



S.A.(MD) No.761 of 2012

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 22.08.2022

CORAM : JUSTICE N.SESHASAYEE

S.A.(MD) No.761 of 2012
and
M.P.(MD)No.2 of 2012
and
C.M.P.(MD)No.7449 of 2022

Samiappan

...1st defendant/Appellant/Appellant

-VS-

1.Jayashree

2.Viveka

3.Minor Vidhusa

...Plaintiffs/1 to 3 respondents/1 to 3

respondents

5.Minor Manikandan

...3 & 4 defendants/4 & 5 respondents/ 4 & 5

respondents

6.P.Kalyani

7.M.Ramayee

8.P.Sampoornam

9.Minor Dhanusa

...8th defendant/9th respondent/9th respondent

[Minor third respondent is declared as major and guardianship of her mother(R1) is discharged vide Court order dated 12.07.2022.

Minor respondents 5 and 9 are declared as major and their guardianship(Court guardian) is discharged vide Court order dated 12.07.2022]

Prayer:- Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree passed in A.S.No.33 of 2010 dated 16.12.2011 on the



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file of the Principal Sub Court, Karur confirming the judgment and decree passed in O.S.No.275 of 2004 dated 13.10.2009 on the file of the Principal District Munsif Court, Karur.

For Appellant : Mr.M.P.Senthil
For R1 & R2 : Mr.R.Chandrasekar
For R6 : Mr.E.K.Kumaresan
For R5 and R9 : Mr.V.Nagarajan

JUDGMENT

The first defendant in a suit for partition is the appellant herein. The suit was laid before the Sub Court, Karur as O.S.No.123 of 1997 and later due to change of pecuniary jurisdiction of the civil Court, it was transferred to the District Munsif Court, Karur, where it was taken on record as O.S.No.275 of 2004. The suit was decreed and it was challenged by the first defendant in A.S.No.33 of 2010, where he faced the same fate as he met before the trial Court.

2. The facts can be briefly explained:

- Certain Murugesan, the second defendant in the suit, was holding 13 items of immovable properties as *Karta* of coparcenery. Apart from



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13 Items of immovable properties, the plaint also details a 14th item, and this comprises essentially of cattle, which as on date does not exist.

- Murugesan is married to the third defendant. Through the third defendant, he had Samiappan, first defendant and three daughters namely, Kalyani, Ramayee and Sampooram, all of who have been arrayed as defendants 5 to 7 respectively. At the relevant time when the suit was instituted, the coparcenery comprised of Murugesan and his only son Samiappan, the first defendant.
- The first plaintiff, Jeyashree is the wife of Samiappan. The couple had a son and also have two daughters. Of them their son died almost immediately after his birth. Their daughters are plaintiffs 2 and 3.
- The plaintiffs' case is straight forward. In the 13 items of ancestral properties, first defendant Samiappan had $\frac{1}{2}$ share. In this along with Samiappan, their predeceased son and the two daughters (plaintiffs 2



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and 3 have equal share as coparceners, with the daughters claiming right in terms of Sec. 29-A of the Hindu Succession Act. Accordingly, each of these four sharers would be entitled to $\frac{1}{4}$ share out of the $\frac{1}{2}$ share of Samiappan. In other words, Samiappan and his three children would be entitled to $\frac{1}{8}$ share each.

- When Samiappan's new born son died, his $\frac{1}{8}$ share in items 1 to 13 devolved on the first plaintiff (mother of the child) as Class-I heir under the First Schedule to the Indian Succession Act. The other two plaintiffs, the daughters of Samiappan and the first plaintiff, are entitled to $\frac{1}{8}$ share each. In short, the plaintiffs claim $\frac{3}{8}$ share in items 1 to 13 with $\frac{1}{8}$ share in them left for Samiappan. The remaining $\frac{1}{2}$ share would belong to second defendant, Murugesan.

3. The defendants 1, 6 and 7 contested the suit. In order to appreciate the contentions of these defendants, it is necessary to introduce certain Selvi @ Chellammal. Her marital status leaves certain elements of uncertainty. According to the contesting defendants, Selvi @ Chellammal was taken as



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second wife by the second defendant, Murugesan, whereas according to the the first plaintiff, Selvi is a mistress of her husband Samiappan, and that through Samiappan, she has a son and daughter, who are arrayed in the suit as defendants 4 and 8. Now reverting back to the pleading of the defendants, they would contend that Selvi indeed was the second wife of Samiappan and that Manikandan and Dhanusha, namely 4 and 8 defendants, were born to Murugesan through Selvi and not to Samiappan.

4. The dispute went to trial and both the trial Court and thereafter the first appellate court have concurrently upheld the plaintiffs claim of 3/8 share in the suit properties. In the mean time second defendant Murugesan had died.

5. It is in this backdrop, this second appeal is filed and it is admitted to consider the following substantial question of law:

“Whether the Courts below are correct in declining the rights of the female heirs/6 to 8 respondents herein in the suit schedule properties without proper interpretation of the Hindu Succession Amendment Act 2005, when the Courts below have got power to mold the relief by taking



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note of the introduction of new enactments and amendments enlarging the right of the parties to the suit and thus the judgment and decree of the courts below warrants interference under Section 100 of the Civil Procedure Code?”

6. The substantial question raised only pertains to the applicability of Sec. 6 of the Hindu Succession Act as amended Vide Act 39 of 2005 to the present case, and if defendants 5 to 7, the sisters of the first defendant Samiappan would be entitled to a share as coparceners. If it is available to them, then the *per capita* share of all the coparceners including Samiappan, first defendant, would get reduced. This issue is no more *res integra* in view of the law declared by the Constitutional Bench of the Supreme Court in ***Vineeth Sharma vs. Rakesh Sharma and others*** [2020 (5) CTC 308].

7. In terms of the law declared, Murugesan, the karta and his four children, namely defendants 1, 5, 6 and 7 would be entitled to 1/5 share each in items 1 to 13. In this 1/5 share, the first defendant and his three children would be entitled to a share each, which implies that the first defendant would be



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entitled to 1/20 share. and the remaining 3/20 share would go to his three children. As already indicated, 1/20 share that ought to go to first defendant's predeceased son, would devolve upon the first plaintiff as Class-I heir of the said predeceased son.

8.1 Turning to the claim of defendants 4 and 8, they claim that they are the children of the second defendant Murugesan and Selvi @ Chellammal. They also claim that Murugesan during his life time has executed a registered Will, dated 17.08.2001 during the pendency of the suit.

8.2 The plaintiff's contention here is two folded:

- a) Inasmuch as the properties are admittedly ancestral properties in the hands of Murugesan, the defendants 4 and 8, even if they are considered as children born to Murugesan, they would not be entitled to a share in the ancestral property as a coparcener, and if at all any, they would be entitled only to share the personal property of Murugesan as per Sec. 16 (2) of the Hindu Marriage Act.



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b) If Murugesan had executed a Will, that could relate only to his share in the ancestral property, since fourth and eight defendants cannot be treated at par with other coparceners. Even, Act 39 of 2005 has not relaxed the concept of coparcenery to confer on the illegitimate children of a male coparcener the status of coparceners. At any rate notwithstanding the fact that these defendants had pleaded about the Will of the second defendant Murugesan, it was neither produced nor proved at any stage of the suit.

8.3 The learned counsel appearing for the defendants 4 and 8 would submit that before the Courts below, these defendants were minors and were represented only by the Court guardian, and that the Court guardian has not properly and diligently defended the right of these defendants based on the Will executed by Murugesan.

9. After carefully weighing the contentions raised by the defendants 4 and 8, it must be held that irrespective of whether they are born to the second defendant as alleged by the contesting defendants or not, the fact remains



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that their status cannot be elevated on par with other coparceners. Now, they claim the right only under the Will executed by Murugesan, second defendant, and their entitlement to a share needs to be ascertained independently as it will not affect the shares of the plaintiffs. Since these defendants were represented only by Court guardian, it is imperative that an opportunity must be given to these defendants to prove the genuineness of the Will alleged to have been executed by Murugesan, and for which purpose, the matter will be remanded back to the First Appellate Court.

10.1 To conclude, the Second Appeal is partly allowed with a modification that the plaintiff would only be entitled to 3/20 share in the suit property and there shall be a preliminary decree for the said share. So far as the claim of defendants 4 and 8 are concerned, the matter is remanded back to the First Appellate Court to enable these defendants to prove the Will, dated 17.08.2001 alleged to have been executed by Murugesan, second defendant.

10.2. The First Appellate Court is required to dispose of the matter within a period of three months from 05.09.2022. After drafting the decree, and the



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papers reach the trial court, the trial court shall initiate suo motu final decree proceedings after giving notice to the counsel on record for both the parties in terms of the judgment in ***Kattukandi Edathil Krishnan and another vs. Kattukandi Edathil Valsan and others*** [2022 SCC Online SC 737]. For the benefit of the First Appellate Court, the operative portion of the judgment is extracted below:

33. We are of the view that once a preliminary decree is passed by the Trial Court, the court should proceed with the case for drawing up the final decree suo motu. After passing of the preliminary decree, the Trial Court has to list the matter for taking steps under Order XX Rule 18 of the CPC. The courts should not adjourn the matter sine die, as has been done in the instant case. There is also no need to file a separate final decree proceedings. In the same suit, the court should allow the concerned party to file an appropriate application for drawing up the final decree. Needless to state that the suit comes to an end only when a final decree is drawn. Therefore, we direct the Trial Courts to list the matter for taking steps under Order XX Rule 18 of the CPC soon after passing of the preliminary decree for partition and separate possession of the property, suo motu and without requiring initiation of any separate proceedings.



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11. The parties are required to appear before the First Appellate Court on
05.09.2022.

12. The Registry is required to send the entire papers forthwith. No costs.
Consequently, connected miscellaneous petitions are closed.

22.08.2022

Internet: Yes
Index: Yes/No
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Note: Issue order copy on 24.08.2022

To

1. The Principal Sub Court, Karur
2. The Principal District Munsif Court, Karur.



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N.SESHASAYEE, J.

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