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S.A.No.646 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.12.2023

CORAM

THE HONOURABLE MR. JUSTICE S.SOUNTHAR

S.A.No.646 of 2017
and
CMP.No.15981 of 2017

Sasikala

...Appellant

Vs.

1.S.G.Rangasamy
2.Saraswathi (Died)
3.Savithiri
4. Deepa

... Respondents

(R2-Died, R4 is brought on record
as LR of the deceased R2 vide
Court order dated 22.11.2023 made
in CMP.Nos.25078/2023 in
SA.No.646/2017)

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgment and decree dated 07.11.2016 in A.S.No.23 of 2016 on the file of the Court of the IV Additional District Judge, Coimbatore, reversing the judgment and decree dated 17.09.2005 in OS.No.1187 of 1999 on the file of the Court of the II Additional Subordinate Judge, Coimbatore.



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For Appellant : Mr.C.R.Prasanan
For Respondents : Mrs.Vijayakumari Natarajan
for Mr.S.Natarajan for R1 & R3
R2- Died

JUDGMENT

The plaintiff in the suit is the appellant. She filed a suit seeking partition of 1/3rd share in the suit property. The suit was decreed in favour of the appellant by granting 4/9th share in the suit property by taking into consideration, increase in the share due to the death of the first defendant pending suit. Aggrieved by the same, the respondents herein preferred an appeal. The first Appellate Court partly allowed the appeal by modifying the decree for partition by granting appellant 1/3rd share in the item Nos.1 & 3 of the suit properties. The suit filed by the appellant was dismissed in respect of the second item of the suit property. Aggrieved by the same, the plaintiff is before this Court.

2. According to the appellant/plaintiff, the deceased first defendant was his father. The third defendant was her sister and the fourth defendant was her mother. The second defendant was son-in-law of first defendant and husband of the deceased second respondent.



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3. It was claimed by the appellant that the suit properties were ancestral properties of the first defendant. Therefore, the appellant, her deceased father/first defendant and her sister/third defendant were entitled to 1/3rd share in the suit properties. It was also further averred that the first defendant at the instigation of the second defendant on 05.12.1997 without any valid consideration created a bogus sale deed and the same was not binding on her, insofar as her share in the suit property. On these pleadings, she sought decree of 1/3rd share.

4. The respondents/defendants filed a written statement claiming that item Nos.1 & 3 absolutely belonged to the first defendant and item No.2 absolutely belonged to the second defendant. It was their case that the item 1 was originally purchased by the first defendant's grand father Attiyanna Gowder on 02.09.1885 and after death of Attiyanna Gowder, his son one Onnamara Gowder/father of the first defendant got the same as absolute owner. The said Onnamara Gowder died 65 years back and on his death the property was inherited by the first defendant as absolute owner. Therefore, item 1 of the suit property was the absolute property of the first defendant. It was also claimed that item Nos.2 & 3 were Natham Poramboke land and the



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first defendant's father Onnamara Gowder occupied the same and after his death, the first defendant continued to occupy the same and put up the superstructure. The first defendant who resided in the house in item No.3 obtained patta in his name. Therefore, item No.3 had also been treated as his own property by virtue of patta obtained by him.

5. As far as, item No.2 is concerned, it was contended by the respondent that item No.2 was occupied by the first defendant as exclusive owner and he sold the said property in favour of the second defendant on 15.09.1997 and by virtue of said sale deed, the second defendant had become exclusive owner of item No.2. Therefore, by denying the claim of the appellant that the suit properties were ancestral property, the respondents/defendants sought for dismissal of the suit.

6. Before the trial Court, the appellant was examined as PW1 and two other independent witnesses were examined as PW2 & PW3. On behalf of the appellant, 9 documents were marked as Ex.A1 to Ex.A9. The second defendant and third defendant were examined as DW1 & DW2 and 10 documents were marked as Ex.B1 to Ex.B10.



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7. The trial Court on appreciation of oral and documentary evidence available on record, came to the conclusion that the suit properties were ancestral properties and hence, the appellant was entitled to 4/9th share after death of first defendant pending suit and accordingly, granted a preliminary decree for partition. Aggrieved by the same, the respondents preferred an Appeal in A.S.No.23 of 2006 on the file of the IV Additional District Judge, Coimbatore.

8. The first Appellate Court came to a finding that after the death of first defendant's father Onnamara Gowder, the first defendant succeeded to the property of Onnamara Gowder as his sole heir and hence, the same should be treated as separate property. Therefore, the First Appellate Court granted a decree for 1/3rd share in respect of item Nos.1 & 3 in favour of the appellant as class-1 heir of first defendant. As far as the item No.2 is concerned since the first defendant sold the same during his life time, the suit was dismissed in respect of item No.2. Aggrieved by the said judgment and decree, the plaintiff has come up with this Second Appeal.



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9. At the time of admission, this Court formulated the following

substantial questions of law:

“a) Whether in law the lower Appellate Court erred in not granting a share in the father's share in the suit item Nos.1 to 3 especially when items Nos.1 & 3 remained undivided without any alienation and also on the ground and that the alienation of item No.2 of the suit properties made under Ex.A3 does not bind the plaintiff/appellant?

b) Whether in law the lower Appellate Court erred in overlooking that the very declaration of the item No.2 of the suit property as ancestral property in Ex.A3 by the 1st defendant Kartha who is competent to declare would determine the character as held in the judgment reported in ILR 24 Mad 829?

c) Whether in law the lower Appellate Court erred in overlooking that the 2nd defendant/1st respondent who is the purchaser under Ex.A3 is estopped by estoppel by document from contending that the property is the separate property of the first defendant besides bound by the recitals “Ancestral Property” in Ex.A2 under Section



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92 of the Evidence Act?

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d) Whether in law the Lower Appellate Court erred in misreading the Sections 6 and 8 of Hindu Succession Act and as per Mitakshara Law, when acquisition of interest in coparcenary remained in the hands of a single person though it be inherited, it could be treated as separate property and once a son is born the concept of the property being a coparcenary property is revived, which would also apply equally to the daughter, after the introduction of the Hindu Succession (Tamil Nadu Amendment) Act, 1989, as laid down in the dictum reported in 2006 (8) SCC 581 and 2013 (9) SCC 419?"

10. The learned counsel for the appellant submitted that the defendants in the written statement clearly admitted the first item was the ancestral property of the family and the first defendant's father Onnamara Gowder died 65 years back. Therefore, it is the contention of the learned counsel for the appellant that on death of Onnamara Gowder, the first defendant would have got the property by surveyorship and the moment the appellant and third respondent had born to the deceased first defendant, they acquired share in the property by birth. Therefore, the appellant is entitled to



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4/9th share in the suit property. The learned counsel for the appellant further submitted that the Courts below failed to see that the first defendant's father Onnamara Gowder died prior to 65 years back and at that time, the Section 8 of Hindu Succession Act, never came in to operation.

11. The learned counsel for the respondents by taking this Court to the judgment passed by the First Appellate Court submitted that after death of Onnamara Gowder, the property was inherited by the first defendant as his heir under Section 8 of the Hindu Succession Act. Once there is an intervention of Section 8 of the Hindu Succession Act, the property will loss its coparcenary character and it has to be treated as a separate property. The learned counsel for the respondents submitted that the First Appellate Court rightly came to the conclusion that the suit property was separate property of the first defendant and granted a preliminary decree for 1/3rd share in favour of the appellant with regard to item Nos.1 & 3 of the suit property.

12. As far as second item is concerned, the learned counsel for the respondents submitted that the first defendant sold the same during his life time and hence the appellant is not entitled to any share in the property.



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13. The appellant came to the Court with specific pleadings that the suit properties were ancestral properties. In the written statement filed by the defendants it was clearly admitted that item No.1 of the suit property was purchased by the first defendant's grand father Attiyanna Gowder under Ex.B10, which would suggest that Attiyanna Gowder purchased item No.1 of the property in the year 1885. Therefore, there is no doubt with regard to the fact that item No.1 was an ancestral property. In the written statement filed on 09.11.2000, it was also admitted by the defendants that the first defendant's father Onnamara Gowder died 65 years back. In that case Onnamara Gowder would have died in the year 1935. Therefore, from the admission of the respondents in the written statement, it is clear that the father of the first defendant died prior to the coming into force of Hindu Succession Act, 1956. In such case, the first defendant would have got the property by surveyorship under old Hindu law and not by operation of Section 8 of the Hindu Succession Act 1956. When there is no intervention of Section 8 of the Act, the property inherited by sole coparcener will be treated as his separate property till birth of his son (now daughters also). The moment a son or daughter is



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born again it will acquire character of coparcenary property. The flouting nature of coparcenary property is very well explained in ***Sivaramakrishnan Vs. Kaveri Ammal and Ors***, reported in ***AIR 1955 Mad 705***. After 2005 amendment to Hindu Succession Act, son or daughter will acquire birth right in the property inherited by their father (by way of survivorship) as a sole coparcener. Therefore, the appellant/plaintiff and the third respondent/third defendant are entitled to 1/3rd share in item No.1 of the suit property as coparceners. Now subsequent to the filing of the suit, the first respondent died leaving behind the appellant, the third defendant and fourth respondent as class-I heir. Therefore, the appellant is entitled to 4/9th share in the suit item No.1 and to that extent the judgment and decree passed by the First Appellate Court is liable to be modified.

14. As far as item Nos.2 & 3 are concerned, it was claimed by the defendants that the said property was occupied by the first defendant's father Onnamara Gowder and later on, after his death, the first defendant continued to occupy the same and acquired patta in his name. Therefore, it should be treated as his own property. However, in the sale deed executed by the first defendant in favour of second defendant under Ex.A3, the suit item No.2 was



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described as ancestral property. It was also recited in that document that since the properties were ancestral properties, the title documents were not available with the first defendant. When the sale deed Ex.A3 was executed by the deceased first defendant in favour of the first respondent/second defendant, the deceased first defendant himself admitted the character of item No.2 of the properties are ancestral properties. The first Appellate Court ought not to have ignored the same and arrived at a conclusion that the said item of property was self acquired property of the first defendant. The first respondent/second defendant, who purchased the suit property from deceased first defendant under Ex.A3, by accepting recital with regard to ancestral character of property covered under the said document cannot turn around and contend it was self acquired property of his vendor. Hence, Ex.A3 is valid only to the extent of 1/3rd share of deceased first defendant and it will not affect 1/3rd share of appellant, which she acquired by birth. Therefore, on the strength of Ex.A3, this Court comes to the conclusion that item No.2 is also ancestral property and hence, the appellant/plaintiff is entitled to 1/3rd share in the item No.2 of the suit property. Further, the first defendant sold his interest (1/3rd share) in item No.2 in favour of the second defendant during his life time. Hence, the decree passed by the first Appellate Court in dismissing the suit in respect of



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item 2 is liable to be set aside by holding that the appellant is entitled to 1/3rd share in the suit item No.2 of the suit property. As far as item No.3 is concerned, the appellant/plaintiff failed to lead any prima facie evidence to show that it is the ancestral property of the family. Therefore, the conclusion reached by the first Appellate Court that the third item was separate property of first defendant is upheld.

15. At this juncture, the learned counsel for the respondents submitted that after the sale by the first defendant in favour of the second defendant under Ex.A3, the second defendant put up a house by spending huge amount and he is residing in the said house along with third defendant. It is made clear that the right of equity shall be determined at the final decree proceedings.

16. In view of the discussions made earlier, all the substantial questions of law are answered in favour of the appellant and the appellant is entitled to 4/9th share in the item No.1 and 1/3rd share in the item No.2.

17. a) In the result, the Second Appeal is partly allowed by setting



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aside the judgment and decree passed by the Courts below, in so far as item Nos.1 & 2 are concerned.

b) A preliminary decree for partition is passed in favour of the appellant/plaintiff in respect of her 4/9th share in the item No.1 and 1/3rd share in the item No.2.

c) The judgment and decree passed by the Courts below in respect of item No.3 is confirmed.

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

22.12.2023

Index : Yes
Internet : Yes
Neutral Citation Case : Yes
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S.SOUNTHAR, J.

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To

- 1.The IV Additional District Judge, Coimbatore,.
- 2.The II Additional Subordinate Judge, Coimbatore.

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and
CMP.No.15981 of 2017

22.12.2023