

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.06.2019

CORAM

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

S.A.No.737 of 2001
and
Cross Objection No.36 of 2002

M.Poongothai

...Appellant/Plaintiff

Versus

1.M.Mariappan (died)

2.(D.Srimathi)

Kalaiselvi Dhanabal

[R2 name Srimathi deleted and in her place
Kalaiselvi Dhanabal Substituted vide order of
Court dt.22.04.2019 made in CMP.No.8958 of 2019]

3.M. Jagadeesan

4.S.Malathi

[R2 to R4 brought on record as LR's of the
deceased sole respondent vide order of Court
dt.18/12/2018 made in CMP.No.22061 of 2017]

5.M.Saraswathi

[R5 brought on record as LR of the deceased
sole respondent, Mariappan vide order of Court
dt.22.04.2019 made in CMP.No.8958 of 2019]

...Respondents/LRs of Defendant

Cross Objection No.36 of 2002:

1.M.Mariappan (died)

... Cross Objector/Defendant

Versus

M.Poongothai

... Respondent/Plaintiff

Prayer in Second Appeal: This Second Appeal has been filed under
Section 100 of C.P.C., against the Judgment and decree dated
17.09.1999 in A.S.No.78 of 1999 on the file of the Principal

District Judge, Salem modifying the Judgement and Decree, dated 27.02.1998 made in O.S.No.436 of 1993 on the file of the Subordinate Court, Namakkal.

Prayer in Cross Objection: This Cross Objection has been filed under Order XLII r/w. Order XLI Rule 22 of CPC., to the Judgment and Decree in A.S.No.78 of 1999 on the file of the Principal District Judge, Salem dated 17.09.1999 on appeal from the Judgement and Decree in O.S.No.436 of 1993 on the file of the Subordinate Court, Namakkal dated 27.02.1998.

For Appellant in Second Appeal
and for respondent in Cross
Objection : Mr.V.P.Sengottuvel

For Respondents in Second Appeal
and for Cross Objector : Mr.L.S.M.Hasan Fizal

JUDGMENT

The appellant - Poongothai has filed this second appeal assailing the Judgment and Decree dated 17.09.1999 in A.S.No.78 of 1999 passed by the first appellate Court, by which the first appellate Court modified the Judgment and decree dated 27.02.1998 passed in O.S.No.436 of 1993 by the Trial Court to the effect that the plaintiff/appellant is only entitled to 1/5 share in the suit property.

2.The case of the appellant herein/plaintiff, is suit for partition and separate possession of the suit property into two halves. The suit is filed against her father Mariappan, as sole defendant contending that the suit property is the ancestral property of the defendant and as daughter of the defendant, the plaintiff is entitled for half share in the suit property.

3.In the suit, a written statement was filed by the defendant/ respondent contending that the plaintiff is not entitled for a decree inasmuch as the marriage solemnized between the defendant and his first wife by name Dhanam was dissolved by a decree of divorce passed by the competent Court and thereafter, towards maintenance, the defendant has paid a sum of Rs.7,000/- to his first wife and Rs.3,000/- to the plaintiff herein, who was minor by then. According to the defendant, on receipt of the amount, the first wife Dhanam, on her own behalf and on behalf of the minor daughter, plaintiff herein, had executed a release deed specifically releasing their claim in the suit property. Therefore, having released their right, if any, in the suit property, the plaintiff is estopped from filing the present suit for partition and separate possession.

4.The Trial court, on consideration of the oral and documentary evidence, passed a preliminary decree for partitioning of the suit schedule property into two halves. Aggrieved by the same, the defendant in the suit - Mariappan, has filed Appeal before the first Appellate Court. The first Appellate Court, finding that the children born to the defendant through his second wife are also entitled to a share in the suit property, has modified the preliminary decree to the extent of holding that the plaintiff is entitled to 1/5 share and the defendant and his three daughters born out of the second marriage are entitled to 1/5 share each. Aggrieved by the same, the present second appeal is filed by the plaintiff by contending that she is entitled to half share in the suit property as prayed for in the plaint. In other words, the appellant challenged the quantum of her share being $\frac{1}{2}$ not $\frac{1}{5}$.

5.On notice, the legal heirs of the defendant have filed a Cross Objection objecting to the decree and judgment passed by the first appellate Court in so far as it relates to quantum of the share allotted to the plaintiff. Inter-alia contended that the appellant/plaintiff had extinguished all her rights, including wedding maintenance, in pursuance of Ex.B1 and her claim in relation to the properties of the defendant.

6.When the second appeal is taken up for hearing, the following substantial questions of law are framed for consideration:-

"1.Whether the Court below is right in holding that the illegitimate children of the respondents herein namely Kalaichelvi. Jagadeesan and malathi are entitled for equal share along with the appellant herein?

2.Whether the lower appellate Court is right in modifying the Judgment and decree of the trial court by granting 1/5 share to the appellant herein along with the respondent herein and the other 3 children when the marriage between the mother of the appellant herein and the respondent herein was dissolved by order dated 26.08.1980 in O.P.No.34 of 1980 by the learned Subordinate Judge, Namakkal on the ground of adultery with one Chinnapappu and also bigamy by marrying Periapappu alias Saroja?"

7.The learned counsel for the appellant would contend that the first Appellate Court erred in modifying the Judgment and Decree passed by the Trial Court without any evidence on record. The first Appellate Court failed to consider that the respondents herein, who are heirs of sole defendant, are not entitled to any

share in the suit property. It is further contended that the plaintiff/appellant and her mother never released their right and interest in the suit property and what was released is only the right for receipt of permanent maintenance. This aspect of the matter was not properly considered by the Appellate Court and prayed for allowing the Second Appeal.

8.The learned counsel appearing for the respondents/cross objectors would contend that even an illegitimate children is entitled for a share in the property of his or her father. Further, he stated that the defendant/respondent-father on dissolution of her marriage with his first wife, who is the mother of the plaintiff, contracted a marriage with the mother of the respondents herein. Therefore, they are not entitled for any of the share in the property and hence, the Lower Appellate Court has correctly apportioned the quantum of share to each person and made the submissions on Ex.B1/relinquish deed. Thus, the plaintiff is not entitled for any share and hence prayed for allowing the Cross Appeal.

9.I have given my anxious consideration to the rival submissions and perused the records. Admittedly, the appellant/plaintiff-Poongothai is a legitimate child of Marriappan and Dhanam and on the date of coming into a force of amended Act 29(A) of Hindu Succession Act, by the Government of Tamil Nadu, the daughter is entitled to a share in the suit property as a co-parcener. Therefore, the plaintiff and his father/Marriappan namely the respondent/defendant are entitled 1/2 share in the property and it is rightly observed by the Lower Appellate Court. Under Ex.B1, mother has relinquished her right of maintenance and subsequently, she also obtained a decree of divorce under Ex.B3, on the ground of adultery committed by the defendant/husband-Mariappan with one Chinnappu and also contracted a marriage with one Periya pappu @ Saroja (said to be Saraswathi).

10.In view of the above decree of divorce, as could be seen from Ex.B3, I find the submissions made by the counsel for respondents 2 to 5 that after divorce of first wife, the said Marriappan had married Periya pappu @ Saroja (said to be Saraswathi) cannot be accepted as there is no evidence to show the solemnization of marriage between them. Hence, this Court holds that the respondents 2 to 5 viz., Kalaiselvi, Jagadesan and Malathi are the legal heirs of the first respondent/ Mariappan (now deceased) and Saroja (said to be Saraswathi). Since the marriage between Saroja (said to be Saraswathi) having taken place during the subsistence of the marriage between Mariappan and Dhanam, the respondents 2 to 4 have to be considered as illegitimate children. However, they are to be treated as legitimate children as per construing the provision, under

Section 16(3) of the Hindu Succession Act, whereby, they are entitled to succeed the property of the father in equal share.

11. In view of the factual position, in the absence of any positive evidence to show that date at solemnization of marriage between Saroja (said to be Saraswathi) and the first respondent/Mariappan (deceased), the said Saroja (said to be Saraswathi) is not entitled to any share in the ancestral property on the death of the first respondent/Mariappan and the respondents 2 to 4 along with the plaintiff are entitled to equal share in the share of the said Mariappan/first respondent.

12. Accordingly, this Court holds that the plaintiff is entitled to $\frac{1}{2}$ share in the ancestral property of the Mariappan. Since pending the second appeal, the said Mariappan died and taking note of the fact that on the death of the first respondent/Mariappan, the succession opens, whereby respondents 2 to 4 are also entitled to get the share of the deceased Mariappan along with appellant. Thus, each one entitled to $\frac{1}{2} \times \frac{1}{4} = \frac{1}{8}$ share in the ancestral property. Thus, the plaintiff is entitled to in the total share of $\frac{1}{2} + \frac{1}{8} = \frac{4}{8} + \frac{1}{8} = \frac{5}{8}$ and the respondents 2 to 4 are also entitled $\frac{1}{8}$ each and Saroja (said to be Saraswathi) is not entitled any share in the ancestral property of Mariappan's property.

13. In view of the above, the Cross objection filed by the cross objector is rejected and the Second appeal filed by the appellant/plaintiff is allowed to the extent indicated above. Accordingly, the substantial questions of law are answered as indicated above in affirmative in favour of the appellant.

14. In the result, the Second Appeal is allowed and the Cross Objection is allowed in part. No costs.

-s/d-

सत्यमेव जयते
Assistant Registrar (CS VI)

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Sub-Assistant Registrar

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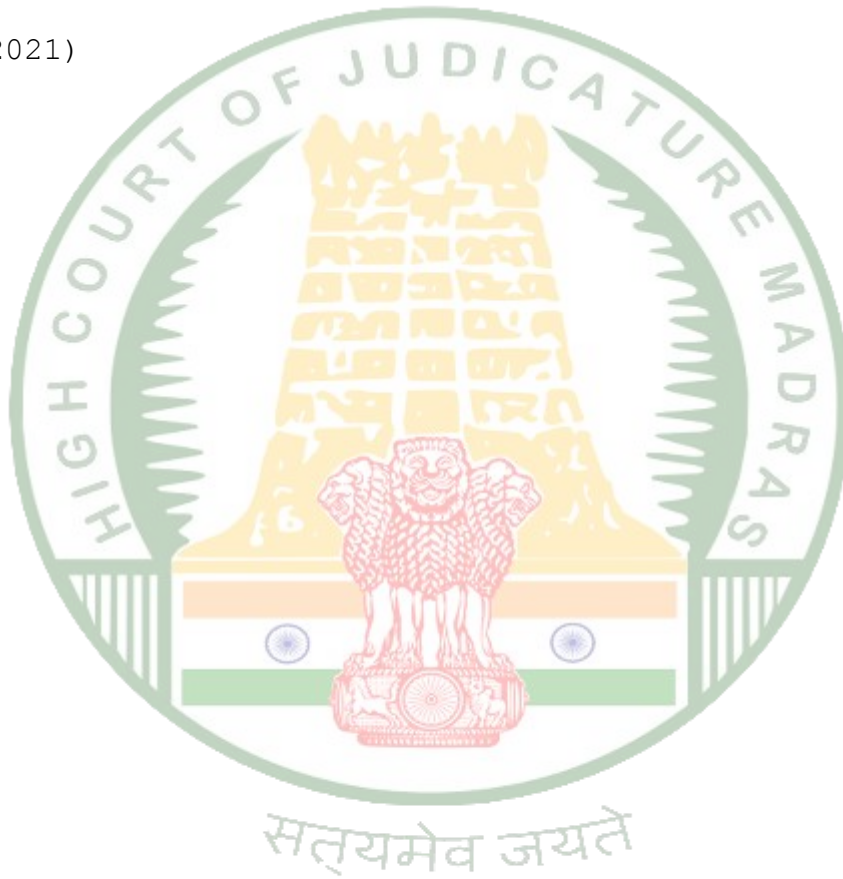
1. The Principal District Court, Salem.

2.The Subordinate Court, Namakkal.

+1 CC to Mr.L.S.M.Hasan Fizal, Advocate sr 49566.

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TM(CO)
SP(30/04/2021)



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