

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.11.2019

CORAM:

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.569 of 2016 and
C.M.P.No.10781 of 2016

K.Chinnakannu ... Appellant/1st Defendant

Vs.

1. Rani
2. Chithra ... Respondents 1 & 2/Plaintiffs

3. K.Muthuraj @ Muthu
4. A.Jayapal
5. G.Baskar ... Respondents 3 to 5/Defendants 2 to 5
6. B.C.Raman (died)
7. Lakshmikanthammal
8. Youvanamala
9. B.R.Manogaran
10. B.R.Surendran
11. B.R.Senthilkumar
12. B.R.Srimala
13. Jothilakshmi
14. B.R.Srinivasan

(RR 7 to 14 brought on record as LRs of the deceased R6 vide order of this Court dated 25.09.2019 made in C.M.P.No.15390 of 2019 in S.A.No.569 of 2016)

... Respondents/LRS of the deceased R6

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 15.09.2015 in A.S.No.9 of 2015 on the file of the Principal District Court, Krishnagiri against the judgment and decree dated 28.11.2014 in O.S.No.24 of 2014 on the file of the Sub Court, Uthangarai.

For Appellant : Mr.D.Baskar

For Respondents: Mr.S.Mukunth for
M/s.Sarvabhauman and Associates
(for R1 and R2)
Mrs.P.Srividhya (for R7 to R14)

J U D G M E N T

The 1st defendant in O.S.No.60 of 2008 (renumbered as O.S.No.24 of 2014) who managed to succeed in getting the suit for partition dismissed by the trial Court, upon its reversal by the lower appellate Court has come up with this second appeal.

2. The plaintiffs who are the daughters of Krishna Gounder and Rajamma filed a suit for partition claiming that the suit properties are joint family properties belonging to plaintiffs and defendants 1 and 2. It is also claimed that the paternal grandmother of the plaintiffs namely Kullachi @ Mariammal was the owner of the properties and the plaintiffs being the legal heirs of Krishna Gounder and Rajamma namely the son and granddaughter (daughter's daughter) of Kullachi are entitled to 1/4th share in the suit properties. They would also claim that the defendants 1 and 2 who are the sons of Krishna Gounder had created Sale deeds dated 22.02.2007 and 02.05.2007 in the names of the 3rd and 4th defendants respectively, after issuance of notice seeking partition and they also indulged alienating the properties, the plaintiffs have come up with the suit for partition.

3. The suit was resisted by the defendants contending that during the life time of Kullachi @ Mariammal, she has executed a settlement deed in favour of her granddaughters under Ex.B1 dated 15.04.1977, settling certain properties in favour of the granddaughters on the understanding was that the other properties will belong to the grandsons absolutely. It was their further claim that there was an oral partition in the year 1975 among defendants 1 and 2 and the same was written and registered on 02.05.2007. According to defendants, taking advantage of the fact that the partition was registered in 2007, the plaintiffs are trying to usurp the properties of the defendants, ignoring the understanding reached within the family.

4. At trial, the 1st plaintiff Rani was examined as P.W.1 and Exs.A1 to A8 were marked. The 1st defendant Chinnakannu was examined as D.W.1 and the 5th defendant B.C.Raman was examined as D.W.2. Exs.B1 to B3 were marked on the side of the defendants.

5. The trial Court upon a consideration of the evidence on record, treated the properties as joint family properties and concluded that the plaintiffs would not be entitled to a share in the suit properties, since their father died even in the year 1971 and the plaintiffs were married prior to 25.03.1989 that the date on which the Hindu Succession Tamil Nadu Amendment Act 1/1990 came into force. The trial Court also concluded that the Hindu Succession amended Act 39/2005 would not confer any right

on the plaintiffs since their father died even in the year 1971. On the aforesaid conclusion, the learned trial judge dismissed the suit in toto. Aggrieved by the said dismissal, the plaintiff preferred an appeal in A.S.No.9 of 2015 on the file of the learned Principal District Judge, Krishnagiri.

6. The lower appellate Court however concluded that the Hindu Succession amended Act 39/2005 would confer equal right upon the plaintiffs. It rejected the claim of the defendants that there was an oral partition in the year 1975. It also held that the partition deed dated 02.05.2007 will not binding on the plaintiffs in as much as it came in to being after introduction of the Hindu Succession Amendment Act 39/2005. The learned Principal District Judge also concluded that the plaintiffs would become coparceners under Act 39 of 2005. The lower appellate Court further found that the E Schedule properties have been carved out of the suit A and B schedule properties. Since the suit 'D' Schedule properties have been sold to the 5th defendant by the plaintiffs also pending suit, the plaintiffs are not entitled to partition of 'D' Schedule properties. On the aforesaid findings, the lower appellate Court granted a decree in respect of A to C Schedule properties and dismissed the suit in respect of D schedule properties.

7. Aggrieved, the 1st defendant has come up with this appeal.

8. The following substantial questions of law were framed at the time of admission:

- i. Is not the finding of the 1st appellate was perverse with regard to the fact that the recitals in Ex.B1 do not refer to joint family property, when there is no specific denial by the plaintiffs themselves?
- ii. Is not the burden cast upon the plaintiffs to prove their case that there was no partition in the family before 29.12.2014 and hence the judgment of the 1st appellate Court is unsustainable in law as it picked holes from the defendants' case?

9. I have heard Mr.D.Baskar, learned counsel appearing for Mr.R.Thamaraiselvan for appellant, Mr.S.Mukunth, learned counsel appearing for M/s.Sarvabhavman & Associates for R1 and R2 and Mrs.P.Srividhya, learned counsel appearing for R7 to R14 who are the legal representatives of the deceased 6th respondent. The respondents 3 and 5 though served, are not appearing either in person or through counsel duly instructed.

10. Before going into the questions of law framed, the appeal with reference to E Schedule Properties can be disposed of by based on the admission of parties. It is admitted by the parties as well as the counsels of all the parties that the suit was filed only for partition of A to D schedules though the plaint shows five schedules of properties namely A to E Schedules. A perusal of the schedule of properties would show that the E Schedule properties comprise the entire B Schedule and item No.2 of A Schedule properties. It is conceded that these properties namely the B Schedule properties and item no.2 of A Schedule properties were sold by the appellant and respondents 1 to 3 in favour of the 5th defendant both prior to and after the filing of the suit. Therefore, neither the appellant nor the respondents 1 to 3 would claim a share over those properties. Hence, the suit in respect of item no.2 of A Schedule properties and the entire B Schedule properties will stand dismissed.

11. Now, adverting to the questions of law framed, though both the Courts below have proceeded on an assumption of the suit properties were joint family properties in the hands of the appellant, it is seen from the pleadings as well as the evidence of the parties that the properties actually belonged to Kullachi @ Mariammal. It is also in evidence that Kullachi @ Mariammal was survived by her son Krishna Gounder. The recitals in Ex.B1 Settlement Deed dated 05.04.1972, would show that Rajamma wife of Krishna Gounder is also the grand daughter of Kullachi @ Mariammal through her daughter. No doubt, there is no evidence regarding the date of death of either Kullachi @ Mariammal or Rajamma. When evidence on exact date of death is absent the necessary presumption is elder of the two died before, therefore, on Kullachi @ Mariammal's death, she had five legal heirs namely her daughter-in-law Rajamma in her capacity her grand daughter (daughter's daughter), the plaintiffs herein and the defendants 1 and 2 who are her grand children through her predeceased son Krishna Gounder. Therefore, on Kullachi @ Mariammal's death each one of them would be entitled to 1/5th share. On the death of Rajamma, the mother of the plaintiffs and defendants 1 and 2, her 1/5th share would devolve on the 4 of them and each would get 1/4th share. Therefore, the plaintiffs and the defendants 1 and 2 would each get 1/4th share in the properties left behind by Kullachi @ Mariammal.

12. No doubt, the Courts below had proceeded on the footing, the properties were joint family properties, the trial Court concluded that neither Tamil Nadu Hindu Succession (amendment) Act 1 of 1990 nor the Central Act 39 of 2005 would apply to the plaintiffs. The trial Court also concluded that the partition pleaded by the defendants is true and dismissed the suit.

13. On appeal, the lower appellate Court concluded that the Hindu Succession Amendment Act 39 of 2005 would apply. The said conclusion to say the least is erroneous. It is settled law that in order to invoke the benefits of Act 39 of 2005, a female Hindu must be in a position to establish that her father was alive when the Act came into force i.e., on 09.09.2005. Admittedly Krishna Gounder died even prior to 1971. The plaintiffs also cannot claim the benefits of Act 1 of 1990 since they were married before 25.03.1989 viz., the death on which the said act came in force. Therefore, the conclusions of the lower appellate Court regarding the entitlement of the plaintiffs as coparceners of a Hindu joint family cannot be sustained and they will have to be interfered with. However, the said conclusion alone does not dispose of the appeal. As already pointed out that it is in evidence that Kullachi @ Mariammal was the owner of the properties and she died after 1956. The suit properties being the properties of a female Hindu cannot be treated as joint family properties in the hands of the plaintiffs and the defendants. It is only Section 15 of the Hindu Succession Act that would govern succession of the estate of a female Hindu. Therefore, as already pointed out, each one of the plaintiffs and the defendants 1 and 2 would have 1/4th share as heirs of Kullachi @ Mariammal under Section 15 of the Hindu Succession Act. Even though the lower appellate Court has adopted a different reasoning, but the conclusion that the plaintiffs and the defendants 1 and 2 are entitled to 1/4th share each is correct. However, the lower appellate Court while granting the decree has wrongly assumed the D Schedule Properties to be the E Schedule Properties and had dismissed the suit in respect of the D Schedule Properties.

14. As I have already pointed out it is the E Schedule properties which comprises of the entire B Schedule Properties and item no.2 of A Schedule properties which has been sold by the plaintiffs and the defendants 1 and 2 in favour of the 5th defendant whose legal representatives, have now been impleaded as respondents 7 to 14 in this appeal. The lower appellate Court has held that the alienation in favour of the defendant 3 and 4 made by defendants 1 and 2 are subject to the right of the plaintiffs. The purchasers namely the defendants 3 and 4 have remained exparte before the Courts below. In view of the conclusions reached to the effect that the properties belonged to Kullachi @ Mariammal, the plaintiffs and the defendants 1 and 2, being children of the predeceased son would be entitled to equal share in the suit properties. Therefore, the suit has to be decreed granting 1/4th share each in favour of the plaintiffs. Adverting to the properties in which the 1/4th share could be granted, it is already seen that the parties have separately alienated their share in the entire B Schedule and item 2 of A Schedule properties which has been described as 'E' Schedule

properties. In fact no prayer for partition of 'E' Schedule properties was made in the plaint. However, since these properties are included in A and B Schedules of the plaint, a modification of the decree granted is required.

15. Hence, the second appeal is allowed, the judgment and decree of the lower appellate Court are modified as follows:

i. The suit is decreed declaring 1/4th share, each of the plaintiffs in respect of item Nos.1, 3 to 10 of A Schedule properties, entirety of the C and D Schedule properties.

ii. The suit will stand dismissed in respect of item no.2 of A Schedule properties and entirety of the B Schedule properties.

iii. In view of the fact that the properties are held to belong to Kullachi @ Mariammal, the questions of law framed at the time of admission based on the case set up by the parties that the properties are joint family properties fades into insignificance.

16. Considering the relationship between the parties, there will be no order as to costs. Consequently connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

To

1. The Principal District Judge,
Krishnagiri.

2. The Subordinate Judge,
Uthangarai.

3. The Section Officer,
VR Section, Madras High Court,
Chennai.

+2cc to M/s.R.Thamarai Selvan, Advocate Sr.98869

+1cc to M/s.Sarvabhauman Associates, Advocate Sr.98635

+1cc to M/s.P.Sri Vidhya, Advocate Sr.98656

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