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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 23.02.2021	Pronounced on: 29.03.2021
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CORAM:

THE HONOURABLE Ms. JUSTICE R.N.MANJULA

S.A.No. 359 of 2010

1.Ramasamy
2.R.Balakrishnan
3.R.Madhappan

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

Vs.

1.Rajagopal
2.C.Ramasamy

... 1st and 2nd Respondents/
Plaintiff/4th defendant

PRAYER: This Second Appeal is filed under Section 100 of C.P.C, against the judgement and decree of the learned Principal Subordinate Judge of Krishnagiri, dated 23.11.2009 in A.S.No.84 of 2006 reversing the judgement and Decree of the learned District Munsif of Krishnagiri dated 28.07.2006 in O.S.No.314 of 1995.

For Appellants : M/s. V.Nicholas

For Respondents : Mr.S.P.Mani for R1

: No appearance for R2

J U D G M E N T

This second appeal has been preferred against the judgment and decree of the learned Principal Subordinate Judge of Krishnagiri, dated 23.11.2009 in A.S.No.84 of 2006 reversing the judgement and Decree of the learned District Munsif of Krishnagiri dated 28.07.2006 in O.S.NO.314 of 1995.



2. The Appellants are the defendants.

3. The short facts of the appellants are as under:

WEB COPY The main plaintiff who is the 1st respondent herein, is represented by his mother. The 1st respondent/plaintiff is the son of the 1st appellant born through his wife Muniyammal. The 2nd appellant is the another son of the 1st appellant through his another wife Chandra. The 1st respondent/plaintiff and the appellants/defendants 1 and 2 were living as a joint family. The suit properties are the joint family properties. The plaintiff's mother married the 1st defendant and they were living together for a long time. Thereafter the first defendant's father deserted and started to live with one Chandra. Only then the plaintiff's mother came to know that the 1st defendant was already married to Chandra and she was his first wife and that the 2nd defendant is the son born to 1st defendant through his first wife Chandra. Since the 1st defendant was living only with the mother of the plaintiff she had no occasion to know about the 1st defendant's earlier marriage. Now the defendants are seriously trying to sell away the properties by depriving the plaintiff's share. Since the appellants 3 and 4 are the prospective buyers, they are also impleaded as parties. The plaintiff has filed this Suit for partition of his 1/3rd share in the suit schedule properties.

4. The short facts of the written statement of the 1st and 2nd defendants are in brief:

The relationship claimed by the plaintiff with the 1st appellant/1st defendant is denied. The plaintiff's mother got married to one Vediappan and the plaintiff was born to him. The plaintiff has come forward with the false claim that he is the son of the 1st defendant. The alleged marriage between the 1st defendant and the plaintiff's mother is also denied. The suit properties are the ancestral properties in which the plaintiff cannot claim any right. Hence the suit should be dismissed.

5. During the course of trial, on the side of the plaintiff 4 witnesses were examined and Exs. P1 to P16 were marked. On the side of the defendants 3 witnesses were examined and Exs.D1 to D9 were marked.

6. After the completion of the trial, the trial Court has dismissed the suit. However the trial Court has made an observation that the respondent/plaintiff was the son of the 1st



defendant born through his wife, Muniyammal. Aggrieved over the same, the plaintiff has preferred the first appeal before the Principal Sub Court, Krishnagiri. The First Appellate Judge allowed the appeal and passed a preliminary decree as prayed for by the plaintiff. Again aggrieved over the same, the appellants/defendants have filed this Second Appeal. The second appeal has been admitted on the following substantial questions of law:-

“(1) Whether the illegitimate child can claim share in the ancestral property belonging to his father?

(2) Whether the suit is bad for non-joinder of necessary party?”

7. Despite the courts below have given different verdict, both Courts have recorded an uniform finding that the respondent / plaintiff is the son, born to the 1st appellant/1st defendant. During the course of the argument also, the learned counsel for the appellant has fairly conceded that the respondent/plaintiff is the son, born to the 1st defendant. However, the appellants claimed that the respondent/plaintiff was the son of the 1st defendant born through his mother Valliammal without marriage and hence he is an legitimate child. It is further submitted that even if the marriage took place between the 1st defendant and the mother of the respondent/plaintiff was a void marriage for the reason that it had happened during the life time of the 1st wife of the 1st defendant without her consent.

8. The learned counsel for the appellant submitted that the trial Court has recorded that the 1st defendant and the plaintiff's mother Muniyammal have lived together as husband and wife and the same was not objected by the appellants before the First Appellate Court and hence the appellants are estopped from raising it in the second appeal. It is further submitted the 1st defendant and the plaintiff's mother had lived together and marriage is presumed between them and hence the plaintiff should be treated as legitimate son of the 1st defendant and he is entitled to a share in the suit property.

9. While recording the paternity of the plaintiff, the Courts below did not record any adverse findings as to his claim that his mother was married to the 1st appellant/1st defendant and that he born to the first appellant. It was not objected by the defendants even during the first appeal proceedings. Having accepted the same now the Appellants can not raise it here.



Further a marriage can be presumed between the two if they co-habit for a long time and conduct themselves as the wife and husband. The plaintiff's mother had lived with the first appellant/ first defendant until he deserted him, on the belief that he was her husband. Even though the first appellant/ first defendant had already married, the manner in which he treated the mother of the plaintiff would presume a marriage between themselves. However it is a void marriage because it had happened during the life time of the first wife of the first Appellant and without her consent.

10. As per Section 16(1) of the Hindu Marriage Act, children born out of a void marriage also legitimate children. However as per sec. 16(3) they cannot claim property rights from anyone except their parents. The learned counsel for the appellants placed his reliance on the following judgments in support of his argument that a child born out of a void marriage cannot seek any right of partition in the ancestral properties.

Sl. No	Citations submitted by the appellants counsel	Reported in
1	Neelamma and others Vs. Sarojamma and others	2006(9) SCC 612
2	Jayammal & 9 others Vs. V.Kumar & 4 others	2008(3) LW 483
3	Jinia Keotin & others Vs. Kumar Sitaram Manjhi & others	2003(3) LW 197
4	Minor Gopi, rep by mother and next friend Santhi Vs. Rathinam	2001(4) CTC 131
5	P.Kamakshi alias Kala Jacob Vs.P.Devaki and others	2002(2) MLJ 564
6	Chinnammal and 8 Others vs Elumalai And 4 Others	2000 II CTC 214
7	Margabandhu and Anr. vs Kothandarama Mandhiri And Ors.	1987 II MLJ 267
8	Perumal Gounder and another, Vs. Pachayappan and others	AIR 1990 Madras 110

11. In the decisions rendered by the Hon'ble Supreme Court in 2003 (3) LW 197 [Jinia Keotin & others Vs. Kumar Sitaram Manjhi & others], 2006 (9) SC 612 [Neelamma and others Vs. Sarojamma and others] and in the decisions of this Court reported in AIR 1990 Madras 110 [Perumal Gounder and another, Vs. Pachayappan



and others] and 2002 (2) CTC 214 [Chinnammal And 8 Others vs Elumalai And 4 Others] and 2001(4) CTC 131 [Minor Gopi, rep by mother and next friend Santhi Vs. Rathinam] and 2008 (3) LW 483 [Jayammal & 9 others Vs. V.Kumar & 4 others] it is uniformly held that the children who born out of void marriage cannot claim any share in the joint family property as a matter of right and their right in the property will be confined only to the share of their parents and they cannot inherit the properties of any other person.

12. The position of law has got corrected recently and the shift is in favour of the children of the void marriage. Until before the amendment of the Hindu Marriage (Amendment) Act in the year 1976, the children born out of the void marriage and voidable marriage were considered as illegitimate children. After the amendment, the stigma on the children born out of void and voidable marriage was removed and the law has recognized those children also legitimate.

13. Despite legitimacy of the child born out of void marriage is accepted, their right of inheritance in the ancestral properties, has been restricted to the share of his father. So it is the contention of the learned counsel for the appellants that the 1st respondent/plaintiff cannot file a suit for partition in the ancestral properties and claim his entitlement as a matter of right. It is further submitted that he is not entitled to 1/3rd share. However in the recent decisions of the Hon'ble Supreme Court, it is held that the entitlement of the children born out of the void marriage to the properties of their parents cannot be restricted only with regard to the self acquired properties.

14. In Revanasiddappa & Anr vs Mallikarjun & Ors [2011 (86) ALR 450] the Division Bench of the Hon'ble Supreme Court has held that in view of the amendment of Section 16(3), the earlier view with regard to void and voidable marriage has been completely changed. It is held that in the changing times, the status of such children and their rights in the property of their parents are also be recognized in a way beneficial to them. However their entitlement in the joint family property will be restricted to their share in their parent's right. For the purpose of convenience, the relevant portion of the above judgment is extracted below:

"33. With the amendment of Section 16(3), the common law view that the off springs of marriage which is void and voidable are illegitimate `ipso-



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jure' has to change completely. We must recognize the status of such children which has been legislatively declared legitimate and simultaneously law recognizes the rights of such children in the property of their parents. This is a law to advance the socially beneficial purpose of removing the stigma of illegitimacy on such children who are as innocent as any other children.

34. However, one thing must be made clear that benefit given under the amended Section 16 is available only in cases where there is a marriage but such marriage is void or voidable in view of the provisions of the Act.

35. In our view, in the case of joint family property such children will be entitled only to a share in their parents' property but they cannot claim it on their own right. Logically, on the partition of an ancestral property, the property falling in the share of the parents of such children is regarded as their self acquired and absolute property. In view of the amendment, we see no reason why such children will have no share in such property since such children are equated under the amended law with legitimate offspring of void marriage. The only limitation even after the amendment seems to be that during the life time of their parents such children cannot ask for partition but they can exercise this right only after the death of their parents."

15. It is further held that the right to property is guaranteed as a constitutional right. There is a guarantee against deprivation of the property right except by due process of law. That part of the above judgment is as extracted under:

"39. Apart from Article 39(f), Article 300A also comes into play while interpreting the concept of property rights. Article 300A is as follows:

"300A. Persons not to be deprived of property save by authority of law: No person shall be deprived of his property save by authority of law."

40. Right to property is no longer fundamental but it is a Constitutional right and Article 300A



contains a guarantee against deprivation of property right save by authority of law.

41. In the instant case, Section 16(3) as amended, does not impose any restriction on the property right of such children except limiting it to the property of their parents. Therefore, such children will have a right to whatever becomes the property of their parents whether self acquired or ancestral."

16. There are other judgments of the Division Bench of this court and the Hon'ble Supreme Court, where different views have been given and hence this issue is ordered to be placed before the larger bench. Since the judgement of Revanasiddappa is the latest in time and hence it can be relied on. However there is no change in the Law with regard to the recognition of children of void marriage as equal co-parceners. Since the plaintiff's right to claim property right is safeguarded and guaranteed as a constitutional right he can file a suit for partition. Section 16(3), limits the right of the children of void marriage to the property of their parents, the 1st respondent /plaintiff cannot claim an equal share in the ancestral property. Hence his entitlement in the ancestral properties can be 1/3 share in the 1/3 share of his father. So he is entitled to 1/9th share in the suit property. Thus substantial question of law No.1 is thus answered.

17. The Appellants /defendants have further submitted that the suit is bad for non-joinder of necessary parties. It is submitted by the respondent/plaintiff that the Appellant did not raise any objections as to the maintainability of the suit on the ground of non-jointer of necessary parties and so the trial Court ought not to have dismissed the suit on this ground. The learned counsel for the respondent/plaintiff relied on the following judgments to canvass his submission and the relevant paragraphs in those judgments are extracted below:

(i) In Rm.Al.Visalakshi Achi (died) and ... Vs. Rm.Seenivasan and three others reported in [1999(3) CTC 57] a learned single Judge of this Court has held as under:

"11....,"all objections on the ground of non-joinder or mis-joinder of parties should be taken at the earliest opportunity or at least at the time of settlement of issues or before such settlement and in the absence of such objection raised at the earliest



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opportunity, it must be deemed that the non-joinder of a party had been waived."

....

16. In the instant case, the non-joinder of Amirthavalli Achi has not been raised in the written statements and it must be held that the defence has been waived by the contesting respondents."

(ii) In Pe.Ramasamy Thevar Vs.Perumal Thevar and ors. reported in [1999(3) CTC 57] another learned single Judge of this Court has held as under:

"7..... Under Order 1, Rule 13, C.P.C., "all objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all cases where issue are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived". Under Order 2, Rule 7, C.P.C. "all objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity, and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived". A reading of the above said provisions would make it clear that in the absence of any plea in the written statement on the misjoinder of parties and misjoinder of cause of action, the trial court was not within its limits in framing issues on this aspect of its own accord and non-suiting the plaintiffs on the ground of misjoinder of parties. On the failure of the appellant to raise any objection regarding misjoinder of parties and cause of action before settlement of issues, the objection must be deemed to have been waived."

(iii) In the judgment of S.A.No.1134 of 2008 [Kannammal and others Vs.Saraswathi] yet another learned single Judge of this Court has held as under:

"13.A careful reading of above clearly



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discloses that there is no clear averment as to who are the co-owners and what exactly is the nature of right claimed by them. A vague statement of this character, in our considered opinion, could hardly be sufficient to non-suit the appellant on the ground of non-joinder of parties."

18. It is seen from the judgments of the Courts below that by necessary parties the Appellant meant the sisters of the first defendant. When this suit was filed, another suit O.S.No.235/1996, was also filed by the appellants for the relief of injunction and both the suits were tried jointly and a common Judgment is passed. Despite the sisters of the 1st defendant /1st appellant have been impleaded as parties to the other suit in O.S.No.235/1996, they have not got themselves impleaded as parties in this suit in O.S.No.314 of 1995. The learned First appellate Judge observed further that the sisters of the 1st defendant were married long back and they are settled and hence they have not evinced any interest to claim a share in partition.

19. In the written statement filed by the 1st and 2nd appellants/defendants, the plea with regard to the non-joinder of necessary properties was not raised. Further, the respondent/plaintiff has been given with a share in the share of his father as per Sec.16 (3). In that context of the matter, other relatives of the first Appellant/first defendant are not necessary parties to this suit. Thus substantial question of law No.2 is answered against the Appellants.

In the result, the present Second Appeal is partly allowed and the judgment and decree of the first appellate court is modified to the extent that the plaintiff is entitled to 1/9 share of the suit scheduled property and the preliminary decree is passed to that effect. No costs. The connected Miscellaneous Petitions if any are also closed.

Sd/-
Assistant Registrar(R)

//True Copy//

Sub Assistant Registrar

jrs



To

1. The Principal Subordinate Judge,
Krishnagiri.
2. The District Munsif Court,
Krishnagiri.
3. The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to M/s.V.Nicholas, Advocate, S.R.No.20673

+1cc to M/s.P.Mani, Advocate, S.R.No.20613

S.A.No.359 of 2010

KJ(CO)
SU(23/11/2021)