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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.12.2021

PRONOUNCED ON : 25.01.2022

CORAM

THE HON'BLE MR. JUSTICE G.CHANDRASEKHARAN

S.A.NO.1064 OF 2019
AND C.M.P.NO.22879 OF 2019

Nirmala

...Appellant/
Plaintiff

Vs.

Duraisamy

...Respondent/
Defendant

Prayer:-

Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree of the lower Appellate Court in rejecting the relief for partition in A.S.No.33 of 2014 dated 11.02.2019, on the file of the Principal District Court, Namakkal, confirming the judgment and decree dated 05.04.2014 passed in O.S.No.57 of 2010 on the file of the Sub Court, Rasipuram.

For Appellant : Mr.C.Jagadish

For Respondent : Mr.S.Sounther

JUDGMENT

This Second Appeal is directed against the judgment and decree of the learned Principal District Judge, Namakkal in A.S.No.33 of 2014, setting aside the dismissal judgment of the trial Court by partly decreeing the suit in respect of declaratory relief and confirming the dismissal of the partition relief claimed.



2. The appellant/plaintiff filed a suit for declaration that the final decree passed in O.S.No.36 of 2006 in respect of suit properties is not binding on the appellant and for partitioning the suit properties into two shares and allotting the portion in Survey No.123/1B in occupation of the appellant as her share. The suit properties situate in Seerapalli village, Rasipuram taluk. The deceased first defendant is the father of the appellant and respondent. There was a partition in respect of suit properties between defendants and first defendant's brother Chinna Gounder, on his behalf and on behalf of his minor son. In the said partition 'A' schedule properties were allotted to defendants 1 and 2 and Chinna Gounder was allotted 'B' schedule property. After the partition, first defendant purchased well and land annexed with the well in Survey No.122/1. Purchased half share in well from one Palaniappa Viagara. The rest was allotted to defendants 1 and 2 in the partition. Since, the property from Palaniappa Viagara on 31.12.1984 was purchased from the income derived from ancestral property, the property purchased under this sale deed is also a joint family property. Appellant's marriage was conducted on 20.02.1988. On 11.09.1991, first defendant executed a settlement deed to an extent of 45 cents in Survey No.118/1 and an extent of 6 cents available at Survey No.123/1 to the appellant and the appellant is enjoying this property. Then as on 04.03.1999, first defendant executed a settlement deed in respect of 60 cents in Survey No.122/8, 44 cents in Survey No.122/9, 66 cents in Survey No.123/1, 30 cents in Survey No.123/2, 1/4 share in the well and electric motor in Survey No.122/1. Appellant is also enjoying these properties. Since, there was a dispute with regard to taking water from common well, appellant filed a suit in O.S.No.57 of 2006 on the file of District Munsif Court, Rasipuram. This suit was dismissed on 30.08.2007. It was pleaded in the suit by the respondent that the settlement in favour of appellant is not true. The suit was dismissed for the reason that appellant has not established the possession and title. There was a suit between the defendants in O.S.No.36 of 2006 and that resulted in passing compromise decree. The suit filed in O.S.No.36 of 2006 without impleading the appellant is not correct. The judgment in O.S.No.36 of 2006 was passed without considering the amendments brought under Act 39/2005 in Hindu Succession Act 1956. Appellant is entitled to 1/3 share in the suit properties and suppressing her right in claiming 1/3 share in suit properties, the suit in O.S.No.36 of 2006 was filed and therefore the judgment and decree in O.S.No.36 of 2006 and final decree passed thereon, will not bind the appellant. During the pendency of this suit, first defendant died and therefore, appellant is entitled to ½ share in the suit properties. Therefore, the suit is filed for the reliefs aforesaid.

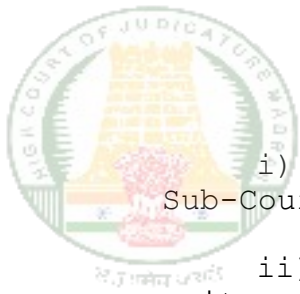


3. It is seen from the case of the respondent/second defendant that there was a partition between defendants and first defendant's brother Chinna Gounder on 02.06.1983. 'A' schedule properties were allotted to defendants and 'B' schedule properties were allotted to Chinna Gounder. It is true that first defendant purchased well and other rights in Survey No.122/1 from Palaniappa Gounder ($\frac{1}{2}$ share). At the time of marriage of the appellant on 20.02.1988, she was provided Rs.1,00,000/-, 50 sovereign gold jewels, apart from marriage expenses. In 1989, she was provided Rs.50,000/- worth of household articles. Marriage of the appellant was celebrated before 1989 and therefore, she is not entitled to claim any share in the suit properties. It is false to allege that appellant was given properties through settlement deed dated 04.03.1999. First defendant was not well and he wanted to execute a Will in favour of his wife Pavayee. Appellant took first defendant to Namagiripettai Sub-Registrar Office on 11.09.1991 and on 04.03.1999 and created the documents in her name on the guise of executing a Will. Respondent came to know about these settlement deeds only after the filing of the suit in O.S.No.57 of 2006. The suit in O.S.No.57 of 2006 was dismissed. It was found that on the basis of these settlement deeds, appellant had effected name change in revenue records and electricity connection. After the dismissal of the suit in O.S.No.57 of 2006, appellant filed this suit. Appellant was permitted to live in the house in Survey No.123/1B. This suit is filed without any basis for claiming partition. Therefore, suit has no merits and liable to be dismissed.

4. In the additional written statement filed by the respondent, it is pleaded that the first defendant died on 28.01.2009. Prior to his death, he executed Will in respect of suit properties on 23.08.2008 in favour of the respondent. Thus, the respondent is entitled to the suit properties absolutely. Respondent is alone repaying the loan obtained by the first defendant.

5. In the reply statement filed by the appellant, the execution of the Will by first defendant in favour of the respondent is denied. It is claimed that the Will is forgery Will, created for the purpose of the suit. It is also claimed that first defendant had not borrowed any loan. The alleged loan transactions are false transactions. It is also not correct to state that she was permitted to reside in the house in the suit property.

6. On the basis of these pleadings, the trial Court framed the following issues and additional issues,
Issues:



i) Whether the decree in O.S.No.36 of 2006 on the file of Sub-Court, Namakkal is not binding on the plaintiff?

ii) Whether the plaintiff is entitled to any share in the suit property?

iii) To what other reliefs the plaintiff is entitled for?

Additional issues:

i) Whether the Will dated 23.08.2008 is true and valid?

ii) Whether the suit is bad for non joinder of necessary parties?

7. During the trial, PW1 and PW2 were examined and Exhibits A1 to 37 were marked on the side of the plaintiff. DW1 and DW2 were examined and Exhibits B1 to B21 were marked on the side of the defendants. That apart, Exhibit X1 and X2 were marked.

8. On considering the oral and documentary evidence, the learned Trial Judge found that appellant is not entitled for the reliefs claimed and dismissed the suit. However, the learned First Appellate Judge found in A.S.No.33 of 2014 filed by the appellant that appellant is entitled for the declaration that the final decree passed in O.S.No.36 of 2006 is not binding on her, but dismissed the relief with regard to partition. Therefore, the appellant filed this Second Appeal.

9. At the time of admission of this Second Appeal, the following substantial questions of law were framed,

i) Whether the Courts below were right in rejecting the relief of partition by applying the provisions of Section 6 of the Hindu Succession Act as amended by Act 39 of 2005?

ii) Whether the Courts below were right in holding that the suit properties are separate properties in the hands of the first defendant?

10. The learned counsel for the appellant submitted that the Courts below have failed to consider the Hindu Succession (Amendment) Act, 2005, wherein, the daughters are given equal right in claiming share in co-parcenary properties. Appellant is a co-parcener within the meaning of Section 6 of Hindu Succession (Amendment) Act, 2005. The respondent took a stand that the suit properties are ancestral properties and therefore settlement deeds executed by the father in favour of the appellant are not valid. When the suit properties are ancestral properties, appellant is entitled for partition as per the

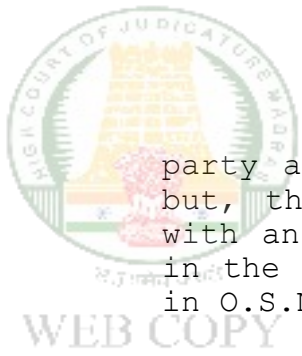


amended Hindu Succession Act. Appellant is not a party to the suit in O.S.No.36 of 2006 and therefore, the judgment and decree in O.S.No.36 of 2006 including the final decree will not bind the appellant. Therefore, the learned counsel for the appellant prayed for setting aside the judgment of the Appellate Court and decreeing the suit. The learned counsel for the appellant relied on the judgment reported in (1999) 3 SCC 91 (Nazim Ali and Others Vs. Anjuman Islamia Chhatarpur and others) with regard to the principles of res-judicata and judgment reported in (2021) 4 SCC 786 (Deccan Paper Mills Company Limited Vs. Regency Mahavir Properties and Others) for the proposition that private documents of which public records are kept are not in themselves public documents.

11. In response, learned counsel for the respondent submitted that there were two registered settlement deeds and an oral partition. There were mutation of revenue records. As per judgment reported in (2020) 9 SCC 1 (Vineeta Sharma Vs. Rakesh Sharma and Others), if oral partition is supported by public documents, oral partition can be accepted. First defendant had executed a Will in favour of the respondent through Exhibit B20. The Will was marked as Exhibit B20. Both the Courts have not considered the Will. Assuming that appellant is entitled for any share in the suit properties, without considering the Exhibit B20 Will, that aspect cannot be decided. The suit is filed without any basis and therefore, liable to be dismissed.

12. Heard the submissions of learned counsel appearing for parties and perused the records.

13. Appellant filed this suit in O.S.No.57 of 2010 seeking the relief of partition, claiming that the suit properties are undivided ancestral joint family properties. She filed the suit against her father and brother. Their father Periyasami @ Semmalai Gounder died during the pendency of the suit. Originally she claimed 1/3 share in the suit properties and after the death of her father, she claims 1/2 share in the suit properties. There is yet another prayer ie., praying to declare that the final decree passed in O.S.No.36 of 2006 on 26.06.2006 will not bind her. O.S.No.36 of 2006 was filed by the respondent Duraisami against his father Periyasami @ Semmalai Gounder for partition of the suit properties into two equal shares and allot one such share to him. Father and son settled the issue between them and as per judgment and decree passed in O.S.No.36 of 2006, respondent is absolutely entitled to all the suit properties. It appears that there was a compromise decree passed in O.S.No.36 of 2006. Appellant's claim is that she is entitled to a share in the suit properties as per the Hindu Succession (Amendment) Act, 39/2005. When that be the case, the suit in O.S.No.36 of 2006 was filed without impleading her as a



party and allowing a compromise decree to be passed is nothing but, the suit in O.S.No.36 of 2006 is an collusive suit filed with an intention to cheat the appellant from getting her share in the suit properties. Appellant came to know about the suit in O.S.No.36 of 2006 when conducting trial in O.S.No.57 of 2006.

14. O.S.No.57 of 2006 was filed by the appellant against her father and brother to pass a scheme decree to draw water from common well, permanent injunction restraining the defendants in that suit from interfering with her enjoyment of drawing water from common well using Service Connection No.1078. She filed this suit primarily on the basis of her right in 'A' schedule properties on the basis of settlement deed dated 04.03.1999 said to have been executed by her father. However, the suit was dismissed by the trial Court for the reason that the suit properties are joint family properties of appellant's father and brother and therefore, her father alone cannot execute the settlement deed dated 04.03.1999 and the settlement deed is not true, valid and not executed by her father. After the dismissal of the suit in O.S.No.57 of 2010, appellant has not preferred any appeal and the judgment in O.S.No.57 of 2010 has become final.

15. From the case stated by the parties, there is no dispute with regard to the fact that appellant's father and brother were allotted 'A' schedule properties in a partition on 02.06.1983. After the partition, Periyasami purchased 1/2 share in the well and the land annexed in S.No.122/1 using the joint family funds. Thus, he became the absolute owner of the well in S.No.122/1. Partition dated 02.06.1983 and purchase of aforesaid 1/2 share in S.No.122/1 are all admitted by the respondent and his father Periyasami in the written statement. The issue started when the appellant claimed independent title and possession in respect of some of the suit properties through two settlement deeds dated 11.09.1991 and 04.03.1999 said to have been executed by Periyasami. It is claimed by her that she is in exclusive possession and enjoyment of properties allotted through these settlement deeds. As already stated, she filed O.S.No.57 of 2010 and that came to be dismissed holding that the settlement deed dated 04.03.1999 is not true, valid and not executed by Periyasami. In the present suit in O.S.No.57 of 2010, the issues are whether she is entitled to a decree for declaration that final decree passed in O.S.No.36 of 2006 will not bind her and she is entitled to partition of 1/2 share in the suit properties.

16. Learned counsel for the appellant submitted that as per the judgment reported in (2020) 9 SCC 1, a daughter becomes a co-parcener, no matter when she was born, the only prohibition is that there should not have been any dispossession, alienation

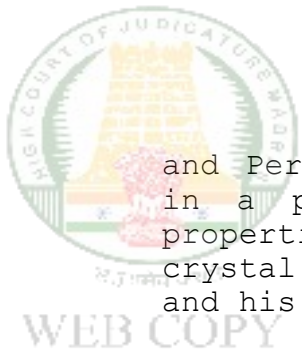


or partition or testamentary dispossession, which had taken place before 20.12.2004. In the case before hand, there is absolutely no evidence before us that the respondent and father Periyasami had partitioned properties allotted to them in the partition on 02.06.1983 and properties purchased from the income generated from the properties allotted in the partition. Therefore, the appellant is entitled to claim share in the suit properties.

17. It is the case of the respondent that there is an oral partition between respondent and his father Periyasami and after that his father Periyasami executed Ex.B20-Will bequeathing his 1/2 share in the suit properties to respondent. There was a compromise decree in O.S.No.36 of 2006. Appellant was allotted properties through a settlement deed.

18. Appellant responded by saying that the execution of settlement deed by Periyasami in favour of appellant was negatived in O.S.No.57 of 2006. That finding has become final. Therefore, it is not open to the respondent to raise the plea that the appellant was given properties through settlement deed. No documents filed in support of oral partition claimed by respondent. It was found in O.S.No.57 of 2006 that the suit properties are joint family properties. It is now not open to the respondent to claim that the settlement deed had come into force and oral partition had taken place.

19. True it is that there is a finding in the judgment in O.S.No.57 of 2006 that the suit properties are undivided ancestral joint family properties of respondent and his father. This judgment has become final and therefore it operates as resjudicata between the same parties as referred infra. Therefore, it is not now open to the respondent to contend that the suit properties are his independent properties, for more than one reasons. It is seen from the partition deed dated 02.06.1983 that Semmalai Gounder and Duraisami were allotted 'A' schedule properties and Chinna Gounder and his four years old minor son Jeyakumar were allotted 'B' schedule properties. It is clearly recited in this document that the suit properties are ancestral joint family properties. 'A' schedule properties, as a whole, were allotted to respondent and his father Periyasami. There is absolutely no evidence to show that respondent and his father Periyasami had divided the properties allotted to them in the partition deed dated 02.06.1983. In the absence of any proof of partition, either oral or through documents, neither Periyasami nor respondent can claim individually 1/2 share each. The properties allotted to them in the said partition can only be said that were in joint possession and enjoyment by them. It is fortified by the pleadings filed in the written statement in O.S.No.57 of 2006. It is specifically pleaded that respondent



and Periyasami are entitled to the properties allotted to them in a partition dated 02.06.1983 and they are enjoying the properties without making any partition. Thus, it is clear as crystal that the suit properties were enjoyed by the respondent and his father jointly without any division.

20. Act 39/2005 has brought about a radical change in the matter of inheritance of ancestral joint family properties by co-parceners. This Act conferred the status of co-parcener on a daughter born before or after the commencement of the Act in the same manner as son with same rights and liabilities. However, this right is subject to certain conditions provided in proviso to Section 6(1) of the Act. The conditions are there should not be any disposition or alienation including any partition or testamentary disposition of property, which had taken place before 20th day of December 2004. Explanation (5) to Section 6 reads that "partition means any partition made by execution of a deed of partition duly registered under Registration Act or partition effected by a decree of a Court". However, the judgment reported in (2020) 9 SCC 1 also recognises oral partition supported by public document, with a word of caution that the plea of partition based on oral evidence alone cannot be accepted and to be rejected outright.

21. In the case before hand, there is absolutely no pleading with regard to when oral partition between respondent and his father Periyasami had taken place, in the written statement and in the additional written statement. In the absence pleadings regarding oral partition, no amount of evidence can be looked into regarding oral partition. In the additional written statement, there is a pleading with regard to Ex.B20-Will said to have been executed by Periyasami in favour of respondent. Therefore, it can only be held that respondent has failed to prove the alleged oral partition between him and his father Periyasami. When it is not established/proved that there was an oral partition between respondent and his father Periyasami, it has to be necessarily concluded that the suit properties are ancestral joint family properties in the hands of Periyasami, appellant and respondent. It is also not in dispute that appellant is also in possession and enjoyment of certain items of suit properties. The suit in O.S.No.36 of 2006 was filed after the introduction of Hindu Succession (Amendment) Act 39 of 2005. Appellant is not a party to O.S.No.36 of 2006. Therefore, the judgment in O.S.No.36 of 2006 will not bind the appellant. Learned first appellate Judge has rightly found so. However, both the courts below have denied the relief of partition. Now, this Court found that the suit properties are ancestral joint family properties. Appellant is a co-parcener, by virtue of Hindu Succession (Amendment) Act 39 of 2005, along



with respondent. Appellant is also entitled to claim share in the suit properties as a matter of right. To what extent, she is entitled to claim ? is the next question to be considered.

22. Originally, appellant filed the suit claiming 1/3 share in the suit properties. After the death of her father Periyasami, she amended the prayer and now claims 1/2 share in the suit properties. Respondent claimed that his father Periyasami had executed Ex.B20-Will bequeathing his share in the suit properties in favour of respondent. Though he produced the Will and gave evidence and examined the attester of the Will as DW.2 in proof of Will, both the Courts below have not given any specific finding to the entitlement of the respondent's right on the basis of the Will. The trial Court observed that appellant is not a coparcener and therefore, she is not entitled for share in the suit properties and therefore, it is not necessary to decide the validity of the Will. The first appellate Court has also recorded the same finding. Now, it is found that the appellant is a coparcener and is entitled to share in the suit property. Therefore, it is necessary to find out the right of the respondent, as per Exhibit B20 Will.

23. It is seen from Ex.B20-Will that Periyasami @ Semmalai Gounder had mentioned about the previous suit proceedings in O.S.No.36 of 2006 and O.S.No.57 of 2006 and the present suit filed for partition by the appellant. Ultimately, it is recited in the Will that whatever the share allotted to him would go to his son Duraisami. One is entitled to execute Will in respect of his share in undivided interest in the joint family properties. It was already found that the respondent and his father Periyasami @ Semmalai Gounder had not divided the properties allotted to them in the partition. Therefore, the properties allotted to them in the partition and purchased through the income derived from the properties allotted in the partition have to be considered as a joint family properties in the hands of Periyasami @ Semmalai Gounder, respondent Duraisami and appellant Nirmala. Periyasami @ Semmalai Gounder had executed Ex.B20-Will bequeathing his share to the respondent. Respondent has given evidence in this regard and produced the Will and he had also examined DW.2 in support of execution of the Will. Though both the Courts below have not given any specific finding as to the entitlement of the respondent on the basis of this Will, the oral evidence of DW.1 and DW.2 and Ex.B20-Will clearly show that it is a genuine and natural Will executed in the then prevailing circumstances among Periyasami @ Semmalai Gounder, respondent and appellant. From the evidence available, this Court comes to the conclusion that respondent has proved the execution of Ex.B20-Will by Periyasami @ Semmalai Gounder. Ex.B20-Will is a genuine and true Will and respondent is entitled to claim the share of Periyasami @ Semmalai Gounder



in the suit properties. In this view of the matter, this Court finds that the respondent is entitled to 2/3 share in the suit properties and the appellant is entitled to 1/3 share in the suit properties.

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24. In view of the reasons stated above, this Court sets aside the judgment and decree of the first appellate Court in negating the relief of partition to the appellant. This Court finds that the appellant is entitled to 1/3 share in the suit properties and respondent is entitled to 2/3 share in the suit properties. This Court answers the first substantial question of law that the Courts below are not right in rejecting the relief of partition. Both the Courts have misconstrued the scope of Section 6 of Hindu Succession Act, especially Hindu Succession (Amendment) Act, 39 of 2005 for substantial question of law No.1. The Courts below are not right in holding that the suit properties are separate properties in the hands of first defendant, for substantial question of law No.2.

25. In fine, this Court sets aside the judgment and decree of the first appellate Court in negating the relief of partition to the appellant and modifies that the appellant is entitled to 1/3 share in the suit properties and the respondent is entitled to 2/3 share in the suit properties. This Second Appeal is allowed in part, as indicated above. The parties are directed to bear their own costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

Mra/Ep

To

1. The Principal District Judge,
Namakkal.
2. The Subordinate Judge,
Rasipuram.



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3. The Section Officer,
VR Section,
High Court of Madras.

+lcc to Mr.C.Jagadish, Advocate, S.R.No.5117
+lcc to Mr.S.Sounther, Advocate, S.R.No.4459

S.A.No.1064 of 2019
and C.M.P.No.22879 of 2019

SV (CO)
PM/22/04/2022