

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 25.11.2019
CORAM

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

S.A. No.782 of 2007
and
M.P.No.1 of 2007

Munusamy Naidu ... Appellant /4th Respondent
4th Defendant

Vs

1.D.Kala ...Respondent/appellant/
Plaintiff

2.Munusamy Mudali
3.Mugunthan
4.Gnanavelu ... Respondents/appellant/
Respondents 1 to 3/
Defendants 1 to 3

PRAYER: Second Appeal filed under Section 100 C.P.C. against the judgment and decree in A.S.No.48 of 2005 on the file of the Additional District Judge cum Fast Track court No.V, Tiruvallur dated 22.02.2007 in reversing the well considered judgment and decree in O.S.No.383 of 1996 on the file of the District Munsif, Tiruvallur dated 02.12.2004.

For Appellant : Mrs.V.Srimathi
For Respondents : No appearance

JUDGMENT

This second appeal has been filed challenging the Judgment and decree dated 22.02.2007 passed by the learned Additional District Munsif, cum Fast Track Court-V, Thiruvallur in A.S.No. 48 of 2005 reversing the Judgement and decree dated 02.12.2004 passed by the District Munsif Court, Thiruvallur in O.S.No.383 of 1996.

Brief facts leading to the filing of this second appeal:

2. The Appellant is the fourth defendant in the suit O.S.No.383 of 1996 on the file of the District Munsif Court, Thiruvallur. The first respondent is the plaintiff and the respondents 2 to 4 are the defendants 1 to 3 in the suit.

3. For the purpose of convenience, the parties are referred to as per their ranking before the Trial Court.

4. The suit was filed by the plaintiff against the defendants seeking for partition of the suit schedule property into four equal shares and for allotment of one share to the plaintiff and put her in separate possession of the same. It is the case of the plaintiff that the suit schedule property is an ancestral property allotted to the share of the first defendant under partition. According to her, the plaintiff and the third defendant are the legal heirs of the first defendant. According to her, she was born on 23.03.1973 and was married on 11.03.1992. It is her case that she and the defendants 1 to 3 lived jointly and the plaintiff was paying the kist for the suit property. It is also her case that from 1989 onwards, she was given her share of income from the suit property. According to her, as she has gained her right of share in the suit property, the decree for specific performance of the agreement of sale dated 21.04.1974 obtained by the fourth defendant in O.S.No.22 of 1979 will not affect her right of share in the suit property as the suit property is a joint family property.

5. It is the case of the plaintiff that before purchasing the property, the fourth defendant ought to have insisted for partition and only thereafter, should have purchased the shares of the vendors. According to the plaintiff, she has been demanding her share in the suit property from 1992 onwards from the third defendants. It is her case that the suit property is still under joint patta standing in the name of the defendants 1 to 3 and one vasanth. It is the case of the plaintiff that subsequent to the Tamil Nadu amendment of the Hindu Succession Act which came into force from 25.03.1989, as per Section 29-A unmarried female legal heirs in a joint family property are also treated as coparceners. According to the plaintiff, since she got married only on 11.03.1992, the Hindu Succession (Tamil Nadu Amendment) Act, 1989 applies to her and she is entitled to 1/4th share in the suit property.

6. According to the plaintiff, she is neither a party to the agreement of sale dated 21.04.1974 entered into by the defendants 1 to 3 with the fourth defendant nor a party to the suit O.S.No.22 of 1979 in which a judgement and decree for specific performance was passed in favour of the fourth defendant. According to her, only by way of abundant caution, the fourth defendant has been made as a party to the suit O.S.No.383 of 1996.

7. Before the Trial Court, the defendants 1 to 3 were set exparte and the fourth defendant alone entered appearance and filed his written statement. As seen from the written statement, it is the case of the fourth defendant that the plaintiff's age is more than 21 years and not 21 years as claimed in the plaint. It is his case that the defendants 1 to 3 had already lost their right in the suit property more than 12 years back prior to the suit and as such the plaintiff claim is unsustainable. According to the fourth defendant, the agreement of sale dated 21.04.1974 entered into by the defendants 1 to 3 with him for the purpose of discharging the ancestral debts of the joint family.

8. According to the fourth defendant, since the vendors to the agreement of sale dated 21.04.1974 fraudulently joined hands with one Govinda Naidu and created another agreement of sale, he was constrained to file a suit for specific performance in O.S.No.22 of 1979. According to him, in the said suit O.S.No.22 of 1979, the defendants filed their written statement and admitted the execution of agreement of sale dated 21.04.1974. According to the fourth defendant, only after hot contest, by the defendants 1 to 3 in the suit, a decree for specific performance was granted in favour of the fourth defendant in O.S.No.22 of 1979 on the file of the Sub court, Thiruvallur which was also confirmed by the Higher courts and a sale deed was also executed by the executing court in favour of the fourth defendant.

9. According to the fourth defendant, at the time of entering into agreement of sale dated 21.04.1974, the vendors handed over to him a registration copy of the sale deed dated 01.12.1939 along with the release deed dated 04.11.1970 executed by Ankammal and the partition deed dated 05.11.1970. It is the case of the fourth defendant that thereafter he discharged the debts of Padmavathy on 17.04.1972 and Chinnappa Naidu and Sulochana on 09.01.1973. Therefore, according to the fourth defendant, the family of the first defendant had already lost their right and interest in the suit schedule property. According to him, on the date of passing of the Hindu Succession (Tamil Nadu Amendment) Act 19789, the suit property was not available for partition as the same was already lost by the first defendant. According to the fourth defendant, the plaintiff is not in joint possession of the suit property with defendants 1 to 3.

10. The fourth defendant has also denied that the defendants 1 to 3 are paying the plaintiff her share of the income from the suit schedule property from 1989. According to the fourth defendant, the suit property was owned by the first

defendant and as karta and manager of his family for discharge of his antecedent debts and to meet his family expenses and necessity, the suit property was alienated. According to him, the alienation is binding on the plaintiff. It is his further case that when the agreement of sale dated 21.04.1974 was entered into, the plaintiff was not born at all. Hence according to the fourth defendant, the plaintiff was not in possession of the suit property and is not entitled to the discretionary relief of injunction.

11. The Trial Court by its Judgement and decree dated 02.12.2004 passed in O.S.No.383 of 1996 on the file of the District Munsif, Thiruvallur dismissed the suit filed by the plaintiff on the ground that the judgement and decree dated 28.11.1986 passed in O.S.No.22 of 1979 filed for specific performance of the agreement of sale dated 21.04.1974 by the fourth defendant has attained finality and a sale deed has also been executed in his favour by the executing court in E.P.No.47 of 1995. The Trial court has also observed that the plaintiff has not produced any evidence to show that she was in joint possession of the suit property along with the defendants 1 to 3 ever since her birth. Therefore the Trial Court held that the Hindu Succession (Tamil Nadu Amendment) Act, 1989 will not enure to the benefit of the plaintiff.

12. Aggrieved by the judgement and decree dated 02.12.2004 passed in O.S.No.383 of 1996 on the file of the District Munsif Court, Tiruvallur, the plaintiff filed an appeal before the lower appellate court namely Additional District Court cum Fast Track Court, Tiruvallur in A.S.No.48 of 2005. The lower appellate court referred to various authorities but without any discussion as to how those authorities will apply for the facts of the instant case reversed the findings of the Trial Court by allowing the appeal filed by the plaintiff. Excepting for stating that the plaintiff has established sufficiently that she is a coparcener having right of share in the suit property, no reason was given by the lower appellate court for arriving at such a conclusion.

13. The lower appellate court has given no reason as to how when the judgement and decree passed in O.S.No.22 of 1979 in favour of the fourth defendant having attained finality in the year 1986 itself will not have any impact on the claim made by the plaintiff. Aggrieved by the Judgement and decree dated 22.02.2007 passed in A.S.No.48 of 2005 on the file of the Fast Track Court No.V, Additional District Court, Tiruvallur, this second appeal has been filed by the fourth defendant.

14. Heard Mrs.V.Srimathi, learned counsel for the Appellant/fourth defendant. A learned counsel has entered appearance on behalf of the first defendant, but there is no representation on his side. Eventhough notice has been duly served on the respondents 2 to 4 and their names having been printed in the cause list today, they remain unrepresented.

Discussion:

15. Admittedly in the case on hand, O.S.No.22 of 1979 filed by the fourth defendant seeking specific performance of an agreement of sale dated 21.04.1974 has been decreed on 28.11.1986 in favour of the fourth defendant and now has attained finality. It is also undisputed that subsequent to the specific performance decree having attained finality, the Appellant/fourth defendant has also obtained a sale deed executed in his name by the executing court in E.P.No.47 of 1995. Admittedly, the plaintiff who claims to be the daughter of the first defendant who executed the agreement of sale along with the second and third defendants in favour of the fourth defendant has not challenged the judgment and decree dated 28.11.1986 passed in favour of the Appellant/fourth defendant in O.S.No.22 of 1979. Without challenging the said judgment passed in favour of the fourth defendant, the plaintiff has filed a separate suit for partition.

16. It is also an admitted fact that the decree for specific performance in favour of the Appellant/fourth defendant has attained finality in 1986 itself. The agreement of sale dated 21.04.1974 entered into between the defendants 1 to 3 and the Appellant/fourth defendant discloses that the suit property was agreed to be sold to the Appellant/fourth defendant only to discharge the antecedent debts of the joint family property. The details of the debts discharged by the Appellant/fourth defendant subsequent to the agreement of sale dated 21.04.1974 have been pleaded in the plaint. No contra evidence has been adduced by the plaintiff to disprove the same. It is the consistent stand of the Appellant/fourth defendant that on the date of passing of Hindu Succession (Tamil Nadu Amendment) Act, 1989, the suit property was not available for partition as the same was already lost by the first defendant and it ceased to be a coparcenary property. It has also been denied by the Appellant/fourth defendant that the defendants 1 to 3 are paying the plaintiff the share of her income from the suit property ever since 1989. No evidence whatsoever has been produced by the plaintiff that she has been receiving her share of income from the defendants 1 to 3 out of the suit property.

17. From the evidence available on record, it can be conclusively established that the first defendant as karta and

manager of his family for discharge of his antecedent debts and to meet his family expenses and necessity, he had agreed to sell the suit property to the Appellant/fourth defendant under the agreement of sale dated 21.04.1974. Further excepting for filing the marriage registration certificate which was marked as Ex.A1, the plaintiff has also not proved her date of birth. The marriage registration certificate authenticates only the date of the marriage and not the date of birth. The plaintiff ought to have produced either the birth certificate or any other public document admissible in evidence to prove her date of birth which she has miserably failed to do so.

18. Since the decree for specific performance passed in O.S.No.22 of 1979 in favour of the fourth defendant attained finality in the year 1986 itself, the Hindu Succession (Tamil Nadu Amendment) Act, 1989 which came into force from 25.03.1989 and it is a prospective amendment will not enure to the benefit of the plaintiff.

19. Further in the case on hand, the date of birth of the plaintiff has not been established by her. She has only filed a marriage registration certificate which was marked as Ex.A1 which gives the date of the marriage. The marriage registration certificate does not give authenticate proof that the plaintiff was born on 23.03.1973. Instead of producing her birth certificate or any other public document to prove her date of birth, she has produced only her marriage registration certificate. A categorical stand has been taken by the Appellant/fourth defendant, as seen from his pleadings and oral evidence that the plaintiff was not born when the agreement of sale dated 21.04.1974 was entered into between the Appellant/fourth defendant and the defendants 1 to 3. This being the case, the burden of proof is only upon the plaintiff under Section 101 of the Indian Evidence Act to establish that she was born on 23.03.1973, which burden she failed to discharge as seen from the evidence available on record. She has also failed to produce any proof to show that she was getting income out of the suit property from the date of coming into force of the Hindu Succession (Tamil Nadu Amendment) Act, 1989 till the date of her marriage on 11.03.1992.

20. The Trial Court has taken into consideration all these aspects and only thereafter has dismissed the suit filed by the plaintiff. However, the lower appellate court erroneously has reversed the findings of the Trial Court and has allowed the appeal filed by the plaintiff. The lower appellate court has not given any consideration to the attainment of finality of the Judgment and decree dated 28.11.1986 passed in O.S.No.22 of 1986

in the year 1986 itself much prior to the coming into the force of Hindu Succession (Tamil Nadu Amendment) Act, 1989 which is a prospective piece of legislation. Excepting for extracting judgements laying down settled propositions of law under the Hindu Succession Act, 1956, no discussion has been given by the lower appellate court as to how those judgements will apply to the facts of the instant case. In fact as seen from the impugned judgment, the lower appellate court has not given any reason as to how the suit filed by the plaintiff for partition is maintainable when the specific performance decree dated 28.11.1986 passed in O.S.No.22 of 1979 in favour of the Appellant/fourth defendant has attained finality and the plaintiff has not challenged the said specific performance decree, despite having knowledge of the same as seen from her pleadings in the plaint and from the evidence available on record. It can be conclusively established that after attainment of finality of the judgment and decree dated 22.11.1986 passed in favour of the Appellant/fourth defendant in O.S.No.22 of 1979, the suit property ceased to be a coparcenary property.

21. The Hindu Succession (Tamil Nadu Amendment) Act, 1989 came into force only on 25.03.1989 and the judgment and decree dated 22.11.1986 passed in O.S.No.22 of 1979 attained finality in the year 1986 itself and subsequent to the attainment of finality, the Appellant/fourth defendant has also obtained sale deed executed through court in E.P.No.47 of 1995. The lower appellate court by total non application by mind and by its perverse findings and misapplication of the Hindu Succession (Tamil Nadu Amendment) Act, 1989 has erroneously reversed the findings of the Trial Court and hence, the judgment and decree passed by the lower appellate court has to be set aside.

22. This Court on 07.08.2007 admitted this second appeal on the following substantial questions of law:

"(i) Whether the lower appellate court is right in decreeing the suit when the plaintiff has no right, title over the suit property?

(ii) Whether the plaintiff can claim share in the suit property, when her predecessor has relinquished their right in favour of the appellant herein?

(iii) Whether the lower appellate court is right in decreeing the suit when the sale deed was executed infavour of the appellant in pursuance of a decree in O.S.No.22 of 1979 on the file of the Sub Court, Tiruvallur and should it not have seen that the suit itself is a collusive act of the defendants 1 and 2 and the plaintiffs?

(iv) Whether the courts below are right in decreeing the suit when the plaintiffs have failed to prove any antecedent right over the property or the ancestral nature of the suit property?

(v) Whether the suit is maintainable in law, when on the date of agreement the plaintiffs were not even born or had any right over the property?"

23. It is established that the plaintiff does not have any right over the suit schedule property as it ceased to be a coparcenary property much prior to the coming into the force of the Hindu Succession (Tamil Nadu Amendment) Act, 1989. The fourth defendant has also established that the defendants 1 to 3 have entered into an agreement of sale dated 21.04.1974 with the Appellant/fourth defendant only to discharge the antecedent debts over the suit property.

Conclusion:

24. For the foregoing reasons, this Court is of the considered view that the substantial questions of law formulated by this Court on 07.08.2007 is answered in favour of the fourth defendant who is the Appellant herein.

25. In view of the above, the judgment and decree dated 22.02.2007 passed in A.S.No.48 of 2005 on the file of the Additional District Judge cum Fast Track court No.V, Tiruvallur is hereby set aside and the judgment and decree dated 02.12.2004 passed in O.S.No.383 of 1996 on the file of the District Munsif, Tiruvallur is confirmed. Accordingly, the second appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Asst.Registrar (CS V)

/true copy/

Sub Asst. Registrar

nl
To

1. The Additional District Judge
cum Fast Track court No.V, Tiruvallur

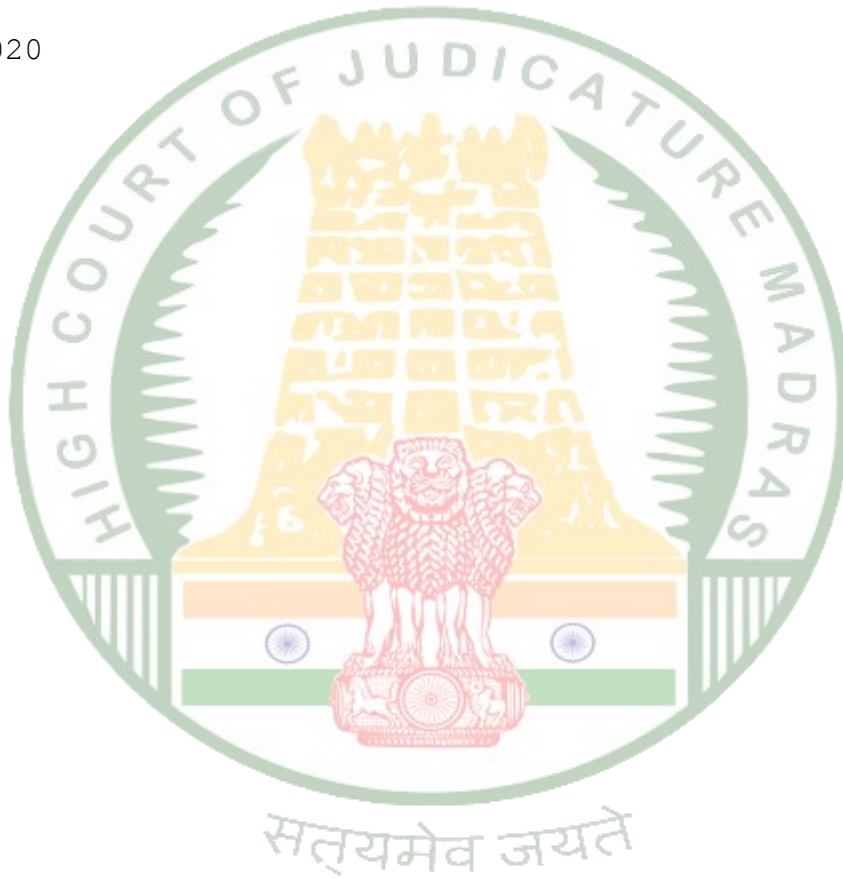
2.The District Munsif, Tiruvallur.

copy to
The Section Officer
VR Section
High Court Madras

+1 cc to Mr.V.Raghavachari Advocate sr98201

S.A. No.782 of 2008

gj (co)
aa18/03/2020



WEB COPY