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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 25.04.2019

PRONOUNCED ON : 03.06.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.20 of 2007

K.B.Parasuraman

...Appellant/6th Defendant

Vs.

1.Sakunthala
2.Varadarajan
3.Devi
4.Minor Koteeswari
rep.by her mother
and Guardian Sakunthala

.. Respondents 1 to 4/
Plaintiffs 1 to 4

5.Mallika
6.Saraswathi
7.Ammu
8.Chandru
9.Thanusu
10.Bhuvaneswaran
11.Lakshmi

...Respondents 5 to 11/
Defendants 1 to 5, 7 and 8

Prayer:- Second Appeal has been filed under Section 100 of the Civil Procedure Code against the Judgement and Decree dated 29.07.2004 passed in A.S.No.3 of 2001 on the file of the Subordinate Court, Kancheepuram, confirming the judgement and decree dated 31.08.2000 passed in O.S.No.1099 of 1996 on the file of the Principal District Munsif Court, Kancheepuram.

For Appellant : Mr.R.Agilesh
For Respondents : Mr.P.Sidharthan

JUDGMENT

In this second appeal, challenge is made to the Judgement and Decree dated 29.07.2004 passed in A.S.No.3 of 2001 on the file of the Subordinate Court, Kancheepuram, confirming the judgement and decree dated 31.08.2000 passed in O.S.No.1099 of 1996 on the file of the Principal District Munsif Court, Kancheepuram.



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2.The second appeal has been admitted on the following substantial question of law:

"Whether the 8th defendant is entitled to the benefit of Act 1 of 1990 and if it is so whether she is entitled to 1/5th share as found by the Courts below and what would be her share if she is not entitled to the benefits of Act 1 of 1990 and consequently, what would be the share of other parties to the suit?".

3.Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

4.For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

5.The suit has been laid by the plaintiffs against the defendants for partition.

6.The case of the plaintiffs, in brief, is that Bheema Naicker had four sons viz., Arunachalam, Raja, Parasuraman and Bhuvaneswaran and one daughter by name Lakshmi and it is stated that Arunachalam and Raja had predeceased him. The plaintiffs are the wife, son and daughter of the deceased Arunachalam. The defendants 1 to 5 are the wife, daughters and sons of the deceased Raja. The defendants 6 & 7 are the sons of Bheema Naicker. The 8th defendant is the daughter of Bheema Naicker. The 9th defendant is the intending purchaser of the suit property from the 8th defendant, who claims that she is the owner of the suit property. According to the plaintiffs, Bheema Naicker inherited the suit property from his father by way of a partition deed dated 18.12.1935 and later purchased the portion and annexed to its original share and further, it is also stated that Bheema Naicker and his brother Ponnusamy had exchanged a portion of the house to annex some area to the original share by way of an exchange deed dated 15.10.1986 and also pleaded that Bheema Naicker had purchased a portion from Annamalai from the joint family funds and thus, Bheema Naicker has got the suit property and the same is the ancestral property of the first plaintiff's husband Arunachalam. The 6th defendant claims that Bheema Naicker had bequeathed his property in his favour by way of a Will in the year 1995 and Bheema Naicker is not entitled to execute the Will in respect of the ancestral property. The abovesaid Will is invalid and Bheema Naicker left behind the plaintiffs and the defendants are his legal heirs and the 8th defendant, the daughter of Bheema Naicker, is not entitled to any share in the suit property as she had already got married



long back and also given another share in other property and accordingly, the plaintiffs claims $\frac{1}{4}$ share in the suit property and hence, the suit for partition.

7.The 6th defendant resisted the plaintiffs' suit contending that though Bheema Naicker had obtained the property by way of the partition deed dated 18.12.1935, the said share obtained by way of the partition is the self acquired property of his father and accordingly, Bheema Naicker in respect of the suit property is entitled to dispose of the same and accordingly, bequeathed the suit property in favour of the 6th defendant by way of a Will dated 23.08.1995 and pursuant to the same, it is only the 6th defendant, who has absolute title to the suit property and the self acquired property of Bheema Naicker is not liable for partition as put forth in the plaint and the plaintiffs are not entitled to claim any share in the suit property and therefore, the suit is liable to be dismissed.

8.Based on the appreciation of the materials placed on record, both oral and documentary, the Courts below have accepted the plaintiffs' case and accordingly, granted the reliefs in favour of the plaintiffs. Impugning the same, the 6th defendant has preferred the second appeal.

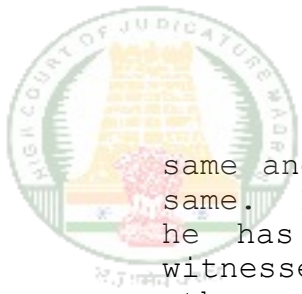
9.The relationship between the parties is not in dispute. Now, according to the plaintiffs, the suit property is the ancestral property of the parties. However, the abovesaid case of the plaintiffs, as such, is found to be unacceptable as per the pleas projected in the plaint. When even according to the plaintiffs, a portion of the suit property had been acquired by Bheema Naicker by way of the partition deed dated 18.12.1935, the copy of which has been marked as Ex.A1 and when it is further seen that Bheema Naicker had acquired certain properties by way of an exchange deed dated 15.10.1986, the copy of which has been marked as Ex.A2 and from the recitals contained in Ex.A2, when it is further seen that Bheema Naicker had acquired the property allotted to his brother Govindarajan and accordingly, when the properties had been acquired by Bheema Naicker by way of partition, exchange and sale and when even further, according to the plaintiffs, Bheema Naicker had purchased a portion from Annamalai and though the plaintiffs would claim that the said portion from Annamalai had been acquired from the joint family funds, however, with reference to the same, there is no material forthcoming on the part of the plaintiffs and when Bheema Naicker is found to have died leaving behind him viz., the female legal heirs also to succeed him, in all, in the light of the position of law as outlined by the Apex Court reported in 2016-4-L.W.309 (Uttam Vs. Saubhag Singh & Ors.), considering the import of Sections 4, 8 and 19 of the Hindu Succession Act, it is found that by virtue of the



abovesaid provisions, the property derived and acquired by Bheema Naicker as abovenoted, could only termed as his self acquired property and not the joint family property qua his sons and daughter and in such view of the matter, it is found that the case of the plaintiffs that the suit property is the ancestral property of Bheema Naicker/Arunachalam, as such, cannot be approved and accepted.

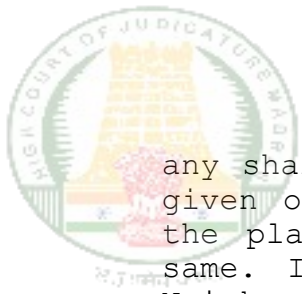
10. In the light of the abovesaid position, when it is found that Bheema Naicker has absolute right and interest in respect of the suit property, it is found that he is entitled to dispose of the same as he desires. Now, according to the 6th defendant, Bheema Naicker had bequeathed the suit property in his favour by way of the Will dated 23.08.1995 marked as Ex.B1. The abovesaid Will has been challenged by the plaintiffs in toto and according to the plaintiffs, the abovesaid Will is a fabricated one. Though PW1, during the course of her evidence, at one place, would state that the Will had come to be acquired from her father-in-law Bheema Naicker at the same breath also testified that at that point of time, Bheema Naicker was not in a conscious state of mind and trouble had erupted between the parties and accordingly, challenged the truth and validity of Ex.B1 Will. Therefore, the argument put forth by the defendants' counsel that PW1 has admitted the execution of Ex.B1 Will by Bheema Naicker, as such, cannot be readily countenanced.

11. The 6th defendant, being the propounder of the Will, has to establish the truth and validity of the same by acceptable and convincing evidence. To sustain his abovesaid case qua the Will, the 6th defendant has examined the attestator of the Will Aanandan as DW1. On a reading of the evidence of DW1, as adduced during the course of chief examination, it is found that at the time of the alleged execution of Ex.B1 Will, Bheema Naicker was aged 80 to 85 years and it is stated by DW1 that Bheema Naicker has affixed only LTI in the said Will and during the course of cross examination, DW1 has admitted that he does not know the date, month and the year of the execution of the Will and also admitted that he was not informed in advance about the execution of the Will and also does not know the day on which the Will had come to be executed and as per the evidence adduced by DW1, it is found that he is always at available at the registrar's office, it is thus seen that he appears to be a stock witness for one and all and furthermore, when DW1 has not claimed and established any prior acquaintance with Bheema Naicker and would only state that he does not know when Bheema Naicker had arrived at the Registrar's office and to say that Bheema Naicker had solicited him to attest the Will executed by him, as such, cannot be believed and accepted. Furthermore, DW1 has only stated that the Will in question was written first and thereafter, typed and Bheema Naicker had affixed his LTI in the



same and thereafter, he and the other attesor had attested the same. DW1 has not named, who is the other attesor, furthermore, he has not deposed that Bheema Naicker, the testator, had witnessed his attestation as well as the attestation of the other attesor. Furthermore, he has also not testified that the other attesor had witnessed the execution of the Will by Bheema Naicker. Furthermore, when DW1 has not identified the other attesor and his evidence of attestation is not found to be satisfying the requirements of the attestation as contemplated under law and when Bheema Naicker has four sons and one daughter and when nothing has been averred in Ex.B1 Will as to why he had chosen to bequeath the suit property in entirety to the 6th defendant alone and excluded his other legal heirs and when there is no recital contained in Ex.B1 Will that he had provided the other properties to the other legal heirs and when from the materials placed on record, it is seen that while conveying his other properties to others, he had disturbed the sale proceeds of his other properties received by him in equal moieties to his legal heirs including his daughter and when there is no enmity or ill will attributed between Bheema Naicker and his other legal heirs for disinheriting them from succeeding to the suit property and when the evidence of PW1 is found to be highly artificial and unacceptable and his presence at the time of the alleged execution of B1 Will is found to be causal and according to him, he was not solicited by Bheema Naicker for attesting the same and when DW1 is not at all acquainted as Bheema Naicker and though later he would claim some acquittance, however, with reference to the same, there is no material projected on his part or on the part of the 6th defendant and when as abovenoted, his evidence as regards the attestation does not satisfy the requirements of law, particularly, for establishing the truth and validity of Ex.B1 Will, in such view of the matter, the Courts below are found to be wholly justified in not placing reliance upon Ex.B1 Will for accepting the defence version. Merely because, Ex.B1 has been registered that by itself would not lend any colour of truth and validity to the same and unless and until, the said Will is established in the manner known to law, it is seen that on the basis of Ex.B1 Will, we cannot hold that Bheema Naicker had not died intestate and bequeathed the suit property in entirety in favour of the 6th defendant as sought to be projected by the 6th defendant. In the light of the abovesaid discussions, the Courts below had for convincing reasonings and conclusions, disbelieved the truth and validity of Ex.B1 Will and Ex.B1 Will being eschewed, it is seen that the plaintiffs and the other legal heirs of Bheema Naicker are entitled to succeed to the suit property in equal moieties as determined by the Courts below.

12.Though the plaintiffs would claim that the daughter of Bheema Naicker viz., the 8th defendant is not entitled to claim



any share in the suit property on the footing that she had been given other shares however, with reference to the said case of the plaintiffs, there is no proof or material pointing to the same. In such view of the matter, as abovenoted, when Bheema Naicker is found to have distributed the sale proceeds of his other properties in equal moieties to his legal heirs, accordingly, the suit property being his self acquired property, on his demise, the same would devolve equally upon his legal heirs and therefore, the question of the applicability of the Amendment Act 1/90 does not extend to the present case and in such view of the matter, the question of the date of the marriage of the 8th defendant is not at all relevant for determining the issues involved in the matter. In the light of the above discussions, in my considered opinion, no substantial question of law is involved in the second appeal. Be that as it may, the substantial question of law formulated in the second appeal is, accordingly answered.

13. In support of his contentions, the defendants' counsel also placed reliance upon the decision reported in AIR 2008 SUPREME COURT 300 (Savithri & ors. Vs. Karthyayani Amma & Ors.). The principles of law outlined in the abovesaid decision are taken into consideration and followed as applicable to the facts and circumstances of the case at hand.

In conclusion, the second appeal fails and is, accordingly, dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

sms

To

1. The Subordinate Judge, Kancheepuram.
2. The Principal District Munsif, Kancheepuram.
3. The Section Officer,
V.R. Section, High Court, Madras.

+1cc to Mr. A. Baskaran, Advocate, S.R.No.45289

S.A.No.20 of 2007

SV(CO)
CS/03/01/2020