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S.A.No.56 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.11.2023

CORAM

THE HONOURABLE MR. JUSTICE S.SOUNTHAR

S.A.No.56 of 2017
and
CMP.No.848 of 2017

1.Saroja
2.Chandra
3.Ramalingam

... Appellants

Vs.

1.Thangavel
2.The Sub Registrar
O/o.Sub Registrar
Veerapandi & Post
Salem District.

... Respondents

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgment and decree passed by the learned II Additional District-cum-Sessions Judge, Salem in A.S.No.80 of 2015 dated 08.02.2016, confirming the judgment and decree dated 29.01.2015 in OS.No.574 of 2012 passed by the II Additional Subordinate Judge, Salem.



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For Appellants : Ms.S.Ambigapathi
For Respondents : Mr.A.Esakkiappan for R1
Mr.C.Sathish for R2
Government Advocate

JUDGMENT

The unsuccessful plaintiffs in the suit for partition are the appellants. The suit as well as the First Appeal preferred by the appellants were dismissed. Aggrieved by the concurrent findings of the trial Court, the appellants are before this Court. The appellants 1, 2 and the first respondent are brother and sisters. The third appellant is the son of deceased sister of the appellants 1 & 2 and the first respondent.

2. According to the appellants/plaintiffs, the suit properties are the ancestral properties of Pachamuthu Padayachi, who is the father of appellants 1 & 2 and the first respondent. He got the suit property under a family partition between himself and his brothers. The said Pachamuthu Padayachi died on 12.07.1989 and thereafter, the parties were in joint possession of the suit properties. As difference of opinion arose among the co-sharers in enjoying the suit properties in common, the appellants were constrained to file a suit for partition claiming 1/4th share each and the appellants also sought for injunction



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restraining the second respondent from registering document pertains to the suit property likely to be executed by the first respondent. The first respondent filed his written statement and resisted the suit on the ground that the father of Pachamuthu Padayachi died on 12.07.1989 and the appellants 1 & 2 and mother of the third appellant got married long back and settled in different places and they also agreed to forego their share in the suit property. Thus, he has been in possession and enjoyment of the suit property right from the year 1989 exclusively and hence, the appellants were ousted from claiming any share in the suit property.

3. The trial Court on appreciation of oral and documentary evidence available on record came to the conclusion that the appellants were not coparceners of the suit property and hence, dismissed the suit. Aggrieved by the same, the appellants preferred an appeal in A.S.No.80 of 2015 on the file of II Additional District-cum-Sessions Judge, Salem. The first Appellate Court also affirmed the findings of the trial Court. Aggrieved by the same, the appellants are before this Court.



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4. At the time of admission, this Court formulated the following substantial questions of law:

“ 1. Whether the Courts below are correct in holding that the appellants have not asserted their right for considerable length of time and as such the appellants are not entitled to seek partition by lapse of time?

2. Whether the Courts below are correct in holding that since the father of the appellants died on 12.07.1989 i.e., after Tamil Nadu Act came into force, the appellants cannot be considered as co-parceners?”

5. As per the admitted case of the parties it is not in dispute that the property originally belonged to father of the parties Pachamuthu Padayachi and he got the said property under the partition between him and his brothers. Therefore, there is no difficulty in coming to the conclusion that the suit properties are ancestral properties of the family.

6. As per the admitted case, the father of the parties Pachamuthu Padayachi died on 12.07.1989. The first Appellate Court non-suited the plaintiffs mainly on the ground that the father of the parties Pachamuthu



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Padayachi, died on 12.07.1989 even prior to coming into force of Hindu

Succession Amendment Act of 2005 and therefore, they are not entitled to claim any share in the suit property. The said findings of the first Appellate Court is not correct in the light of the judgment of the Hon'ble Apex Court in ***Vineeta Sharma vs. Rakesh Sharma and Ors***, reported in **(2020) 9 SCC 1**.

The relevant observations made by the Hon'ble Apex Court in the said judgment reads as follows :

“129.Resultantly, we answer the reference as under:

(i) The provisions contained in substituted Section 6 of the Hindu Succession Act, 1956 confer status of coparcener on the daughter born before or after amendment in the same manner as son with same rights and liabilities.

(ii) The rights can be claimed by the daughter born earlier with effect from 9.9.2005 with savings as provided in Section 6(1) as to the disposition or alienation, partition or testamentary disposition which had taken place before 20th day of December, 2004.

(iii) Since the right in coparcenary is by birth, it is not necessary that father coparcener should be living as on 9.9.2005.(Emphasis Supplied)

(iv) The statutory fiction of partition created by proviso to Section 6 of the Hindu Succession Act, 1956 as originally



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enacted did not bring about the actual partition or disruption of coparcenary. The fiction was only for the purpose of ascertaining share of deceased coparcener when he was survived by a female heir, of Class-I as specified in the Schedule to the Act of 1956 or male relative of such female. The provisions of the substituted Section 6 are required to be given full effect. Notwithstanding that a preliminary decree has been passed the daughters are to be given share in coparcenary equal to that of a son in pending proceedings for final decree or in an appeal.

(v) In view of the rigor of provisions of Explanation to Section 6(5) of the Act of 1956, a plea of oral partition cannot be accepted as the statutory recognised mode of partition effected by a deed of partition duly registered under the provisions of the Registration Act, 1908 or effected by a decree of a court. However, in exceptional cases where plea of oral partition is supported by public documents and partition is finally evinced in the same manner as if it had been affected by a decree of a court, it may be accepted. A plea of partition based on oral evidence alone cannot be accepted and to be rejected out rightly.”

7. While considering the effect of amendment of 2005 Act, the Hon'ble Apex Court held that the date of the death of co-parcener or father of



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the parties is irrelevant and amending Act should be so interpreted in order to give full effect to the object of the Act.

8. In view of the settled law as laid down by the Hon'ble Apex Court in *Vineeta Sharma vs. Rakesh Sharma and Ors*, (cited supra), the conclusion reached by the First Appellate Court that the appellants could not be considered as coparceners in respect of the suit property as their father Pachamuthu Padayachi died prior to 2005 Amending Act, is erroneous and liable to be set aside. The date of marriage of daughters also paled into insignificance in view of Hindu Succession Central Amending Act of 2005.

9. As far as the plea of ouster raised by the first respondent is concerned, the Courts below also erroneously held that, since the suit for partition is filed by the appellants after 35 years from the date of death of Pachamuthu Padayachi, it should be presumed that they were ousted from claiming any share in the suit property. Ex.X1 A-Register produced by PW2 would suggest that the property stands in the name of Pachamuthu Padayachi in A-Register. Further the revenue documents produced by the respondents would suggest patta name change has been effected only in respect of portion



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of the suit property and in respect of remaining property patta still stands in the name of Pachamuthu Padayachi. Even assuming patta of entire suit property has been changed into the name of the first respondent, merely because, mutation of revenue records had taken place in favour of male member of the family, it cannot be presumed that the female member of the family is not entitled to claim share in the suit property.

10. In the case on hand from the evidence available on record, it is clear that the first respondent is in possession of the property. The possession of one co-sharer should be presumed as the one for the benefit of the other co-sharer also, namely the appellants. Hence, the conclusion reached by the trial Court as well as the first Appellate Court as if the appellants were ousted from the suit property and they were not entitled to claim partition is not acceptable to this Court.

11. In view of the discussions made earlier, both the substantial questions of law framed at the time of admission are answered in favour of the appellants and the Second Appeal is allowed by setting aside the judgment and decree passed by the Courts below.



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12. a) In the result, the Second Appeal is allowed by setting aside the judgment and decree passed by the Courts below.

b) In the facts and circumstances of the case, there shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

06.11.2023

Index : Yes
Internet : Yes
Neutral Citation Case : Yes
dna

To

1.The II Additional District-cum-Sessions Judge, Salem.

2.The II Additional Subordinate Judge, Salem.



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S.SOUNTHAR, J.

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