



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 16.06.2022

CORAM : JUSTICE N.SESHASAYEE

S.A. (MD) No.592 of 2010

and

M.P (MD) .No.2 of 2010

WEB COPY

1.N.Angaleshwari
2.Minor Saranya
3.Minor Sivashakthi
4.Minor Pandiselvi ... Appellants/Appellants/Plaintiffs

Vs.

1.Nallakutti ... Respondent/Respondent/Defendant
2.Malaiammal
3.Pandiammal
4.Bosepandi ... Respondents

(R2 to R4 are impleaded Vide Court order dated 08.11.2016 made in CMP(MD).No.1636 of 2016 in SA(MD).No.592 of 2010)

Prayer:- Appeal filed under Section 100 of Civil Procedure Code, against the concurrent judgment and decree dated 17.06.2009 in A.S.No.139 of 2007 on the file of the Subordinate Court, Sivagangai by confirming the judgment and decree dated 17.07.2007 in O.S.No.73 of 2005 on the file of the District Munsif Court, Sivagangai.

For Appellants : Mr.F.X.Eugene
For R1 : Mr.K.Baalasundaram

For R2 : Mr.D.Rameshkumar

For R3 & R4 : No appearance

JUDGMENT

This second appeal is preferred by the plaintiffs in O.S.No.73 of 2005 on the file of the District Munsif Court, Sivagangai. The plaintiffs are the daughters of the defendant. Of the four plaintiffs, the first plaintiff alone had attained the age of majority at the time when the suit was laid. The plaintiffs 2 to 4 were stated to be aged 16, 13, 5 respectively, and they were represented by their mother as guardian. The suit is laid for



partition of 11 items of suit properties. For the convenience, the parties are referred to as per their rank before the trial court.

2. The case of the plaintiffs is straight forward: That the 11 items of suit-properties are ancestral properties in the hands of the defendant, and that the plaintiffs as daughters of the defendant would be entitled to 4/5 share in the suit properties as coparceners.

3. The suit was resisted by the defendant and his defences are three fold:

(a) of the 11 items of suit properties, item No. 2 is self acquired property of the defendant, and item No.3 is assigned by the Government, and that these properties are not partible;

(b) that the defendant had already delivered some eight items of properties, all of which are ancestral in character, to the plaintiffs. However, the first plaintiff/the elder daughter of the defendant had clandestinely mutated the revenue records in the name of the wife of the defendant. Inasmuch as these properties are also ancestral properties, they should have been included in the plaint and the suit is bad for seeking partial partition as these eight items of properties were not included in the suit; and

(c) in all these properties, the defendant's sister (*) **Malaiammal** has the share in it. She is a necessary party and hence, the suit is bad for non-joinder of necessary party.

4. The trial Court raised pointed issues on all the aspects of defence, but proceeded to dismiss the suit over looking the fact that notwithstanding Section 29-A of Hindu Succession Act, the daughters would still be entitled to a share in the partition. The plaintiffs moved the Appellate Court in A.S.No.139 of 2007 before the Subordinate Court, Sivagangai and the Appellate Court also returned with the same verdict.

5. It may have to be mentioned here that so far as the trial Court is concerned, it went by the fact that the defendant did not enter the box. That perhaps may impact only two of the defences raised by the defendant namely that the suit is bad for partial partition and that also the defence relating to item No.2 of the suit properties. The trial Court has also stretched the same fact and held that since the defendant has not entered the box to speak about the entitlement of (*) **Malaiammal**/ his sister, that contention would also fail.

6. The plaintiffs are now before this Court and it is admitted on the following substantial questions of law:

(a) *Whether the Lower Courts are correct in holding that the second and third items of properties are self*



acquired properties when the defendant admitted that profession is only agricultural and the remaining properties are all ancestral?

(b) Whether both the Lower Courts are correct in holding that during the life time of Hindu father, the female members born after 1956 to him, are not eligible to ask for partition in the ancestral properties?

(c) Whether the lower Courts are correct in holding that the properties partitioned in the father's joint family properties would become self acquired property of the father and in which the children could not ask partition during the life time of the father?

7. The above questions as framed does not adequately address a critical question of law. Prior to Act 39 of 2005, unmarried daughters would be entitled to a share in the ancestral property only Vide Sec. 29-A of the Hindu Succession Act as inserted by the State legislature. As per the provision, any married daughter as on the date of coming into force of that provision would not be eligible to be considered as a coparcener for them to claim a share as a co-parcener in the ancestral property. However, the march of law saw the advent of amendment to Sec. 6 of the Hindu Succession Act Vide Central Act 39/2005. The amended Sec. 6 literally eliminated the marital status of a daughter a determinative criterion to seek a share in the ancestral property, and only fixed partition in terms of the Explanation appended to Sec.6 as the bottom line to decide whether the daughters would be entitled to the share in the ancestral property along with the son. Certain clarity required in understanding this provision also has been finally declared by the Constitutional Bench of the Hon'ble Supreme Court in **Vineeta Sharma Vs Rakesh Sharma** [(2020) 9 SCC 1].

8. This would imply that the plaintiffs would be entitled to a share in such properties, which are partible. Here, an aspect of defence vis-a-vis item No.3 of the suit property becomes significant. The defendant would say that this item of property was assigned by the Government to him and the learned counsel for the appellants admitted that this property indeed was assigned by the Government to the defendant. This Court, therefore, cannot grant a decree vis-a-vis item No.3 of the property against the terms of the assignment and in the absence of the proceedings of assignment.

9. Having found that the plaintiffs are entitled to a share in all the items of the suit properties except item 3, still it needs to be that this Court is not in a position to ascertain the specific share that each of the plaintiffs are entitled to since (*) **Malaiammal**, the sister of the defendant and the aunt of the plaintiffs is not before the Court. In fitness of things, when the



defendant has introduced **(*)Malaiaammal** in his defence. The plaintiffs ought to have been careful to implead her. On this point there was some cross-examination when P.W.1, the mother of the plaintiffs, was in the witness box. If **Vineeta Sharma's case** applies, then it would apply in equal force to the defendant's sister **(*)Malaiaammal** as well.

10. Necessarily, this Court may have to remand the matter back to the trial Court to ascertain the exact extent of share that the plaintiffs would be entitled to in the presence of **(*)Malaiaammal** before it.

11. For the reasons stated, this Court set aside the decrees of the first appellate Court and the trial court and remands the matter back to the trial Court and the trial Court shall hear **(*)Malaiaammal**, if she so appears and decide the *inter se* share of the plaintiffs in the presence of **(*)Malaiaammal**. The plaintiffs are directed to file necessary application for impleading **(*)Malaiaammal** within four weeks from the date on which this Court has directed them to appear, and is required to dispose of the suit within three months from the date on which service of summons on **(*)Malaiaammal** is complete. It is made clear that the case is remanded only for the purpose of hearing **(*)Malaiaammal** and not the present defendant. Consequently, connected M.P(MD).No.2 of 2010 is closed. No costs.

12. The Registry is required to transmit all the papers later by 27.07.2022 to the trial Court. Both sides are required to appear before the trial Court on 01.08.2022. **(*)Time for filing the impleading application will stand extended from 22.08.2022.**

Sd/-

Assistant Registrar (Records)

(*)Corrected as per the order of this Court dated 11.08.2022

Vide SA(MD).592 of 2010

Sd/-

Assistant Registrar (Records)

// True Copy //

26/07/2022

Sub Assistant Registrar(CS)

rmk



To
(*) to be substituted to the order already despatched on 26.07.2022

1.The Subordinate Judge, Sivagangai District.

2.The District Munsif, Sivagangai.

3.The Record Keeper, VR Section,
Madurai Bench of Madras High Court, Madurai.(2 copies)

+1 CC to M/s.F.X. EUGENE, Advocate (SR-37281)

S.A.(MD) No.592 of 2010
16.06.2022

MGJ(26.07.2022) 5P 6C

TR(12.08.2022) 5P 6C