

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.06.2019

CORAM:

THE HON'BLE MR. JUSTICE T.RAJA

C.M.S.A.No.24 of 2010

Lakshmi

.. Appellant/1st Respondent/Petitioner

Vs

Indian Bank,
Rep. By its Branch Manager,
Elumathoor Branch,
Erode Taluk and District. ... Respondent/Appellant/1st Respondent

Prayer : Civil Miscellaneous Second Appeal is filed under Section 100 of the Civil Procedure Code against the judgment and decree of the learned First Additional Subordinate Judge, Erode, in C.M.A.No.8 of 2007, dated 10.08.2010, reversing the fair and final order of the learned Principal District Munsif Court, Erode, in E.A.No.96/2004 in E.P.R.No.43 of 2004 in O.S.No.523 of 1995, dated 14.09.2006.

For Appellant : Mr.S.Kaithamalai Kumaran

For Respondent : Mrs.Rita Chandrasekaran
for M/s.Aiyar & Dolia

JUDGMENT

Challenging the judgment and decree of the learned First Additional Subordinate Judge, Erode, in C.M.A.No.8 of 2007, dated 10.08.2010, reversing the fair and final order of the learned Principal District Munsif Court, Erode, in E.A.No.96/2004 in E.P.R.No.43 of 2004 in O.S.No.523 of 1995, dated 14.09.2006, the appellant has filed this appeal raising the following substantial questions of law:-

"a) Is the lower appellate Court justified in assuming that on the date of borrowal by the judgment debtor the joint family was existing and the debts were created for the benefit of joint family, overlooking that much prior to the borrowal, the appellant became a sharer, entitled to

5/6th share in the properties?

b) Are not the judgment and decree of the lower appellate Court vitiated when there was no joint family existing on the date of borrowal from the respondent Bank and as such one co-sharer cannot create an encumbrance over the entire properties?"

2. Short facts leading to the filing of this appeal are stated below:

It is averred that the appellant's husband, namely, deceased Mysamy borrowed a loan from the respondent Bank on 03.12.1989. As the said deceased Mysamy committed default and not repaid the loan, the respondent Bank filed a suit in O.S.No.523 of 1995 and obtained a preliminary decree on 05.11.1998 and thereafter, final decree on 14.07.1999. Subsequently, the respondent Bank filed the above said EP for sale of the mortgaged property. It is at this stage, the appellant herein filed E.A.No.96 of 2004 claiming 5/6th share in the property on the ground that the appellant is the wife of the deceased Mysamy.

3. It is further averred that out of the lawful wedlock with deceased Mysamy, the appellant said to have given birth to a son by name Elango on 15.11.1985, however, he died on 14.02.1986. Again, she gave birth to twins on 30.08.1987. The second twin son born at 6.02 p.m. died after an hour and that the first twin son died on 14.10.1987. Therefore, it was claimed that after the death of Elango/first son, the appellant had inherited half share of the property as Class I heir of the said Elango and likewise, after the death of twins, the appellant had inherited 2/6th share of twins and therefore, the appellant is entitled for 5/6th share of the suit property and that the deceased Myswamy was entitled to 1/6th share of the suit property. It is further averred that as the appellant was not well, she had agreed for the deceased Mysamy to marry her own sister as the second wife and out of the said wedlock, the second wife gave birth to a son by name Senthilkumar. However, due to ill-treatment of the deceased Mysamy and the second wife, the appellant had left the matrimonial home and thereafter, she had also filed a suit in O.S.No.825 of 2000 for partition and separate possession and also for permanent injunction and the said suit is pending on the file of the Principal Subordinate Judge, Erode.

4. It is further averred that while the said suit was pending, the respondent Bank obtained a judgment and decree dated 14.07.1999 in O.S.No.523 of 1995 against the appellant's husband/deceased Mysamy and thereafter, the respondent Bank had also filed E.P.No.367 of 1999 bringing the suit property for

sale. Therefore, since there was no necessity for the deceased Mylsamy to borrow a loan from the Bank and that the said Mylsamy also has no right over the suit property, she had moved an application in E.A.No.96 of 2004 seeking to raise the attachment over 5/6th share of the suit schedule property.

5. The respondent Bank, opposing the said E.A., pleaded that after the preliminary decree was passed on 05.11.1998, final decree was also passed on 14.07.1999 and subsequently, when the respondent Bank filed E.P.R.No.43 of 2004, for sale of mortgaged property, the appellant herein in collusion with her husband deceased Mylsamy has filed the present application.

6. Learned counsel for the appellant submitted that even prior to the borrowal of loan from the respondent Bank, the appellant became entitled to 5/6th share of the suit properties as a heir of her three deceased minor sons as stated above, and therefore, any encumbrance created by the deceased Mylsamy is not binding on the appellant. It is further contended that on the date of borrowal of loan by the deceased Mylsamy/judgment debtor on 03.12.1989, the appellant was entitled to 5/6th share in the suit properties and hence, the judgment debtor/deceased Mylsamy was not entitled to create any encumbrance over the share of the appellant. On this basis, he prayed for allowing the present appeal.

7. But, this Court hardly finds any merit on the above said submission. Firstly, the properties were ancestral properties and the said deceased Mylsamy borrowed the loan only for improvement of the said properties. Secondly, when there was an allegation that the appellant's husband/deceased Mylsamy married her own sister as a second wife and that out of the said wedlock, a male child was born and that due to ill-treatment she left the matrimonial home, no acceptable evidence was produced by the appellant before the Courts below to substantiate the same. Therefore, the learned first appellate Court has rightly come to the conclusion that under law, the sons are liable to pay the legally enforceable debt of their father deceased Mylsamy and hence, the entire property is liable to be brought for sale. In such view of the matter, the contention of the learned counsel for the appellant that the subject properties are ancestral properties and that the appellant has got 5/6th share in the said properties cannot be sustained. When the appellant is liable to pay all the debts of the deceased Mylsamy out of his estate to the respondent Bank, without proving or substantiating her contention that out of the wedlock with deceased Mylsamy she gave birth to three deceased minor sons, she cannot claim any share as sought for in E.A.No.96 of 2004.

8. Moreover, the respondent Bank had already filed a

suit in O.S.No.825 of 2000 on the file of the learned Principal Sub Court, Erode, and obtained a preliminary decree on 05.11.1998 and the final decree on 14.07.1999 and subsequently, they had filed the above said EP for sale of mortgaged property for realization of the above said loan amount. Therefore, the filing of E.A.No.96 of 2004 at this belated point of time by the appellant herein in collusion with her husband deceased Mysamy cannot be sustained, inasmuch as there was no any bonafide or merit in the said application as discussed supra.

9. As highlighted above, when the appellant's husband/deceased Mysamy had borrowed the loan from the respondent Bank for improvement of the suit properties, even coparceners are liable to pay the debts and therefore, the judgment and decree passed by the learned first appellate Court cannot be found fault with. Accordingly, answering the substantial questions of law against the appellant, the Civil Miscellaneous Second Appeal stands dismissed. No Costs.

s/d-
Assistant Registrar (CS V)

True Copy

Sub-Assistant Registrar

To

- 1.The Additional Subordinate Judge, Erode.
- 2.The Principal District Munsif Court, Erode.

Copy to
The Section officer
VR Section
High Court, Madras 104.

+1 CC to Mr.S.Kaithamalai Kumaran, Advocate sr 49322.
+1 CC to M/s. Aiyar and Dolia, Advocate sr 49053.

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SSI (CO)
SP(03/02/2020)