



WEB COPY

S.A.Nos.836 & 855 of 2018



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 25.03.2024

Pronounced on: 12.04.2024

CORAM :

THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.Nos.836 & 855 of 2018
and C.M.P.Nos.11480 of 2019 & 23805 of 2018

Chakravarthi

...Appellant in
both Second Appeals

Vs.

1.Parvathi
2.Malarkodi
3.Mahalakshmi
4.Shanthi
5.Sivakani
6.Jeyapaul

...Respondents in
S.A.No.836 of 2018

Sivakani

...Respondent
in S.A.No.855 of 2018

Prayer in S.A.No.836 of 2018 : Second Appeal filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree dated 23.04.2012 made in A.S. No.73 of 2011 on the file of the II Additional District Court, Cuddalore, confirming the judgment and decree dated 31.08.2009 made in O.S. No.184 of 2001 on the file of the District Munsif cum Judicial Magistrate, Kattumannarkoil.

Prayer in S.A.No.855 of 2018 : Second Appeal filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree dated 23.04.2012 made in A.S. No.2 of 2012 on the file of the II



S.A.Nos.836 & 855 of 2018

Additional District Court, Cuddalore at Chidambaram, reversing the judgment and decree dated 31.08.2009 made in O.S. No.49 of 2002 on the file of the District Munsif cum Judicial Magistrate, Kattumannarkoil.

(In S.A.No.836 of 2018)

For Appellant : Mr.A.Gouthaman

For Respondents

R1 : Died
RR2 to 5 : Mr.A.Muthukumar
R6 : Not ready in notice

(In S.A.No.855 of 2018)

For Appellant : Mr.A.Gouthaman

For Respondent : Mr.A.Muthukumar

COMMON JUDGMENT

The plaintiff, in a suit for partition and also being a defendant in a suit for permanent injunction filed by the 5th defendant in the suit for partition, is the appellant in both the above Second Appeals.

2.The parties are described as per their litigative status in the partition suit, namely O.S.No.184 of 2001.



WEB COPY

S.A.Nos.836 & 855 of 2018



3.The brief facts that are necessary for adjudicating the above Second Appeals are as follows:

The plaintiff, claiming to be the son through the 1st wife of his father, namely Nataraja Padayachi, filed the suit seeking partition and separate possession of his 1/7th share in the suit property. The 1st defendant is the 2nd wife of the said Nataraja Padayachi. The defendants 2 to 6 are the children of Nataraja Padayachi, born through the 2nd wife. The 6th defendant is the son in-law of one of the deceased daughters of Nataraja Padayachi, who died after the demise of Nataraja Padayachi. According to the plaintiff, his father Nataraja Padayachi, died intestate on 05.06.1996, all his properties would devolve equally amongst the plaintiff and the defendants. As the defendants were not coming forward to partition the suit properties, the plaintiff was constrained to issue a notice. However, the 5th defendant issued a reply with false allegations. Therefore, the plaintiff instituted the suit.

4.The said suit was resisted by the defendants stating that the plaintiff had earlier filed a suit for partition in O.S.No.95 of 1982, as against his father Nataraja Padayachi and his brothers and the said suit ended in a compromise and the suit was subsequently withdrawn by the



plaintiffs. According to the defendants, he had also executed a release deed dated 07.07.1983, on receiving a sum of Rs.6,500/- and on the same day, Nataraja Padayachi executed a Settlement Deed in favour of the plaintiff. In short, the defendants contended that the plaintiff had relinquished all his rights in the joint family properties, by way of registered documents which have also been acted upon and therefore, the plaintiff was not entitled to seek for a partition of the suit property. In the suit for injunction in O.S.No.49 of 2002, the 5th defendant in the partition suit, claiming to be the son of Nataraja Padayachi through the 2nd wife and being in possession of the property, approached the court and prayed for permanent injunction on the ground that the defendant, namely the plaintiff in the partition suit, had prevented the 5th defendant from carrying repairs to the dilapidated house.

5.Both the suits were tried together and were dismissed by the Trial Court.

6.Aggrieved by the dismissal of suit for partition, the plaintiff has preferred an appeal in A.S.No.73 of 2011. Aggrieved by the suit for permanent injunction, the 5th defendant preferred an appeal in A.S.No.2 of 2012. Both the appeals were heard together and the First Appellate



Court dismissed the appeal as against the partition suit. However, the First Appellate Court reversed the judgment and decree of the Trial Court insofar as the suit for permanent injunction was concerned and granted the relief of permanent injunction. Aggrieved by the judgment and decree in these two appeals, the present Second Appeals have been preferred.

7. On 09.01.2019, the Second Appeal No.836 of 2018, which has been filed against the judgment and decree in A.S.No.73 of 2011 in O.S.No.184 of 2001 being a suit for partition, was admitted on the following two substantial questions of law:

"(1) Whether the courts below right in dismissing the suit for partition under the ground that there was already a settlement deed executed by father in favour of plaintiff and hence plaintiff could not claim any right over the property, ignoring the position of law that the present suit filed by the plaintiff claiming a share under the capacity that the legal heir of his father who died intestate leaving some properties which is absolutely belonged to him to succeed his legal heirs.?"

"(2) Whether the courts below right is dismissing the suit for partition ignoring the law that the earlier suit for partition is between the plaintiff and his father and father's brothers and their legal heirs and depute in that suit is with regard right of the plaintiff over the joint family properties and the present suit for partition is with regard right of the plaintiff over the absolute right of the father who died as Intestate.?"



WEB COPY

8.I find that the Second Appeal which is preferred against the injunction suit in S.A.No.855 of 2018, has not yet been admitted. However, I have heard Mr. A.Gouthaman, learned counsel for the appellant in both the appeals and Mr. A.Muthukumar, learned counsel for respondents 2 to 5 in both the Second Appeals.

9.The issue involved in both the suits is common and hence, both the Second Appeals have been taken up for final hearing together.

10.The learned counsel for the appellant would submit that there was no material suppression of any fact germane to the suit for partition. He would also state that the earlier suit was filed during the lifetime of the father and not only against his father, but also uncles and admittedly, the said suit ended in a compromise decree. The father had settled five items of property in favour of the plaintiff. Admittedly, on the same day, the father Nataraja Padayachi, settling five items of property on the plaintiff, the appellant released his rights in the joint family properties vide Ex.B2 and Ex.B3. The father died on 05.06.1996. According to the learned counsel for the appellant, on the demise of the father, the plaintiff would automatically become entitled to 1/7th share in his property and therefore, the courts below have erroneously non-suited the plaintiff, holding that



his release deed would estop him from claiming a right in the father's share. He would therefore pray for the Second Appeal being allowed

11.Per contra, the learned counsel for the respondents, Mr.A.Muthukumar, would submit that after the Release Deed was executed by the plaintiff, his father and the son through the 2nd wife were continuing as a Hindu Undivided Family and therefore, under the proviso to Section 6 of the Hindu Succession Act, 1956, read with the Explanations, the plaintiff having released his share in the joint family property, would not be entitled to any share in the father's property also.

12.The learned counsel, Mr. A.Muthukumar would place reliance on the following passage from Mulla's Principles of Hindu Law (15th Edition,1982)

“Explanation II: Separated member - When partition takes place between members of a joint family every coparcener is entitled to a share. But a partition between coparceners may be partial as for instance when one coparcener separates from the others and the others do not separate but continue to remain joint or become reunited (§328). In such a case on the death of any such coparcener the proviso will come into operation but the separated member or his heirs cannot claim any share in the interest of the deceased in the coparcenary, he having already gone out of the coparcenary. Explanation II is intended to make the position clear. The rule stated in



WEB COPY



S.A.Nos.836 & 855 of 2018

the Explanation will apply even where at the time of the separation of a member the coparcenary consisted of only two members, for instance a father and a son and the son became separated from the father and obtained his share of the ancestral property. In such a case if there is a son begotten and born to the father after the partition the share of the ancestral property acquired by the father will immediately become property of a coparcenary consisting of the father and the son or sons begotten and born after such partition (0). And in case the father thereafter dies intestate the separated son or his heirs cannot claim a share out of the interest of the father in such coparcenary by relying on the rule laid down in the proviso. As regards the separate or self-acquired property of the father the position will be different because now under section 8 in a case of this nature a separated son is entitled to a share in such property left by the father (p).

Illustrations:

(1) A and his sons B and C constitute a Mitakshara coparcenary. B separates himself from the family and takes his one-third share of the coparcenary property. A and C continue to be joint as before. A dies intestate thereafter leaving him surviving his daughter D and his two sons. On A's death A's interest in the coparcenary will not devolve upon by survivorship, but by operation of the proviso it will devolve by succession upon Cand Din equal shares (section 8). B will have no claim for any share in the same. He will, however, be entitled to a share in the separate or self-acquired property left by A.

(2) A and his son B constitute a Mitakshara coparcenary. B's mother had died leaving her husband A, son B and daughter D. B separates from his father and takes his one-half share in the coparcenary property. A marries again and a son C is born to him by his wife W with the result that A and C become members in a coparcenary consisting of the



two of them. On A dying intestate thereafter his share in the coparcenary will not devolve by survivorship upon C but by operation of the proviso it will devolve by succession upon his son C, widow W and daughter D in equal shares (section 8). B will have no claim for any share in the same. He will, however, be entitled to a share in the separate or self-acquired property of A.”

13.The learned counsel would also place reliance on the decision of the Andhra Pradesh High Court in the case of ***Ganta Appalanaidu vs Ganta Narayanamma and Others***, reported in ***AIR 1972 AP 258***, where the learned single judge of the Andhra Pradesh High Court, following Explanation 2 to Section 6 of the Hindu Succession (Amendment) Act, 2005, held that a divided son would stand excluded. He would also place reliance on the decision of another bench of the Andhra Pradesh High Court in the case of ***Satyapuraju Venkata Rama Raju vs Sayapuraju Suryanarayana Raju***, reported in ***2012 0 Supreme AP 601***, where the learned judge, referring to the decision in the ***Ganta Appalanaidu’s*** case as referred herein supra, also held that a divided son would not be entitled to a share in partition. The learned counsel would also place reliance on the decision of the Karnataka High Court in the case of ***M.V. Shivaji Rao Kore and Ors vs Rukminiyamma and Ors***, reported in ***AIR 1973 KANT 113***, where the Karnataka High Court, again referring to Explanation 2 to



Section 6 of the Hindu Succession (Amendment) Act, 2005, held that a coparcener who chose to separate himself from the coparcenary before the death of the deceased, would not be entitled to seek for partition.

14.The learned counsel for the respondents would also place reliance on the case of *Yashoda (Alias Sodhan) vs Sukhwinder Singh and Others*, reported in *2022 SCC OnLine SC 1208*, where the Hon'ble Supreme Court dealt with what would be a 'material fact'. The Hon'ble Supreme Court held that a 'material fact' would depend on the facts and circumstances of each case and it would have to be material for the purpose of determination of the lis and a person invoking discretionary jurisdiction of the Court cannot be allowed to approach the Court with a pair of dirty hands. This decision has been relied on by the learned counsel for the respondents, since the plaintiff has not chosen to disclose the earlier suit proceedings for partition filed by the plaintiff, even during the lifetime of his father Nataraja Padayachi.

15.Having considered the rival submissions advanced by the learned counsel on either side, the short but interesting question that arises for consideration in the Second Appeals is as to whether a divided and separated son would be entitled to seek a share in his father's share/property.



WEB COPY

S.A.Nos.836 & 855 of 2018



16. Though the learned counsel for the respondents has placed reliance on the decisions of the Andhra Pradesh High Court as well the Karnataka High Court, a Full Bench of this Court in a decision reported in *AIR 1979 Mad 1* in the case of *The Additional Commissioner, Income Tax, Madras-1 vs P.L. Karuppan Chettiar, Karur*, discussed the character of property obtained in a partition affected between a father and son. The Hon'ble Full Bench held that the property that fell to the share of the father would be the separate property of the father and succession to such share would be only in terms of Section 8 of the Hindu Succession Act, 1956, and not in terms of Section 6. It was a case where a person had obtained a property under the partition deed and at his death, his son was alive. The issue was pertaining to the property which was obtained by the father in the partition to which the son was also a party. The Hon'ble Full Bench concluded, holding that the commentaries in Mulla's Principles of Hindu Law which were brought to the notice of the Full Bench, did not deal with Section 8 and only dealt with Section 6 and concluded that the son would be entitled to the property of the father under Section 8 of the Hindu Succession Act, 1956. This decision of the Hon'ble Full Bench of this Court was also quoted with approval by the



Hon'ble Supreme Court in the case of *CWT vs Chander Sen*, reported in
(1986) 3 SCC 567.

17.In fact, the decision of the Hon'ble Full Bench was also taken before the Hon'ble Supreme Court by the department, namely Commissioner of Income Tax and the Hon'ble Supreme Court dismissed the appeal holding that the earlier decision of the Hon'ble Supreme Court in *Chander Sen*'s case had already dealt with this issue and therefore, the appeal could not be entertained.

18.The decisions relied on by the learned counsel for the respondents were all prior to the decision of the Hon'ble Full Bench of this court and therefore, I do not deem it to follow the decision of the Andhra Pradesh High Court and the Karnataka High Court.

19.With regard to suppression of material fact, I do not think that the plaintiff, not mentioning about the earlier partition suit filed even during the lifetime of his father and his uncles would in any way affect his present claim for partition which is subsequent to the demise of his father alone. Therefore, I am not able to bring the said earlier lis not being mentioned as suppression of material fact. The Courts below have



therefore incorrectly applied proviso to Section 6 of the Hindu Succession Act, 1956, instead of Section 8 and have thereby, disentitled the plaintiff from relief. The plaintiff is entitled, as a son, to a share in his father's property. Such share can only be in respect of the father's share in the schedule property and not in the entirety of the schedule of property, since the plaintiff having already released his share in the coparcenary property, cannot gain a back door entry as a coparcener, merely because his father died subsequently and seek for a an equal share in the coparcenary property.

20. Even though the suit was filed in the year 2000, the Amendment Act 39 of 2005 treats the daughters as coparceners and they would get a birthright in the suit property and would be treated as coparceners on an equal footing along with the son. Thus, after the Release Deed executed by the plaintiff and after the death of the father in the year 1996, in terms of the ratio laid down by the Hon'ble Supreme Court in the case of *Vineeta Sharma vs Rakesh Sharma and Others*, reported in **2020 9 SCC 1**, there being no partition effected in the family despite the demise of the father prior to the Amendment Act 39 of 2005, the daughters should also be treated as coparceners and should be given an equal share along with the sons. However, considering that there has



S.A.Nos.836 & 855 of 2018

to be a notional partition just prior to the demise of the father, the father would be become entitled to only a $1/7^{\text{th}}$ share in the suit properties. Thus, the plaintiff's share would again by only $1/7^{\text{th}}$ of the said $1/7^{\text{th}}$ share, namely $1/49^{\text{th}}$ share and not $1/7^{\text{th}}$ share.

21.Thus, S.A. No.836 of 2018 is partly allowed and the judgment and decree of the Courts below are set aside and there shall be a preliminary decree in favour of the plaintiff/appellant declaring his $1/49^{\text{th}}$ share in the suit properties. S.A. No.855 of 2018 is allowed and the judgment and decree of the First Appellate Court in A.S. No.2 of 2012 is set aside and Judgment and Decree of the Trial Court in O.S.No.49 of 2002 is restored. There shall be no order as to costs. Consequently, connected Civil Miscellaneous Petitions are closed.

12.04.2024

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

rkp



WEB COPY



S.A.Nos.836 & 855 of 2018

To

1. The II Additional District Court, Cuddalore.
2. The District Munsif cum Judicial Magistrate, Kattumannarkoil.



WEB COPY



S.A.Nos.836 & 855 of 2018

P.B.BALAJI, J.

rkp

Pre-delivery Judgment in

S.A.Nos.836 & 855 of 2018
and C.M.P.Nos.11480 of 2019 and 23805 of 2018

12.04.2024