

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 27.01.2020

Date of Verdict : 14.02.2020

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

S.A.No.1616 of 2001
& S.A.No.678 of 2002
and C.M.P.Nos.348, 349 of 2010

S.A.No.1616 of 2001

1. P.Narayanasamy @ Durai
2. Bharathan Timber Mart
Rep by its Partners Narayanasamy,
Sampath Kumar, Selvaraj,
100, Mill Road,
Coimbatore. ...Appellants/Appellants/
Defendants 10 & 11

Vs.

1. Najmunnisa @ Nazmeen ...Ist Respondent/Ist Respondent
Plaintiff
2. Nazmeen Hussain
3. Refi Ahamed
4. Imtiaz Ahamed
5. Azar Ahamed
6. Nizar Ahamed
7. Nazreen Kabir
8. Parven Mallick
9. Yasmeen Salaudeen
10. Nazeem Jaleel ...Respondents 2 to 10/Respondents 2 to 10
Defendants 1 to 9

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 20.12.2000 made in A.S.No.6 of 1998 on the file of the II Additional District Judge, Coimbatore, confirming the judgment and decree dated 03.11.1997 made in O.S.No.514 of 1989 on the file of the Principal Subordinate Court, Coimbatore.

For Appellants : Mr.S.Sundaresan

For Respondents

R1 : Mr.K.P.Ashok

For R2 to R10 : Not ready in notice

S.A.No.678 of 2002

and C.M.P.Nos.348, 349 of 2010

Najmunnisa @ Nazmeen

...Appellant/Appellant/Plaintiff

Vs.

1. Nazmeen Hussain

2. Refi Ahamed

3. Imtiaz Ahamed

4. Azar Ahamed

5. Nizar Ahamed

6. Nazreen Kabir

7. Parveen Mallick

8. Yasmeen Salauddin

9. Nazeem Jaleen

10. P.Narayanasamy

11. Bharathan Timber Mart

Rep by its Partners P.Narayanasamy,

N.Sampath Kumar, N.Selvaraj,

100, Mill Road,

Coimbatore.

...Respondents 1 to 11/

Respondents 1 to 11/

Defendants 1 to 11

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 20.12.2000 made in A.S.No.240 of 1998 on the file of the II Additional District Judge, Coimbatore, confirming the judgment and decree dated 03.11.1997 made in O.S.No.514 of 1989 on the file of the Principal Subordinate Court, Coimbatore.

For Appellant : Mr.K.P.Ashok

For Respondents

R1 to R9 : Given up

For R10 & R11 : Mr.S.Sundaresan

COMMON JUDGMENT

These second appeals have been filed as against the common judgment and decree dated 20.12.2000 made in A.S.Nos.6 & 240 of 1998 on the file of the II Additional District Judge, Coimbatore, confirming the judgment and decree dated 03.11.1997 made in O.S.No.514 of 1989 on the file of the Principal Subordinate Court, Coimbatore.

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

3. The case of the plaintiff in brief is as follows :-

3.1. The suit is filed for partition. The suit property originally belonged to Zainab Khatun W/o. Abdul Ghufoor. They had three sons viz., G.Mohamed Hussain, G.Mohamed Omar and G.Abdul Jalleel. The said Zainab Khatun died intestate in the year 1968, leaving behind her three sons. They are being the legal heirs to succeed the suit property as tenants-in-common. They were in joint possession and enjoyment of the suit property as tenants-in-common. One of the sons viz., G.Mohamed Omar leased out the suit property to the 10th defendant and collected rent from the tenant on behalf of his and two brothers. One of the brother viz., G.Abdul Jalleel had settled his undivided 1/3th share in favour of his two other brothers absolutely by a registered settlement deed dated 27.09.1969. Therefore, the two brother G.Mohamed Hussain and G.Mohamed Omar are entitled to have half share in the suit property. In fact, G.Mohamed Omar was collected rent from the 10th defendant for the lease on behalf of G.Mohamed Hussain.

3.2. While being so, on 27.12.1984, G.Mamed Omar died intestate leaving behind his wife i.e., the plaintiff herein, as his sole legal heir to succeed to 1/4th share of his half share in the suit property. As the plaintiff is an issueless widow and in Muslim law, she is entitled to have 1/4th share in the suit property. Balance 3/4 share was inherited by other two brother G.Mohamed Hussain and G.Abdul Jalleel. After demise of her husband, the sons of G.Mohamed Hussain, i.e., the defendants 2 to 5 were collected rent on behalf of their father, the plaintiff and another brother. While being so, G.Mohamed Hussain died intestate in the year 1985, leaving behind his wife, the first defendant herein and his sons i.e., the defendants 2 to 5 and daughters 6 to 8. After demise of said G.Mohamed Hussain, the plaintiff, another brother G.Abdul Jalleel and the defendants 1 to 8 were in joint possession and enjoyment of the suit property as tenant-in-common and the defendants 2 to 5 were

collecting the rent from the 10th defendant. Thereafter another brother G.Abdul Jalleel also died intestate in the year 1988 leaving behind his wife, the ninth defendant herein to succeed his share in the suit property.

3.3. The suit property originally ad measuring 6400 sq.ft., of vacant land with tiled house and the same was leased out to the 10th defendant for his timber business. The plaintiff used to visit the suit property and she lastly visited in January 1989. When the plaintiff visited suit property in the first week of June 1989, there was a pucca terraced building constructed in the suit property. On enquiry, she came to understand that the defendants 2 to 5 colluded with the 10th defendant had constructed the terraced building without getting consent from the plaintiff. In fact, during the life time of her husband, his brother G.Mohamed Hussain filed suit in O.S.No.670 of 1971 on the file of the Subordinate Court, Coimbatore, for partition and separate possession, in which a preliminary decree was passed on 10.07.1973, by which the suit property had to be divided into two equal shares. In the final decree petition in I.A.No.86 of 1974, there was a compromise between the husband of the plaintiff and his brother and the final decree was passed on 23.02.1974. As per the final decree western portion of the suit property was allotted to the share of G.Mohamed Hussain and eastern portion of the suit property comprised Door Nos.24 & 25 ad measuring 2880 sq.ft., allotted to the husband of the plaintiff. Even after final decree, the 10th defendant continued as tenant in the eastern portion of the suit property.

3.4. While being so, on 27.12.1984 the plaintiff's husband died and as such she is a only legal heir succeeded 1/4th share of the eastern portion of the suit property. Remaining share was inherited by her husband's brother G.Mohamed Hussain and G.Abdul Jalleel. The entire property mentioned in the A schedule and the eastern side shown in the B schedule in the suit property. Pending suit, the suit property has been purchased by the 11th defendant, as such he has been implicated as 11th defendant. Hence the suit.

4. Before the trial Court, the defendants 1 to 9 remained absent and set ex-parte. Resisting the plaintiff's case, the 10th defendant filed written statement and stating that he purchased the suit property from G.Mohamed Hussain and G.Abdul Jalleel by the sale deed dated 28.06.1985. Even before the purchase of the suit property, he was a lessee and he took the vacant cite on lease under the lease deed dated 01.12.1955 and put up construction to do the timber business. Even if he not purchased the suit property, he is entitled to have the benefit

under the Tamil Nadu City Tenants Protection Act. Further the plaintiff estopped from claiming her share in view of the order passed in I.A.No.86 of 1974 in O.S.No.670 of 1971. In fact, the plaintiff neither has filed any application to set aside the decree passed in O.S.No.670 of 1971 nor pleaded about the same.

4.1. Further the suit is bad for non joinder of M/s.Bharathan Timber Mart, who is the necessary party. Further the plaintiff failed to implead the legal heirs of the deceased G.Abdul Jaleel. In fact, half of the suit property which was acquired by the said Mohamed Hussain already conveyed to M/s. Ananda Corporation. Therefore, the 10th defendant is a bonafide purchaser for valid sale consideration and the entire old constructions were demolished and put up new construction up to two stories for which the 10th defendant invested more than Rs.10 lakhs. Therefore, the plaintiff is not at all entitled for her share in the construction. Further submitted that there is no valid marriage between them and she herself declared "Thalak, Thalak, Thalak" and both have got separated. Therefore, there is absolutely no basis to claim the status as wife by the plaintiff. Hence, prayed for dismissal of the suit.

5. Resisting the plaintiff's case, the 11th defendant represented by its partner and filed written statement by stating that 11th defendant is the bonafide purchaser of the entire property in the suit B schedule property by the registered sale deed dated 28.06.1985 from G.Mohammed Hussain and G.Abdul Jaleel for valid sale consideration. Thereafter, they demolished the old construction and put up a new RCC building. Now the entire area have been constructed with three storied building about 7,200 sq.ft. In fact, the plaintiff was fully aware of the construction from the year 1988 and as such she is estopped from claiming actual possession of the suit property. In fact, no rent was paid by the 11th defendant to the plaintiff from the year 1985. Therefore, the plaintiff cannot seek any remedy of partition in the suit property and prayed for dismissal of the suit.

6. On the side of the plaintiff, she herself examined as P.W.1 and were marked Ex.A.1 to Ex.A.7. On the side of the defendants, they examined D.W.1 & D.W.2 and were marked Ex.B.1 to Ex.B.26. On perusal of the material produced on record and on considering both the oral and documentary evidence adduced by the respective parties and also the submissions made, the trial Court decreed the suit filed by the plaintiff on condition that 1/4 share expenditure for the construction of the building payable by the plaintiff to the defendants 10 & 11. Aggrieved by the same, the plaintiff as well as the defendants 10 & 11 preferred appeal suits. The plaintiff filed appeal suit in

A.S.No.240 of 1998 and the defendants preferred appeal suit in A.S.No.6 of 1998 before the II Additional District Court, Coimbatore. Both the appeals were clubbed together and the first appellate Court dismissed both the appeals by a common judgment and decree. Aggrieved by the same, the defendants 10 & 11 preferred the second appeal in S.A.No.1616 of 2001 and the plaintiff filed the second appeal in S.A.No.678 of 2002.

7. At the time of admission of the second appeal in S.A.No.1616 of 2001 on 19.10.2001, the following substantial questions of law were formulated for consideration:-

"1. Whether the Courts below are right in accepting the legal certificate and marriage certificate under Ex.A.2 and Ex.A.4 in the absence of any proof and decided in favour of plaintiff in the light of the fact that factum of marriage was denied specifically?

2. Whether the Courts below are right in granting the relief of partition without a prayer for recovery of possession in the light of the finding that the appellants are enjoying the properties exclusively as purchaser by ousting all the claim?"

7.1. At the time of admission of the second appeal in S.A.No.678 of 2002 on 06.06.2002, the following substantial question of law was formulated for consideration:-

"Whether the Courts below are right in overlooking that the 11th defendant knowing fully well that having no title to the 1/4th share of the B-schedule property, made improvements, is entitled for the value of the same?"

8. The learned counsel appearing for the defendants 10 & 11 submitted that the plaintiff is not at all entitled for any share as claimed by her, since she did not prove that she is the legally wedded wife of G.Mohamed Omar. As per Mohammedan Law, wife is not at all entitled for any share. Further, the entire B schedule property was purchased by the defendants 10 & 11 by the sale deed dated 28.06.1985. Even the plaintiff had full knowledge about the same, she did not file any suit within the period of three years from the date of sale. As such the suit itself barred by limitation. Further she did not challenge the sale deed dated 28.06.1985, purchased by the defendants 10 & 11 as such, the suit is liable to be dismissed.

8.1. He further submitted that Ex.A.2 is the marriage certificate, in which different address was mentioned. The death certificate of Mohamed Omar was marked as Ex.A.3 in which different address was mentioned. The alleged legal heir certificate was marked as Ex.A.4 issued by the Tashildar. The Tashildar has no power to issue legal heir certificate under Mohammeden Law and as such it is an invalid document. Therefore, the plaintiff failed to prove that she is a legally wedded wife to Mohamed Omar. The plaintiff also failed to examine any witness to prove Ex.A.2, the marriage certificate. In fact, she categorically deposed that she left from the so-called husband and lived separately. Though she stated that she lived along with her husband for nine years, there is absolutely no evidence to prove the same.

8.2. Further he vehemently contended that even assuming that the marriage held between the plaintiff and the said Mohamed Omar, according to the plaintiff, she was only 12 year old during her marriage. Under Mohammeden Law, when the girl attained puberty, she can get marriage with the consent of two guardians. No guardian was appointed and no one was examined as guardian to prove the marriage between the plaintiff and Mohamed Omar. When the plaintiff failed to prove that she is a legally wedded wife of Mohamed Omar as such, she is not entitled for any share as claimed by her.

9. Per contra, the learned counsel appearing for the plaintiff submitted that already there was a partition suit between the plaintiff's husband and his brother in O.S.No.670 of 1971, in which a preliminary decree was passed on 10.07.1973. In the final decree application, there was a compromise memo filed and accordingly, they got separate half of the share and the husband of the plaintiff was allotted the suit B schedule property. After demise of her husband, she is entitled to have 1/4th share in the suit B schedule property.

9.1. He further submitted that the plaintiff got marriage with Mohamed Omar on 05.05.1975 and the suit has been filed in the year 1989 in which, she categorically stated that she was aged about 30 years. Therefore, at the time of her marriage, she was above 16 years as such no need to appoint any guardian. Further the defendants 1 to 9 were absent before the trial Court and set exparte. The defendants 10 & 11 have no locus to challenge the marriage of the plaintiff, since the concerned persons i.e., defendants 1 to 9 to questioned the same, but they never questioned the marriage of the plaintiff. Further in the written statement, the 10th defendant categorically mentioned that only on the plaintiff's instigation, she got divorce from

Mohamed Omar as such, she is not entitled for any share in the suit property. Therefore, the 10th defendant categorically admitted that the plaintiff got married the said Mohamed Omar and thereafter got divorce. In Mohammeden law, the women cannot say "Thalak" for divorce. Further to prove his contention, the 10th defendant failed to examine any of the family members i.e., the defendants 1 to 9 to disprove the marriage between the plaintiff and Mohamed Omar. Ex.A.2 the marriage certificate issued by the Government Chief Kazi and he is the competent person to issue marriage certificate. Further, when there is no clause-1 legal heir, the Tashildar has power to issue legal heir certificate to the Muslim wife. Admittedly, the plaintiff and her husband viz., Mohamed Omar had no issues. Therefore, the Tashildar is the competent person to issue legal heir certificate.

9.2. He further contended that it is categorically proved that the plaintiff is the only legal heir of her deceased husband. When the defendants 10 & 11 vehemently contended that the plaintiff is not the legal heir of Mohamed Omar, they have to produce the legal heir certificate of their vendors i.e., the defendants 1 to 9. But they also failed to produce any piece of evidence to disprove the case of the plaintiff. Further, the property situated in Coimbatore, Whereas, the defendants 10 & 11 registered their sale deed in Chennai. Therefore, the plaintiff had absolutely no knowledge about the sale and the encumbrance certificate also categorically shows that no entry made about the sale. Encumbrance certificate is marked as Ex.A.5. Therefore, there is absolutely no limitation to file suit for partition.

9.3. Further he submitted that the defendants 10 & 11, without even verifying the legal heirs of the deceased Mohamed Omar, have purchased the suit property. When the plaintiff is having her 1/4 share, the defendants 10 & 11 ought not to have put up any construction in the suit property. Therefore, the plaintiff is not liable to pay any cost for 1/4th share to the defendants 10 & 11 for the new construction. As such, both the Courts below erred in holding that the plaintiff is liable to the construction charges for her share, to get her share in the suit property and prayed to allow the appeal filed by the plaintiff and dismiss the appeal filed by the defendants 10 & 11.

10. Heard Mr.P.Ashok, learned counsel appearing for the plaintiff and Mr.S.Sundaresan, learned counsel appearing for the defendants 10&11.

11. This Court has dealt with the factual matrix of the case and need not to reiterate the same any further. However for the purpose of deciding the substantial questions of law, certain facts which are absolutely need and necessity alone will be reiterated and discussed here under :-

According to the plaintiff, she is the legally wedded wife of one Mohamed Omar. Originally the suit property belonged to her mother-in-law viz., Zainab Khatun. The said Zainab Khatun and her husband gave birth to three sons and after their demise, their three sons succeeded the entire suit property. One of the son viz., Abdul Jalleel had relinquished his right over the suit property in favour of his two brothers viz., Mohamed Hussain and Mohamed Omar by a settlement deed dated 27.09.1969. Thereafter, they filed suit for partition in O.S.No.670 of 1971 on the file of the Subordinate Court, Coimbatore, in which half share in the suit property was allotted to each of them by a compromise memo in final decree application, by an order dated 23.02.1974. The final decree was passed and accordingly the western side portion of the suit property was allotted to Mohamed Hussain and the eastern side of the suit property was allotted to Mohamed Omar.

12. Further on 05.05.1975 the plaintiff got married with Mohamed Omar and their marriage certificate was marked as Ex.A.2. They lived together and on 27.12.1984, her husband died intestate leaving behind the plaintiff alone as his legal heir. Death certificate of the said Mohamed Omar was marked as Ex.A.3. The legal heir certificate was marked as Ex.A.4. Therefore, the plaintiff alone is the legal heir of the deceased Mohamed Omar. Accordingly, she is entitled to have 1/4th share in the suit B schedule property and remaining 3/4 share was inherited by other two brothers of the deceased husband of the plaintiff.

13. While being so, by registered sale deed dated 28.06.1985, the suit property was purchased by the 11th defendant in which, the 10th defendant is one of the partner and they demolished the old building and constructed new building by spending more than Rs.10 lakhs. The learned counsel appearing for the defendants 10 & 11 contended that the plaintiff is not at all the legally wedded wife to Mohamed Omar as such, she is not entitled for 1/4th share as claimed by her. The address mentioned in the death certificate and the marriage certificate and the legal heir certificate are different to each other and the plaintiff also deposed that she was staying separately from her husband. Further the Tashildar is not a competent person to issue legal heir certificate to the plaintiff. But the defendants did not examine any one of the relatives i.e., the

defendants 1 to 9 to disprove the case of the plaintiff. They also did not mark any of the documents to show as the other persons are the legal heir of the deceased Mohamed Omar. At the time of filing of the suit, the plaintiff is aged about 30 years and her marriage took place on 05.05.1975. Therefore at that time of her marriage, she was more than 16 years and their marriage is valid one. To prove the said contention, the registration of marriage certificate has been marked as Ex.A.2, which was issued by the Chief Government Kazi.

14. In the written statement filed by the 10th defendant, he categorically mentioned that the plaintiff never lived with Mohamed Omar and she is not entitled to claim share in the suit property in the status of wife. She never lived with him as there is no hope for marital life and there is no valid marriage in any event and there is separation by declaring 'Thalak' and both were separated. It shows that the plaintiff and her husband got married and thereafter they got separated. Therefore, the marriage between the plaintiff and her husband is categorically admitted by the defendants 10 & 11 and it is also proved by the Ex.A.2, marriage certificate issued by the Government Kazi. The legal heir certificate also issued in favour of the plaintiff as such, both the Courts below rightly concluded that the plaintiff is entitled to have her 1/4th share in the suit B schedule property.

15. Further the learned counsel appearing for the defendants 10 & 11 submitted that the plaintiff had full knowledge about the construction and as such she ought to have filed the suit within the period of three years that too by challenging the sale deed. Admittedly, the plaintiff residing at Chennai and she used to go Coimbatore once in six months to visit the suit property. When the plaintiff visited the suit property in the year 1989, she had knowledge about the construction and immediately she filed the suit. According to the plaintiff, the construction started in the month of January, 1989 and completed in the year June 1989. Ex.B.4 to Ex.B.17 categorically proved that the construction process started in the month of May 1988 and completed in the month of February, 1989. Therefore, the principle of estoppel cannot apply here, since the plaintiff had absolutely no knowledge about the construction and she never waited for the completion of construction. Further the defendants 10 & 11 before purchasing the suit property, they ought to have verify the other share holders of the suit property, since admittedly, the legal heir of one of the brother executed the sale deed. The defendants 10 & 11 failed to establish that they have verified the Encumbrance certificate before purchasing the suit property and no document

is filed before the trial Court to prove that the legal heir of the other deceased brother also had knowledge about the purchase of the property.

16. Insofar as the liability of payment of 1/4th value of the cost of the construction, admittedly the 10th defendant was tenant in the suit property even prior to their purchase. He was in possession of the suit property including the property mentioned in the suit A schedule property. The plaintiff cannot recover possession because her subsequent purchaser i.e., the 11th defendant made construction without the knowledge of the plaintiff by spending huge amount. Admittedly, there is a construction of ground + two floor and the plaintiff is entitled only the land in the suit B schedule property. Since the plaintiff is entitled to have her 1/4th share in the suit B schedule property, necessarily she has to pay the construction cost of the building of her share of 1/4. Therefore this Court does not find any infirmity or illegality in the order passed by the Courts below.

17. In view of the above discussion, this Court does not find any valid reason to interfere with the reasonings and findings rendered by the Courts below. Therefore, this Court is of the considered opinion that no substantial question of law involved in these appeals. Be that as it may, all the substantial questions of law formulated by this Court are answered in favour of the plaintiff and as against the defendants 10 & 11 insofar as the second appeal in S.A.No.1616 of 2001. Insofar as the second appeal in S.A.No.678 of 2002, the substantial questions of law formulated by this Court are answered in favour of the defendants 10 & 11 and as against the plaintiff.

18. In fine, both the second appeals are dismissed by confirming the judgment and decree passed by the Courts below. Consequently, connected miscellaneous petitions are closed. There is no order as to costs.

Sd/-

Asst.Registrar

/true copy/

Sub Asst. Registrar

rts

11/12

To

1. The II Additional District Judge,
Coimbatore.
2. The Principal Subordinate Judge,
Coimbatore.
3. The Section Officer,
V.R.Section,
Madras High Court,
Chennai.

+2 ccs to Mr.K.P.Ashok Advocate sr12873,12874

Common Judgment
in S.A.No.1616 of 2001
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