



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 11.03.2021

CORAM

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A.(MD)No.16 of 2015

K.Thangaraj

Appellant/Appellant/Plaintiff

Vs.

1.K.Ruckmony
2.K.Paul Raj
3.K.Jeyaraj
4.K.Mohanraj
5.K.Tamil Selvi
6.K.Thilagavathi
7.K.Selvarani
8.K.Jeya Sudha
9.N.Suyambulingam
10.T.Ravi

Respondents/Respondents/Defendants

PRAYER:- Second Appeal filed under Section 100 of Code of Civil Procedure, against the Judgment and Decree passed in A.S.No.58 of 2013, on the file of the Principal Subordinate Judge, Nagercoil, dated 11.02.2013, partly decreed the suit in O.S.No.469 of 2008, on the file of the Principal District Munsif Court, Nagercoil, dated 08.02.2013.

For Appellant : Mr.T.Selvakumaran
For R1, R2 & R4 to R10 : Ms.Shiva Dharshana
For R3 : No appearance

J U D G M E N T

The plaintiff in O.S.No.469 of 2008, on the file of the Principal District Munsif, Nagercoil is the appellant. Challenge is to the decree for partition granted by the Appellate Court, modifying that of the trial Court by reducing the share of the plaintiff to 1/9th from 1/7th share.

2.The plaintiff sued for partition, contending that the property belonged to one Kulandaivel, who died intestate on 14.09.1981, leaving behind the plaintiff and the defendants 1 to 8, to succeed to his estate. While the plaintiff and the defendants 2,3,4 are the sons of the said Kulandaivel, the first defendant is the wife and the defendants 5,6,7 and 8 are the daughters. The plaintiff would however claim 1/6th share in the suit properties on the ground that some of the properties were sold for the purposes of performance of the marriage of the defendants 5 to 7 and therefore, they are not entitled to share in the property. Thus excluding the defendants 5 to 7, the plaintiff sought for 1/6th share.



3.The suit was resisted by the defendants contending that the plaintiff's claim for 1/6th share is in fact legal and justifiable. It also claimed that certain properties were alienated for the purpose of legal necessities. The fact that some of the properties are alienated for the purpose of the performance of the marriage of the daughters would denude their right to claim their share from their father's estate.

4.At trial, the plaintiff himself was examined as PW 1 and Exs.A1 to A6 were marked. The first defendant was examined as DW 1 and Ex.B1 was marked. Though the plea was raised by the third defendant that the 7th item of the suit property was settled in favour of the third defendant, the same was rejected on the ground that no evidence was let in in support of the said plea.

5.The trial Court, upon consideration of the evidence available on record, agreed with the contentions of the plaintiff and concluded that the defendants 5,6 & 7 would not be entitled to a share, as some of the family properties were admittedly sold for the purpose of the marriage of those defendants. The trial Court upheld certain alienations made by the first defendant and granted a decree in respect of the suit items 1 to 9, except Item 4. The trial Court held that the mortgage in respect of item 3, would be binding on the plaintiff and declared the share to the plaintiffs subject to the mortgage. Aggrieved by the said decree of the trial Court, the plaintiff preferred an appeal in A.S.No.58 of 2013

6.The lower Appellate Court on re-appreciation of the evidence on record, concluded that the trial Court erred in excluding the defendants 5, 6 & 7 from succession to the estate of the deceased father. The Appellate Court rightly concluded such exclusion is unknown to law. On the said findings, though the defendants had not filed any appeal against the decree of the trial Court, the Appellate Court exercised its power under Order 41 Rule 33 of CPC, to do complete justice between the parties and modified the decree of the trial Court and granted, 1/9th share to the plaintiff in suit 1,3,7,8 and 9 only, since it found that the other items were not available for partition. Aggrieved, the plaintiff has come up with this Second Appeal.

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

- i. Whether the learned Principal Subordinate Judge is right in partly reversing the well considered judgment of the trial Court, when DW1 admitted in her cross examination that marriage was conducted by the first defendant only through the joint family property for defendants 5 to 7?



ii. Whether the learned Principal Subordinate Judge right in partly reversing the well considered judgment of the trial Court, when the learned Judge rejected shares in Item Nos.2,4 and 6?

8. Appeal heard on 16.02.2021. I had framed the following additional substantial question of law.

"Whether the lower Appellate Court was right in reversing the decree granted by the Court below in favour of the plaintiff in Appeal filed by the plaintiff himself without there being any Appeal or Cross Objection by the defendants, whose claim was rejected by the trial Court?"

9. I have heard Mr.T.Selvakumaran, the learned counsel appearing for the appellant and Ms.Shiva Dharshana, the learned counsel appearing for the respondents.

10. Mr.T.Selvakumaran, the learned counsel appearing for the appellant would vehemently contend that the Appellate Court was not right in exercising its power under Order 41 Rule 33, in the case on hand. According to him, the Appellate Court is not empowered to modify the decree to the prejudice of the appellant in an appeal filed by him. While conceding the power of the Appellate court to do complete justice, the learned counsel appearing for the appellant would contend that the Appellate Court ought not to have reversed the factual findings of the trial Court, which are in favour of the appellant. He would further contend that DW 1 has admitted that the marriages of the defendants 5,6 & 7 were performed by selling some of the family properties. Therefore, the trial Court was right in concluding that the defendants 5,6 & 7 would not be entitled to a share in the estate of Kulandaivel.

11. Contending contra, Ms.Shiva Dharshana, the learned counsel appearing for the respondents would submit that the Appellate Court was justified in invoking its power under Order 41 Rule 33. Drawing my attention to the judgment of this Court in **Annappoorani Vs. Janaki reported in 1995 1 LW 141**, where this Court had held that the Court shall pass a legally justifiable decree in partition suit and the Court shall not grant a larger share to the plaintiff, merely because the defendant remains exparte, the learned counsel for the respondent would vehemently contend that in view of the pronouncement of this Court, the Appellate Court was justified in invoking its power under Order 41 Rule 33. She would also point out that the Appellate Court had relied upon the judgment of the Honourable Supreme Court, **Subhodkumar and others Vs Bhagwant Namdeorao Mehetre and others, reported in 2007 11 SCC Page 75**, in respect of exercising power under Order 41 Rule 33.



12.I have considered the submissions of the counsel for the parties. As regards the submission of the learned counsel for the appellant with respect to the admission of DW 1, I have gone through the cross examination of DW 1 and I am unable to cull out any evidence to the effect that the properties were partitioned and sold, for the performance of their marriage. After all for the performance of marriage of daughters, is a recognized legal necessity under Hindu Law and it is the obligation of the father to perform the marriage of his daughters. Hence, the fact that some of the properties were sold for the purpose of performance of their marriage cannot be a ground to deny those defendants a share in the property of the father. I therefore find that the first question of law framed on 16.02.2015 has to be answered against the appellant. As regards the second and additional substantial question of law, that was framed on 16.02.2021, the judgment of this Court in **Annapoorani Vs. Janaki reported in 1995 1 LW 141** answers the issue. While considering the scope of a partition suit, this Court had observed as follows.

10. In any event, the Court ought to have borne in mind the provisions of the Hindu Succession Act and passed a decree in accordance with law. The Court has completely failed to apply its mind to the relevant provisions of law. It should also be noted that the evidence adduced before the Court does not also warrant the grant of a declaration as prayed for. The plaintiff's father who has given evidence as P.W.1, has merely stated that his daughter is the wife of deceased Velu, and that the property was purchased under Ex.1, Ex.A2 is a letter written by the deceased Velu to the plaintiff on 14.07.1983. Thus, on the totality of the evidence and the averments in the plaint, the only decree which could have been legally passed by the Court is to declare the right of the plaintiff to one half share and reject the prayer for recovery of possession. In the normal course, the plaintiff should have been directed to file a suit for partition.

11. When this Court finds that a decree suffers from an error of law apparent on the face of the record owing to non-application of mind of the Court, to the relevant principles of law, this Court cannot keep silent and allow the decree to be in force, particularly, when it causes grave injustice. There can be no doubt, whatever that under the Hindu Succession Act, certain persons are designated as Class I heirs and all of them are entitled to succeed to the estate of a deceased Hindu. There is no earthly



reason for depriving the mother of the deceased of her legitimate share in the estate which in this case happens to be a moiety. This is a typical case of miscarriage of justice which should be rectified the moment it comes to the notice of this Court. It is only for that reason, I am exercising my powers under Section 115 of the Code of Civil Procedure and Article 227 of the Constitution of India.

13. In a suit for partition, the Court is bound to grant the share, which the parties are entitled to, depending on the Law of succession. As rightly pointed out by the Appellate Court, the trial Court was not justified in rejecting the share of the defendants 5, 6 & 7. In a partition suit, the plaintiff's are the defendants and defendants are the plaintiffs. Therefore, in an appeal against the decree for partition, the Appellate Court has all powers to pass a legal decree. Therefore, the exercise of power under Order 41 Rule 33 by the Appellate Court cannot be said to be illegal. The second question of law and the additional question of law framed on 16.02.2021 are therefore answered against the appellants. The Second Appeal fails and it is accordingly dismissed. However, considering the relationship between the parties, there is no order as to costs.

Sd/-

Assistant Registrar (T&P)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

To

1. The Principal Subordinate Judge, Nagercoil

2. The Principal District Munsif, Nagercoil

Copy to

The Section Officer, V.R Section. (2C)
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s. T.SELVAKUMARAN, Advocate (SR-10616[F] dated 12/03/2021
+1 CC to M/s. M.P.SENTHIL, Advocate (SR-10650[F] dated 12/03/2021)

S.A. (MD) No.16 of 2015

Dated 11.03.2021

KMK (CO)

KB (29.04.2021) 5P 7C

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