



S.A.No.58 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 05.02.2024

Delivered on:16.02.2024

CORAM:

THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No.58 of 2018

and

C.M.P.No.1153 of 2018

Vijaya

W/o.Mannu Udaiyar

...Appellant

Vs.

1. Deivanai Ammal
W/o.Late Muthukrishnan Udaiyar

2. Selvi
W/o.Parasuraman

...Respondents

(Memo dated 30.11.2023 recorded)

R1 died. Appellant and R2 (already on record) are recorded as legal heirs of the deceased R1 viz., Deivanai Ammal vide Court order dated 30.11.2023 made in S.A.No.58 of 2018



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PRAYER:

Second Appeal filed under Section 100 of the Code of Civil Procedure, against the Judgment and Decree of the learned District Judge, Tiruvannamalai dated 29.02.2012 made in A.S.No.62 of 2001 in reversing the well considered judgment and decree of the learned Principal Subordinate Judge, Tiruvannamalai dated 18.04.2001 made in O.S.No.80 of 1994.

For Appellant : Ms.G.Sumithra

For Respondents : Mr.M.Himavanth

J U D G M E N T

The plaintiff, who filed a suit for partition is the appellant.

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

3. The material facts that are necessary for deciding the above Second Appeal are as follows:

(i) The plaintiff is the daughter of the first defendant and



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Muthukrishna Udaiyar. The second defendant is the younger sister of the plaintiff. It is the case of the plaintiff that the defendants and the plaintiff are the only surviving legal heirs of late Muthukrishna Udaiyar. According to the plaintiff, the suit properties are all separate and self-acquired properties of her father Muthukrishna Udaiyar and being the daughter, the plaintiff was entitled to 1/3rd share. The suit was resisted by the mother / first defendant, who filed a written statement stating that a son was born to her and Muthukrishna Udaiyar on 11.12.1959. However, the said son died when he was five years old in 1964, leaving behind the first defendant as his sole and surviving legal heir under the provisions of the Hindu Succession Act, 1956. The claim of the plaintiff that all the suit properties were separate and self-acquired properties of Muthukrishna Udaiyar is also denied and in view of the above, the first defendant sought for dismissal of the suit.

(ii) The first defendant also filed an additional written statement stating that she had executed a last Will and Testament on 30.04.1996 bequeathing her properties in favour of her younger daughter namely, the second



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defendant. In view of the above, according to the first defendant, the plaintiff's suit was liable to be dismissed.

4. The trial Court, on appreciation of oral and documentary evidence granted a preliminary decree of 1/3rd share in favour of the plaintiff in the suit items 1 to 8, 10 to 33, 36 and 38. The said preliminary decree was challenged by the defendants namely, mother and sister of the plaintiff in A.S.No.62 of 2001. In the said appeal suit, the plaintiff filed a cross appeal in respect of disallowed items.

5. The First Appellate Court set aside the judgment and decree of the trial Court and modified the preliminary decree holding that the plaintiff was entitled only to 1/6th share in respect of items 1 to 8, 10 to 32 and 37. The Cross Appeal was partly allowed in respect of item No.37 alone, dismissing the same in respect of item Nos.34 and 35.



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6. Aggrieved by the judgment and decree of the First Appellate Court, the plaintiff is before this Court by way of second appeal. Pending the above second appeal, it was brought to the notice of this Court that the first respondent / mother passed away on 17.09.2023. In view of the appellant and second respondent being the only legal heirs of the deceased first respondent, the same was recorded by this Court and the counsel for appellant and the second respondent were heard. The Second Appeal has not yet been admitted.

7. On hearing learned counsel on both sides, I admit the second appeal on the following substantial question of law:-

"Whether the judgment and decree of the First Appellate Court holding that the suit properties were the joint family properties at the hands of the father, Muthukrishna Udaiyar can be sustained in the absence of any evidence adduced by the defendants that the suit properties were purchased only out of surplus income derived from the ancestral property?"



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8. Heard Ms.G.Sumithra, learned counsel for the appellant and Mr.M.Himavanth, learned counsel for respondents.

9. Learned counsel for the appellant would primarily rest her case on the Larger Bench Judgment of Hon'ble Supreme Court in ***Vineeta Sharma*** case [***Vineeta Sharma Vs. Rakesh Sharma and others reported in (2020) 9 SCC***] and state that in view of the change in legal position, the daughters are also to be treated as coparceners and even in the event of the properties being held to be joint family properties, still the plaintiff would be entitled to an equal share along with male coparcener namely, the son of Muthukrishna Udaiyar, who died at the age of five years.

10. Per contra, Mr.M.Himavanth, learned counsel for the respondents would submit that the First Appellate Court has confused itself with some of the items of suit properties and also did not take into account the fact that items 9, 33, 34, 35, 36, 38, 39 to 46 were not available for partition. He would further state that the mother has admittedly, executed a Will



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bequeathing her share in favour of her younger daughter namely, the second defendant and the mother has also spoken about the said Will and therefore, subsequent to the demise of the first respondent, her share would stand bequeathed to the second respondent alone. He would further state that in view of the death of the son of the first respondent and Muthukrishna Udaiyar at the age of 5 years, as a minor, being the only Class I legal heir of the said minor son VEDIYAPPAN, his share would stand inherited only by the mother and therefore, the claim of the plaintiff / appellant to 1/3rd share is unsustainable.

11. In view of the legal position settled by Hon'ble Supreme Court in ***Vineeta Sharma*** case, a daughter is now entitled to an equal share and is to be treated on par with the son.

12. In view of the said legal position, the question as to whether the properties were joint family properties or separate properties of Muthukrishna Udaiyar pales into insignificance.



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13. From the evidence on record, I am able to see that the defendants have established the birth of the son Vedyappan and also his death in the year 1964. Therefore, his share would stand inherited by the mother / first defendant. The first defendant has categorically stated that she has executed her Will, disinheriting the plaintiff and bequeathing her share in all the properties to the second defendant, her younger daughter. Thus, the plaintiff cannot claim a share in the mother's property. Taking into account, the fact that there has been no partition in the family earlier especially, during the lifetime of minor son Vedyappan, applying the ratio laid down by Hon'ble Supreme Court in *Vineeta Sharma's* case referred to supra, the plaintiff's share will have to be accordingly arrived at.

14. No doubt, as rightly pointed out by the learned counsel for the appellant, the defendants have not been able to prove the availability of surplus income in order to apply the same towards purchase of the other properties. As already stated, this does not affect the shares of the parties in view of the dictum of the Hon'ble Supreme Court in *Vineeta Sharma's* case.



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Moreover, I have also called upon learned counsel on either side to give a list of items that are available for partition since both learned counsel agreed that the Courts below have confused the issues considering the fact that there are several items of properties and there has been duplication of some of the items of the suit properties.

15. From the gist of submissions filed by learned counsel for respondents which was also accepted by learned counsel for appellant, it is seen that the properties that are available for partition are only items 1 to 8, 10 to 32 and 37. The remaining items namely, items 9, 33, 34, 35, 36, 38, 39 to 46 are unavailable for partition. This factum is not denied by the learned counsel for the appellant. Thus, the shares of the appellant / plaintiff in items 1 to 8, 10 to 32 and 37 is declared to be 1/4th share. The daughters namely, the plaintiff and second defendant would become entitled to 1/4th share each. The share of the minor son VEDIYAPPAN would stand inherited by the mother, the first defendant and the mother's share gets enlarged to one 1/2 share. The said one 1/2 share of the mother has been bequeathed under Ex.B22 dated



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30.04.1996 in favour of the second defendant. Thus, the second defendant's share would get enlarged to 3/4th and the balance 1/4th share is the share of the appellant.

16. In view of the above, the judgment and decree of the First Appellate Court is hereby modified and there shall be a preliminary decree declaring the appellant / plaintiff's share as 1/4th share in respect of items 1 to 8, 10 to 32 and 37 and in respect of other items, the Second Appeal stands dismissed.

17. The Second Appeal is partly allowed. Consequently, connected miscellaneous petition is closed. There shall be no order as to costs.

16.02.2024.

Internet: Yes
Index: Yes/No
Neutral Citation: Yes/No
Speaking/Non-speaking order

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To

1. The District Judge,
District Court,
Tiruvannamalai.

2. The Principal Subordinate Judge,
Sub-Court,
Tiruvannamalai.



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P.B.BALAJI, J.,

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