

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

<i>Reserved on</i>	<i>15.03.2024</i>
<i>Pronounced on</i>	<i>22.03.2024</i>

CORAM :**THE HONOURABLE MR.JUSTICE P.B.BALAJI**

S.A.No.205 of 2018
&
CMP No.5184 of 2018

K.V.Shanmugam

. Appellant/2nd defendant

Vs.

Veerammal(died)

1.Devi

2.Amsadevi

3.Eswari

...Respondents/plaintiff/defendants 3 & 4

Prayer:- This Second Appeal has been filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 22.02.2017 made in A.S.No.24 of 2016 on the file of III Additional District Judge, Gobichettipalayam, reversing the judgment and decree dated 29.09.2016 passed in O.S.No.77 of 2011 on the file of the learned Subordinate Judge, Gobichettipalayam.

For Appellant : Mr.P.Valliappan, SC for
Mr.S.M.S.Shri Ram Narayanan
For Respondents : Mr.V.P.K.Gowtham for R1

JUDGMENT



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This Appeal has been preferred as against the Judgment and decree dated 22.02.2017 made in A.S.No.24 of 2016 on the file of III Additional District Judge, Gobichettipalayam, reversing the judgment and decree dated 29.09.2016 passed in O.S.No.77 of 2011 on the file of the learned Subordinate Judge, Gobichettipalayam.

2.The second defendant in a suit filed for partition, is the appellant herein.

3.The parties are described as per their litigative status before the trial Court.

4.The plaintiff, being one of the heirs of Late Veerappa Gounder, who had died intestate in February 2003, filed the suit, seeking to declare her 1/4th share in the suit property. The first defendant is the mother of the plaintiff and the defendants 2 to 4 are the daughters and son respectively of Late Veerappa Gounder and the first defendant, viz., siblings of the plaintiff. The trial Court dismissed the suit on the ground



that the marriage of the plaintiff was prior to the Tamil Nadu Amendment Act (1) of 1990 and therefore, she was not entitled to seek for partition.

5. On Appeal, the First Appellate Court, reversed the findings of the trial Court and granted a preliminary decree for 1/8th share in the suit property in favour of the plaintiff. Aggrieved by the said preliminary decree for 1/8th share being declared to the plaintiff, the second defendant, who is none else than the brother of the plaintiff, has preferred the present Second Appeal.

6. The above Second Appeal was admitted by this Court on 11.01.2019, on the following substantial questions of law:

"(i) When the 1st respondent admittedly got married prior to coming into force of Tamil Nadu Act 1 of 1990 and her father Veerappa Gounder died in February 2003, whether the 1st respondent is entitled to claim share over the HUF properties?

(ii) When the 1st respondent failed to include all the properties, is the suit for partition maintainable particularly when it is well settled that



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a suit for partial partition is not maintainable in law?

(iii) When the Trial Court had rightly dismissed the suit on the ground that dismissal of the suit against the 3rd respondent would disentitle the 1st respondent from maintaining the claim for partition against the other defendants, is the Lower Appellate Court correct in law in reversing the same on the surmises and conjectures?"

7. I have heard Mr.P.Valliappan, learned Senior Counsel appearing for Mr.S.M.S.Shri Ram Narayanan, learned counsel for the appellant and Mr. V.P.K.Gowtham, learned counsel for the first respondent.

8. The learned Senior counsel appearing for the appellant would mainly contend that before the trial Court, the suit came to be dismissed against the 4th defendant for default and subsequently, the suit itself came to be dismissed, declaring that the plaintiff was not entitled to any share in the suit property. According to the learned Senior counsel, the defect of not restoring the suit in respect of the 4th defendant, would have to be held fatal to the plaintiff's case and the suit for partition automatically would



have to be dismissed.

9.Per contra, Mr.V.P.K.Gowtham, learned counsel for the first respondent would submit that though the 4th defendant had appeared through a counsel before the First Appellate Court and she had not raised any objection for a share being declared in favour of the plaintiff, therefore, the technical objection raised by the learned Senior counsel for the appellant, cannot be sustained. He would place reliance on the decision of this Court in “*Alamathal @ Alamelu & Others Vs. Karppathal & Others*” reported in *CDJ 2021 MHC 6849*, wherein, this Court has held that even where one of the defendants had not filed any written statement claiming share in the property, there would be no embargo for granting or declaring the share of the said defendant as in a suit for partition, even the defendant is also construed as one of the plaintiffs and a preliminary decree can be passed in favour of any of co-sharers, on payment of Court fee and that the share of any party, including the defendant in the joint family property, cannot be deprived of their share on the ground of non-payment of Court fee and it is always



open to the defendant to come forward and get his share declared and allotted even at the stage of final decree proceedings.

10. I have gone through the records and also considered the arguments advanced by the learned counsel on either side. The Appeal hinges on a very short question. Insofar as the first substantial question of law is concerned, the entitlement of the daughter, who got married prior to the coming into force of the Tamil Nadu Act 1 of 1990 (herein after referred to as "the Act") is no longer *res integra* in view of the subsequent decision of the Hon'ble Supreme Court in "***Vineetha Sharma Vs. Rakesh Sharma***" reported in (2020) 9 SCC page 1. Thus, it is clear that even if the plaintiff had been married even prior to the coming into force of the Act and despite the death of the father, Veerappa Gounder in February 2003, the plaintiff would be entitled to a share in co-parcenary property and consequently, she is entitled to seek her share in the suit property.

11. Insofar as the second substantial question of law with regard to



the partial partition is concerned, it is seen that this issue has arisen only pursuant to the demise of the mother, who was a party, namely, the first defendant in the suit and she having died pending the suit proceedings, her death, pending the suit would not render the suit filed earlier in respect of the father's property as not maintainable on the ground of partial partition. Therefore, the first two substantial questions of law do not merit any consideration.

12. It is only the third substantial question of law that survives for consideration. As contended by the learned Senior Counsel for the appellant, admittedly, the plaintiff has not restored the suit against the 4th defendant subsequent to the suit being dismissed for default as against the 4th defendant. However, I find that the said dismissal of the suit against the 4th defendant and the same not having been restored subsequently, would not in any way affect the plaintiff's claim for partition for the following reasons:

(i) Even though this suit was dismissed for default as against the 4th defendant, it is pertinent to note that after trial, the suit came to be



dismissed in its entirety.

(ii) Subsequently, the plaintiff alone has preferred the first Appeal against all the defendants, including the 4th defendant.

13. Before the First Appellate Court, the 4th defendant has engaged a counsel and the 4th defendant has not objected to the claim of partition made by the plaintiff relying on any testamentary instrument or other document rendering the suit for partition being liable to be dismissed. Therefore, the 4th defendant having entered appearance in the first Appeal proceedings and not objected to the claim of the plaintiff being adjudicated, would not enable the second defendant to raise the issue on her behalf i.e. the 4th defendant and seek for dismissal of the suit for partition. Further, in a suit of this nature, as rightly held by this Court in the decision cited supra, even the defendant is a plaintiff. Order 41, Rules 4 and 33 of the Code of Civil Procedure assume relevance, which are enabling provisions and empowers the Court to exercise its discretion in favour of persons who have not appealed against the decree, provided the decision proceeds on grounds common to the appellants and the non-



appealing persons. The said provisions are extracted as under for easy reference.

Order 41, Rule 4 and 33 of CPC read as under:

"4. Where there are more plaintiff's or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.

"33. The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection:"

14. Therefore, in terms of the mandate under Order 41 Rule 4, the appellate Court can reverse the decree in favour of the plaintiffs or the defendants, as the case may be, when the decree appealed from, proceeds on any ground common to all the plaintiffs or to all the



defendants. In terms of Order 41 Rule 33, the Appellate Court has power to pass any decree and make any order as the case may require, even if the appeal is only as to part of the decree and it may also be exercised in favour of all or any of the respondents, although such respondents may not have filed any appeal or objection.

15. On a conjoint reading of the above provisions, it is clear that despite the suit being dismissed for default as against the 4th defendant, the 4th defendant had chosen to appear in the first Appeal and did not object for the partition decree being granted in favour of the plaintiff. I do not find that the defect of not restoring the suit, which was dismissed for default as against the 4th defendant, would stand in the way of a preliminary decree being passed in favour of the plaintiff. I do not find any infirmity and illegality in the findings arrived at by the First Appellate Court in passing a preliminary decree in favour of the plaintiff, declaring her 1/8th share in the suit property.

16. In the light of the above discussion, the third substantial



question of law is answered against the appellant.

17. Accordingly, the Second Appeal fails and it is dismissed. There shall be no costs throughout. Consequently, connected miscellaneous petition is closed.

22.03.2024

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To

1. The III Additional District Judge, Gobichettipalayam
2. The Subordinate Judge, Gobichettipalayam

P.B.BALAJI,J.



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**Pre-delivery Order in
SA.No.205 of 2018**

22.03.2024