

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 22.01.2020

CORAM:

THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM

S.A.No.457 of 2016 &
C.M.P.No.7734 of 2016

1.Krishnasamy
2.Nanjappa Gounder
3.Paranthaman

.. Appellants/Respondents 1 to 3/Defendants 1 to 3

Versus

1.Nanjammal
2.Suseela
3.Savithri
4.Marayal

.. Respondents 1 & 2/Appellants/Plaintiffs
.. Respondents 3 & 4/ Respondents 4 & 5/Defendants 4 & 5

Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 25.04.2014 passed in A.S.No.106 of 2013, on the file of Principal District Judge, Erode, modifying the Judgment and Decree, dated 24.10.2013 passed in O.S.No.41 of 2011, on the file of Subordinate Judge, Gobichettipalayam.

For Appellants : Mr.K.Govi Ganesan

For Respondents : Mr.N.Chinnaraj for R1 and R2
No appearance for R3
R-4 (Dismissed)

JUDGMENT

This appeal is directed against the Judgment and Decree passed in A.S.No.106 of 2013 by the Principal District Judge, Erode, modifying the Judgment and Decree of the Sub Court, Gobichettipalayam, passed in O.S.No.41 of 2011.

2. The defendants are the appellants herein. The suit in O.S.No.41 of 2011 came to be filed by the respondents 1 and 2, seeking partition for allotment of 16/49 share in the suit properties. The plaintiffs and the defendants 1 to 4 are the children of Late Moothanda Gounder, born through his first wife Kolandhayal. After the death of the first wife, the said Moothanda Gounder married the fifth defendant as his second wife, but no issues for them. It is the case of the

plaintiffs that the suit properties are ancestral properties and their father died intestate on 24.12.2009 and hence, as per Section 6 of Hindu Succession (Amendment) Act 2005 (Act 39 of 2005) [in short "Central Amended Act 39 of 2005"], they are entitled for share as coparceners.

3. In the written statement, it is contended that the plaintiffs got married on 29.03.1973 and 31.10.1982 respectively. After marriage, the first plaintiff did not come to the suit properties situated in Kongarpalayam Village and enjoyed the properties and she has been ousted and excluded from possession and enjoyment of the properties by the defendants. Further, the second plaintiff was given in adoption to one Kandasamy and Thangayal, when she was 8 months old. Ever since, the second plaintiff did not come to enjoy the suit properties. Thus, the plaintiffs have lost their right by efflux of time.

4. On the basis of the above pleadings, the trial Court framed necessary issues. On the side of the plaintiffs, the second plaintiff gave evidence as P.W.1 and Exs.A1 to A18 were marked. On the side of the defendants, two witnesses were examined and Exs.B1 to B4 were produced.

5. The trial Court, after considering the evidence, held that the Central Amended Act 39 of 2005 has no application to this case, since both the plaintiffs got married before the Hindu Succession (Tamil Nadu Amendment) Act 1 of 1990, (in short "Tamil Nadu Act 1 of 1990") which came into effect from 25.03.1989. By holding so, the trial Court applied the theory of notional partition and held that the plaintiffs are entitled to 2/28th share in the suit properties and the defendants 1 to 4 are entitled to 1/4 share in the suit properties and 1/28th share acquired from their father, and the fifth defendant is entitled to 1/28th share, acquired from her husband. The matter was taken up on appeal by the plaintiffs. The appellate Court, held that the plaintiffs are entitled to 16/49 share in the suit properties as per Section 6 of Central Amended Act 39 of 2005. Aggrieved over the same, the defendants have preferred this appeal.

6. This appeal was admitted on the following substantial questions of law:-

"(a) Whether the Tamil Nadu Act 1 of 1990 or Central Amended Act 39 of 2005 will apply to the facts and circumstances of the case when especially the said question is pending consideration before the Hon'ble Apex Court?

(b) When Tamil Nadu Act 1 of 1990 had come into force on 25.03.1989 is it correct on the part of the appellate Court to apply the Central Amended Act 39 of 2005 to the case and granted 16/49 shares to the plaintiffs?"

7. Mr.K.Govi Ganesan, learned counsel for the appellants argued that the appellate Court has erroneously modified the Judgment and Decree of the trial Court, by granting 16/49 shares to the plaintiffs. It is the submission of the learned counsel that Tamil Nadu Act 1 of 1990 alone will apply to the facts and circumstances of the case.

8. Per contra Mr.N.Chinnaraj, learned counsel for the respondents 1 and 2 would submit that the trial Court by taking note of the provisions contained in Tamil Nadu Act 1 of 1990, held that Central Amended Act 39 of 2005, would not be applicable to the case of the plaintiffs. It is further submitted that the first appellate Court, rightly allowed the appeal by considering provisions contained in Section 6 of Central Amended Act 39 of 2005. Hence, no warrant of interference is required and prayed for dismissal of the appeal.

9. Heard the rival submissions on either side and perused the materials available on record.

10. In the case on hand, it is not disputed that the plaintiffs and the defendants 1 to 4 are the children of Moothanda Gounder and Kolandhayal. The fifth defendant is the second wife of Moothanda Gounder. It is also not disputed that the suit properties are ancestral properties and the plaintiffs' father died intestate on 24.12.2009. According to the plaintiffs, they are entitled for share as per Section 6 of Central Amended Act 39 of 2005. In the written statement, the character of the suit properties and the relationship of the parties were not disputed.

11. It is the case of the defendants that the first plaintiff married on 29.03.1973 and since then, she was out of possession of the suit properties. The second plaintiff was taken in adoption by Kandasamy and Thangayal, when she was 8 months old. As such, the defendants are in exclusive possession and enjoyment of the suit properties and thereby, they perfected title by ouster and exclusion. However, during cross-examination, D.W.1 admitted that the first plaintiff is residing at Kongarpalayam Village, where, the suit properties Items 1 to 3 are situated. He further deposed that he did not have personal knowledge about the adoption of the second plaintiff and he came to know about the said adoption through his paternal uncle, one Mariappa Gounder and his relatives Thiruvengkata Gounder and K.P.Eswaran. Admittedly, those persons were not examined. D.W.2 is the Principal of Ariyappampalayam Town Panchayat Municipal School and deposed that the second plaintiff Susheela was admitted in their School on 30.10.1967 and as per the admission register her father's name is one Palanisamy. Hence, the defense that the second plaintiff was taken adoption was rejected.

12. It is true that the Tamil Nadu Act 1 of 1990 came into force on 25.03.1989. As per Section 29-A of Tamil Nadu Act 1 of 1990, in a Hindu joint family, a daughter of coparcener shall by birth become a coparcener in her own right in the same manner as a son and have the same rights in the coparcenary property, but the said Section should not apply to a daughter married before commencement of Act 1 of 1990.

13. It is pertinent to note that Hindu Succession Act, 1956 was amended in the year 2005 and Section 6 of the amended Act would run thus:-

"6 Devolution of interest in coparcenary property. -

(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,-

(a) by birth become a coparcener in her own right in the same manner as the son;

(b) have the same rights in the coparcenary property as she would have had if she had been a son;

(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener: Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

(2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force in, as property capable of being disposed of by her by testamentary disposition.

(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,-

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and

(c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.

...."

14. A plain reading of the above provision would make it clear that the daughter of the coparcener shall by birth become a coparcener and she is entitled to get a share in the same manner as the son and the property of a joint family shall devolve as per the New Act, provided, the coparcener property is available for partition and it was not already alienated or disposition had taken place. It is to be seen that the date of marriage of a daughter loses significance.

15. In the case on hand, it is not disputed that the father of the plaintiffs Moothanda Gounder died on 24.12.2009. The property was neither alienated nor partitioned between the sharers on 9th September 2005, when the Act came into force. Since the plaintiffs satisfied the legal requirements in Section 6, in my view, the appellate Court has rightly modified the share in accordance with the Central Amended Act 39 of 2005, and granted preliminary decree by allotting 8/49 share each to the plaintiffs.

16. For the foregoing reasons, the questions of law are answered against the appellants and the appeal is dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-VIII)

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Sub Assistant Registrar

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To

1. The Principal District Judge,
Erode.

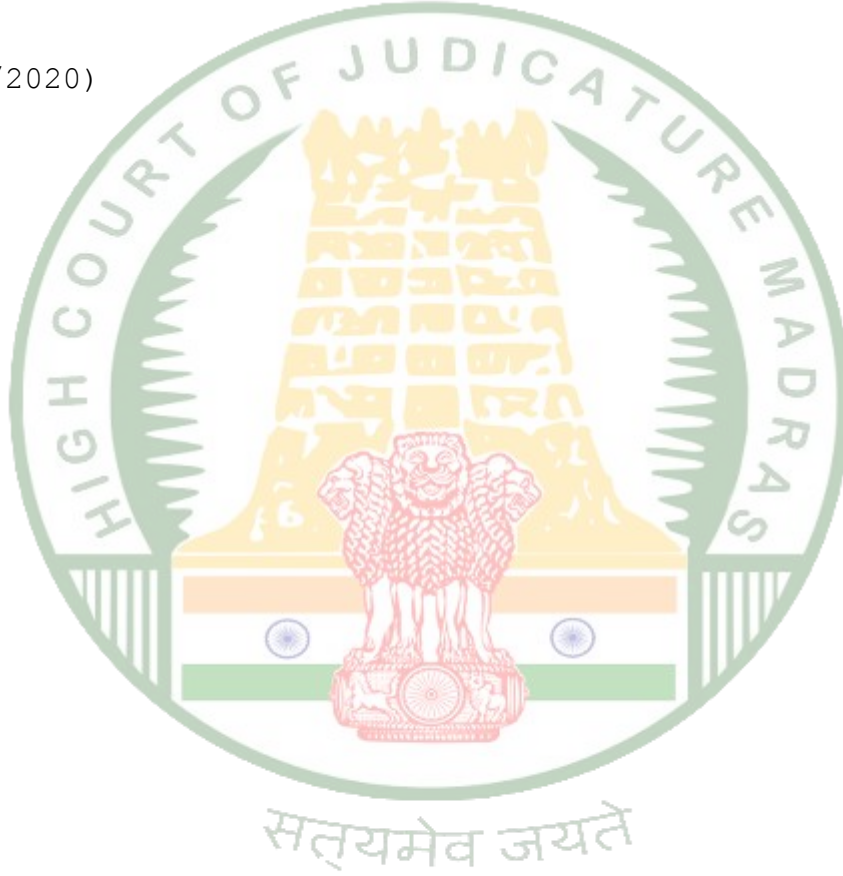
2. The Subordinate Judge,
Gobichettipalayam.

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

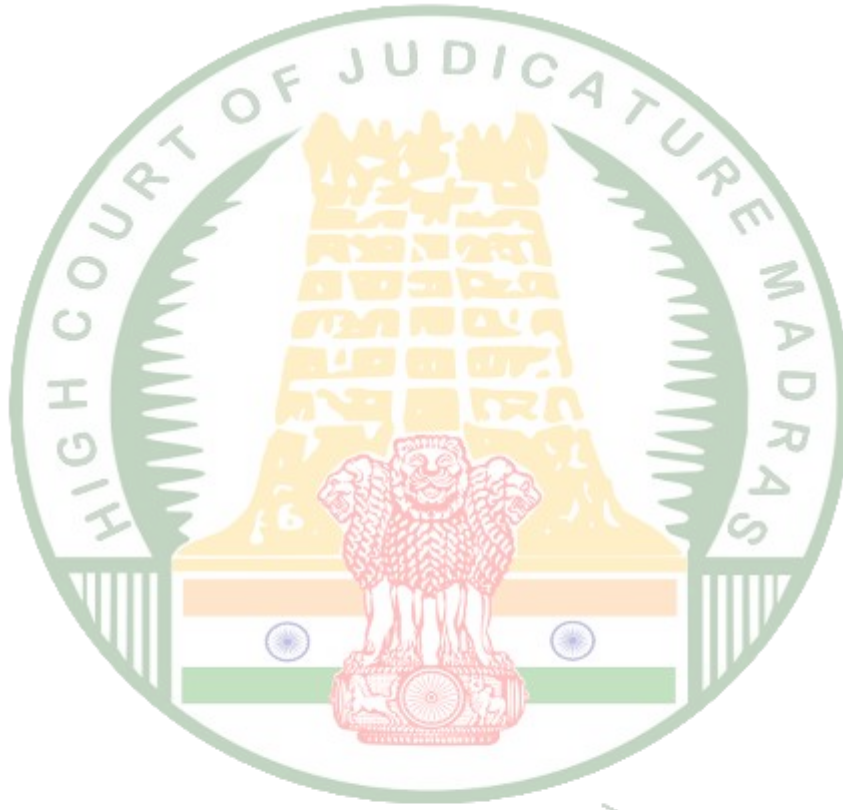
+1cc to Mr.K.Govi Ganesan, Advocate SR.No.4465

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C.M.P.No.7734 of 2016

NMI (CO)
GMY (06/03/2020)



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