



S.A.No.745 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on 12.02.2024	Judgment Pronounced on 15.03.2024
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THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No.745 of 2019
and C.M.P.No.5406 of 2020

V.Nandhakumar

..Appellant

Vs.

1.Vaigai @ Jamuna
2.Suganthi
3.Gopinath
4.Gunapoosaniamma

..Respondents

PRAYER: The Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 04.01.2018 passed in A.S.No.41 of 2015 on the file of the IV Additional Judge, City Civil Court, Chennai, reversing the judgment and decree dated 18.06.2013 passed in O.S.No.5344 of 2009 on the file of the V Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.D.Nandagopal

For Respondent : Mr.P.M.Subramaniam, Senior Counsel
for Mr.A.J.Alwyn Prabakar

JUDGMENT



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WEB COPY This Second Appeal has been filed against the the judgment and decree dated 04.01.2018 passed in A.S.No.41 of 2015 on the file of the IV Additional Judge, City Civil Court, Chennai, reversing the judgment and decree dated 18.06.2013 passed in O.S.No.5344 of 2009 on the file of the V Assistant Judge, City Civil Court, Chennai.

2.The plaintiff in a suit for partition is the appellant herein, aggrieved by the reversal findings rendered by the First Appellate Court, dismissing the suit filed by him seeking partition and separate possession.

3.The parties are described as per their litigating status before the Trial Court.

4.The brief facts that are necessary for deciding the Second Appeal are as follows:

The 1st defendant is the father of the plaintiff. The 2nd defendant is the sister of the plaintiff. It is the case of the plaintiff that the schedule mentioned property originally belonged to the plaintiff's grandfather, Samy Chettiar, who was allotted the same by the Collector of Chennai, several decades back. Thereafter, the plaintiff's grandfather was in possession and enjoyment of the



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property, having constructed a house out of his self earned income.

Subsequently, the Samy Chettiar died leaving behind the 1st defendant and another son, S.Vasudevan and in the Partition Deed dated 20.02.1971, 'A' schedule property therein was allotted to the plaintiff's father, the 1st defendant and 'B' schedule property was allotted to the 1st defendant's brother, S.Vasudevan. However, it is stated that till the death of Samy Chettiar, both the plaintiff's father and his brother S.Vasudevan were in joint possession and enjoyment of the suit property with their respective families, paying all taxes in the name of the father, Samy Chettiar. The plaintiff demanded share of property which was refused by the 1st defendant which led to lodging of the police complaints before the D-5, Police Station, Adyar, as well as before the local Panchayat. In the meantime, the plaintiff came to know that the 1st defendant had sold the suit property to his sister, the 2nd defendant on 18.06.2007 and alleging that the Sale Deed was fraudulent and the 1st defendant had no right to sell the same, the suit came to be filed for partition and also for declaring the Sale Deed dated 18.06.2007 executed by the 1st defendant in favour of the 2nd defendant as null and void.

5.The 1st defendant filed a written statement stating that the 1st



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defendant was entitled to dispose of the suit property as he and his wife, being aged, were forced to incur medical expenses and maintenance expenses and the plaintiff and his wife are always troubling and torturing the 1st defendant and his wife, despite they being aged parents of the plaintiff. It is further contended that the plaintiff never looked after the parents at any point of time and they were left to fend themselves. The Trial Court, holding that the 1st defendant was entitled only to 1/5th share in the suit property and could not alienate the entire suit property, decreed the suit by granting a preliminary decree for partition and also holding that the Sale Deed executed by the 1st defendant in favour of the 2nd defendant was not binding upon the plaintiff.

6.The defendants preferred an appeal in A.S.No.41 of 2015 and the First Appellate Court, finding that the Samy Chettiar had died only after coming into force of the Hindu Succession Act, 1956, and that Samy Chettiar also admittedly died intestate, held that division of the property would be governed only by Section 8 and not Section 6 of Hindu Succession Act, and consequently, upheld the Sale Deed executed by the 1st defendant in favour of the 2nd defendant and dismissed the suit for Partition. Aggrieved by the



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reversal finding rendered by the First Appellate Court, the plaintiff has come up with the present Second Appeal.

7.The above Second Appeal was admitted by this Court on 11.07.2019 on the following four substantial questions of law:

a) Whether the lower appellate Court was correct in reversing the judgment of the Trial Court in the light of the Ex.A2, reply notice, where the first respondent/defendant admits that he is ready too allot a share in the suit property to the appellant/plaintiff?

b) Whether the findings of the first appellate court suffers from perversity?

c) Whether failure on the part of the defendants to enter into the witness box and states their case on oaths and does not offer to be cross examined by the appellant/plaintiff, the court would draw adverse inference against the defendants under Section 114 of the Indian Evidence Act?

d) Whether the lower appellate court was legally justified in dismissing the suit by holding that the suit schedule property is a separate property of the plaintiff's



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father, the first defendant in the suit?

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8.I have heard Mr.D.Nandagopal, learned counsel for the appellant and Mr.P.M.Subramaniam, learned Senior Counsel for Mr.A.J.Alwyn Prabakar, learned counsel for the respondents.

9.Mr.D.Nandagopal, learned counsel for the appellant would state that the finding of the First Appellate Court that the property was the self acquired property of the father, the 1st defendant, was wholly unsustainable. In this regard, the learned counsel for the appellant would place reliance on the decisions of the Hon'ble Supreme Court in ***Rohit Chauhan Vs. Surinder Singh & Others*** reported in ***2013 (4) CTC 539*** as well as ***M.Yogendra and Others Vs. Leelamma N and Others*** reported in ***(2009) 15 SCC 184*** and also the judgment of this Court in ***A.S.(MD).No.152 of 2015*** dated ***10.03.2023***.

10.In ***Rohit Chauhan's*** case, the Hon'ble Supreme Court held that coparcenary property meant the property which consists of ancestral property and a coparcener would be a person who shares equally with others, inheritance, in the estate of a common ancestor. The Hon'ble Supreme Court



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held that the concept of “coparcenary” is narrower than Hindu Joint Family and before commencement of Hindu Succession (Amendment) Act, 2005, only male members used to acquire right by birth and the said coparcener would have no definite share in the coparcenary property, but, only an undivided interest which enlarges and diminishes by deaths and births respectively in the family. The Hon'ble Supreme Court also held that when coparcenary property was sold in entirety and without there being any legal necessity then the Sale Deeds were illegal, null and void.

11.In *M.Yogendra's* case, the Hon'ble Supreme Court held that the property in the hands of the sole coparcener allotted to him in partition shall be his separate property and the same shall revive only when a son is born to him.

12.In a recent decision of this Court also, the ratio laid down by the Hon'ble Supreme Court in *Rohit Chauhan's* case as well as *M.Yogendra's* case has been followed and applied and this Court held that any alienation prior to the birth of the son would alone be saved and after the birth of the son, the plaintiff would be entitled to a share by birth, in the available



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properties. The learned counsel for the appellants would therefore pray for the Second Appeal being allowed.

13.Per contra, Mr.P.M.Subramaniam, learned Senior Counsel for the respondents would state that the Lower Appellate Court has rightly considered the effect of the 1971 Partition Deed and held that Section 8 of Hindu Succession Act, alone would apply and not Section 6 of Hindu Succession Act, thereby giving any right to the plaintiff to seek partition. He would also refer to Ex.A10, where the 1st defendant has sold the property only to discharge debts of the family. He would further take me through the evidence of P.W.1, especially, cross-examination where the plaintiff admits that it was the father who built the house, thereby indicating that it was a separate property of the father and not joint family property available for partition. He would also take me through the reply notice in Ex.A2 as well as the covenants in Ex.A3, Partition Deed in the year 1971 and Ex.A10, Sale Deed dated 18.06.2007 and finally pray for dismissal of the Second Appeal.

14.I have carefully considered the rival contentions advanced and put forth by the learned counsel for the appellant and the learned Senior Counsel



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appearing for the respondents. I have gone through the pleadings and documents filed by way of typed set of papers, besides also the oral and documentary evidence and judgments of the Courts below.

15.It is seen from Ex.A2, reply notice, sent by the father, 1st defendant to the appellant/plaintiff, he has stated that he was graciously ready to forgive all the misdeeds of the plaintiff and agreed to give him a share in the property, though denying the plaintiff's claims under Ex.A1, legal notice. Merely because the father had expressed an intention to give a share to the plaintiff, it would not automatically mean that the plaintiff has a right to seek partition. Therefore, I am unable to countenance the arguments of the learned counsel for the appellant that because the 1st respondent had issued a reply notice, agreeing to give a share to the plaintiff, the plaintiff was entitled to a decree for partition. Even from the reply notice, Ex.A2, it is clear that the 1st defendant has no where admitted that the property was available for partition and what all he has said is that he was willing to give a share to his son, after forgiving him for all acts of omissions and commissions that he has committed against the father.

16.Thus, now it requires to be seen whether the plaintiff is entitled to



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seek his share being declared, by birth and whether Section 6 of Hindu Succession Act would apply or Section 8 of the Act. If it is a case where Section 6 of the Hindu Succession Act applies, then certainly the plaintiff would become entitled to a share by birth. However, if the appropriate provision to be applied is Section 8, then it would be the separate property of the father, 1st defendant and he was at perfect liberty to deal with the same and consequently, the plaintiff would not have a right to seek partition of the suit property.

17. In this regard, to ascertain the character of the property, it is seen from the plaint averments that even according to the plaintiffs, the property was originally allotted by the Collector of Chennai, before the Hindu Succession Act, 1956, came into force. The plaintiff admitted in the witness box that his father alone put up the construction and he was in enjoyment of the same. The relevant and significant document to decide the character of property would be the deed of partition dated 20.02.1971, under which the two sons of Samy Chettiar, the original allottee of the property, namely, Visvanathan and Vasudevan have partitioned the estate of the said Samy Chettiar and the suit property under the said Partition Deed was allotted to the



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plaintiff's father, that is the 1st defendant. According to the learned counsel for the plaintiff, the 1st defendant would only take the property as Kartha of his Hindu undivided family and not as his same property.

18.However, per contra, Mr.P.M.Subramanian, learned Senior Counsel would contend that since it was the self acquired property of the grandfather, Samy Chettiar and subsequently, in 1971, his two sons have partitioned the properties of the said Samy Chettiar and the suit property went to the share of the 1st defendant, the property would only be the separate property of the 1st defendant and not the property which would be taken by him as joint family property capable of being divided further on the birth of any sons to said Visvanathan.

19.It is an admitted fact that Samy Chettiar died intestate and thereafter, his surviving legal heirs, namely the two sons have divided the properties belonging to the Samy Chettiar in and by Ex.A3 Partition Deed.

20.The First Appellate Court rightly found that the property was the self acquired property of late Samy Chettiar and when his Class I legal heirs



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had partitioned the properties of Samy Chettiar including the suit property, then they would be taking their respective shares under Section 8 of the Hindu Succession Act, as their respective separate properties. Moreover, the partition in the year 1971 was only after the death of Samy Chettiar and therefore, the claim of the plaintiff that he would be entitled to birth right in view of mandate of Section 6 of the Hindu Succession Act and consequently would be entitled to file a suit for partition, cannot be countenanced.

21. Moreover, the plaintiff himself has also admitted in his evidence that the property was enjoyed absolutely by the 1st defendant, his father who had in fact put up the construction of the house out of his own funds. This would also be an additional factor which strengthens the case of the defendants that the suit property was the separate property of the 1st defendant and not a joint family property as alleged by the plaintiff. Moreover, the property admittedly was assigned by the Collector of Chennai in favour of the grandfather of the plaintiff i.e., father of the 1st defendant and it is for the plaintiff to prove and establish that the suit property is ancestral in nature.

22. Four (04) generations downwards would become entitled to share



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in the property, if the property is ancestral property and thereby would be available for partition. Only under such circumstances, the ratio laid down by the Hon'ble Supreme Court as well as this Court would apply and where by birth of a son, then the share of the father would get diminished. In ***M.Yogendra's*** case, the facts were slightly different. Properties were allotted in a partition in the year 1948 before the commencement of the Hindu Succession Act and therefore, the Hon'ble Supreme Court held that it would constitute coparcenary properties at the hands of the father. Similarly in ***Rohit Chauhan's*** case also the ratio laid down in ***M.Yogendra's*** case alone was followed and applied and these two cases were relied on by the learned Single Judge of this Court in A.S.(MD).No.152 of 2015.

23.Here, on the facts of the present case, it is not the case as in the facts of the decisions relied on by the learned counsel for the appellant. Even according to the plaintiff, the properties were only allotted to his grandfather and subsequent to demise of his grandfather, the properties of the grandfather were partitioned by his surviving legal heirs. Thus, the sons of the grandfather (i.e.) the 1st defendant and his brother took the properties only under Section 8 of the Hindu Succession Act and not under Section 6 of the



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Hindu Succession Act. Therefore, I do not find any illegality or perversity in the findings arrived at by the First Appellate Court. Consequently, the substantial questions of law are answered against the appellant herein.

24.In the result, the Second Appeal is dismissed. There shall be no order as to costs. Consequently, connected Civil Miscellaneous Petition is closed.

15.03.2024

Index : Yes/No
Speaking Order/Non-Speaking Order

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To

- 1.The IV Additional Judge, City Civil Court, Chennai.
- 2.The V Assistant Judge, City Civil Court, Chennai.
- 3.The Section Officer, V.R.Section, High Court, Madras.

P.B.BALAJI, J.

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Pre-delivery judgment made in

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