



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 02.11.2023

CORAM:

THE HONOURABLE MRS.JUSTICE S.SRIMATHY

S.A.(MD).No.244 of 2020

Kumarammal

... Appellant

/Vs./

1. Mupidi Naiker

2. Ganesan

3. Thangammal

...Respondents

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code to set aside the Judgment and Decree is A.S.No.27 of 2018 dated 12.09.2019 on the file of the Learned Subordinate Judge, Kovilpatti confirming the Judgment and Decree passed in O.S.No.32 of 2007, dated 05.03.2018 on the file of the Learned District Munsif Cum Judicial Magistrate, Vilathikulam.

For Appellant : M/s.S.Pon Senthil Kumaran

For Respondents : Mr.George Raja, for
Ajmal Associates

JUDGMENT

The Second Appeal is filed against the Judgment and Decree, dated 12.09.2019 in A.S.No.27 of 2018 on the file of the Learned Subordinate Court, Kovilpatti, confirming the Judgment and Decree, dated 05.03.2018 passed in



O.S.No.32 of 2007, on the file of the District Munsif Cum Judicial Magistrate Court, Vilathikulam.

2. The plaintiff is the appellant herein and the defendants is the respondents herein. For the sake of convenience, the rank of the parties shall be referred as plaintiff and defendants as stated in suit.

3. The suit in O.S.No.32 of 2007 was filed for partition claiming $\frac{1}{2}$ share in the suit property. The plaintiff and the 1st defendant are brother and sister. The 2nd defendant's name is shown in the joint Patta. The 3rd defendant is a purchaser of the property from the 1st defendant. It is the case of the plaintiff that the suit property belonged to Muthusurappa Naiker, who had three sons namely Kicha Naiker, Chinnasamy Naiker and Ramasamy Naiker. There was a partition among them and the suit property was allotted to the share of Chinnasamy Naiker, who is the father of the plaintiff and the 1st defendant. The 1st defendant remained bachelor. The plaintiff sought partition of the property but the 1st defendant refused, hence the suit for partition was filed.

4. The case of the 1st defendant is that the suit property is not an ancestral property but self-acquired. Further there was oral partition between



the plaintiff and the 1st defendant and the plaintiff was given certain properties, hence the suit for second partition is not maintainable.

5. The Trial Court had considered the suit in O.S.No.32 of 2007 and dismissed the suit. Aggrieved over the plaintiff had preferred appeal in A.S.No.27 of 2018 and dismissed the same. Hence the present second appeal.

6. The second appeal is admitted on the following substantial question of law:

a. Whether the Courts below were correct by holding that the Appellant is not entitled to the benefit of Hindus Succession Amendment Act 39 of 2005, when the suit properties were admittedly ancestral and in the absence of proof of previous partition.

b. Whether the courts below were right in rejecting the claim of the plaintiff / appellant in toto when she is entitled to have a share in the share allotted to her farther in notional partition?

7. As far as the 1st substantial question of law is concerned, the contention of the plaintiff is that the suit properties are ancestral property and the same is admitted by the 1st defendant in the reply notice marked as Ex. B4. The contention of the 1st defendant as stated in the written statement is that the suit properties are self-acquired property of the 1st defendant which were



purchased through sale deed and exclusively belongs to the 1st defendant.

Further the suit property was not belonging to the Muthusurappa Naiker. While dealing with this issue the Trial Court after considering the rival claims had held that the Serial No.13 and 14 in Item No.1 of schedule of properties belongs to the 1st defendant through sale deeds. As far as other Serial No.1 to 12 in Item No.1 and Items 2 to 6 belongs to the 1st defendant as coparcener along with the father Chinnasamy Naiker. However, denied granting the relief of partition on the ground that the father died in the year 1972 and from the said year the 1st defendant was in enjoyment of the property as coparcener and hence the plaintiff is not entitled to the property. On appeal the Appellate Court had held that the 1st defendant had admitted that some of properties are ancestral and based on such an admission it cannot be concluded that the properties are ancestral.

8. After perusing the pleadings, evidence and the impugned judgments this Court has given its anxious consideration. The Trial Court had held that the 1st defendant had admitted that the properties are ancestral and hence it had come to the conclusion that the properties are ancestral. The Trial Court has dismissed the suit based on the fact that the father died in the 1972. During the year 1972, the 1st defendant alone is a coparcener along with father



and hence the Trial Court has declined the share of the plaintiff/daughter. Based on the amendment of Hindus Succession Amendment Act 39 of 2005 and based on the Judgment in the case of *Vineeta Sharma Vs. Rakesh Sharma and Others*, reported in **2020 (3) TLNJ 174 (Civil)**, the plaintiff is being a daughter would become coparcener along with the father and the 1st defendant brother. Therefore, this Court is of the considered opinion that the Trial Court had erred in denying the partition.

9. The Appellate Court has held the admission of the 1st defendant would not be sufficient proof to come to the conclusion that the properties are ancestral. And the plaintiff ought to independently prove the properties are ancestral. This Court is of the considered opinion when the rival parties admit certain facts then the same need not be considered as “issue” between the parties. Further in the present case the 1st defendant had claimed that some of the properties are self-acquired through sale deeds which are marked as Ex.B1 and Ex.B2 and after considering the same both the Courts have held that Serial No.13 and 14 are self-acquired. Further when the plaintiff had produced patta standing in the name of the 1st defendant and the 1st defendant had admitted that the patta was changed in his name after the demise of the father. When the 1st defendant had admitted the said fact and for an admitted fact the plaintiff need



not produce any evidence or any proof. In such circumstances the Appellate Court had erred in coming to the conclusion that the plaintiff has not produced any evidence to prove the ancestral nature of the properties. This Court is of the considered opinion that the Appellate Court had erred in demanding independent evidence for the admitted facts.

10. The contention of the 1st defendant is that there was oral partition between the plaintiff and the 1st defendant. However, the plaintiff's case is that there is no oral partition at all. When the 1st defendant is claiming oral partition, then the 1st defendant has to prove the oral partition. But the Courts below had placed the burden of proof on the plaintiff and the same is incorrect.

11. The 1st defendant tried to convince the Court by saying that the property in S.No.89 in N.Jagaveerapuram was allotted to the plaintiff through oral partition. On perusing the written statement and proof affidavit of the 1st defendant it is seen that the 1st defendant had stated that at the time of the death of the father the plaintiff was 1 ½ years old and hence the 1st defendant had conducted the marriage and the marriage expenses were borne by the 1st defendant. Further the gold and other articles were given by the 1st defendant.



After some years of marriage, the property in S.No.89 in N.Jagaveerapuram was given to the plaintiff based on the oral partition before community elders and relatives. The 1st defendant is stating that the said property was granted based on the oral partition. This Court is of the considered opinion that when there are several properties (Serial Nos.1 to 12 in Item and Items 2 to 6) granting only one property to the plaintiff will not amount to oral partition. Therefore, the claim of oral partition fails. Therefore, the 1st substantial question of law is answered in favour of the plaintiff.

12. As far as the 2nd substantial question of law is concerned, this Court had held that the plaintiff is entitled to some properties as stated supra and hence the plaintiff cannot be declined her share in toto. However, the shares ought to be reworked. The said issue is already considered in a recent Judgment in the case of ***Prasanta Kumar Sahoo & Ors Vs. Charulata Sahu & Ors., reported in 2023 SAR (Civ) 493***, wherein ***Vineeta Sharma*** case is referred and it has been held as follows:

“81. We do not find any merit in the submissions canvassed by Mr.Basant learned Senior Counsel appearing for the Appellants that in a partition suit, the preliminary decree cannot be varied in the final decree proceedings, despite the amendment of the law governing the parties.



82. *In our opinion, no error not to speak of any error of law could be said to have been committed upon Courts below, while determining the shares of the parties. The only thing that needs to be done now is to give effect to the amendment in the provisions of Section 6 of the 1956 Act and redetermine the shares of the parties accordingly. To put it straight, the plaintiff is entitled to 1/3rd share in all the properties of her Late father. The issue whether all the properties were ancestral as raised on behalf of the Appellants pale into insignificance.”*

In the present case the father, the plaintiff and the 1st defendant are coparceners. Hence the properties ought to be divided as 1/3 shares each. The plaintiff and the 1st defendant are entitled to the 1/3 of their share. And the father's share of 1/3 again should be divided between the 1st defendant and the plaintiff. Hence the 2nd substantial question of law is held in favour of the plaintiff.

13. The Learned Counsel appearing for the 1st defendant submitted that the marriage expenses spent by the 1st defendant may be taken into account while allotting the properties. This Court is of the considered opinion that the 1st defendant is entitled to deduct such expenses.

14. The Learned Counsel appearing for the 1st defendant submitted that some of the properties already sold through sale deeds to the 3rd defendant



and hence the suit is bad without prayer to set aside the sale. But the Learned Counsel appearing for the plaintiff submitted that the said sale deed was executed after receiving the pre suit notice from the plaintiff and hence the 3rd defendant cannot be considered as bonafide purchaser. After hearing the submissions this Court is of the considered opinion that it is settled proposition that any alienation of undivided interest in the coparcener property made by coparcener without the consent of the other coparcener, the same would not bind others. Hence the alienation of entire property after receiving pre suit notice is invalid to the extent of plaintiff's share.

15. At this juncture, the Learned counsel appearing for the 1st defendant and the plaintiff submitted that the Ganesan is not having any share. It is seen that the Trial Court has not framed any issue "whether the Ganesan is entitled to any other property based on the Patta". The 1st defendant had stated in the written statement that the Ganesan's name is wrongly entered and he had filed a petition to remove the same. The 1st defendant it at liberty to litigate the same before the appropriate authorities and the issue is left open.

16. Accordingly, this Second Appeal is allowed in above terms. The Judgment and Decree, dated 12.09.2019 in A.S.No.27 of 2018 on the file



of the Learned Subordinate Court, Kovilpatti, confirming the Judgment and Decree, dated 05.03.2018 passed in O.S.No.32 of 2007, on the file of the District Munsif Cum Judicial Magistrate Court, Vilathikulam, are hereby set aside. No Costs.

02.11.2023

Index : Yes / No
NCC : Yes / No
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TO:

1. The Subordinate Court, Kovilpatti.
2. The District Munsif Cum Judicial Magistrate Court,
Vilathikulam.
3. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SRIMATHY, J.

KSA

Judgment made in
S.A.(MD)No.244 of 2020

02.11.2023