

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 12.03.2019

PRONOUNCED ON : 02.04.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.155 of 2013

K.V.Karuppusamy ... Appellant / Defendant

Vs.

K.Rajkumar ... Respondent / Plaintiff

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 04.12.2012 and made in A.S.No.67 of 2012 on the file of the Principal District Judge, Coimbatore, affirming judgment and decree dated 17.08.2010 and made in O.S.No.38 of 2009 on the file of the Principal Sub-Judge, Coimbatore.

For Appellant : Mr.G.RaviShankar

For Respondent : set ex-parte

JUDGMENT

This Second Appeal has been filed by the defendant against the judgment and decree passed by the Principal District Judge, Coimbatore in A.S.No.67 of 2012, dated 04.12.2012 confirming the judgment and decree passed by the Principal Sub-Judge, Coimbatore in O.S.No.38 of 2009 dated 17.08.2010.

2. The respondent herein has filed a suit in O.S.No.38 of 2009 on the file of the Principal Sub-Judge, Coimbatore, to divide the suit property into two equal shares and to allot one such share to him. The learned Principal Sub-Judge, Coimbatore by the judgment dated 17.08.2010 had passed a preliminary decreed to divide the suit property into two equal shares and to allot one such share to the plaintiff. Aggrieved by the same, the defendant had filed an appeal in A.S.No.67 of 2012 on the file of the Principal District Judge, Coimbatore. The learned Principal District Judge, Coimbatore, by the judgment dated 04.12.2012 had dismissed the said appeal and confirmed the judgment and decree passed by the trial Court. Feeling aggrieved, the defendant has filed the present Second Appeal.

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

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

(a) The plaintiff is the son and the defendant is the father. The suit property originally belonged to the great grandfather of the plaintiff namely, one Perumal as his ancestral property. The said Perumal along with his son Ramalingam had been living together as undivided Hindu Joint Family. After, the death of Perumal, his son Ramalingam and his five grand sons namely, Vellingiri, Karuppusamy(defendant), Boopathi, Nagarajan and Loganathan had divided the aforesaid properties under a registered partition deed dated 18.12.1990.

(b) In the said partition deed, the 'B' Schedule property was allotted to the share of the plaintiff's father namely, the defendant herein. The said 'B' Schedule property is the suit property. After the aforesaid partition, the plaintiff was born and thereafter, the plaintiff and the defendant constituted a Hindu Undivided Family (HUF) and they have been in joint possession of the suit property as coparceners. So, the plaintiff and the defendant are entitled to half share each in the suit property. The defendant is leading a wayward life without taking care of his wife and sons and also having illegal affairs with several ladies and neglected to maintain the plaintiff and his mother Hence, the plaintiff's mother had filed a suit in O.S.No.24 of 2008 on the file of the Family Court, Coimbatore, seeking maintenance and also for charge over the suit property and the said suit is still pending. The defendant is trying to alienate the suit property. The plaintiff demanded for partition, but, the defendant did not come forward for amicable partition and hence, he was forced to file the above suit for the relief of partition.

4. The averments made in the written statement filed by the defendant are in brief as follows:

Since the defendant and his family members entered into partition and executed a partition deed before the birth of the plaintiff, the plaintiff is not entitled to get any share in the suit property. The plaintiff has filed the above suit by making false and imaginary allegations against the defendant. The allegation that the defendant is having illegal affair with several ladies is totally false and defamatory. It is false to state that the defendant is trying to alienate the suit property. The plaintiff is not having any right over the suit property and therefore, the defendant prayed to dismiss the suit.

5. Based on the aforesaid pleadings, the learned Principal Sub-Judge, Coimbatore, had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as PW1 and marked Exs.A1 and Ex.A2 as exhibits. On the side of the defendant, the defendant examined himself as DW1 and he has not marked any exhibits on his side.

6. The learned Principal Sub-Judge, Coimbatore, after considering the materials placed before him found that after the birth of the plaintiff, the plaintiff and the defendant became coparceners and as such, the plaintiff is entitled to get half share in the suit property. Accordingly, he passed a preliminary decree to divide the suit property into two equal shares and to allot one such share to the plaintiff. Aggrieved by the same, the defendant had filed an appeal in A.S.No.67 of 2012 on the file of the Principal District Judge, Coimbatore. The learned Principal District Judge, Coimbatore, had dismissed the said appeal confirming the judgment and decree passed by the trial Court. Feeling aggrieved, the defendant has filed the present Second Appeal.

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

"1. Whether the Courts below failed to consider a son of divided son does not get right from his father by birth who is excluded by virtue of Section 8 of the Hindu Succession Act and he cannot become coparceners in the property in question?

2. Whether the Courts below erred in treating the suit property obtained by the defendant in the partition deed dated 08.02.1990 as joint family property in the light of well settled ratio laid down by the Supreme Court in 2010-5-L.W.329 wherein it was held that the property obtained under the Partition Deed shall be treated as self acquired property and they can deal with the property exclusively excluding their son the son of the divided son does not get right from his father by birth who is excluded by virtue of Section 8 of the Act and he cannot become the coparcener in the suit property?

8. Though notice has been served on the respondent and his name also printed in the cause list, he has not appeared either in person or through counsel and hence, he was called absent and set exparte. Hence, after hearing the arguments of Mr.G.Ravi Shankar, learned counsel for the appellant/defendant and perusing records, the judgment is being passed in the Second Appeal.

9.Substantial questions of law 1 and 2:

The learned counsel for the appellant/defendant has submitted that admittedly, the defendant got the suit property in the partition which took place between the defendant and his brothers and their father and as such, the suit property is the separate property of the defendant, in which, the plaintiff cannot claim any share during the life time of the defendant. He further submitted that the Courts below without considering the legal position in a proper perspective have concurrently held that the suit property is the joint family property and hence, the plaintiff is entitled to get half share. He further submitted that the approach of the Courts below is against the settled position of law and therefore, he prayed to allow the Second Appeal and set aside the judgments and decrees passed by the Courts below and dismiss the suit.

10. The learned counsel for the appellant, in support of his contentions, relied upon the following decisions:-

1) M.Kumaran Vs. J.Rajesh (Minor) (Rep.by his mother and natural guardian J.Gomathi) and another, 2010-5-L.W.329.

2) The Additional Commissioner of Income-tax, Madras-1, Vs. P.L.Karuppan Chettiar, AIR1979 (Madras) 1 : 1978 (3) ILR (Madras) 305.

3) M.Yogendra and others Vs. Leelamma.N and others, (2009) 7 MLJ 1086 (SC).

11. It is an admitted fact that the plaintiff is the son of the defendant. It is also an admitted fact that after the partition which took place between the defendant and his brothers and their father, the plaintiff was born. It is also an admitted fact that in the said partition, the suit property was allotted to the share of the defendant.

12. According to the plaintiff, the suit property and other properties are ancestral properties and in the partition which took place between the defendant and his brothers and their father, the suit property was allotted to the defendant and as such, the suit property is also an ancestral property. The case of the defendant is that since he got the suit property in the partition and at that time, the plaintiff was not born, the suit property is his separate property in which the plaintiff cannot claim any right.

13. A copy of the partition deed dated 08.02.1990 has been filed by the plaintiff and marked as Ex.A1. A perusal of the said document, would show that the defendant and his brothers and their father had partitioned their ancestral properties and in the said partition, the suit property was allotted to the share of the defendant.

14. In M.Yogendra and others Vs. Leelamma.N and others (cited supra), the Hon'ble Supreme Court in para No:19 has held as follows:-

"19. Mr.Bhat, however, would contend that the properties at the hands of K Doddananjundaiah which were allotted to him in partition which took place between him and his brother in the year 1948 would constitute coparcenary properties at his hands, with respect we cannot persuade ourselves to agree with the said view which has been accepted by the courts below. It is now well-settled in view of several decisions of this Court that the property in the hands of sole coparcener allotted to him in partition shall be his separate property for the same shall revive only when a son is born to him. It is one thing to say that the property remains a coparcenary property but it is another thing to say that it revives. The distinction between the two is absolutely clear and unambiguous. In the case of former any sale or alienation which has been done by the sole survivor coparcener shall be valid whereas in the case of a coparcener any alienation made by the karta would be valid. This aspect of the matter has been considered by this Court in Commissioner of Wealth Tax, Kanpur And Others v. Chander Sen And Others (1986) 3 SCC 567. This Court upon noticing the provisions of the Hindu Succession Act opined as under:-

"It is clear that under the Hindu law, the moment a son is born, he gets a share in the father's property and becomes part of the coparcenary. His right accrues to him not on the death of the father or inheritance from the father but with the very fact of his birth. Normally therefore whenever the father gets a property from whatever source from the grandfather or from any other source, be it separated property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. But the question is: is the position affected by Section 8 of the Hindu Succession Act, 1956 and if so, how? The basic argument is that Section 8 indicates the heirs in respect of certain property and I of the heirs includes the son but not the grandson. It includes,

however, the son of the predeceased son. It is this position which has mainly induced the Allahabad High court in the two judgments, we have noticed, to take the view that the income from the assets inherited by son from his father from whom he has separated by partition can be assessed as income of the son individually. Under Section 8 of the Hindu Succession Act, 1956 the property of the father who dies intestate devolves on his son in his individual capacity and not as karta of his own family. On the other hand, the Gujarat High Court has taken the contrary view."

It was furthermore held :

"18. Section 8 of the Hindu Succession Act, 1956 as noted before, laid down the scheme of succession to the property of a Hindu dying intestate. The Schedule classified the heirs on whom such property should devolve. Those specified in Class I took simultaneously to the exclusion of all other heirs. A son's son was not mentioned as a heir under Class I of the Schedule, and, therefore, he could not get any right in the property of his grandfather under the provision. The right of a son's son in his grandfather's property during the lifetime of his father which existed under the Hindu law as in force before the Act, was not saved expressly by the Act, and therefore, the earlier interpretation of Hindu law giving a right by birth in such property "ceased to have effect". The Court further observed that in construing a Codification Act, the law which was in a force earlier should be ignored and the construction should be confined to the language used in the new Act. The High Court felt that so construed, Section 8 of the Hindu Succession Act should be taken as a self-contained provision laying down the scheme of devolution of the property of a Hindu dying intestate. Therefore, the property which devolved on a Hindu on the death of his father intestated after the coming into force of the Hindu Succession Act, 1956,

did not constitute HUF property consisting of his own branch including his sons. It followed the Full Bench decision of the Madras High Court as well as the view of the Allahabad High Court in the two cases noted above including the judgment under appeal."

15. In this case also in the partition which took place between the defendant and his brothers and their father on 08.02.1990 vide Ex.A1, the suit property was allotted to the defendant. In view of the aforesaid decision of the Hon'ble Supreme Court, the suit property shall be the defendant's separate property till his son (plaintiff) was born. Once his son born, the property revived as co-pacenary property.

16. In this case, admittedly, the defendant has not inherited any property of his father as Class I heir under Section 8 of the Hindu Succession Act, 1956. On the contrary, he got the property as coparcener only in the partition which took place between him and his brothers and their father. Therefore, the moment his son born, the said property revived as co-pacenary property.

17. In M.Kumaran and another Vs. J.Rajesh and another, (cited supra) the father and his sister divided the property of their father. This Court has held that since the father got the property as legal heir of his father, the said property is his separate property in which the son cannot claim any share. In this case, as already pointed out that the defendant did not get the suit property through his father as legal heir. On the contrary, he got the property as co-parcener in the partition which took place between him and his brothers and their father. Therefore, the aforesaid decision will not apply to the facts of this case.

18. In The Additional Commissioner of Income-tax, Madras-1, Vs.P.L.Karuppan Chettiar, (cited supra) one Palaniappa Chettiar, who along with his wife Anandavalli Achi, their son Karuppan Chettiar and their daughter-in-law constituted a Hindu Undivided Family (HUF). There was a partition in this family on 22.03.1954 by and under which Palaniappa Chettiar was allotted certain properties and he got separated. Thereafter Karuppan Chettiar son of Palaniappa Chettiar and his wife and their subsequently born sons and daughter constituted a Hindu Undivided Family (HUF). Palaniappa Chettiar died on 09.09.1963 leaving behind his widow Anandavalli Achi and his son Karuppan Chettiar as his legal heir. In that case, the question which came up for consideration before the Hon'ble Full Bench of this Court was whether the share got by the Karuppan Chettiar from the property allotted to his father Palaniappa Chettiar was his

separate property or not. The Hon'ble Full Bench of this Court has held that since Karuppan Chettiar got the share in the suit property as Class I heir of his father Palaniappa Chettiar, the son of Karuppan Chettiar cannot claim any share.

19. In this case, as already pointed out that the defendant has not obtained the suit property from his father as legal heir. On the contrary, he got the property in a partition which took place between him and his brothers and their father and in such a case, the moment his son is born, the property revived as co-parcenary property. In case the defendant got any share from the property which was allotted to his father under Ex.A1 partition deed after the death of his father as legal heir, the said property has to be treated as a separate property of the defendant. But in this case, he did not get the property as a legal heir of his father. He got the property as coparcener and therefore, the suit property is the ancestral property and as such the plaintiff is entitled to get the share in the suit property as coparcener. Therefore, the aforesaid decision also will not help the appellant/defendant.

20. The Courts below taking into consideration of all the aforesaid facts have rightly held that the suit property is the co-parcenary property of the plaintiff and the defendant and hence, the plaintiff is entitled to get half share. Therefore, this Second Appeal is not having any merits and the same is liable to be dismissed. Accordingly, the substantial questions of law are answered against the appellant/defendant.

21. In the result, the Second Appeal is dismissed. No costs. Confirming the judgment and decree passed by the Courts below.

Sd/-

Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

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To

1. The Principal District Judge, Coimbatore.
2. The Principal Sub-Judge, Coimbatore.
3. The Section Officer,
V.R.Section, Madras High Court, Chennai.

S.A.No.155 of 2013

PA(CO)
SSM(15/10/2019).