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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.03.2019

PRONOUNCED ON : 22.05.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.1613 of 1999

Smt.Kamatchi Bassappan

... Appellant

Vs.

1. K.A.Sankaran
2. A.Sundaram
3. A.Shanmugam (died)
4. A.Kirubakaran
5. Kalyaniammal
6. Prema
7. Lalitha
8. Padmini
9. P.Shanmugam
10. Kuppulakshimi
11. Senthilnathan
12. S.Durga Devi

(RR10 to 12 brought on record
as LR's of the deceased R3 vide
Order of Court dated 04.12.2012
made in CMP.Nos.315 to 317 of 2012
in S.A.No.1613 of 1999)

... Respondents

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 03.02.1999 made in A.S.No.67 of 1997 on the file of the Second Additional District and Session Judge, Krishnagiri reversing the judgment and decree dated 30.04.1997 made in O.S.No.91 of 1992 on the file of the Sub Court, Krishnagiri.

For Appellant :Mr.S.Siva Shanmugam

For Respondents :M/s.M.Jai Kumar for R1, R2, R4 to R7
:Mr.M.C.Swamy for M/s.H.M.Malathy
for R9

:M/s.S.Kanniah for R8

:R10 to R12 Set exparte



JUDGMENT

This second appeal has been filed by the plaintiff against the judgment and decree passed by the Second Additional District Judge, Krishnagiri in A.S.No.67 of 1997 dated 03.02.1999 reversing the judgment and decree passed by the Sub Judge, Krishnagiri in O.S.No.91 of 1992 dated 30.04.1997.

2. The appellant herein had filed a suit in O.S.No.91 of 1992 on the file of the Sub Judge, Krishnagiri for the relief of partition to divide the suit properties in to nine equal shares and allot one such share to her. The learned Sub Judge by the judgment dated 30.04.1997 passed a preliminary decree directing to divide the Item Nos. 1 and 3 of the suit properties in to nine equal shares and allot one such share to the plaintiff. In respect of Item No.2 is concerned, she directed to divide the said item into 45 equal shares and allot one such share to the plaintiff. Item No.2-A is concerned, she directed to divide the said item into 270 equal shares and allot one such share to the plaintiff. Aggrieved by the same, the defendants 2 to 5 had filed an appeal in A.S.No.67 of 1997 on the file of the Second Additional District Judge, Krishnagiri. The learned Second Additional District Judge, Krishnagiri by the Judgment dated 03.02.1999 had partly allowed the said appeal and modified the judgment and decree of the Trial Court to the effect that the plaintiff is entitled to 1/45 share in Item Nos. 2 and 3 of the suit properties. In so far as Item Nos. 1 and 2-A are concerned, the plaintiff is at present not entitled to ask for partition in view of the bar under Section 23 of the Hindu Succession Act. Feeling aggrieved, the plaintiff has filed the present second appeal.

3. For the sake of convenience, the parties are referred to as described before the Trial Court.

4. The averments made in the plaint are in brief as follows:

The suit properties originally belonged to one Annamalai Maniyakar. The said Annamalai Maniyakar died intestate on 11.08.1990 leaving behind him the plaintiff and the defendants 1 to 8 as his legal heirs. The plaintiff and the defendants 6 to 8 are daughters, the first defendant is the wife and the defendants 2 to 5 are the sons. They are entitled to get 1/9 share each in the suit properties. After the death of Annamalai Maniyakar, the plaintiff demanded a family partition, but the second defendant being the eldest son in the family was avoiding the same. Hence, the plaintiff issued a lawyer's notice dated 28.12.1991 to the defendants 1 to 8 demanding partition of her legitimate 1/9 share. Though the defendants 1 to 8 had received



the said notice, they neither come forward for amicable partition nor sent any reply. The plaintiff learnt that on 29.01.1992 the defendants 2 to 5 have entered into a registered sale agreement with ninth defendant in respect of Item No.1 of the suit properties. The said sale agreement will not bind upon the plaintiff. Further, the plaintiff came to know that the defendants 1 to 8 are trying to dispose of the entire suit properties to third parties. Hence, the plaintiff was constrained to file the above suit for partition to divide the suit properties in to nine equal shares and allot one such share to her.

5. The averments made in the written statement filed by the second defendant and adopted by the defendants 1 and 3 to 6 are in brief as follows:

a)Admittedly, the male members are residing in the family dwelling houses and hence the plaintiff is being a female member, she is not entitled to the partition in view of Section 23 of the Hindu Succession Act, 1956. The plaintiff omitted to include the movables and hence the suit is not maintainable in respect of "B" schedule property. No doubt, the plaintiff is the daughter of the deceased Annamalai Maniyakar, her marriage was celebrated with the family funds and in fact more than Rs.3,00,000/- was spent by way of jewels etc. The suit properties are not separate properties of the deceased Annamalai Maniyakar. The suit properties are the joint family properties and hence the claim for 1/9 share is misconceived. The plaintiff was given more jewels at the time of marriage and after the death of father, within a few days, the daughters agreed to receive Rs.10,000/- each and in the said oral partition arrangement, the plaintiff got Rs.10,000/- and she is not entitled to ask for partition.

b)The plaintiff never demanded for partition. Since the defendants 2 to 5 are entitled to the suit properties, they are entitled to alienate the same. As already stated that the suit properties are joint family properties in which the plaintiff cannot seek any share. In any event, she can claim 1/45 share. There is no cause of action and the suit has not been properly valued. Therefore, the defendants 1 to 6 prayed to dismiss the suit.

6. Based on the aforesaid pleadings, the learned Sub Judge, Krishnagiri had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined herself as P.W.1 and also examined one more witness as P.W.2. She had marked Exs.A.1 to A.9 as exhibits. On the side of the defendants, the second defendant was examined as D.W.1 and they also examined two more witnesses as D.W.2 and D.W.3. They had marked Exs.B.1 and B.2 as exhibits on their side.



7. The learned Sub-Judge, Krishnagiri, after considering the materials placed before her found that the Item Nos. 1 and 3 of the suit properties are the self-acquired properties of late Annamalai Maniyakar in which the plaintiff is entitled to 1/9th share. She further found that Item No.2 of the suit properties is the ancestral property in which the late Annamalai Maniyakar is entitled to 1/5th share and in the said item, the plaintiff is entitled to 1/45th share. She further found that Item No.2 - A is also the ancestral property in which the said late Annamalai Maniyakar is entitled to 1/6th share and in the said item, the plaintiff is entitled to 1/270th share. Accordingly, she passed a preliminary decree directing to divide the Items 1 and 3 into 9 equal shares and allot one such share to the plaintiff to divide Item No.2 into 45 equal shares and allot one such share to the plaintiff, in Item No. 2-A to divide the same into 270 shares and allot one such share to the plaintiff. Aggrieved by the same, the defendants filed an appeal in A.S.No.67 of 1997 on the file of the Second Additional District Judge, Krishnagiri. The learned Second Additional District Judge, Krishnagiri had partly allowed the said appeal and modified the judgment and decree passed by the Trial Court to the effect that in Item Nos.2 and 3 of the suit properties, the plaintiff is entitled to 1/45th share, in respect of Item Nos.1 and Item No.2- A are concerned, the plaintiff is not entitled to ask partition at present in view of the provisions of Section 23 of the Hindu Succession Act, 1956. Feeling aggrieved, the plaintiff has filed the present second appeal.

8. This Court at the time of admitting the second appeal has formulated the following substantial questions of law:

" 1) Whether the lower Appellate Court was right in holding that the appellant is not entitled to claim for partition and separate possession with regard to Item 1 and 2A of the suit schedule properties citing Sec. 23 of the Hindu Succession Act ?

2) Whether the Lower Appellate Court's findings are sustainable in law, in view of the amendments of the Hindu Succession Act? "

9. Heard Mr.S.Siva Shanmugam, the learned counsel for the appellant and Mr.Jai Kumar, the learned counsel for the respondents 1, 2 and 4 to 7, Mr.M.C.Swamy for M/s.H.M.Malathy, the learned counsel for the ninth respondent and Mr.S.Kanniah, the learned counsel for the eighth respondent.

10. Substantial questions of law 1 and 2:



The learned counsel for the appellant/plaintiff has submitted that the first appellate court erred in reversing the well considered judgment of the trial court. He further submitted that the first appellate court failed to see that in the partition which took place between the late Annamalai Maniyakar and his brothers dated 13.03.1967 itself, it is clearly stated that the rice mill (Item No.3 of the suit property) was specifically excluded on the ground that the said property is a separate property of the said Annamalai Maniyakar. He further submitted that since Item No.3 of the suit properties has been excluded in the aforesaid partition, and the said property never treated as joint family property, the plaintiff is entitled to get 1/9th share in the said property. He further submitted that even though Item No.1 of the suit property has been purchased after partition dated 13.03.1967, there is no evidence that the said Annamalai Maniyakar had purchased the said property from and out of the income derived from the joint family properties and therefore, in the said property, the plaintiff is entitled to get 1/9th share. He further submitted that by virtue of the Hindu Succession (Amendment) Act 39 of 2005 Section-23 of the Hindu Succession Act has been deleted and hence the plaintiff is entitled to get share in the residential houses also (Item Nos.1 and 2-A. He further submitted that even assuming that all the properties are the ancestral properties in view of the Hindu Succession Act (Amendment) Act, 39 of 2005, a daughter would be a co-parcener by her birth, and would have the same rights and liabilities as that of a son and hence, the plaintiff is entitled to claim equal share as that of her brothers. He further submitted that since the plaintiff also has become a co-parcener by birth, she is entitled to get 1/9th share in all the properties and therefore, he prayed to allow the second appeal and set aside the judgment and decree passed by the first appellate court and restore the judgment and decree passed by the trial court. In support of the aforesaid contentions, he relied upon the decision in Danamma @ Suman Surpur and another Vs. Amar and others (2018) (3) SCC 343.

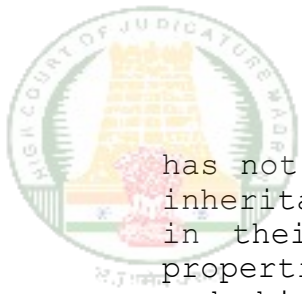
11. Per contra, the learned counsel for the respondents has submitted that in Ex.B1 partition deed dated 13.03.1967, it is clearly stated that even before execution of the said document, father of Annamalai Maniyakar had orally allotted the family properties to his sons and only recognising the said allotment, Ex.B1 has been executed. He further submitted that since already the family properties were divided and allotted to the respective sharers, only from and out of the income derived from the said share, the said Annamalai Maniyakar had purchased the land and subsequently constructed a mill in Item No.3 of the suit properties. He further submitted that merely because the said property was not subjected to partition in Ex.B1, it cannot be presumed that the said property



is a self-acquired property of the late Annamalai Maniyakar because he had no independent income for purchasing the land and constructing the mill. He further submitted that taking into consideration of the aforesaid facts, the first appellate court has rightly held that the said property is also a joint family property in which the plaintiff is entitled to 1/45th share only. He further submitted that admittedly Item No.1 has been purchased by the late Annamalai Maniyakar only after Ex.B1 partition deed and taking into consideration of the said fact, the first appellate court has held that the said property is also a joint family property in which the plaintiff is entitled to 1/45th share alone. He further submitted that in so far as the Item No.2-A is concerned, in Ex.B1, it is clearly stated that in the said house, the said Annamalai Maniyakar himself is entitled to 1/6th share and the remaining 5/6th shares are allotted to his brothers and that being so, without impleading the brothers of Annamalai Maniyakar, the plaintiff cannot seek any partition in the said house. He further submitted that the decision in Danamma @ Suman Surpur and another Vs. Amar and others (cited supra), has been considered by the Hon'ble Supreme Court in the subsequent decision in Mangamal @ Thulasi and another Vs. T.B.Raj and Others (2018) 15 SCC 662 and held that only living daughters of living coparcener as on 09.09.2005 irrespective of when such daughters are born would be entitled to the share in the ancestral property and therefore, the plaintiff cannot claim that she is a coparcener in view of the Hindu Succession (Amendment) Act 39 of 2005 and get equal share in the ancestral property as that of the son and hence, he prayed to dismiss the second appeal.

12. It is not in dispute that the plaintiff and the defendants 6 to 8 are daughters and the first defendant is the wife and the defendants 2 to 5 are the sons of late Annamalai Maniyakar. The suit schedule contains 'A' and 'B' schedule. 'A' schedule contains 4 items of immovable properties. In 'B' schedule, it is stated as movables (inventory to be taken and determined). It appears that the plaintiff has not adduced any evidence with regard to the availability of the suit 'B' schedule properties (movables properties). The courts below also did not give any findings with regard to the suit 'B' schedule properties. The evidence was adduced only in respect of the suit 'A' schedule properties and the courts below also gave findings, only in respect of the suit 'A' schedule properties. So, it is clear that there is no such 'B' schedule properties and hence, it appears that the plaintiff has abandoned the claim in respect of the suit 'B' schedule properties.

13. In respect of the suit 'A' schedule properties, in the plaint, the plaintiff has simply stated that the suit properties belonged to her father Annamalai Maniyakar but she



has not stated, how her father got the said properties either by inheritance or by partition or by purchase. The defendants also in their written statement have simply stated that the suit properties are joint family properties of Annamalai Maniyakar and his sons but they also have not stated how the said Annamalai Maniyakar got the said properties. According to the plaintiff, the father of Annamalai Maniyakar had allotted the shares to his sons and they were in separate possession and enjoyment of their respective shares and from and out of the income derived from the said shares, the late Annamalai Maniyakar had purchased the land and constructed the mill in Item No.3 of the suit properties.

14.A registration copy of the partition deed dated 13.03.1967 executed between Annamalai Maniyakar and his five brothers has been produced by the defendants and marked as Ex.B1. Though in the said document, it is stated that even during the life time of Annamalai Maniyakar's father viz., Veeranna Maniyakar had allotted certain properties to his sons, it is not stated when such arrangement has been made. Under the said circumstances, it cannot be presumed that even before purchase of the land in Item.No.3 of the suit properties, the family properties were orally partitioned by Veeranna Maniyakar and some of the items were allotted to Annamalai Maniyakar and only from the income of the said properties, the said Annamalai Maniyakar had purchased the land, which is mentioned in item No.3. It is an admitted fact that the said Annamalai Maniyakar had purchased the land in Item No.3 of the suit properties under the originals of Exs.A6 and A7. Ex.A6 is the registration copy of the sale deed dated 26.03.1958 standing in the name of Annamalai Maniyakar. Under the said document, Annamalai Maniyakar had purchased 32 cents in S.No.477 of hamlet of Gundalapatti village and 6 cents in S.No.53/1 of the same village from one Gopal Mudaliar and his sons. Ex.A7 is the registration copy of the sale deed dated 06.02.1958 stands in the name of Annamalai Maniyakar. Under the said document, the said Annamalai Maniyakar had purchased 16 cents in S.No.477 of hamlet of Gundalapatti executed by one Chinnathaiyammal and others. In the said documents, while describing the avocation of Annamalai Maniyakar, it is stated that he is an agriculturist and businessman. So, it is clear that out of the income derived from his business, he would have purchased the aforesaid properties under the originals of the Exs.A6 and A7. The aforesaid view has been strengthened by the recitals found in Ex.B1 partition deed. In Ex.B1, it is stated that the land and rice mill which is situated in hamlet of Gundalapatti village exclusively belongs to Annamalai Maniyakar and hence the said property was not subjected to family partition. If really the said property was acquired by Annamalai Maniyakar derived from the income from the joint family, in the said partition, the



said property also would have been included. Therefore, it is clear that the said property is the separate property of late Annamalai Maniyakar.

15. Item No.1 of the suit property is the house property and admittedly the same has been purchased by Annamalai Maniyakar under the original of Ex.A5 i.e., after Ex.B1 partition. Therefore, it has to be presumed that the said property has been purchased from and out of income derived from the joint family properties and therefore the said property also should be treated as a joint family property.

16. Item No.2 of the suit properties are agricultural lands and admittedly they were allotted to Annamalai Maniyakar under Ex.B1 partition deed and therefore, the said properties are ancestral properties. Item No.2-A of the suit properties is the house property. Admittedly, the said house has been subjected to partition under Ex.B1. Under Ex.B1, the entire house was not allotted to the share of Annamalai Maniyakar. The said house was allotted to all the six brothers and each of them are entitled to 1/6th share in the property and that being so, the plaintiff cannot seek partition in the said property without impleading the brothers of late Annamalai Maniyakar.

17. The trial court has held that in Item No.1 of the suit properties, the plaintiff is entitled to 1/9th share and in Item No.2-A, the plaintiff is entitled to 1/270th share. The first appellate court has held that the Item No.1 is an ancestral property, in which, the plaintiff is entitled for 1/45th share and as far as Item No.2-A is concerned, the late Annamalai Maniyakar himself got only 1/6th share, in which, the plaintiff is entitled to 1/270th share but since the aforesaid houses are dwelling houses and the male heirs have not chosen to divide the said properties, in view of the provisions of Section 23 of the Hindu Succession Act, 1956, the plaintiff being a female heir is not entitled to ask for partition in the said properties. But the said Section 23 has been deleted by the Hindu Succession (Amendment) Act 39 of 2005 and hence now there is no bar for seeking partition in respect of dwelling house by the female heirs. Accordingly, in respect of Item No.1 of the suit properties since the said property has been held as ancestral property in which the plaintiff is entitled to 1/45th share. In so far as Item No.2-A is concerned, even though the bar under Section 23 has been removed now, since all the sharers have not been impleaded as parties, the plaintiff cannot seek partition in respect of the said property.

18. In Danamma @ Suman Surpur and another Vs. Amar and others, (cited supra), the Hon'ble Supreme Court in paragraph Nos.23 and 24 has held as follows:



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"23) The law relating to a joint Hindu family governed by the Mitakshara law has undergone unprecedented changes. The said changes have been brought forward to address the growing need to merit equal treatment to the nearest female relatives, namely daughters of a coparcener. The section stipulates that a daughter would be a coparcener from her birth, and would have the same rights and liabilities as that of a son. The daughter would hold property to which she is entitled as a coparcenary property, which would be construed as property being capable of being disposed of by her either by a will or any other testamentary disposition. These changes have been sought to be made on the touchstone of equality, thus seeking to remove the perceived disability and prejudice to which a daughter was subjected. The fundamental changes brought forward about in the Hindu Succession Act, 1956 by amending it in 2005, are perhaps a realization of the immortal words of Roscoe Pound as appearing in his celebrated treatise, *The Ideal Element in Law*, that "the law must be stable and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and the need of change."

24) Section 6, as amended, stipulates that on and from the commencement of the amended Act, 2005, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son. It is apparent that the status conferred upon sons under the old section and the old Hindu Law was to treat them as coparceners since birth. The amended provision now statutorily recognizes the rights of coparceners of daughters as well since birth. The section uses the words in the same manner as the son. It should therefore be apparent that both the sons and the daughters of a coparcener have been conferred the right of becoming coparceners by birth. It is the very factum of birth in a coparcenary that creates the coparcenary, therefore the sons and daughters of a coparcener become coparceners by virtue of birth. Devolution of coparcenary property is the later stage of and a consequence of death of a coparcener. The first stage of a coparcenary is obviously its creation as explained above, and as is well recognized. One of the incidents of coparcenary is the right of a coparcener to seek a severance of status. Hence, the rights of coparceners emanate and flow from birth



(now including daughters) as is evident from sub-s (1) (a) and (b). "

19. The aforesaid decision has been dealt with by the Hon'ble Supreme Court in the subsequent decision in Mangamal @ Thulasi and another Vs. T.B.Raj and Others, (cited supra), as held in paragraph Nos.16 and 17 as follows:

"16. It is pertinent to note here that recently, this Court in Danamma @ Suman Surpur & Anr. Vs. Amar & Ors, 2018 (1) Scale 657 dealt, inter-alia, with the dispute of daughter's right in the ancestral property. In the above case, father of the daughter died in 2001, yet court permitted the daughter to claim the right in ancestral property in view of the amendment in 2005. On a perusal of the judgment and after having regard to the peculiar facts of the Danamma (supra), it is evident that the Division Bench of this Court primarily did not deal with the issue of death of the father rather it was mainly related to the question of law whether daughter who born prior to 2005 amendment would be entitled to claim a share in ancestral property or not? In such circumstances, in our view, Prakash & Ors. (supra), would still hold precedent on the issue of death of coparcener for the purpose of right of daughter in ancestral property. Shortly put, only living daughters of living coparceners would be entitled to claim a share in the ancestral property.

11) Hence, without touching any other aspect in the present case, we are of the view that the appellants were not the coparceners in the Hindu Joint Family Property in view of the 1989 amendment, hence, they had not been entitled to claim partition and separate possession at the very first instance. At the most, they could claim maintenance and marriage expenses if situation warranted."

20. From the aforesaid decisions, it is clear that for Applicability of Tamilnadu Amendment Act, 1989 or the Central Amendment Act of 39 of 2005 that on the date of commencement of the said Act, the father should be alive and the daughter should not have married. For the applicability of the Hindu Succession (Amendment) Act 2005, on the date of commencement of the said Act, the father should be alive, then only the daughters can claim the status of co-parcener. In this case, though the father of the plaintiff Annamalai Maniyakar was alive on the date of commencement of the Tamilnadu Amendment Act, 1989, the marriage



of the plaintiff, as admitted by her in cross examination, took place in the year 1981. So, she cannot claim the benefit of the Tamilnadu Amendment Act, 1989. She also cannot claim the benefit of the Hindu Succession (Amendment Act, 2005) because on the date of the commencement of the said Act, her father Annamalai Maniyakar was not alive. As per the plaint averments, the said Annamalai Maniyakar died on 07.08.1990. Therefore, she cannot claim the benefits under the Amendment introduced by the Central Government also.

21. As already pointed out that the Item Nos.1 and 2 of the suit properties are the ancestral properties. In the said properties, the plaintiff is entitled to get 1/45th share. In so far as the Item-3 is concerned, it is a self-acquired property of late Annamalai Maniyakar and hence the plaintiff is entitled to get 1/9th share in the said property. In so far as Item 2-A is concerned, the plaintiff cannot seek partition without impleading the brothers of late Annamalai Maniyakar and hence the suit has to be dismissed in respect of said Item. Accordingly, the substantial questions of law are answered.

22. In the result, the second appeal is partly allowed. The judgments and decrees of the courts below are modified as follows:-

(i) That the Item Nos.1 and 2 of the suit 'A' schedule properties be divided into 45 equal shares and one such share be allotted to the plaintiff;

ii) Item No.3 of the suit 'A' schedule properties be divided into 9 equal shares and one such share be allotted to the plaintiff;

iii) Item 2-A of the suit 'A' schedule properties is concerned, the suit is dismissed. It is open to the plaintiff to file a separate suit in respect of the Item 2-A of the suit 'A' schedule properties, after impleading all the brothers of late Annamalai Maniyakar.

(iv) that the suit is dismissed in respect of the suit 'B' schedule properties.

(v) and that considering the facts and circumstances of the case, the parties are directed to bear their respective costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

Vv/gv



To

1. The Second Additional District and Session Judge, Krishnagiri
2. The Sub Court, Krishnagiri.
3. The Section Officer, VR Section, High Court, Madras.

S.A.Nos.1613 of 1999

SV(CO)
SSM(17/09/2019)