found that the plaintiffs have specifically pleaded that Karuppa Gounder died about 10 years ago and accordingly, the plaintiffs are entitled to their due share in the suit properties as put forth in the plaint. The suit having come to be laid in the year 1989, and as per the above version of the plaintiff, it is found that according to the plaintiffs, Karuppa Gounder had died in or about 1979.

5.The defence has been taken inter alia that Karuppa Gounder died in 1953 itself and therefore, as per law, then prevailing the plaintiffs are not entitled to claim any share in the suit properties and accordingly, the plaintiffs are not entitled to maintain the suit for partition. Further, the defendants have also taken the plea of adverse possession, by way of ouster in respect of the suit properties and on that plea also, sought for the dismissal of the plaintiffs' suit and the defendants have also sought for the dismissal of the plaintiffs' suit by invoking section 23 of the Hindu Succession Act 1956.

6.On the basis of the oral and documentary evidence adduced by the respective parties, it is found that the trial court was pleased to determine that the first plaintiff is entitled to $\frac{1}{4}$ share in the first item of the suit properties and accordingly, further, holding that at present, the first plaintiff is not entitled to seek partition in respect of the second item of the suit properties, accordingly, granted the relief in favour of the first plaintiff and the first appellate court has also confirmed the same.

7.As regards the plea of adverse possession projected by the defendants by way of ouster as rightly determined by the Courts below, the defendants are found to have not placed acceptable evidence to sustain the abovesaid plea and accordingly, it is found that the Courts below had negatived the plea of adverse possession projected by the defendants for dismissing the plaintiff's suit. The abovesaid determination of the Courts below being found to be based on proper appreciation of the materials placed on record, no interference is called in the second appeal with reference to the same. Accordingly, the third substantial question of law formulated in the second appeal is answered against the defendants and in favour of the plaintiffs.

8.The main issue involved in the matter is as to when Karuppa Gounder had died? Whether before the advent of the Hindu Succession Act 1956 or after the advent of the Hindu Succession Act 1956 ? As above seen, according to the plaintiffs, Karuppa Gounder died in or about 1979. Whereas, according to the defendants, he died even prior to 1953. In this connection, the plaintiffs in support of their case placed reliance upon the certificate issued by the Judicial Magistrate marked as Ex.A1 as issued u/s.11 of the Registration of Births and Deaths Act 1969. However, as rightly determined by the first appellate court, the said certificate purported to be issued by the Judicial Magistrate under the above provision of law cannot be straightaway accepted, as the same could not be considered as conclusive evidence and in such view of the matter, it is found that on the basis of Ex.A1 alone, we cannot safely conclude that Karuppa Gounder died on 10.12.1980 as mentioned in Ex.A1.

9.The defendants have placed reliance upon Ex.B1 to urge that Karuppa Gounder died prior to 1953. Ex.B1 is a discharge security deed executed by the first defendant, son of Karuppa Gounder. By way of projecting the said document, it is the case of the defendants that inasmuch as Karuppa Gounder was not living at that point of time, the abovesaid document has come to be executed by the first defendant alone and therefore on that basis, the Court should hold that Karuppa Gounder should have died prior to 19.10.1953 on which date, Ex.B1 has come to be executed. When it is found that the properties concerned are the joint family properties, as rightly determined by the first appellate court, there is nothing wrong in a joint family member executing the document in the nature of Ex.B1 on behalf of all the joint family members and therefore, by way of Ex.B1 alone, it cannot be considered that at that point of time, Karuppa Gounder was not alive. The first appellate court has rightly declined to draw a presumption based on Ex.B1 that Karuppa Gounder would not have been alive at that point of time. As rightly found, if really Karuppa Gounder had not been alive at that point of time, the first defendant would have been shown as the son of Late Karuppa Gounder in the said document. However, no such description of the first defendant is mentioned in the said document and in such view of the matter, the first appellate court has rightly determined that on the strength of Ex.B1 alone, we cannot conclude that Karuppa Gounder had died prior to 19.10.1953 as claimed by the defendants.

10.Left with no other documentary evidence to determine the actual date of death of Karuppa Gounder and accordingly the Courts below, based on the oral evidence adduced by the parties concerned, accordingly, the Courts below determining that the defendants had taken the plea that Karuppa Gounder had died prior to 19.10.1953 only to deprive the plaintiffs of their due

share in the suit properties and accordingly, the first appellate court, on the basis of the oral evidence of the first plaintiff determined that, Karuppa Gounder should have died in the year 1980 or atleast after 1956 and accordingly proceeded to accept the plaintiffs' case for their demand of share in the suit properties.

11. That apart, as rightly determined by the first appellate court, even assuming for the sake of arguments, that Karuppa Gounder had died in the year 1953 as put forth by the defendants, it is found that as per the Hindu Women's Rights to Property Act 1937, both the son and the mother would have inherited the properties equally and accordingly, determined rightly that the second plaintiff would have inherited half share in the suit properties by way of a limited estate and after the advent of the Hindu Succession Act 1956, her limited estate would have blossomed into the absolute estate and accordingly, the second plaintiff having bequeath her interest in favour of the first plaintiff, by way of a Will, determined that the first plaintiff would be entitled to $\frac{1}{4}$ th share in the suit properties and the abovesaid view of the first appellate court is found to be tenable in the eyes of law.

12. As regards the execution of the Will marked as Ex.A4 executed by the second plaintiff [deceased] in favour of the first plaintiff, it is found that the said Will has come to be established by the due examination of the attester as P.W.2 and when it is found that the evidence of P.W.2 is convincing for establishing the genuineness of the Will and when there is no material to hold that the deceased second plaintiff was not hale and health at that point of time and accordingly, it is found that relying upon the evidence of P.W.2, the Courts below have accepted the truth of Ex.A4 Will and on that basis, rightly held that the first plaintiff is entitled to her due share in the suit properties.

13. In the light of the above discussions, it is found that the Courts below based on the materials available on record, on a proper consideration of the same, in the light of preponderance of probabilities, determined that Karuppa Gounder had died only after the advent of the Hindu Succession Act 1956 and further, the Courts below have also appreciated the evidence adduced by the first plaintiff for the proof of Will through the mouth of the attester P.W.2, in the proper perceptive, thereby upheld Ex.A4 Will and in such view of the matter, the abovesaid determination of the Courts below, as regards the date of death of Karuppa Gounder and the genuineness of Ex.A4 Will do not warrant any interference in the second appeal and accordingly, the substantial questions of law 1 and 2 formulated in the second appeal are answered in favour of the plaintiffs and against the defendants.

14.For the reasons afore stated, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

s/d-
Assistant Registrar (CS-V)

True Copy

Sub-Assistant Registrar

mfa

To

- 1.The Principal District Judge,
Principal District Court,
Coimbatore.
 - 2.The Subordinate Judge,
Subordinate Court,
Tirupur.
 - 3.The Section Officer,
VR Section,
High Court. (2 Copies)
- +1 CC to Mr.S. Gunalan, Advocate sr 31614

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and
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SP(30/05/2018)

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