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S.A.No.1051 of 2008

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.04.2024

CORAM

THE HONOURABLE MR. JUSTICE C.KUMARAPPAN

S.A.No.1051 of 2008

1.Periasamy (deceased)

2.Ramakrishnan

3.Sankar

4.Rajagopal

[Sole appellant died, A2 to 4 are Lrs of the deceased A1 vide
Court order dated 12.09.2014 made in M.P.No.1 to 3/2014 in
S.A.No.1051 of 2008 (RR3 to 5 are transposed as A2 to 4)]

...Appellants

Vs.

1.Jai Ganesh

2.Jai Kamatchi

...Respondents

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree made in A.S.No.99 of 2004 dated 28.03.2005 on the file of the Principal District Judge, Villupuram, confirming the judgment and decree made in O.S.No.30 of 1996, dated 21.10.1998 on the file of the Subordinate Judge, Kallakurichi.

For Appellants : Mr.R.Marudhachalamurthy

For Respondents : R3, R4 and R5 transposed
vide Court order dated 12.09.2014
No appearance for R1 and R2



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J U D G M E N T

The first defendant was originally figured as an appellant in the present appeal. Subsequent to the demise of the first appellant, the first defendant's children through his first wife, namely the respondents 3 to 5 were transposed as the appellants 2 to 4. The plaintiffs who are the 2nd wife of original appellant/1st defendant were arrayed as respondents 1 and 2 in the appeal.

2. For the sake of convenience, the parties will be referred according to their litigative status before the Trial Court.

3. The brief facts, which give rise to the instant second appeal are as follows:

Originally the suit property belongs to one Gopal Iyer. After his demise, the property devolves upon one Periyasamy. According to the plaintiff, they are the children born to Periasamy through his second wife viz., Bhuvaneshwari. Whereas the defendants 2 to 4 are the children of Periasamy through his first wife Kannamma.



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4. It is the case of the plaintiff that the first defendant has not at all maintained the plaintiff and his mother. The mother has filed suit for maintenance. The same was decreed and was confirmed up to the High Court. In spite of such order, the first defendant neglected to maintain the plaintiff and his mother. Therefore, now the plaintiff has come forward with the suit for partition claiming 1/5th share in the suit property and also claiming Rs.30,000/- towards marriage expenses for the second defendant/daughter.

5. The said suit was resisted by the first defendant by contending that he never married to one Bhuvaneshwari who happens to be the mother of the plaintiff and it is also the contention of the first defendant that he also got yet another daughter one Gajalakshmi and she has not been arrayed as the party to the instant suit. It is also the contention of the first defendant that the marriage expenditure claimed by the second defendant is exorbitant.

6. Evidence and findings before the Court below:

Before, the trial Court, on behalf of the plaintiffs, the plaintiffs' mother as well as first plaintiff was examined as Pws.1 and 2 and they also marked their birth certificates as Exs.A1 and A2. On behalf of the defendants,



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no witness was examined. The trial Court after having considered oral and documentary evidence has found that the plaintiffs are entitled to have the share in the suit property.

7. Aggrieved by the same, when the first defendant approached the First Appellate Court. The First Appellate Court has found that the finding recorded by the trial Court is well merited. Apart from that the First Appellate Court has also found that since the First Appeal has been filed after passing of final decree, such conduct of the appellants could also be one of the grounds not to interfere with the order of the trial Court.

8. Not satisfied with the order of the First Appellate Court, the first defendant has filed the instant second appeal. During the pendency of the second appeal, on his demise, his first wife's son transposed as appellants 2 to 4.

9. At the time of admission, this Court formulated the following substantial question of law by order dated 26.09.2008:

“Whether the Plaintiffs claiming to be



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the sons of the second wife, being the illegitimate children, can maintain the suit for partition claiming equal share along with the class-I heirs in respect of ancestral properties?.

10. The learned counsel appearing for the appellants/defendants 3 to 5 would vehemently contend that though it is the contention of the plaintiffs that they are illegitimate children, in order to have a share in father's property, under Section 16 of Hindu Marriage Act, there is a duty cast upon the plaintiffs to establish the marriage between the first defendant and the plaintiff's mother Bhuvaneshwari. The trial Court has found that there was no marriage between Bhuvaneshwari and the first defendant. In view of such finding of fact, the trial Court held that the plaintiffs are not entitled to have a share.

11. Apart from that, the next limb of the argument of the learned counsel for the appellants is that, even for a moment if the Court arrived at a conclusion that, the plaintiffs are the illegitimate children by holding that there was a marriage between the first defendant and the plaintiffs' mother, even then, in the suit property, which are ancestral in character, the plaintiffs cannot



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have equal share as that of the first wife's son. Therefore, in the above ground, the learned counsel for the appellant would submit that the order of the First Appellate Court is liable to be interfered with.

12. Despite publication has been issued against the respondents, no one as appeared on behalf of the respondents.

13. Now the sum and subsistence of the arguments of the learned counsel for the appellants is on two fold:

(1) whether is there any proof to show that there was a marriage between first defendant and Bhuvaneshwari?;

(2) If there is a marriage, whether the plaintiffs can have equal share as that of the first wife's son?

14. In respect of a marriage, as rightly contended by the learned counsel for the plaintiffs, there is a finding by the trial Court that the plaintiffs have failed to prove the marriage. But this Court is of the firm view that such finding is perverse, on the simple reason that the mother of the plaintiffs viz., Bhuvaneshwari has deposed before the Court saying that there was a marriage



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between her and the first defendant. But inspite of such affirmation by the plaintiffs' mother, the defendants did not come to the box to rebut the statement made by the Bhuvaneshwari.

15. Apart from that, it is an admitted case that Bhuvaneshwari has already fled a suit claiming maintenance, and that such order has been confirmed up to the High Court. Therefore, in such peculiar circumstances, this Court is of the firm view that the finding recorded by the trial Court that the plaintiffs have not proved the marriage is absolutely perverse finding. However, the trial Court has found that the plaintiff and children of 1st defendant are granted partition as prayed for. Therefore, the finding in respect of marriage of Bhuvaneshwari with 1st defendant is perverse finding, which is liable to be interfered by this Court.

16. Coming to the order of the First Appellate Court, the First Appellate Court apart from concurring the final conclusion of the trial, Court has also found the conduct of the first defendant in not contesting the case properly. It is pertinent to mention that the defendants neither come forward to let in any evidence, nor mark any documents to support his case. The First



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Appellate Court also found that, the defendants have filed the First Appeal, only after passing the final decree.

17. As already mentioned, this Court is of the firm view that, the plaintiffs have proved the marriage between their mother and the first defendant. If that being the case, what is the plaintiffs share is to be seen. The trial Court has granted equal share of $1/6^{\text{th}}$ (each) to the plaintiffs and also granted Rs.30,000/- in favour of the second plaintiff towards the marital expenditure.

18. In this regard, the learned counsel appearing on behalf of appellants would contend that even according to the case of the plaintiffs, the suit property is the ancestral property. If that being the case as per the Full Bench decision of the Hon'ble Supreme Court in ***Revanasiddappa and another Vs. Mallikarjun and others*** reported in ***(2023) 10 SCC 1***, the plaintiffs cannot have any right over the coparcenary property. Therefore, in view of the above submissions of the learned counsel, it is the duty of the Court to find out whether suit property is coparcenary property or not.

19. If we look at the claim, there is a specific pleading that the



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suit property belongs to Gopal Iyer namely the grand father of the plaintiff, which factum was also admitted by the first defendant. If the property is admitted to be as the property of the first defendant's father, after his demise by virtue of Section 8 of the Hindu Succession Act, the property will devolve on the first defendant, and the same would become his absolute property. Therefore, this Court holds that the suit property cannot be construed as a coparcenary property. However, the same may be construed as the ancestral property which has been dealt under Section 8 of Hindu Succession Act. In such an event under Section 16 of the Hindu Marriage Act, the plaintiffs can have the share in their parent's property namely the first defendant's property.

20. Therefore, the findings arrived at by the trial Court that the plaintiffs are entitled to have a share of $1/6^{\text{th}}$ (each) in the suit property is well merited, and this Court could not find any ground to interfere with the ultimate order of both the Courts below. Therefore, in view of the above detailed discussion, this Court is of the firm view that the substantial question of law framed is liable to be answered in favour of the respondents and against the appellants.

21. In nutshell:



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(a) The second appeal is dismissed by confirming 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.

18.04.2024

Index : Yes/No
Internet : Yes/No
Neutral Citation Case : Yes/No
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To

1. The Principal District Judge, Villupuram.
2. The Subordinate Judge, Kallakurichi.



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C.KUMARAPPAN, J.

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