



S.A. No.727 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.02.2024

DELIVERED ON : 01.03.2024

CORAM:

THE HON'BLE MR. JUSTICE P.B. BALAJI

S.A. No.727 of 2019
and CMP No.13869 of 2019

S.Thamilarasi

.... Appellant

Versus

R. Varadhappan (died)

1.S.Sumathi

2.S.Saraswathi

3.S.Maheswari

4.L.Vasanthi

5.M.Annapoorani

... Respondents

Second Appeal filed under Section 100 of the Civil Procedure Code, against the decree and judgment passed in A.S. No.90 of 2012 dated 28.11.2018 on the file of Principal District Court, Salem in modifying the judgment and decree dated 25.04.2017 in O.S.No.102 of 2010 on the file of Subordinate Court, Sankari.



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For Appellant

: Mr.V.Raghavachari
Senior Counsel for
Mrs.V.Srimathi

For Respondents

: Mr.S.Viswanathan
for M/s Dass & Viswa Associates
For R.1
Mr.K.R.Samratt
For R.2 and R.3
Mr.R.Marudhachalamurthy
For R.4 and R.5

JUDGMENT

The third plaintiff in O.S.No.102 of 2010 is the appellant in the present Second Appeal. The parties are described as per their litigative status before the trial Court.

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

The third plaintiff/appellant herein along with her two sisters, viz., S.Saraswathi and S.Maheswari instituted a suit in O.S.No.102 of 2010 against their father, R.Varadhappan/the 1st defendant and also against their



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sisters viz., L.Vasanthi/2nd defendant and M.Annapoorani/3rd defendant. The plaintiffs sought for partition of the ancestral property into six equal shares and for allotting 1/6th share each to the plaintiffs.

3. The father/1st defendant filed a written statement stating that the properties were not ancestral joint family properties and therefore, the plaintiffs had no right to seek for partition during his life time. Further, the 1st defendant/father had also stated that after the death of his first wife viz., Seerayee @ Ponnammal/the mother of the plaintiffs, the father/1st defendant was deserted by his children and therefore, he married for the second time, one Sumathi, from Kerala and that the marriage was solemnized at Guruvayurappan Temple at Guruvayur, Kerala on 22.08.2010. According to the 1st defendant, the plaintiffs filed the suit only on coming to know about the 1st defendant's second marriage. He also further stated that he has settled properties in favour of his daughters and the suit has been filed only apprehending that the 2nd wife Sumathi would take away all the properties.



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4. It is the further case of the 1st defendant that the suit properties and the other properties were partitioned in the month of May 2007, but, by mistake, instead of mentioning it as a partition deed, it was mentioned as if the 1st defendant had settled the properties in favour of the plaintiffs and the defendants 2 and 3 and therefore, he sought for dismissal of the suit.

5. Before the trial Court, the registered Settlement Deed dated 06.07.2012 was marked as Ex.A.1 on the side of the plaintiff.

6. The trial Court, after appreciation of the oral and documentary evidence adduced by the parties, passed a preliminary decree for partition, declaring the plaintiffs' 3/6th share in the suit property and also granted the relief of permanent injunction to restrain the first defendant from alienating or encumbering the suit property. The said judgment and decree was challenged by the father, the 1st defendant.



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7. Pending appeal, the father/1st appellant/1st defendant died and the second wife viz., Sumathi got herself impleaded as 2nd appellant in the appeal suit in A.S.No.90 of 2012. The 2nd appellant projected a Will dated 15.04.2013, said to have been executed by the 1st defendant/1st appellant. In fact, an application was filed in I.A.No.96 of 2016 for receiving the said Will, as evidence in the appeal. The first appellate Court remitted the matter to the trial Court for the limited purpose of deciding the genuineness of the Will dated 15.04.2013.

8. Before the trial Court, issues were framed regarding the due execution and genuineness of the Will dated 15.04.2013 and after the parties adduced evidence, the trial Court came to the finding that the Will produced by the 2nd appellant was not a genuine document. After such finding rendered by the trial Court, the 1st appellate Court heard the appeal and proceeded to allow the appeal on a limited circumstance viz., in and by a settlement deed dated 25.04.2017, executed by the 1st appellant in favour of the 2nd appellant, marked as Ex.A.1 during re-trial after remand, the 1st defendant had settled his share in favour of the 2nd wife viz., 2nd appellant and since the plaintiffs



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had not specifically denied the settlement deed, the First Appellate Court held that it was not required to be proved as contemplated under Section 68 of the Indian Evidence Act, 1872 and therefore, proceeded to hold that the 2nd appellant would be entitled to the 1/6th share in the suit property while confirming the shares as per the preliminary decree, already granted in favour of the plaintiffs viz., 1/6th share each.

9. Aggrieved by the allotment of 1/6th share to the 2nd appellant, the 3rd plaintiff alone has chosen to prefer the above second appeal. The Second Appeal came to be admitted by this Court on 08.07.2019 on the following substantial questions of law:-

- (i) Whether the 1st defendant could execute a deed of settlement in favour of the 1st respondent, especially when it is coparcener property?
- (ii) Whether a document executed *lis pendens* be given effect to when the rights of the parties are subjected to judicial scrutiny?
- (iii) Whether the Courts below are right in relying upon an unmarked document in the suit for the



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purposes of allocating 1/6th share in favour of the 1st respondent?

(iv) Whether the Lower Appellate Court is right in not appreciating the fundamental fact that the Trial Court was called upon only to render a finding on Ex.C.1 dated 15.04.2013 and when the document dated 06.07.2012 was not the subject matter of adjudication is the Lower Appellate Court right in relying upon it, to grant a share in favour of the 1st respondent?

(v) Whether the Lower Appellate Court had not exceeded the scope of remand and had arrived at a perverse conclusion?

(vi) In the absence of proof of settlement could it be relied upon for conferring a legal right?

(vii) Is the Lower Appellate Court right in not making a distinction between the marking of a document and proof of it and whether the reliance placed on the document dated 06.07.2012 is perverse?

10. I have heard Mr.V.Raghavachari, learned Senior Counsel appearing for Mrs.V.Srimathi, Mr.S.Viswanathan, learned counsel



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representing for the 1st respondent; Mr.K.R.Samratt, learned counsel for the respondents 2 and 3 and Mr.R.Marudhachalamurthy, learned counsel for the respondents 4 and 5.

11. Mr.V.Raghavachari, learned Senior Counsel appearing for the appellant would primarily focus his arguments on the substantial questions of law that have been framed by this Court and contend that the father viz., the 1st appellant in A.S.No.90 of 2012 had no right to execute the settlement deed, especially when the character of the property was admittedly joint family and ancestral in nature. He would place reliance on the judgment of the Division Bench of this Court in the case of *N.Kalavathy vs Sriramulu Naidu and others* reported in *2023 3 Law Weekly 209, (A.S.No.63 of 2012 dated 07.06.2023)*, where I was a part of the Division Bench, which rendered the judgment. In the above said case, we have followed the ratio laid down by the Hon'ble Supreme Court in the case of *Thamma Venkata Subbamma vs Thamma Rattamma and Others* reported in *(1987) 3 SCC 294*, which held that the settlement by a coparcener without the consent of other coparceners was a void transaction and that no legal rights would flow under



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such a document. He would also further invite my attention to the decree passed by the trial Court. It is seen from the decree that, while granting the preliminary decree for partition, the trial Court also granted the relief of permanent injunction restraining the 1st defendant from alienating or encumbering the suit property. According to the learned Senior Counsel, admittedly, after delivering the judgment and decree by the trial Court alone, the 1st appellant has proceeded to settle the property in favour of the 2nd appellant. This, again, is a clear violation of the decree passed by the competent Civil Court and therefore, he would contend that the settlement deed cannot be looked into and had to be rejected.

12. Further, the learned Senior Counsel would state that the 2nd wife/2nd appellant has not challenged the findings of the trial court regarding the genuineness of the Will and the same was also confirmed by the 1st appellate Court. Therefore, according to the learned Senior Counsel, the 2nd wife/ 2nd appellant/1st respondent in the second appeal would not be entitled to any right whatsoever and in the worst scenario, according to him, if this Court feels that the 2nd appellant/1st respondent in the second appeal has established



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the factum of being the 2nd wife of the 1st defendant/1st appellant, then, she would become entitled to 1/6th share in the 1/6th share of the 1st defendant i.e., 1/36th share. He would therefore pray for the Second Appeal being allowed.

13. Per contra, Mr.S.Viswanathan, learned counsel appearing for the 1st respondent in the second appeal/2nd wife of the 1st defendant, would contend that the 1st appellate Court had rightly held that the settlement deed, executed by the 1st defendant, in favour of the 2nd wife, who is the 1st respondent in the Second Appeal, was never challenged and in fact, it was marked only by the plaintiffs themselves, when the 1st appellate Court had remanded the matter to the trial Court. Further, the learned counsel would also state that when the preliminary decree had been passed by the trial Court, declaring 1/6th share of the 1st defendant, the property would cease to be coparcenary property and his 1/6th share, which was settled on the 1st respondent/2nd wife, was valid in the eye of law. He would, therefore, pray for dismissal of the second appeal.

14. I have carefully considered the rival submissions advanced by the learned Senior Counsel as well as the learned counsel for the respondents.



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15. It is seen from the judgment of the Courts below that there is a categorical finding rendered by both the Courts below that the suit properties were originally belonging to the paternal grand father viz., Ramasamy Gounder and that the suit properties were concurrently characterised as ancestral Hindu joint family properties. Applying the amended provisions of Section 6 of Hindu Succession (Amendment) Act 39 of 2005 , the Courts also found that the daughters are entitled on equal footing with the sons. Thus, the only question that remains to be answered is as to the effect of the settlement deed executed by the 1st defendant in favour of the 1st respondent/2nd wife of the 1st defendant.

16. Admittedly, the property has been found to be ancestral joint family property. The 1st respondent/2nd wife has not chosen to challenge the said findings rendered by the trial Court and confirmed by the 1st appellate Court. In such circumstances, in view of the ratio laid down by the Division Bench of this Court in the case of *N.Kalavathy vs Sriramulu Naidu and others* reported in **2023 3 Law Weekly 209**, the settlement deed executed by the 1st



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defendant in favour of the 1st respondent/2nd wife is a void document and I am unable to countenance the submission of the learned counsel appearing for the 1st respondent that since there is a preliminary decree passed, confirming the 1/6th share of the 1st defendant, the settlement deed would have to be held to be valid. Unless and until a final decree is passed, the rights of the parties do not stand fully crystalised. The Hon'ble Supreme Court in the case of ***Vineetha Sharma vs Rakesh Sharma and Others*** reported in **2020 9 SCC 1**, laid down as hereunder”-

“87. It is settled proposition of law that without partition, only undivided share can be sold but not specific property, nor joint possession can be disrupted by such alienation. Whether the consent of other coparcener is required for sale or not, depends upon by which School of Mitakshara law, parties are governed, to say, in Benares School, there is a prohibition on the sale of property without the consent of other coparceners. The Court in the abovesaid decision made general observation but was not concerned with the aspect when the partition was completed, the effect of intervening events and effect of statutory provisions as to partition, as such, it cannot be said to be an authority as to provisions of Section 6 as substituted and as to enlargement of the right by operation of law achieved thereunder. Shares of coparceners can undergo a change in coparcenary by



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birth and death unless and until the final division is made. The body of coparcenary is increased by the operation of law as daughters have been declared as a coparcener, full effect is required to be given to the same. The above decision cannot be said to be an authority for the question involved in the present matters.

..

*114. In the instant case, the question is different. What has been recognised as partition by the legislation under Section 6, accordingly, rights are to be worked out. This Court consistently held in various decisions mentioned above that when the rights are subsequently conferred, the preliminary decree can be amended, and the benefit of law has to be conferred. Hence, we have not hesitation to reject the effect of statutory fiction of the proviso to Section 6 as discussed in *Prakash v. Phlavati* (2016) 2 SCC 36 and *Danamma* (2018) 3 SCC 343. If a daughter is alive on the date of enforcement of the Amendment Act, she becomes a coparcener with effect from the date of the Amendment Act, irrespective of the date of birth earlier in point of time.”*

17. Thus, I am not convinced with the arguments of the learned counsel for the 1st respondent that the settlement deed can be limited to the 1st defendant's 1/6th share. In any event, the settlement deed is a void document as already discussed herein supra. Yet another reason as to why the settlement deed cannot be a valid document is that it came to be executed



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after the judgment and decree of the trial Court, in and whereby a relief of permanent injunction was granted against the 1st defendant, restraining him from alienating or encumbering the suit property. Thus, viewed from both these angles, the settlement deed cannot be accepted as a valid document, leave alone be held to be binding on the plaintiffs and other siblings of the plaintiffs.

18. One another circumstance which goes against the 1st respondent/2nd wife is that the settlement deed was not even marked during the trial of the suit. The purpose of marking the settlement deed, that too, by the plaintiffs themselves, was only for the limited purpose of comparing the signatures available in the said settlement deed with the disputed signature in the Will. Admittedly, therefore, the settlement deed was not even put forth by the 1st respondent. The introduction of the settlement deed was only during trial, after remand and therefore, the issue of due execution or validity or otherwise of the settlement deed was never in question and there was no occasion also for the same. However, the 1st appellate Court has taken cognizance of the said settlement deed to hold that the 1st defendant had settled his share in



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favour of the 1st respondent/2nd wife and that the settlement deed was not specifically denied by the plaintiffs. As already found, when the settlement deed was not even introduced by the 1st respondent and it was marked only for the limited purpose of comparing the signatures, the first appellate Court fell in error in holding that the execution of the said settlement deed was not specifically denied by the plaintiffs. On the contrary, the 1st appellate court ought to have found that the said settlement deed was marked as Ex.A.1 in I.A.No.96 of 2016 alone and not in the suit. There is no occasion for the plaintiffs to plead with regard to either the admission or denial of the said document. Thus, even from this angle, the findings of the 1st appellate Court are unsustainable.

19. For all the above reasons, I am inclined to allow the Second Appeal and all the substantial questions of law are answered in favour of the appellant and the preliminary decree passed by the trial Court and modified by the 1st appellate Court is modified as hereunder:-



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20. The appellant/3rd plaintiff is entitled to $7/36^{\text{th}}$ share ($1/6 + 1/36^{\text{th}}$ share) and the plaintiffs 1 and 2, who are the respondents 2 and 3 are also entitled to $7/36^{\text{th}}$ share each ($1/6 + 1/36$). Similarly, the defendants 2 and 3/respondents 4 and 5 in the Second Appeal would also be entitled to $7/36$ ($1/6 + 1/36$) each and the first respondent/(2nd wife of the 1st defendant shall be entitled to $1/36^{\text{th}}$ share.

21. The Second Appeal is allowed accordingly. No costs.
Consequently, connected miscellaneous petition is closed.

01.03.2024

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

To

1. The Principal District Court, Salem.
2. The Subordinate Court, Sankari
3. The V.R. Section, High Court, Chennai.

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P.B.BALAJI,J.

sr

Pre-Delivery Judgment
in S.A.No.727 of 2019

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