

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :07.02.2022

Pronounced on :17.02.2022

Coram::

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

Appeal Suit No.1016 of 2008

V.Bakkiyam

..Appellant/Plaintiff

/versus/

1.C.Kandasamy Gounder(died)

2.K.Murugan

3.Sanjai Savla

4.Major Sibi Chakravarthy @ Magudeeswaran

5.Major Mageswaran

(memo dated 23.04.2013 recorded in
S.R.No.3246 vide Court order dated
07.02.2022 made in A.S.No.1016 of 2008)
(1st respondent died, sole appellant and R2
brought into record as LR of the deceased
1st respondent viz (C.Kandasamy Gounder)
vide Court order dated 07.02.2022 made
in A.S.No.1016 of 2008 (Dr.GJJ))

(RR4 & 5 declared as major and
the guardian R3 viz Sanjai Sevla
discharged from the guardianship
vide Court order dated 20.12.2021
made in C.M.P.Nos.21054 & 21055
of 2021 in A.S.no.1016 of 2008
(AANJ))

..Respondents/Defendants

Prayer: Appeal Suit has been filed under Section 86 of C.P.C.,
praying to set aside the judgment and decree dated 30.06.2008
and made in O.S.No.100 of 2006 on the file of the Additional
District Judge/Fast Track Court No.2, Salem.

For Appellant :Mr.R.Thiagarajan for
Mr.T.Gowthaman

For Respondents :Mr.P.Jagadeesan for R2, R4 and R5
Mr.D.M.Senthil Kumar for R3
R1-died

J U D G M E N T

Suit for partition filed by the sole appellant herein was dismissed by the trial Court. Being aggrieved by the judgment of dismissal, the present Appeal Suit is filed.

2.For clarity sake, parties are referred to their status and ranking found in the trial Court decree.

3.Brief facts of the case as per the plaint is that, Kandasamy Gounder (first defendant) had two wives. The plaintiff is the daughter of his senior wife Pongiammal. The first defendant got separated from his senior wife and married the mother of the second defendant in the year about 1968. The mother of the plaintiff died in the year 2001. The suit properties are the ancestral properties of the first defendant. Hence, as per the Hindu Succession (Amendment) Act, 2005, being the daughter of the first defendant, the plaintiff has sought for 1/3rd share in the suit property. In support of the said claim, the plaintiff has relied upon the joint sale of the ancestral property on 19.08.2002 by the family members, to show it has been jointly enjoyed by the plaintiff and the defendants. The plaintiff had contended that the defendants among themselves excluding her had created a registered deed of partition on 21.01.2004 in respect of the ancestral property. The said partition is non-est in law and fraud played against the plaintiff. On the very same day, the first defendant had settled the properties in favour of the second defendant's minor sons. The partition deed and the subsequent settlement deed have no binding effect on the plaintiff. Hence, after making a demand for partition, the suit for partition claiming 1/3rd share in the suit schedule property came to be instituted.

4.The first defendant, who is the father of the plaintiff, in his written statement, had contended that, the plaintiff does not form part of the Hindu joint family. The suit properties are not Hindu joint family properties. The Hindu Succession (Amendment Act) 2005, will not apply to the

plaintiff. Therefore, the plaintiff have no right to claim 1/3rd share in the suit property. The suit schedule properties were subjected to partition on 21.01.2004 and the partition deed was duly registered. As per the registered partition deed dated 21.01.2004, "A" schedule property measuring 03.22 acres in S.No.123/1 of Gajjainaickenpatti Village with half share in the well and five horse power electric motor and pumpset, allotted to the first defendant. The second defendant was allotted 2.25 acres of land with half share in the well and five horse power electric motor and pumpset. Thereafter, the first defendant had settled his portion of property in favour of the minor sons of the second defendant. The partition deed followed by the settlement deed are valid. The heritage got obstructed prior to amendment. The subsequent amendment to Section 6 of the Hindu Succession (Amendment Act), 2005 does not invalidate any registered document, which came into effect prior to 20.12.2004.

5. According to the first defendant, the plaintiff was born somewhere in 1942. She got married prior to 25.03.1989. When the father is alive, the plaintiff as a daughter have no right to succession during the lifetime of her father. She is not a co-parcener as defined under Section 6 of the Hindu Succession (Amendment Act), 2005. It is true that the ancestral house built in the village natham was sold on 14.08.2002. The plaintiff was asked to sign in the sale deed at the request of the purchaser and she executed the deed not as a sharer of the property. Being a vexatious suit, it has to be dismissed with costs.

6. According to defendants 4 and 5, the minor sons of the second defendant became entitled to the properties measuring 3.22 acres in S.No.123/1 of Gajjalanaickenpatty Village with half share in the well and electric motor and pumpset by virtue of a registered settlement deed dated 21.01.2004. The father of the minors, who is the second defendant took permission of the District Court in G.O.P.No.39 of 2007 to sell the minors' property and on obtaining permission, this property was sold to the third defendant and proceeds of sale has been invested in other immovable property fetching better income. The property was sold for value to the third defendant, who is a bona fide purchaser. The plaintiff, who have no right to question the alienation, is not entitled to sustain the suit for partition.

7. Based on the pleadings, the trial Court has framed the following Issues:-

(1) Whether the suit properties are joint family properties?

- (2) Whether the plaintiff is entitled for 1/3rd share?
- (3) Whether the suit properties not yet subjected to partition?
- (4) Whether the plaint is maintainable?
- (5) What other relief the plaintiff is entitled to?

8. The following Additional Issues were framed subsequently on 27.12.2007:-

(1) Whether the settlement deed in favour of the minors is valid and whether it had come into effect?

(2) Whether the sale in favour of the third defendant is valid and enforceable?

9. To prove the claim, the plaintiff examined two witnesses and marked four exhibits. On behalf of the defendants, in defence, two witnesses were examined and 1 exhibit was marked.

10. The trial Court, after considering the oral and documentary evidence, held that when the first defendant got separated from the mother of the plaintiff, he had settled 2.10 cents of land in her favour and the said land has not been enjoyed by the plaintiff and therefore, the plea of the plaintiff that the properties of the first defendant have jointly been enjoyed by the plaintiff and the defendants found to be false and there was no joint enjoyment of the suit property by the plaintiff along with the defendants 1 and 2. Contrarily, the partition deed (Ex.A3) duly executed between the first defendant and the second defendant supported by evidence that the suit properties were exclusively enjoyed by defendants 1 and 2 alone. Therefore, there is no illegality as alleged by the plaintiff in the partition followed by settlement. Hence, the trial Court held that the plea of the plaintiff that the suit property was never subjected to alienation or division, is false. Held the partition deed dated 02.01.2004 a valid document and the settlement by the first defendant in favour of the defendants 4 and 5 also valid. Further, the trial Court relying upon the judgment rendered in (2008 (1) MLJ 560 [Angammal and others v. C.Sellamuthu and others]) held that a right of a female daughter as a co-parcener in the ancestral property gets accrued only 09.09.2005. The date on which the amendment came into force and the Act specifically exclude the properties already subjected to alienation, transfer, mutation, division etc., prior to 20.12.2004. Therefore, in this case, the plaintiff, who got marriage in the year 1962, cannot claim right

over the property by virtue of Section 6 of the Hindu Succession (Amendment Act), 2005 as a co-parcener, since the property has already been subjected to division and alienation.

11. In sum and substance, the trial Court held that the plaintiff, who got married in the year 1962 cannot claim share in the ancestral property, which was subjected to partition prior to 20.12.2004. The aggrieved plaintiff in her grounds of the appeal has stated that the judgment of the Court below is contrary to law and principle laid down by the Hon'ble Supreme Court, interpreting Section 6 of the Hindu Succession (Amendment Act), 2005.

12. According to Mr. R. Thiagarajan, the learned counsel appearing for the appellant, having recognised the right of the plaintiff in the ancestral property and selling the ancestral house jointly in the year 2002 (Ex.A1) and yet another property in the year 1999 (Ex.A4), the defendants cannot deny the share of the plaintiff in the other ancestral properties, which are the subject matter of the suit. It is contended that the partition deed (Ex.A3) and the settlement deed (Ex.A2) are sham and nominal documents, which are created for the purpose of defeating the right of the plaintiff.

13. Relying upon the judgment of the Hon'ble Supreme Court rendered in Vineeta Sharma v. Rakesh Sharma and others reported in (2020) 9 SCC 1, the learned counsel appearing for the appellant would emphasise that the right of the female member of the family over the ancestral property is absolute par with male heirs as a co-parcener and in this case, though the plaintiff was married as early as 1962, her right over the ancestral property cannot be deprived. The amendment has retrospective effect and the sham and nominal partition deed will not take away the daughter's lawful claim.

14. Mr. P. Jagadeesan, the learned counsel appearing for the respondents 2, 4 and 5 would submit that including the plaintiff as one of the parties to the sale deed at the instance of the buyer will not convey any share or right over the property. Admittedly, the suit property is the ancestral property and the partition among the co-parceners was effected through the partition deed dated 02.01.2004 (Ex.A3). Based on the said partition deed, the subsequent settlement deed (Ex.A2) in favour of the minors was settled. Thereafter, on getting permission of the District Court in G.O.P.No.39 of 2007 vide order dated 25.04.2004 (Ex.B1), the property was sold in favour of the third defendant.

15.Mr.D.M.Senthil Kumar, the learned counsel appearing for the third respondent states that he is a bona fide purchaser for value, based on the registered partition deed, registered settlement deed and permission granted by the competent Civil Court to deal with the minors' property. Therefore, he prayed that the judgment of the trial Court has to be confirmed.

16.The point for determination in this appeal is,
Whether the partition deed dated 02.01.2004 (Ex.A3) followed by the settlement deed dated 21.01.2004 (Ex.A2) will dis-entitle the appellant seeking partition of the suit schedule property by virtue of Section 6 of the Hindu Succession (Amendment) Act, 2005?

17.The facts elucidated through evidence indicates that the suit property devolved on the first defendant as ancestral property. The plaintiff is the daughter of the first defendant. The plaintiff got married in the year 1962. The suit property was subjected to partition among male members of the family i.e the father and son by virtue of a registered partition deed dated 02.01.2004 (Ex.A3). The first defendant, out of love and affection had settled his share of property in favour of his grandsons, who are none other than the sons of the second defendant. The said settlement deed is also duly registered on 21.01.2004 and acted upon by getting permission of the District Court in G.O.P.No.39 of 2007. The same has been sold in favour of the third respondent.

18.The recital found in Exs.A1 and A4, which are the sale deeds executed by the defendants 1 and 2 along with the plaintiff, reveals that the property stood in the name of the first defendant and he is the prime vendor and only as a precaution the plaintiff and the second defendant as the legal heirs of the first defendant have been arrayed as party to the sale deed and they have executed the sale deed jointly. The property sold or the property retained by the first defendant has never been accepted to be the joint family property upon which the plaintiff have no animus.

19.The specific case of the plaintiff/appellant is that though she was married in the year 1962, the suit properties were in joint possession and enjoyment. However, there is no document or evidence to substantiate the said claim. She admits that her father Kandasamy gounder (first defendant) while got

separated from her mother Pongiammal, settled 2 acres 10 cents of land and the same is in her possession. Her mother died on 27.12.2000. She had been a party to two sale deeds along with Kandasamy and Murugan the first and second defendants respectively. Those sale deeds are executed on 09.08.1999 and 19.08.2002. In these documents, the recital clearly indicates that the property is the ancestral property of Kandasamy gounder, who is the father of the plaintiff. The others were included as vendors in the capacity of legal heirs of Kandasamy gounder. The plaintiff admits that the negotiation for the sale of property which is the subject matter of Ex.A1 and Ex.A4 was done by her father Kandasamy Gounder and consideration was received by her brother Murugan. While so, the plea of the defendants that the plaintiff was added as a party in these two sale deeds only at the instance of the buyer stands vindicated. If really the plaintiff had any animus over those properties, she would have give share in the sale proceeds.

20.As far as the alienation of the property in favour of the third respondent, pursuant to the partition deed, it is appropriate to refer Sections 6(1) and 6(5) of the Hindu Succession Act, 1956, which were amended in the year 2005, which reads as below:-

6(1)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 liability 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.

6(5): Nothing contained in this Section shall apply to a partition, which has been effected before the 20th day of December, 2004.

Explanation: For the purposes of this section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908), partition effected by a decree of a Court.]

21.The learned counsel appearing for the appellant heavily relying upon the judgment of the Hon'ble Supreme Court in [Vineeta Sharma v. Rakesh Sharma and others reported in (2020) 9 SCC 1] case submitted that the said partition deed is a sham and nominal document and therefore, Section 6(5) of the Hindu Succession Act, 1956 has no relevancy to the facts of the case and based on the dictum laid down by the Hon'ble Supreme Court in Vineeta Sharma case, the appellant is entitled for 1/3rd share in the ancestral property.

22.Section 6 of the Hindu Succession Act, which has enlarged the scope of coparcenary by way of amendment has a rider in Section 6(5). Therefore, to extent the benefit of amendment the estate of the coparcenary must remain unobstructed. If it is an obstructed heritage, Section 6 of the Act will not enure any benefit to the appellant herein. In the instant case, the marriage of the appellant took place in the year 1962 and she had been living separately. She admits that after the demise of her mother in the year 2000, there was no contact between the appellant and her father. In Vineeta Sharma case, the Hon'ble Supreme Court made the following observations about obstructed heritage and unobstructed heritage referring the treatise on Hindu law by Mulla.

48.In Mitakshara coparcenary, there is unobstructed heritage i.e. apratibandha daya and obstructed heritage i.e. sapratibandha daya. When right is created by birth, it is called unobstructed heritage. At the same time, the birthright is acquired in the property

of the father, grandfather, or great-grandfather. In case a coparcener dies without leaving a male issue, right is acquired not by birth, but by virtue of there being no male issue, it is called obstructed heritage. It is obstructed because the accrual of right to it is obstructed by the owner's existence. It is only on his death that obstructed heritage takes place. Mulla on Hindu Law has discussed the concept thus:

"216. Obstructed and unobstructed heritage.— Mitakshara divides property into two classes, namely, apratibandha daya or unobstructed heritage, and sapratibandha daya or obstructed heritage.

(1) Property in which a person acquires an interest by birth is called unobstructed heritage, because the accrual of the right to it is not obstructed by the existence of the owner.

Thus, property inherited by a Hindu from his father, father's father, or father's father's father, but not from his maternal grandfather, [Mohd. Husain Khan v. Babu Kishva Nandan Sahai, 1937 SCC OnLine PC 48 : (1936-37) 64 IA 250 : ILR 1937 All 655 : 169 IC 1 : AIR 1937 PC 233; Om Parkash v. Sarvjit Singh, 1993 SCC OnLine HP 36 : AIR 1995 HP 92 (property inherited from person other than father, father's father, or father's father's father is obstructed heritage).] is unobstructed heritage as regards his own male issue i.e. his son, grandson, and great-grandson. [Sirtaji v. Algu Upadhyay, 1936

SCC OnLine Oudh CC 112 : ILR
(1937) 12 Luck 237 : 163 IC
935 : AIR 1936 Oudh 331] His
male issues acquire an interest
in it from the moment of their
birth. Their right to it arises
from the mere fact of their
birth in the family, and they
become coparceners with their
paternal ancestor in such
property immediately on their
birth, and in such cases
ancestral property is
unobstructed heritage.

Property, the right to which
accrues not by birth but on the
death of the last owner without
leaving a male issue, is called
obstructed heritage. It is
called obstructed, because the
accrual of right to it is
obstructed by the existence of
the owner.

Thus, property which devolves on
parents, brothers, nephews,
uncles, etc. upon the death of
the last owner, is obstructed
heritage. These relations do not
take a vested interest in the
property by birth. Their right
to it arises for the first time
on the death of the owner. Until
then, they have a mere spes
successionis, or a bare chance
of succession to the property,
contingent upon their surviving
the owner. [Mitakshara, Ch. I,
S-1, v-3.]

(2) Unobstructed heritage
devolves by survivorship;
obstructed heritage, by
succession. There are, however,
some cases in which obstructed
heritage is also passed by
survivorship."

23. In the light of the above explanation given by the Hon'ble Supreme Court in Veenta Sharma case, the registered partition deed dated 02.01.2004 (Ex.A3) is prior to 20th December, 2004. Soon thereafter, the first defendant had settled the property in favour of his grand minor sons under Ex.A2. Thereafter, for the interest of the minors with the Court permission the property has been sold to the third defendant and from the sale proceeds, alternate property has been purchased in the name of the minors. Ex.B1-sale deed in favour of the third defendant shows that he is the bona fide purchaser for value after permission from the Court to sell the minor's property.

24. The crucial date is 20.12.2004. To appreciate the appellant's claim devolution on female member of the family in respect of the co-parcenary property was recognised through the amendment. Unless on the date the property stood as unobstructed heritage, the female member of the family can have no right to claim share in the co-parcenary property under Section 6 of the Act. Obviously in this case, the plaintiff had no right in the property on her birth. Due to her marriage prior to 1989 and the registration of the partition deed prior to 20.12.2004, the heritage has got obstructed. If at all the plaintiff have any right over the father's property, it can only be under Section 8 of the Act, provided her father had died intestate. In the instant case, the suit property had lost its character of joint hindu undivided family property on 21.01.2004, when division among the male co-parcener given effect by a registered partition deed (Ex.A3), the share of the appellant's father being settled under Ex.A2, the appellant have no right in the suit property, in view of the proviso to Section 6(1) and restriction under Section 6(5) of the Act.

25. As far as the facts of this case is concerned, the plaintiff's father has already settled the property soon after the partition and thereafter, his grandsons who are the beneficiary of the settlement and they had sold away the property to the third respondent. Therefore, the judgment of the trial Court dismissing the suit is in accordance with law. The subsequent judgment of the Hon'ble Supreme Court in Vineeta Sharma case does not make any change in the legal proposition. Therefore, this appeal is liable to be dismissed as devoid of merits.

26. Regarding the purchaser of the suit properties, the learned counsel appearing for the third respondent contended that the third respondent is the bona fide purchaser and he

purchased the property after due verification of the documents particularly Ex.B1-Court order passed in G.O.P.No.39 of 2007. Though he has purchased the property pending suit, having purchased the property from the lawful owner, no relief can be granted to the plaintiff against the third defendant/subsequent purchaser.

27.In the result, this Appeal Suit is dismissed as devoid of merits. The judgment and decree dated 30.06.2008 made in O.S.No.100 of 2006 on the file of the Additional District Judge/Fast Track Court No.2, Salem are hereby confirmed. Taking into consideration the relationship between the parties, there is no order as to costs.

Sd/-

Assistant Registrar(CS-IX)

// True Copy //

Sub Assistant Registrar

ari

To:

1.The Additional District Judge/
Fast Track Court No.2, Salem.

Copy to:
The Section Officer,
V.R.Section,
High Court, Madras-104.

+1cc to Mr.I.Arokiasamy, Advocate SR.No.10027
+1cc to Mr.P.Jagadeesan, Advocate SR.No.10555
+1cc to Mr.T.Gowthaman, Advocate SR.No.10345

A.S.No.1016 of 2008

NRL(CO)
CB(10/03/2022)