



A.S.No.586 of 2

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.12.2023

CORAM:

THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR. JUSTICE N.SENTHILKUMAR

A.S.No.586 of 2017

R.B.Thilip Kumar

...Appellant

Vs.

1.R.Balakrishnan

2.R.B.Aravindsamy

3.C.Sekar

...Respondents

[Cause title accepted vide order dated 06.11.2017
made in CMP.No.18879 of 2017 in
AS.Sr.No.78227 of 2017]

Prayer: Appeal Suit filed under Section 96 of the Code of Civil Procedure, to set aside the judgment and decree dated 29.04.2017 passed by the learned Principal Judge, Thiruvallur District in the suit in O.S.No.38 of 2013 and allow the suit as prayed for.

For Appellant : Mr.K.S.Ganesh Babu

For Respondents : Mr.R.Krishnaswamy for R1 and R2

R3 – Served – No appearance



J U D G M E N T

WEB COPY (Judgment of the Court was delivered by **R.SUBRAMANIAN, J.**)

The plaintiff in O.S.No.38 of 2013 is on appeal challenging the judgment and decree of the trial Court dismissing his suit for partition solely on the ground that he sought to exclude the 2nd defendant from sharing the ancestral property on the ground that the 2nd defendant was born to the second wife of the 1st defendant, which marriage happened during the subsistence of the first marriage.

2. The plaintiff sought for partition and separate possession of his half share contending that the suit properties were ancestral properties belonging to the joint family consisting himself and the 1st defendant. Though the 2nd defendant was impleaded as the son of the 1st defendant, the plaintiff took a specific plea that the 2nd defendant being an illegitimate son is not entitled to any share in the ancestral properties of the family.

3. The suit was resisted by the 1st defendant contending that the properties were his self-acquisition. The 1st defendant admitted that the plaintiff was born through his first wife but denied the claim that the 2nd



defendant is an illegitimate son born through the concubine Ms.Jamuna. It was contended that the 1st defendant had married the said Jumuna on 08.02.1990 according to the Hindu rituals. Certain alienations that were sought to be set aside were also sought to be validated on the ground that those alienations were made for necessities.

4. On the above pleadings, the trial Court framed the following issues:

1)Whether the suit properties are ancestral properties of the plaintiff and the 1st defendant?

2)Whether the partition that took place earlier between the father of the 1st defendant and the 1st defendant was registered in 1990?

3)Whether the suit A schedule properties belonged to the plaintiff and the 1st defendant and they are in joint possession of the same?

4)Whether the plaintiff has right over the B schedule property?

5)Whether the sale by the 1st defendant of the B schedule property to the 3rd defendant is valid and binding on the plaintiff?

6)Whether the suit properties belong exclusively to the 1st defendant?

7)Whether the plaintiff is entitled to a decree of half share in the suit properties?



8) To what other relief the plaintiff is entitled?

5. At trial, the plaintiff was examined as PW1 and his mother Bhanumathi was examined as PW2. Exs.A1 to A7 were marked. The 1st defendant was examined as DW1 and three other witnesses were examined as DW2 to DW4. Exs.B1 to B3 were marked.

6. On a consideration of the evidence on record, the learned trial Judge concluded that the suit properties are ancestral properties belonging to the joint family of which the 1st defendant is the karta. The trial Court further concluded that the plaintiff cannot seek partition to the exclusion of the 2nd defendant. The trial Court further found that the marriage between the 1st defendant and Jamuna has been proved and the 2nd defendant was born out of the said wedlock. Having been born of the wedlock, which is in violation of the provisions of the Hindu Marriage Act, the 2nd defendant, according to the trial Court, would part take the character of the legitimate son in view of Section 16 of the Hindu Marriage Act. On the said finding, the trial Court concluded that the plaintiff cannot seek a partition to the exclusion of the 2nd defendant and therefore dismissed the suit. Hence, the plaintiff is on appeal.



7. The only issue that would arise is whether the dismissal of the suit on the ground that the plaintiff cannot seek partition to the exclusion of the 2nd defendant is justified or not.

8. The question as to whether a son born out of the second marriage, which is in violation of the provisions of the Hindu Marriage Act, though being a legitimate son, would be entitled to a share in the ancestral properties as a co parcener has been answered by the Hon'ble Supreme Court recently in *Revanasiddappa and another Vs. Mallikarjun and others* reported in **2023 SCC OnLine 1087**, where the Hon'ble Supreme Court while answering the reference on the very question held that such a son who is deemed to be a legitimate son as per Section 16 of the Hindu Marriage Act would not be entitled to a share as the coparcener, but would be entitled to a share in the father's share in the coparcenary property as clause I heir.

9. In view of the said pronouncement of the Hon'ble Supreme Court, the question that is raised in this appeal has to be answered in favour of the appellant. Therefore, the dismissal of the suit by the trial Court on the ground that the plaintiff cannot seek a share to the exclusion of the 2nd

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defendant cannot be sustained. The appeal has to be necessarily **allowed**.

Therefore, the judgment and the decree of the trial Court are set aside.

There will be a preliminary decree declaring the half share to the plaintiff.

Any alienation that has been made either prior to or during the pendency of the suit will not be binding on the plaintiff with reference to his half share.

10. It is made clear that the 2nd defendant would be entitled to a share in the property that would be allotted to the 1st defendant in the final decree proceedings as a Class I heir. It is stated that the 1st defendant had settled a portion of the property on the plaintiff, the Court will consider allotment of that property to the plaintiff in the final decree proceedings, if it is desirable to do so in equity. Any alienation made will be subject to the result of the suit and will be binding only with reference to the half share in the 1st defendant in the properties. No costs.

(R.S.M.,J.) (N.S.,J.)
12.12.2023

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Index :No
Internet :Yes
Neutral Citation :No
Speaking order



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