

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.09.2021

CORAM

THE HON'BLE MR.JUSTICE M.GOVINDARAJ

SA NO.443 OF 2013

1.T.Sivakumar

2.R.Suguna

... Appellants/Plaintiffs

VS.

1.T.Rajendran

2.G.Sowrnambiga

... Respondents/Defendants

PRAYER: Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree dated 16.03.2012 made in AS No.21 of 2011 on the file of the Principal District Court, Erode, confirming the judgment and decree dated 02.08.2010 made in O.S.No.8 of 2007 on the file of First Additional Subordinate Court, Erode.

For Appellants : Mr.V.P.Sengottuvel

For Respondent-1 : Mr.M.Guruprasad

J U D G M E N T

The unsuccessful plaintiffs are the appellants in the present Second Appeal.

2.The plaintiffs filed a Suit for partition against their brother and sister. The parties to the Suit are sons and daughters of one Thiruvenkatasamy. The first plaintiff and the first defendant are the sons and second plaintiff and the second defendant are the daughters. Thiruvenkatasamy along with his children constituted a Joint Hindu Family and being a co-parcener of the said Joint Hindu Family, the parties are entitled to equal share in the property. The father Thiruvenkatasamy being a Kartha of the Joint Hindu Family put up a pucca construction over the same for the benefit of the joint family and it is enjoyed by all of them as co-parceners. The said Thiruvenkatasamy died intestate on 28.05.2000 leaving behind him, his two sons, two daughters and his wife Saraswathi

as his legal heirs. The said Saraswathi also died intestate. Therefore, the parties are entitled to 1/4th share in the Suit property. The first defendant with an ulterior motive, created fraudulent unlawful and invalid documents threatening coercing his father, which according to them will not affect their right to title. Since the first defendant evaded partition for six months, the plaintiffs have approached the Court for partition.

3.The first defendant filed a written statement denying the averments made in the plaint. According to him, the properties are ancestral properties. The first plaintiff had unfortunately lost his eye sight due to his illness at his very young age. Therefore, he was given special education and his father got him a job in Lakshmi Mills. He preferred to settle at Coimbatore itself and the first plaintiff declared that he was neither willing nor able to take part in the activities of the family and he requested that he may be given a separate property at Coimbatore itself. Therefore, his father purchased the property at Sakthi Nagar, Singanallur Post, Coimbatore, using the family funds in lieu of his share in the properties at Erode. The first plaintiff accepted the arrangement and orally relinquished his right in the Suit property and got separated from the family and its properties. Therefore, he has no share in the Suit property. Hence, the property cannot be treated as a joint family property in respect of the plaintiffs and the second defendant.

4.The averment that the Thiruvengkatasamy, the father and his two sons viz., the first plaintiff and the first defendant, have jointly secured loan of Rs.1,00,000/- by mortgaging the property is false and it is only a procedural formality and that will not confer any right on the plaintiffs to seek for partition. In respect of daughters are concerned, they were given in marriage and as per the caste customs, huge amounts along with several jewels as Sridhana were given. Since the daughters were given in marriage in 1978 and 1981 respectively, Act 1 of 1990 is not applicable to them and therefore, they are not entitled to any share in the property and resisted for partition of the property.

5.The Trial Court after framing appropriate issues, dismissed the Suit holding that the first plaintiff has already relinquished his right over the Suit property and therefore, the first defendant is entitled to 50% as his share and the remaining 50% share through the WILL executed by the father and thus, he is entitled to entire property and the property is not liable for partition.

6.On appeal, the First Appellate Court had found that the Suit is bad for partial partition, even though it is held that the said Thiruvengkatasamy and his male heirs are entitled

to equal share. Aggrieved over the findings of the Courts below, the plaintiffs are before this Court.

7.The Second Appeal was admitted by this Court on 22.02.2019 on the following substantial questions of law:

"1)Whether the Courts below are right in accepting the oral relinquishment, when the 1st plaintiff, the 1st defendant and their father Late G.Thiruvengadasamy jointly mortgaged the suit property on 28.01.1998 in Ex.A.1?

2)Whether the Courts below are right in dismissing the suit by holding that the 2nd plaintiff and the 2nd defendant are not entitled to get share in their ancestral property, when Act 39 of 2005 conferred right on them, in the absence of any Partition which has been effected before 20.12.2004?

3)When the Courts below are right in holding that there was no suspicious circumstances prevail with regard to the Execution of Will in Ex.B.12, when the Will does not speak about disinheriting the 1st plaintiff who is a blind person from his young age and his 2 daughters?"

8.Heard the submissions made on either side.

9.The admitted facts are that the Suit property was purchased out of the sale proceeds of an ancestral property in the year 1946, by the father of the parties namely, Thiruvenkatasamy. First plaintiff and first defendant are the sons. First plaintiff lost his eyesight at his young age. He got employment in Laxmi Mills at Coimbatore, and settled in a house purchased in his name. The first defendant was all along living with his father. Father during his lifetime mortgaged the property along with his sons for a sum of Rs.1,00,000/- with Co-operative Bank for developing the property.

10.The dispute revolves around the division of status of the joint family and rights of parties for claiming partition of the Suit property.

11.The plaintiffs claim that there was no division of status among the co-parceners and they are entitled to equal share in view of the latest dictum of Hon'ble Supreme Court. On the other hand, the first defendant strongly rests his case on oral relinquishment made by the first plaintiff and his separation from the family and the marriage of daughters even before the enactment of Act 1 of 1990.

12.The evidence available before the Court elicit that a Suit was filed for partition by the first defendant against his father in O.S.No.637 of 1994 on 10.08.1994. It was decreed on 25.10.1994 pursuant to a compromise reached between the father and first defendant. Accordingly, the first defendant was allotted with 50% of share in the Suit property and remaining 50% allotted to father's share. Even this 50% share of the father was bequeathed in favour of the first defendant by a registered WILL dated 04.01.1995. These events are strongly objected by the plaintiffs and serious suspicions have been raised.

13.The Trial Court accepted the case projected by the first defendant. But the First Appellate Court varied from it and held that the Suit is bad for partial partition leading to the substantial questions of law.

14.At the outset, the admitted fact remains that the Suit property is a joint family property. The first defendant in the previous Suit filed against his father categorically plead that it is a joint family property. There is no averment in that plaint marked as Ex.A2 that there was oral relinquishment by the first plaintiff. In that event, the said Suit for partition, without impleading the first plaintiff as party is bad for non-joinder of parties. The decree passed in the Suit would not be binding upon the first plaintiff. The First Appellate Court has rightly rejected the contention of the first defendant that he got a right of 50% of the share in the joint family property by virtue of a decree passed by the Competent Court. Apart from this, it is noted that the Suit was instituted on 10.08.1994 and decreed on 25.10.1994. Surprisingly, the finality has been reached within a short span of two months. Normally, when a Suit is instituted in a Civil Court, summons will be issued giving two to three months for first hearing of the Suit. But, in the instant case, the defendant appeared, compromise memo filed and Suit was decreed in two months gives an impression that it was either a collusive Suit or some fraud played upon the Court.

15.Secondly, the Suit was filed excluding one of the co-parceners without setting out any reason for the same. Above all, the Suit was filed out of the misunderstanding that arose between the parties. The speed in which the Suit was filed, decree obtained and without notice to other co-parceners, whether they have any right or not raises serious suspicion as raised by the appellants / plaintiffs. Therefore, the finding of the appellate Court that without proof oral relinquishment decree of partition of 50% of the shares of a joint family property is not valid and binding on the plaintiffs. The further finding that bequeathing 50% of the share in the joint family

property by the father in excess of his 1/3 share is also justified.

16.Thirdly, the execution of the disputed WILL is shrouded with suspicious circumstances. If the WILL dated 04.01.1995 is true, it could have been informed to the first plaintiff by his father during his lifetime itself. There was no necessity for the father and the first defendant to include the first plaintiff as a party to the mortgage of the joint family property with the Co-operative Bank. If there was oral relinquishment and separation of first plaintiff is true, it should have been divulged to the Bank or at least to the first plaintiff. The execution of mortgage deed including the first plaintiff brings to the fore the surreptitious decree and so called WILL as collusive, fraudulent and illegal.

17.Fourthly, even assuming that there was a WILL executed by the father, it shall be proved in accordance with law. There shall be unambiguous proof as to its execution by reliable evidence. In the instant case, the disputed WILL was said to have been executed by the father of the parties in the presence of two attestors. But, the independent attestor or the witnesses who identified the execution were not examined before the Court. The propounder would depose he would not examine any of them. On the other hand, one of the attestors who is a close relative of the propounder was examined. The oral evidence adduced by the close relative of the beneficiary also does not gain confidence of the Court. In the absence of credible evidence or other evidence to prove the execution of the WILL, it cannot be said the same was proved and the first defendant has derived title to the entire property disentitling the other parties from claiming partition. The finding on this aspect by the trial Court is erroneous and it has been rightly set aside by the First Appellate Court.

18.In so far as the oral relinquishment is concerned, the First Appellate Court has rightly found that it has not been proved. It is well settled that the burden lies on the propounder of the disputed issue. The first defendant would plead that the first plaintiff had relinquished his rights. Hence, the burden lies on his shoulders to prove that there was oral relinquishment and that the first plaintiff had relinquished his rights. It has rightly been found that oral relinquishment as claimed by the first defendant is not supported by oral or documentary evidence. But, at the same time, there is no evidence to show that the property purchased in the name of the first plaintiff was out of the income of the joint family business. It is an admitted fact that the first plaintiff was employed at Coimbatore and was earning. The property was purchased in his name after his employment.

Therefore, a finding without framing an issue on this aspect and without any evidence on this aspect by the First Appellate Court is erroneous and perverse.

19. Besides this, the issue with regard to the rights of the married daughters in terms of Act 1 of 1990 and Act 39 of 2005 were also not framed and no evidence was adduced on this aspect. As of today, the claim for partition has not been finally decided as the Suit for partition has been dismissed by both the Courts.

20. The Hon'ble Supreme Court in VINEET SHARMA VS. RAKESH SHARMA AND OTHERS [MANU/SC/0582/2020] has held that the daughters are entitled to equal share even after the death of the father. The Hon'ble Supreme Court has answered the reference as under:

"129. Resultantly, we answer the reference as under:

(i) The provisions contained in substituted [Section 6](#) of the Hindu Succession Act, 1956 confer status of coparcener on the daughter born before or after amendment in the same manner as son with same rights and liabilities.

(ii) The rights can be claimed by the daughter born earlier with effect from 9.9.2005 with savings as provided in [Section 6\(1\)](#) as to the disposition or alienation, partition or testamentary disposition which had taken place before 20th day of December, 2004.

(iii) Since the right in coparcenary is by birth, it is not necessary that father coparcener should be living as on 9.9.2005.

(iv) The statutory fiction of partition created by proviso to [Section 6](#) of the Hindu Succession Act, 1956 as originally enacted did not bring about the actual partition or disruption of coparcenary. The fiction was only for the purpose of ascertaining share of deceased coparcener when he was survived by a female heir, of Class I as specified in the Schedule to the Act of 1956 or male relative of such female. The provisions of the substituted [Section 6](#) are required to be given full effect. Notwithstanding that a preliminary decree has been passed the daughters are to be given share in coparcenary equal to that of a son in pending proceedings for final decree or in an appeal.

(v) In view of the rigor of provisions of Explanation to [Section 6\(5\)](#) of the Act of 1956, a plea of oral partition cannot be accepted as the statutory recognised mode of partition effected by a deed of partition duly registered under the provisions of the [Registration Act, 1908](#) or effected by a decree of a court. However, in exceptional cases where plea of oral partition is supported by public documents and partition is finally evinced in the same manner as if it had been affected by a decree of a court, it may be accepted. A plea of partition based on oral evidence alone cannot be accepted and to be rejected outrightly."

21.As per the above decision rendered by the Hon'ble Supreme Court, the daughters are also considered as co-parceners and they got right retrospectively. Therefore, the death of the father in the year 2000 does not affect their rights as per the above cited judgment. In that view of the matter, the judgment and decree passed by the Courts below are not sustainable and it is declared that the parties are entitled to partition in equal moiety.

22.In view of the above discussions, the questions of law are answered in favour of the appellants and the judgment and decree dated 16.03.2012 passed in AS No.21 of 2011 by the learned Principal District Judge, Erode, confirming the decree dated 02.08.2010 passed in O.S.No.8 of 2007 on the file of First Additional Subordinate Court, Erode, is set aside. The Suit is decreed and a preliminary decree is passed and the parties are entitled to equal share.

23.In the result, the Second Appeal is allowed. No costs.

Sd/-
Assistant Registrar(CS-I)

//True copy//

Sub Assistant Registrar

TK

To

1.The Principal District Judge
Principal District Court
Erode.

2.The First Additional Subordinate Judge
First Additional Subordinate Court
Erode.

+1cc to Mr.M.Guruprasad, Advocate SR.No.47643

+1cc to Mr.VP.Sengottuvel, Advocate SR.No.47756

SA NO.443 OF 2013

EV(CO)
GMY(18/07/2022)