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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 21-09-2021

Judgment Pronounced on : 24-01-2022

CORAM

THE HON'BLE MRS.JUSTICE S.KANNAMMAL

Civil Miscellaneous Second Appeal Nos.7 & 9 of 2013
and
M.P.Nos.1 of 2013

Mrs.Unnamalai

... Appellant in both CMSAs

-Versus-

1.Mrs.Thamizharasi
2.Mr.Arjunan
3.The Executive director,
Sri Raghavendra Chit Funds Pvt Ltd
Lakshminarayanan Street,
T.Nagar, Chennai 600017.

... Respondents in both CMSAs

Prayer in C.M.S.A.No.7 of 2013:-This Civil Miscellaneous Second Appeal is filed under Order 21, Rule 8 of CPC r/w Section 100 of CPC against the order of the learned Principal District Judge, Krishnagiri, dated 18.09.2012 passed in C.M.A.No.22 of 2010 confirming the order dated 21.01.2010 passed by the learned Principal Subordinate Judge, Krishnagiri, in R.E.A.No.64 of 2009 in R.E.P.No.66 of 2008 in A.R.C. (O.S.) No.614 of 1998.

Prayer in C.M.S.A.No.9 of 2013:-This Civil Miscellaneous Second Appeal is filed under Order 21, Rule 8 of CPC r/w Section 100 of CPC against the order of the learned Principal District Judge, Krishnagiri, dated 17.09.2012 passed in C.M.A.No.21 of 2010 confirming the order dated 21.01.2010 passed by the learned Principal Subordinate Judge, Krishnagiri, in R.E.A.No.63 of 2009 in R.E.P.No.65 of 2008 in A.R.C. (O.S.) No.612 of 1998.

For Appellant : Mr.T.Srinivasa Raghavan
for Appellant in both
CMSAs

For Respondent(s) : Mr.G.Veerapathiran in both
CMSAs for R3



COMMON JUDGMENT

These Civil Miscellaneous Second Appeals are by the unsuccessful claimant, challenging the dismissal of the Civil Miscellaneous Appeals by the lower appellate Court, confirming the order of the Executing Court, dismissing the claim petitions.

2. The brief facts leading to the filing of these Civil Miscellaneous Second Appeals are as follows:-

Appellant is a third party claimant in both the execution proceedings. The respondents 1 and 2 are the judgment debtors and the 3rd respondent is the decree holder. The 3rd respondent had initiated two separate Arbitration Cases in ARC Nos.614 and 612 of 1998 against the respondents for recovery of money due under two different promissory notes and obtained Awards as against the respondents 1 and 2 on 31.07.1998. There were no appeals as against the awards and, therefore, the Awards dated 31.07.1998 have become final. Earlier, the execution petitions filed by the decree holder in the year 1999 for the arrest of the 2nd judgment debtor pursuant to the awards, it appears, had been dismissed by the executing court for the default of the petitioners and the subsequent execution petitions filed by the decree holder in the year 2001 for attachment of the properties of the judgment debtors had also been dismissed for the default of the petitioner. Thereafter, on 10.04.2008, the 3rd respondent initiated two separate execution proceedings as stated above against the respondents 1 and 2 herein in R.E.P.No.66 and 65 of 1998 respectively on the file of the Executing Court (Sub Judge), Krishnagiri, for attachment of the property belonging to the respondents 1 and 2 herein for realization of the amounts due under the Awards. Pending those execution petitions, it appears, that the appellant herein had filed a suit on 04.11.2008 in O.S.No.91 of 2008 on the file of the learned Principal District Judge, Krishnagiri, against the respondents 1 and 2 herein and one Ramalingam for a preliminary decree of partition of the subject matter of the property into four equal shares by metes and bounds and for allotment of one such share in her favour and for permanent injunction restraining the other co-sharers from alienating or making any encumbrance over the suit schedule properties, wherein the defendants were set ex parte. Pending the above said suit, it appears, the appellant had filed two separate Claim Petitions on 01.03.2009, which are the subject matter in the present appeals.

3. Appellant (claimant) filed the Claim Petitions inter alia contending that she is the elder sister of the 2nd respondent. The 1st respondent is the wife of the 2nd respondent. She was given to understand that attachment proceedings were initiated as against the respondents 1 and 2 pursuant to the Awards passed by the Registrar of Chit Funds, Chennai. The properties in question are not the absolute properties of the respondents 1



and 2 and they are the joint family properties. In the partition alleged to have been entered into between the brothers, she was not added as a party. In the property in question, which was said to have been allotted to the share of the 2nd respondent herein, she has also a share and she is entitled to $\frac{1}{4}$ share. Therefore, the partition said to have been effected between the brothers will not bind on the appellant. The properties are not liable for attachment as they are joint family properties and not the exclusive properties of the 2nd judgment debtor.

4. The Claim Petitions were resisted by the decree holder, the 3rd respondent herein, inter alia contending that the partition took place in the family of the 2nd respondent as early as in the year 1987 and as per Section 6 of the Hindu Succession Act, as amended by Central Act 39 of 2005, the appellant (sister) was not entitled to claim for partition. Moreover, the properties were self acquired properties of the respondents 1 and 2. The said respondents played fraud upon the court in collusion with the appellant, as the suit for partition was not at all maintainable in view of the provisions of the Hindu Succession Act prevailed at the relevant point of time.

5. The Executing Court, by an order, dated 21.01.2010, dismissed the objections / claim petitions mainly on the ground that the partition deed produced by the appellant dated 03.06.1987 was effected much prior to the Tamil Nadu Amendment in Section 29-A of the Hindu Succession Act, and the amendment made by the Central Government by way of Act 39 of 2005, which was given effect to much after the alleged partition and, therefore, the appellant was not entitled to claim partition in the subject matter of properties. Challenging the same, the appellant preferred two separate appeals which were dismissed by the appellate court. Aggrieved by the same, the appellant is before this Court with the present Civil Miscellaneous Second Appeals.

6. These Civil Miscellaneous Second Appeals have been admitted on the following substantial questions of law:-

(1) Whether the enactment of the Hindu Succession (Amendment Act) [Act 39 of 2005] is to equal the rights unconditionally to the daughter of a co-parcener?

(2) Whether the time when the succession opened would be a relevant consideration in determining the applicability of the Hindu Succession (Amendment) Act [Act 39 of 2005], which confers a higher right on the daughter of a co-parcener?



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(3) When the Hindu Succession (Amendment) Act [Act 39 of 2005) makes the daughter of a co-parcener as a co-parcener in the co-parcenary and who by birth, shall become a co-parcener in the same manner as a son, whether it would be proper to deny the daughter of such right on the ground that she could not claim a statutory right because her father had died before the Hindu Succession (Amendment) Act [Act 39 of 2005) or Tamil Nadu Amendment Act, 1990 [Act 1 of 1990] came into force?

(4) When the proviso to Section 6(1) of The Hindu Succession (Amendment) Act [Act 39 of 2005) provides for the non-validation clause, only in respect of disposition, alienation or partition, whether it would be proper to hold that a daughter born to a co-parcener who died prior to the enactment of said Act, would be disentitled to the benefit of Act?

(5) Whether the Amendment has given a right by birth on the daughter and whether it would relate back to the date of her birth and time of the death of her father co-parcener, cannot have a bearing on the rights of the daughter?

(6) Whether an exparte Decree, until set aside is effective and binding on the parties like a decree on merits?

7. Learned counsel for the appellant would contend that before 1938, female Hindus had no right in the property, but, under the Hindu Women's Property Act, 1938, Hindu widow was given a limited right. It is further contended that under Hindu Succession Act, 1956, the limited right got blossomed into an absolute right and Section 6 (5) of the Amended Act of 2005 does not disqualify a daughter. The learned counsel would also contend that under the un-amended Section 6 of the Hindu Succession Act, a daughter being a Clause 1 heir would succeed to the share of the father and the father's share will not devolve on other coparceners, by survivorship. According to him, Section 6 was amended only to enlarge the limited right of the Hindu daughter into a larger right of coparceners. He would also point out Para 47 of the Judgment of the Hon'ble Supreme Court in Vineeta Sharma v. Rakesh Sharma, 2020 (5) CTC 302, as to the objects and reasons of the Bill to the Hindu Succession Act, 1956, which reads as under :

'47. Statement of Objects and Reasons behind the introduction of Bill is reproduced as under:



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"STATEMENT OF OBJECTS AND REASONS : The Hindu Succession Act, 1956 has amended and codified the law relating to intestate succession among Hindus. The Act brought about changes in the law of succession among Hindus and gave rights which were till then unknown in relation to women's property. However, it does not interfere with the special rights of those who are members of Hindu Mitakshara coparcenary except to provide rules for devolution of the interest of a deceased male in certain cases. The Act lays down a uniform and comprehensive system of inheritance and applies, inter alia, to persons governed by the Mitakshara and Dayabhaga schools and also to those governed previously by the Murumakkattayam, Aliasantana and Nambudri laws. The Act applies to every person who is a Hindu by religion in any of its forms or developments including a Virashaiva, a Lingayat or a follower of the Brahmo, Pararthana or Arya Samaj; or to any person who is Buddhist, Jain or Sikh by religion; or to any other person who is not a Muslim, Christian, Parsi or Jew by religion. In the case of a testamentary disposition, this Act does not apply and the interest of the deceased is governed by the Indian Succession Act, 1925.

2. Section 6 of the Act deals with devolution of interest of a male hindu in coparcenary property and recognises the rule of devolution by survivorship among the members of the coparcenary. The retention of the Mitakashara coparcenary property without including the females in it means that the females cannot inherit in ancestral property as their male counterparts do. The law by excluding the daughter from participating in the coparcenary ownership not only contributes to her discrimination on the ground of gender but also has led to oppression and negation of her fundamental right of equality guaranteed by the Constitution. having regard to the need to render social justice to women, the States of Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra have made necessary changes in the law giving equal right to daughters in Hindu Mitakshara coparcenary property. The Kerala Legislature has enacted the Kerala Joint Hindu Family System (Abolition) Act, 1975.

3. It is proposed to remove the discrimination as contained in section 6 of the Hindu Succession Act, 1956 by giving equal rights to daughters in the Hindu Mitakshara coparcenary property as the sons have. Section 23 of the Act disentitles a female heir to ask



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for partition in respect of a dwelling house wholly occupied by a joint family until the male heirs choose to divide their respective shares therein. It is also proposed to omit the said section so as to remove the disability on female heirs contained in that section.''

8. The learned counsel would further contend that Sub-section 5 of Section 6 of the Act cannot be used to nullify or set at naught the real object of the main enactment. He would also point out para 50 of the judgment in Vineeta Sharma, cited above, in which, a relevant portion from the judgment in Savita Samvedi v. Union of India, 1996 (2) SCC 380, has been extracted, which reads as under :

'50. Concerning gender discrimination to a daughter who always remains a loving daughter, we quote Savita Samvedi (Ms) & Anr. v. Union of India & Ors., 1996 (2) SCC 380, thus:

"6. A common saying is worth pressing into service... "A son is a son until he gets a wife. A daughter is a daughter throughout her life."

7. ...The eligibility of a married daughter must be placed on a par with an unmarried daughter (for she must have been once in that state),to claim the benefit....

...(Otherwise, it would be) unfair, gender-biased and unreasonable, liable to be struck down under Article 14 of the Constitution. ... It suffers from twin vices of gender discrimination inter se among women on account of marriage."

He would finally submit that even if the appellant in both the cases is not eligible to be a coparcener, her right by succession is not taken away and, accordingly, he sought for setting aside the judgment and decree passed by the lower appellate Court.

9. Conversely, learned counsel for the 3rd respondent would submit that the Courts below, after having appreciated the oral and documentary evidences, have rightly dismissed the R.E.As. and C.M.As. and, therefore, no interference is called for by this Court. It is further submitted that the respondents 1 & 2 are playing fraud by filing such untenable petitions to cheat the respondent/ Decree holder.

10. This Court has heard the learned counsel appearing for the appellant and the learned counsel appearing for the 3rd



respondent. Despite service of notice and names having been printed, respondents 1 and 2 neither appeared in person nor are represented by any counsel.

11. Appellant is the sister of 2nd respondent and the 1st respondent is the wife of 2nd respondent. The 3rd respondent herein obtained an award, dated 31.07.1998, against the respondents 1 and 2. The 3rd respondent is the Decree Holder and the award amount is Rs.2,74,695/-.The 3rd respondent filed R.E.P.No.66 of 2008 to enforce the award by attachment and sale of immovable properties of the 2nd respondent, which were given as security. In the meantime, the appellant filed a suit for partition in O.S.No.91 of 2008 against her brothers, wherein an ex-parte decree was passed, since the brothers did not appear and contest the suit.

12. Thereafter, the appellant filed petitions in R.E.A.Nos.63 and 64 of 2009 before the Executing Court as a third party, claiming right over the attached property, which was brought to sale by the 3rd respondent. The said R.E.As. were dismissed on 21.01.2010 by the learned learned Principal Sub-Judge, Krishnagiri, holding that the appellant herein has no locus standi for claim and she has no right to file any claim petition, since there was a family partition on 03.06.1987 before the Hindu Succession (Tamil Nadu Amendment) Act, 1989, (Act 1 of 1990) in Section 29A coming into force on 25.03.1989, so also the Hindu Succession (Amendment) Act, 2005, (Act 39 of 2005), and the said amendment has no retrospective effect. Pursuant to that, the appellant filed C.M.A.Nos.21 of 2010 and 22 of 2010 against the orders made in R.E.A.Nos.63 of 2009 and 64 of 2009. Both the C.M.As were also dismissed by the learned Principal District Judge, Krishnagiri, confirming the orders of the learned Principal Sub-Judge, Krishnagiri.

13. At this juncture, it is relevant to refer to Section 6 of the Hindu Succession Act, 1956. The said Section was amended by the Hindu Succession (Amendment) Act, 2005, (Act 39 of 2005). It reads as under :

'Section 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,

—



(b) have the same rights in the coparcenary property as she would have had if she had been a son;

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.

(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,-

(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

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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.

(4) After the commencement of the Hindu Succession (Amendment) Act, 2005*, no court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt: Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005*, nothing contained in this sub-section shall affect-

(a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or

(b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.

Explanation. -For the purposes of clause (a), the expression "son", "grandson" or "great-grandson" shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005*.

(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) or partition effected by a decree of a court.] Statement of Objects and Reasons [The Hindu Succession (Amendment) Act, 2005] Section 6 of the Act deals with devolution of interest of a male Hindu in coparcenary property and recognises the rule of devolution



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by survivorship among the members of the coparcenary. The retention of the Mitakshara coparcenary property without including the females in it means that the females cannot inherit in ancestral property as their male counterparts do. The law by excluding the daughter from participating in the coparcenary ownership not only contributes to her discrimination on the ground of gender but also has led to oppression and negation of her fundamental right of equality guaranteed by the Constitution having regard to the need to render social justice to women, the States of Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra have made necessary changes in the law giving equal right to daughters in Hindu Mitakshara coparcenary property. The Kerala Legislature has enacted the Kerala Joint Hindu Family System (Abolition) Act, 1975. It is proposed to remove the discrimination as contained in section 6 of the Hindu Succession Act, 1956 by giving equal rights to daughters in the Hindu Mitakshara coparcenary property as the sons have.

14. In this context, it is also significant to understand what a 'Coparcenary' is ? A coparcenary consists of a 'propositus', that is, a person at the top of a line of descent, and his three lineal descendants, namely, sons, grandsons and great-grandsons. Coparcenary property is named thus because the co-ownership is marked by "unity of possession, title and interest". Simply stated, a coparcenary has succession of up to four degrees of lineal descent. Suppose Ram is the Karta of a Hindu Undivided Family (HUF), his son Mohan, Mohan's son Rohan and Rohan's son Sohan are coparceners. Upon his birth, Sohan's son Kaylan will not have the coparcenary rights in the property until the demise of Ram. Under the Hindu succession law, the term 'coparcener' is used to denote a person, who assumes a legal right in his ancestral property, by birth in a Hindu Undivided Family (HUF). As per the Hindu Succession Act, 1956, any individual, who is born in an HUF, becomes a coparcener, by birth. In other words, coparceners are members of an HUF, who assume a legal right in their ancestral property, by birth. An HUF is a group of people, who are the lineal descendants of a common ancestor. This group would include the eldest member and three generations of a family and all these members are recognised as coparceners. According to law, all coparceners acquire a right over the coparcenary property by birth, while their share in the property keeps on changing with new additions in the family. Similarly, an ancestral property is a property acquired by great grandfather, which has been passed down from generation to generation i.e., grandfather and father, up to the present generation, i.e., son, without being divided or partitioned by the family. To put it otherwise, an ancestral property is the one, which is inherited



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up to four generations of male lineage. The right to a share in an ancestral property accrues by birth itself, unlike other forms of inheritance, where legacy opens upon the death of the owner. It was in the year 2005, with the amendment to Section 6 of the Hindu Succession Act, 1956, which amendment came into effect on September 9, 2005, daughters' rights regarding coparcenery/ancestral property were made the same as that of sons, with them being covered under the term 'Coparcener'.

15. Admittedly, partition, in this case, was effected among the respondent 2, his brother and widowed mother, namely, Muniammal on 11.07.1962 and the same was registered as Document No.2030 of 1962 before SRO, Pochampalli. Another Deed of Partition was also effected between the same parties on 03.06.1987 and the same was registered as Document No.516 of 1987 on the file of SRO, Pochampalli.

16. Section 29 A of the Hindu Succession (Tamil Nadu Amendment) Act, 1989, came into force on 25.03.1989. The amendment to Hindu Succession Act, 1956, came into force by Act 39 of 2005 from 09.09.2005.

17. It is important to mention here that as long as the property is not proved to be the joint family property or coparcenery property, the contention that the suit property was the joint family property or the coparcenery property cannot be countenanced. Moreover, it is the specific contention of the third respondent that the suit property in question is the self acquired property of the second respondent. Appellant also has not produced any document or evidence to prove the same for claim. Though the appellant has produced two documents, namely, Partition Deeds, dated 11.07.1962 and 03.06.1987, it is not established that the suit properties are the joint family or coparcenery properties. Besides, the said partitions were much prior to the Hindu Succession (Tamil Nadu Amendment) Act, 1989, in Section 29A, and the Hindu Succession (Amendment) Act, 2005, in Section 6. In other words, amendments to the said Acts were made much after the division of the suit property.

18. Any law, rule, act, statute or amendment can be only prospective, unless it is specifically mentioned therein that it is retrospective in nature from a particular date. As could be seen from the present amendments, they are given only prospective nature, but not retrospection.



19. In order that a Hindu claims a right of coparcenery, he or she must prove that the property, in which he/she claims share, is a joint family property or coparcenery property and it is undivided. In the case on hand, the property in question was partitioned/divided among the second respondent, his brother and widowed mother on 11.07.1962 and 03.06.1987, through registered partition deeds, which was 60 and 35 years back respectively. However, the amendment to Section 6 of the Hindu Succession Act, 1956, came into effect only with effect from 09.09.2005, whereby, daughter becomes a coparcener by birth in her right in the same manner as that of son. In this regard, the crucial point to be examined is, whether the property is a joint family/coparcenery property and that it is undivided among the family members. As already stated above, the property in question is not only not joint family/coparcenery property but it is also divided among the family members. Amendment to Section 6 will not have any application if the property is self-acquired or inherited by father under Section 8 of the Act. Joint Hindu Family property or coparcenery property, that too which is undivided, is subject to strict proof of the claim. If the same is not proved by the claimant, the amendment to Section 6 is of no avail to her. In this case, since it is not established that the suit property is the joint family property or the coparcenery property, that too is undivided, the appellant cannot claim any right over the property as a coparcener. Non-appearance of respondents 1 and 2 to contest the matter also creates a doubt in the mind of this Court as to collusion between the appellant and the said respondents.

20. Section 6 (1) of the Hindu Succession (Amendment) Act, 2005 is very specific that 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, by birth, become a coparcener in her own right in the same manner as the son. It means, since the said amendment has come into force only from 09.09.2005, it will have effect only from that date and not prior to that. In addition, the proviso clause is also very clear 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. Since, in this case, the partitions of the property took place on 11.07.1962 and 03.06.1987, which were much prior to 20.12.2004, the amendment will not have a bearing on the said transactions. Even assuming that the suit property is a coparcenery property, in view of the proviso to Section 6 (1), the appellant is not entitled to any share, as the amendment will not affect the partitions, which took place prior to 20.12.2004, which has exactly happened in this case, as stated supra.



21. Civil Miscellaneous Second Appeals are, accordingly, dismissed. No costs. Consequently, the connected Miscellaneous Petitions are also dismissed.

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Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

kmk/dixit

To

- 1.The Principal District Judge, Krishnagiri.
- 2.The Principal Subordinate Judge, Krishnagiri.

Copy to:

The Section Officer,
VR Section,
High Court, Madras

Civil Miscellaneous Second Appeal
Nos.7 and 9 of 2013

RR(CO)
A.SK(26/04/2022)