



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 18.02.2022	Pronounced on : 03.03.2022
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THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

Appeal Suit Nos.341 & 353 of 2015

A.S.No.341 of 2015:-

1. Chinnusamy, (Rep by Power Agent Krishnaveni)
2. Thangavel, ... Appellants/Defendants

/versus/

S.Thangammal, ... Respondent/Plaintiff

Prayer: Appeal Suit is filed under Section 96 of C.P.C., against the judgment and decree dated 26.02.2015 in O.S.No.154 of 2013 on the file of the Additional District Court, Namakkal so far as it relates to granting a decree for partition in favour of the plaintiff, the respondent herein for 1/3rd share in schedule 1 of the suit property.

For Appellants : Mr.D.Shiva Kumaran

For Respondent : Mr.T.Dhanyakumar

A.S.No.353 of 2015:-

S.Thangammal, ... Plaintiff/Appellant

/versus/

1. Chinnusamy,
(Rep. By Power Agent Krishnaveni).
2. Thangavel, ... Defendants/Respondents

Prayer: Appeal Suit is filed under Section 96 of C.P.C., praying to set aside the judgment and decree dated 26.02.2015 made in O.S.No.154 of 2013 on the file of the Additional District Court, Namakkal.



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For Appellant : Mr.T.Dhanyakumar

For Respondents : Mr.D.Shiva Kumaran

COMMON JUDGMENT

These two appeals are directed against the judgment and decree passed by the Trial Court in O.S.No.154 of 2013 filed for partition of the 1st and 2nd schedule of the suit properties. The Trial Court, while considering positively in favour of the plaintiff in respect of 1st schedule property, dismissed the suit in respect of 2nd schedule property. The defendants, who has lost the suit in respect of 1st schedule property had preferred A.S.No.341 of 2015. The plaintiff, who has lost the suit in respect of 2nd schedule property has preferred A.S.No.353 of 2015.

2. The short facts involved in this case as stated in the plaint is that, the 2nd defendant/Thangavel is the father of plaintiff/Thangamal and 1st defendant Chinnusamy. The plaintiff claiming suit schedule properties are ancestral properties and jointly held by Thangavel and his two children, prepared the suit for partition. According to the plaintiff, the properties enumerated in 1st schedule of the plaint was ancestral property of Thangavel, which he got through the partition between his parents, brother and son vide registered deed dated 31.07.1981. From out of the said nucleus, 2nd schedule property was purchased. While so, both 1st and 2nd schedule of the suit properties have attained the character of coparcener property and available for division between sons and daughter of Hindu Male Karta namely Thangavel. The amended Hindu Succession Act, 39/2005 recognises the female heirs as coparcener along with male heirs, while so ignoring the right of the daughter, who is the plaintiff, her father Thangavel executed a release deed on 11.02.2013, in favour of his son Chinnusamy, the 1st defendant in respect of property mentioned under 1st schedule. Such release in favour of one of the coparcener will inure the right and enlarge the right of other coparcener. Therefore, the plaintiff is entitled for $\frac{1}{2}$ share in the properties mentioned in 1st schedule.

3. Regarding the property mentioned in 2nd schedule, being the property purchased from the ancestral nucleus and surplus also carries character of ancestral property in which the plaintiff is entitled for $\frac{1}{3}$ rd share. The 2nd defendant in



respect of this property had clandestinely executed a registered settlement deed on 03.02.2013 in favour of his son Chinnusamy/ the 1st defendant . This came to the knowledge of the defendant only on 01.10.2013. The said settlement deed is void and will not take away the share of the plaintiff in the suit 2nd schedule property. Therefore, the suit is laid claiming $\frac{1}{2}$ share in the 1st schedule and $\frac{1}{3}$ rd share in 2nd schedule of the suit properties.

4. The 2nd defendant denying the averments made in the plaint filed had contended that after the partition between him, his parents and brother on 31.07.1981, the 1st schedule property has become the absolute property held jointly by the defendants. Thereafter, the property has no trace of coparcener character. In any event, since division has been effected prior to 20.12.2004, the plaintiff being a female heirs, she can have no right in the property. Therefore, the release of his right in favour of 1st defendant vide release deed dated 11.02.2013 is valid.

5. As far as 2nd schedule property is concerned, same was purchased by the 2nd defendant on 24.10.1994 from out of his independent earning. Being his absolute property, he has every right to deal with it as per his wish. He, out of love and affection, had settled the 2nd schedule property in favour of his son/1st defendant on 08.02.2013. The plaintiff is not a coparcener and the property is not an ancestral property, hence the suit filed by the plaintiff for partition is bad in law.

6. The Trial Court, after considering rival pleadings framed the following issues:-

(i). Whether it is true that the plaintiff is not the coparcener since partition effected before 20.12.2004?

(ii). Whether it is true that suit 2nd schedule property is the self acquired property of 2nd defendant.

(iii). Whether it is true that the court fee is to be calculated under Section 37(1) of Court Fee Act?

(iv). Whether the plaintiff is entitled to $\frac{1}{2}$ share in schedule A of the suit property and $\frac{1}{3}$ share in Schedule II of the suit property?

(v). To what relief the plaintiff is entitled in to?



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7. Before the Trial Court, the plaintiff has mounted the witness box and was examined as P.W.1. 7 exhibits were marked on behalf of the plaintiff. On behalf of the defendant, 2nd defendant mounted the witness box, no documents marked.

8. On considering the evidence, the trial Court held that 1st schedule of the suit property carries the character of ancestral property. The partition effected under Ex.A.1 dated 31.07.1981 allotting the 'A' schedule property to the defendants will not takeaway the character of coparcener property. Therefore, said division was though prior to 20.12.2004, the right of the plaintiff being female heir will not be taken away. Therefore, passed the preliminary decree in favour of the plaintiff declaring her 1/3 share in the 1st schedule property.

9. Regarding 2nd schedule property, the Trial Court held that it is not a property held jointly by the family members. It is the absolute property of the 2nd defendant when he is alive, his daughter who is the plaintiff has no right or claim in the property and 2nd defendant, who is the absolute owner of the 2nd schedule property had already gifted the properties in favour of the 1st defendant through Ex.A.2. The plaintiff not challenged the validity of the said document, hence she is not entitled for any share in the suit property. Being aggrieved by the judgment and decree of the trial Court partly allowing and partly dismissing the suit, both the plaintiff against the disallowed portion and 1st defendant against the allowed portion are before this Court by way of appeals.

Point for consideration:-

(i). Whether in view of the partition deed dated 31.07.1981, the 1st schedule property allotted to the defendants become an obstructed heritage?

(ii). Whether any material evidence available to show that 2nd schedule property was purchased from the surplus income derived from 1st item property?

10. The points involved in this case is whether the property divided between the family members in the year 1989 under Ex.A.1 is an obstructed heritage of Mitakshara Hindu family or unobstructed heritage available for all the surviving coparcenar.

11. Reading of the recital found in Ex.A.1 dated 31.07.1981, it indicates that it is a deed of partition between



Perumal Gounder his wife, their children Thangavel, Ponnuvel, Muthuvel and minor son Chinnusamy. The few essential facts disclosed in the deed is that, the parties to the document say they form part of undivided Hindu joint family and the property mentioned in the deed has been devolved on Perumal Gounder, his son, Thangavel, Muthuvel and Ponnuvel jointly under a Will dated 19.10.1974 and kept undivided till the date of this partition deed.

12. From the recital (Ex.A.1), we find that a larger extend of land including 'A' schedule held by Perumal Gounder (Sr) and it was bequeath to his son Perumal Gounder (Jr) through a Will dated 19.10.1974. This property held by Perumal Gounder and his sons Thangavel, Ponnuvel and Muthuvel got divided under the Will of their father held those properties undivided. Under Ex.A.1 dated 31.07.1981. The said partition is among Perumal Gounder (Jr) his wife Dhanapalammal, his sons Thangavel, Muthuvel and Ponnuvel and grand child Chinnusamy born to Thangavel. The properties enlisted under the 1st schedule of the property were allotted jointly to Thangavel and his minor son Chinnusamy. In the said deed, there is also a reference that before this partition, the respective parties to the deed have established their own individual family and living separately carrying on business individually and enjoying the properties separately according to their convenience. To record, the said division in the presence of elders and relatives the deed of partition has been executed. Perumal Gounder and his wife Dhanapalammal were not interest in getting any share for themselves in the property reserved their right of maintenance and same has been recorded. Under this partition deed, the 1st schedule property has been allotted to Thangavel and his minor child Chinnusamy. They are the defendants in this suit. From the recital of this partition deed Ex.A-1, it is clear that Thangavel and son Chinnusamy got this property jointly in a division effected among the family members as early as 31.07.1981. This division is in respect of property not inherited by succession but through a Will executed by the father of the 2nd defendant. No doubt, in Ex.A.1, the properties are described as ancestral property bequeath by Perumal Gounder under a Will dated 19.10.1974 as "பூர்வீகமாயும் காலவஞ்சென்ற நம்மில் 1 நபரின் தகப்பனும் 3, 4, 5 லக்கமிட்டவர்களின் தகப்பனும் ,,, சொன்ன வெ.எ.பெருமாள் கவுண்டர் 19.10.1974ம் தேதி பதிவுசெய்யப்பட்ட உயில் சாசனப்படியும் நம்மில் 1, 4, 5 லக்கமிட்டவர்களுக்கு சர்வதந்திரமாய் பாத்தியப்பட்டது"

13. It is clear from this recital that the property which was ancestral in nature individual properties acquired by the brothers and property inherited through a Will were consolidated by Perumal Gounder and his sons. They were enjoying their



respective piece of property informally before effecting a formal division under Ex.A.1. Therefore, undoubtedly this property which is now the subject matter of the suit had lost its coparcener character due to the obstruction. Initially, by a Will dated 19.10.1974 and the subsequent partition deed (Ex.A.1) dated 31.07.1981.

14. After the amendment of Section 6 of Hindu Succession Act 39/2005, which includes the female heir to inherit the coparcenary property by survivorship is only in respect of unobstructed heritage and not in respect of obstructed heritage. The new provision retains succession to the property by either testamentary or interstate succession. The change which has been brought in is in respect of the daughters right as a coparcener. Contrarily under the old law, women were not treated as coparceners and the devolution of interest in the coparcener property was restricted only to the male members. Either under the old Act or after amendment to treat the property as coparcenary property to apply section 6 of the Hindu Succession Act, the heritage must be unobstructed for three generations.

15. In *Ganduri Koteswaramma -vs- Chakiriyani* and another reported in (2011) 9 SCC 788, the Hon'ble Supreme Court has held that,

"Sub-section (5) of Section 6 leaves no room for doubt as it provides that this section shall not apply to the partition which has been effected before 20-12-2004. For the purposes of new Section 6 it is explained that "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 or partition effected by a decree of a court. In light of a clear provision contained in the Explanation appended to sub-section (5) of Section 6, for determining the non-applicability of the section, what is relevant is to find out whether the partition has been effected before December 20, 2004 by deed of partition duly registered under the Registration Act, 1908 or by a decree of a court."



16. It is made clear in Vineeta Sharma -Vs- Rakesh Sharma and others reported in (2020) 9 SCC 1 that disposition or alienation including partitions which may have taken place before 20th December 2004 as per law applicable prior to the said date will remain unaffected. (Emphasis added)

17. In the case in hand, after the partition on 31.07.1981 under Ex.A.1, the share allotted to the defendants has become their separate property held jointly and the said severance of status cannot be ignored.

18. In this context, it is also appropriate to refer the relevant proviso to Section 6 of the Hindu Succession Act, 39/2005, which specifically excludes the property which has been obstructed by disposition and which was subject to disposition.

"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



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incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act, or any other law for the time being in force, as property capable of being disposed of 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.

Explanation.—For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.



19. Under the Will of V.E.Perumal Gounder(Sr) executed on 19.10.1974 and the first schedule suit property devolved Perumal Gounder(Jr). Later under Ex.A-1, dated 31.07.1981, Perumal Gounder along with his sons and the grand-child with specific recital that these properties along with the other properties enjoyed separately as per convenience and this partition is to record the same. Therefore, during the life time of Thangavel or his son Chinnusamy, succession to the legal heirs will not open. While so, the plaintiff, who is the daughter of Thangavel, till his lifetime, can have no right in the property of her father, which her father got under the partition deed.

20. Merely because the properties were allotted under the partition deed between father, sons and grand son will not gain the character of coparcener. Unless, enough material is available to show that the properties devolved without obstruction for 3rd generations and the plaintiff is the member of 4th generation. Only if a property inherited by Hindu, from his father, grand-father, great-grandfather, will become an unobstructed heritage as regards to his own male issues i.e., son, grand son, great-grand son. Now, after the amendment of Hindu Succession Act 39/2005, same has to substitute with expressions as children, grand children, great-grand children. If the property has crossed 3rd generations, without obstruction the 4th generation become the coparcener and entitled to share the property on their birth applying survivorship. When there is an obstruction in the heritage, the property lose its character of coparcener and the advantage of inheriting the property by survivorship gets lost.

21. Therefore, this Court holds that on the execution of the partition deed dated 31.07.1981, the 1st schedule property has become separate property of defendants 1 & 2 and had lost the character of ancestral property, even if he had any earlier. Hence, the Trial Court passing a preliminary decree in respect of 1st item property treating it as an ancestral property is liable to be inferred and set aside. Hence the appeal filed by the appellants/Defendants in A.S.No.341 of 2015 is bound to be allowed and the appeal filed by the Appellant/Plaintiff in respect of 2nd schedule property on the premise it was purchased from out of the income derived from the 1st schedule property has to be dismissed. The Trial Court finding in respect of 2nd schedule property has to be confirmed.



22. Accordingly, the Appeal Suit No.341 of 2015 is allowed and A.S.No.353 of 2015 is dismissed. In the result, the judgment and decree of the trial Court in O.S.No.154 of 2013 is set aside and the suit for partition is dismissed in toto. Considering the relationship to the parties, there shall be no order as to costs.

SD/-
ASSISTANT REGISTRAR

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SUB ASSISTANT REGISTRAR

To:-

1.The Additional District Court,
Namakkal.

2.The Section Officer,
V.R.Section, High Court, Madras.

+2cc to Mr.T.Dhanyakumar, Advocate Sr.14804, 14373

+2cc to Mr.D.Shivakumaran, Advocate Sr.14060, 14061

Appeal Suit Nos.341 & 353 of 2015

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srg 04/04/2022