



WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	18.12.2023
Pronounced on	21.12.2023

CORAM

THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN THILAKAVADI

Appeal Suit.No.271 of 2012 and
M.P. No. 1 of 2012

1.C.Shanmugam
2.C.Alagesan
3.C.Venkatesan

....Appellants/plaintiffs

Vs.

1.Chinnapaiyan
2.Asaithambi

...Respondents/Defendants

Prayer: First Appeal has been filed under order 41 Rule 1 r/w section 96 of CPC, against the Judgement and Decree dated 07.09.2011 made in O.S.No.190 of 2010 on the file of the Additional District and Sessions Judge (FTC No.2) Salem.



WEB COPY



For Appellants : Mr.P.Jagadeesan

For R1 & R2 : No appearance

J U D G M E N T

This appeal is preferred against a judgment and decree dated 07.09.2011 in O.S.No.190 of 2010 passed by the learned Additional District and Sessions Judge (FTC No.2) Salem.

2.The plaintiffs are the appellants. The plaintiffs filed the above suit in O.S.No.190 of 2010 for partition in the suit property and for permanent injunction restraining the defendants from alienating the suit property.

3.The case of the plaintiffs is that, the plaintiffs are brothers and the 1st defendant is the father of the plaintiffs and their mother is one Kamala. The 2nd defendant is the son of the 1st defendant born through one Pappa, a concubine of the first defendant herein. The 1st defendant lived with his concubine along with the 2nd defendant. The suit properties are the joint family properties of the 1st defendant and his father Chinnusamy and his



WEB COPY

elder brother Kandhasamy. They divided the properties under a registered partition deed dated 30.04.1979. In that partition deed the properties described in the A schedule were allotted to Chinnusamy and his wife Arayee to be enjoyed by them for life without any right of alienation, and after the life time of Chinnusamy and his wife Arayee the properties described in the A schedule were directed to be divided into two equal shares and the 1st defendant and his elder brother Kandasamy has to succeed the property. After the demise of Chinnusamy and his wife Arayee, the A schedule property mentioned in the partition deed was divided into two equal shares. The 1st defendants and the plaintiffs 1 to 3 executed a sale deed in favour of the elder brother Kandasamy in respect of his half share. The other half share was allotted to the 1st defendant and the plaintiffs and that share was conveyed to the 1st plaintiff by the 2nd and 3rd plaintiffs and the 1st defendant. The 1st plaintiff took possession of the said property and he is in exclusive possession and enjoyment of the said property. Therefore, there is no dispute between the members of the family in respect of A and B schedule properties mentioned in the partition deed.



WEB COPY

4.The properties described in C schedule of the partition deed was allotted to the 1st defendant namely Chinnapaiyan which the plaintiffs and the 1st defendant are in joint possession. They are cultivating the above property according to their convenience without division by metes and bounds. While so, the 1st defendant was gained over by his concubine Pappa and the 1st defendant was attempting to alienate the properties mentioned in the suit to deprive the plaintiffs' lawful share in the said properties. Hence, the plaintiffs were constrained to file the above suit for partition. The trial Court upon considering the averments made in the plaint and the evidence on record dismissed the above suit placing reliance on the judgment reported in **2010(4) TNLJ 133 (CIVIL)** and held that the sons of a divided son does not get rights from his father by birth, who are excluded by virtue of Section 8 of Hindu Succession Act and they cannot become coparcenors in the properties in question.

5.Aggrieved by this, the present appeal suit is filed by the appellants/plaintiffs.

6.The learned counsel appearing for the appellants would contend



WEB COPY

that the property which the 1st defendant got by virtue of the partition deed amongst his father and brother although separate property qua other relations, it attained the characteristics of co-parcenary property after the plaintiffs were born. He would submit that it is settled principle that the property inherited by a male Hindu from his father, father's father or father's father's father is an ancestral property. The essential feature of ancestral property, according to Mitakshara Law, is that the sons, grandsons and great grand sons who inherits it, acquires interest and the rights attached to such property at the moment of their birth. The share which a co-parcenor obtains on partition of ancestral property is ancestral property as regards his male issue. After partition, the property in the hands of the son will continue to be the ancestral property and the natural or adopted son of that son will take interest in it and is entitled to it by survivorship. Therefore, the property acquired by the first defendant in the partition deed dated 30.04.1979, although is a separate property qua other relations but it is a coparcenary property in so far as his sons and grandsons are concerned. Thus, the property which had fallen to the share of the first defendant retained the character of the coparcenary property and the plaintiffs being his sons have a right in the suit property. Hence,



WEB COPY

the findings of the trial Court that the claim of the plaintiffs are barred under Section 8 of the Hindu Succession Act is incorrect. Hence, the judgment and decree passed by the trial Court in O.S.No.190 of 2010 dated 07.09.2011 is liable to be set aside. To support his contention he has relied upon the cases reported in:

- 1.(2018) 7 SCC 646***
- 2.(2013) 9 SCC 419***
- 3.(2009) 15 SCC 184***

7.From the above submission, the points that arises for consideration is as follows:

- 1.Whether the claim of the plaintiffs are barred under Section 8 of the Hindu Succession Act?
- 2.Whether the plaintiffs acquired interest and rights in the suit property at the moment of their birth?
- 3.Whether the appeal can be allowed?

Point Nos.1 and 2

It is not in dispute that the 1st defendant acquired the suit property by virtue of the registered partition deed dated 30.04.1979 which took



WEB COPY

place amongst himself and his father and his brother. It is also not in dispute that the plaintiffs and the 2nd defendant are the sons of the 1st defendant. The plaintiffs filed the aforesaid suit for partition. In the above suit, the defendants 1 and 2 remained ex-parte. On the basis of the pleadings of the plaintiffs, the trial Court had come to the conclusion that the property in question was acquired by the 1st defendant in the partition held between his father and his brother on 30.04.1979 by executing Ex.A.1 partition deed and therefore, the sons of a divided son does not get right from his father by birth, who are excluded by virtue under Section 8 of Hindu Succession Act and that the plaintiffs cannot become coparcenors in the property in question. Therefore, the claim of the plaintiffs is barred under Section 8 of the Hindu Succession Act. The said findings of the trial Court is under challenge in this appeal. According to the appellants, they acquired interest and rights in the property at the moment of their birth. It is now well settled in view of several decisions of the Hon'ble Supreme Court that the property in the hands of a sole coparcenor allotted to him in partition shall be the separate property for the same and shall revive only when a son is born to him. It was held in the case of ***Surendra Kumar Bhatia vs Kanhaiya Lal & Ors*** vide (2009) 15 SCC



184 that,

" It is one thing to say that the property remains a coparcenary property but it is another thing to say that it revives, the distinction between the two is absolutely clear and unambiguous. In the case of former any sale or alienation which has been done by the sole survivor coparcener shall be valid whereas in the case of a coparcener any alienation made by the karta would be valid."

8.This aspect of the matter has been considered by the Hon'ble Supreme Court in ***Commissioner of Wealth Tax, Kanpur & Ors v. Chander Sen & Ors*** reported in ***(1986) 3 SCC 567***

"It is clear that under Hindu law, the moment the son is born, he gets a share in the father's property and becomes part of the coparcenary. His right accrues to him not on the death of the father or inheritance from the father but with the very fact of his birth. Normally, therefore, whenever the father gets a property from whatever source from the grandfather or from any other source, be it separated



WEB COPY



property or not, his son should have a share in that and it will become part of the joint Hindu Family of his son and grand son and other members who form joint Hindu Family with him. But the question is: is the position affected by Section 8 of the Hindu Succession Act, 1956 and if so, how? The basic argument is that Section 8 indicates the heirs in respect of certain property and Class I of the heirs includes the son but not the grandson. It includes, however, the son of the predeceased son. It is this position which has mainly induced the Allahabad High Court in the two judgments, we have noticed, to take the view that the income from the assets inherited by son from his father from whom he has separated by partition can be assessed as income of the son individually. Under Section 8 of the Hindu Succession Act, 1956 the property of the father who dies intestate devolves on his son in his individual capacity and not as karta of his own family. On the



other hand, the Gujarat High Court has taken the contrary view."

9.It was furthermore held:

"Section 8 of the Hindu Succession Act 1956 as noted before, laid down the scheme of succession to the property of a Hindu dying interstate. The Schedule classified the heirs on whom such property should devolve. Those specified in Class I took simultaneously to the exclusion of all other heirs. A son's son was not mentioned as an heir under Class I of the schedule, and, therefore, he could not get any right in the property of his grandfather under the provision. The right of a son's son in his grandfather's property during the life time of his father with existed under the Hindu law as in force before the Act, was not saved expressly by the Act, and therefore, the earlier interpretation of Hindu Law giving a right by birth in such property 'ceased to have effect. The Court further observed that in



WEB COPY



construing a codification Act, the law which was in a force earlier should be ignored and the construction should be confined to the language used in the new Act. The High Court felt that so construed, Section 8 of the Hindu Succession Act should be taken as a self-contained provision laying down the scheme of devolution of the property of a Hindu dying intestate. Therefore, the property which devolved on a Hindu on the death of his father intestate after the coming into force of the Hindu Succession Act, 1956, did not constitute HUF property consisting of his own branch including his sons. It followed the Full Bench decision of the Madras High Court as well as the view of the Allahabad High Court in the two cases noted above including the judgment under appeal."

10. Therefore, Section 8 of the Hindu Succession Act 1956, laid down the scheme of devolution of property of a Hindu male dying interstate. In the present case, the suit property which had fallen to the



WEB COPY

share of the 1st defendant, retained the character of a coparcenary property and the plaintiffs being his sons have right in the said property. Hence it cannot be said that the suit filed by the plaintiffs was not maintainable. Therefore, the properties acquired by the 1st defendant in the partition deed dated 30.04.1979, although are separate properties qua other relations, it is a coparcenary property in so far as his sons and grandsons are concerned. In the instant case, the plaintiffs have clearly established that the properties are ancestral properties which have been divided between the 1st defendant and his father chinnusamy and his elder brother kandasamy as per the date of partition dated 30.04.1979.

11.Hence, the suit is maintainable and the plaintiffs are entitled for 1/3 share in the suit properties and the judgement and decree passed by the trial Court in O.S.No.190 of 2010 is set aside.

12.Accordingly, the appeal suit stands allowed. No costs.
Consequently connected Miscellaneous Petition is closed.

21.12.2023



Internet: Yes/No

Index: Yes/No

Speaking/Non-speaking order

WEB COPY

K.GOVINDARAJAN THILAKAVADI, J.

vsn

PRE- DELIVERY JUDGEMENT MADE IN

Appeal Suit.No.271 of 2012 and

M.P.No. 1 of 2012

21.12.2023