SUPREME COURT OF INDIA

R.Mahalakshmi

Vs.

A.V.Anantharaman

C.A.No.5053 of 2009

(S.B. Sinha and Deepak Verma JJ.)

03.08.2009

JUDGMENT

Deepak Verma, J.

1. Leave granted.

2. Appellant, feeling aggrieved by the judgment and decree passed by the High Court of Judicature at Madras in S.A No.1168 of 2007, decided on 1.11.2007, arising from the judgment and decree passed in A.S. No.39 of 2006 on the file of the Principal District Judge, Chengalpattu on 20.11.2006, whereby and whereunder the judgment and decree passed by Additional Sub-Judge, Chengalpattu in O.S.No.666 of 2001 decided on 27.7.2004 has been confirmed, is before us, challenging the same on variety of grounds.

3. Certain facts not in dispute are as under:

> The appellant is real sister of respondents, being son and daughters of late Sh. A.V. Venkataraman, who died in the year 1961 intestate. His wife Rathna, mother of the parties also died on 15.3.1996 intestate.

4. It has also not been disputed before us that family partition had taken place between the father of the present parties and his respective brothers on 27.4.1954, which was duly registered before the Sub- Registrar. In the said partition, apart from the suit property, father and mother of parties were allotted plots No.2 and 3 shown in greater details in the deed of partition.

5. Since there arose dispute between the parties with regard to ancestral property left behind by late A.V. Venkataraman, the appellant was constrained to send a legal notice to the respondents on 8.6.1998 claiming partition and separate possession to the extent of 1/5th share. Respondent No.1 suitably replied to the same. Since the dispute could not be resolved,

even after exchange of notices, respondent No.1 as plaintiff, filed a suit in the court of Addl. Sub-Judge at Chengalpattu registered as O.S.No.666 of 2001 claiming the following decree:

> "a) passing a preliminary decree for partition of plaintiff's 6/20 share in the suit property, to appoint an advocate commissioner to divide the suit properties by metes and bounds to pass a final decree and while passing preliminary decree and final decree and deliver separate possession of the suit property.
>
> b) For such other relief or reliefs as this Hon'ble court may deem fit in the circumstances of the case."

6. Respondent Nos.2, 3 and 4 herein, arrayed as defendant Nos.1, 2 and 3 in the said suit filed their respective written statement as one set denying the contentions raised by the plaintiff.

7. The present appellant who was arrayed as defendant No.4 in the suit, filed the written statement denying the allegations made by the plaintiff respondent No.1 herein and further submitted as under:

8. That some of the neighbours like Mr. Ranganathan and Mr. Murugan, Dhanammal have encroached upon the land and, therefore, the plaintiff should also seek their eviction. She further submitted that suit is bad for partial partition as plaintiff has not included other properties of her father and mother, that is - 1) plot No.3 of 185 Adyarthankal in father's name 2) plot No.2 of 195 Adyarthankal in the mother's name and 3) Death cum service benefits of father.

9. Apart from this, the appellant herein further averred that she has spent considerable amount of money, material and labour for the protection, upkeep and improvements of the suit property and, therefore, she is entitled to be reimbursed to that extent.

10. On the strength of the pleadings of the aforesaid parties, the Trial Court framed the following issues:

> 1) Is the plaintiff eligible for a share of 6/20?
>
> 2) A share of 6/20 to Defendant 2, and 1/20 share to 1st and 3rd defendant are eligible?
>
> 3) Is the 4th Defendant as claimed in the counter eligible for 36/90 share?
>
> 4) Is the partition affected by the encroachments referred by the 4th Defendant and also other items of the properties?
>
> 5) Cost award to the Plaintiff?

6) In this suit the Plaintiff filed P1 to P5 documents. 4th Defendant filed D1 to D 17 documents.

7) Issues addressed : 1 to 4.

11. To prove the case, plaintiff has examined himself as P.W.1 and marked documents Ex.P-1 to P-5 while the present appellant arrayed as defendant No.4 examined herself and marked documents Ex.D-1 to D-17.

12. After appreciation of evidence available on record, the suit of respondent No.1-plaintiff was decreed in the following terms:

> Finally, Plaintiff, 2nd Defendant, 4th Defendant each to 6/20 share in the suit property and 1st and 3rd Defendants each 1/20 share in the suit property is the preliminary decree, is decided and delivered. Plaintiff and the Defendants relationships being considered, also the nature of the case being kept in mind, their costs must be borne by themselves only it is ordered.

13. Feeling aggrieved and dissatisfied with the said judgment and decree passed by trial court, appellant herein was constrained to file appeal before the Principal District Judge at Chengalpattu. Grounds urged in her written statement before the trial court were attacked and hammered in the Appeal.

14. Following two questions were formulated by the first Appellate Court:

1) Whether the suit is bad for partial partition?

2) Whether the decree and judgment of the trial court is to be confirmed or not?

15. First Appellate Court was of the view that since appellant herein had failed to mention anything in her legal notice with regard to other properties said to have been owned and possessed by her late father A.V. Venkataraman and mother, she is not entitled to put forth a new case contrary to the documents available on record. Accordingly, the first Appellate Court came to the conclusion that suit would not be bad for partial partition.

16. As regards point No.2, it came to the conclusion that since relationship between the parties has not been disputed and that defendant No.2 remains unmarried and 4th defendant (appellant) got married subsequent to the year 1989 as such they will be entitled to receive their respective share in accordance with law but not as has been claimed by the appellant.

17. The first appellate court further noted that appellant has not led any evidence as to how she is entitled to 36/90th share and how she has worked out the said figure. Thus, the judgment and decree passed by the trial court came to be affirmed.

18. Appellant, still feeling aggrieved by the said judgment and decree, filed Second Appeal, in the High Court which also came to be dismissed.

19. According to appellant, the following substantial questions of law arose in her appeal, which are reproduced herein below:

> a) Whether the courts below were correct in finding that the plaintiff is entitled to 6/20th share in the suit property?
>
> b) Whether the suit is bad for partial partition?
>
> c) Whether the suit is bad for non-payment of court fees on the value of share of the plaintiff in the suit properties?
>
> d) Whether the finding of the court below that the plaintiff is in joint possession of the suit property is correct in the absence of any other finding to that effect?

20. The learned Single Judge of the High Court did not formulate any substantial question of law but considered the same as mentioned hereinabove.

21. To conclude, the learned Single Judge recorded the following findings: since I have come to the conclusion that there are no other properties apart from the suit property, the substantial question of law that have been formulated by the appellant only on facts and no substantial question of law has arisen for consideration in the Second Appeal.

In the result, the second appeal fails and the same is dismissed. Consequently, the M.P. is closed. No costs.

22. Feeling aggrieved and dissatisfied with the said judgment and decree passed in the Second Appeal, appellant-defendant No.4 is before us challenging the same on variety of grounds.

23. During the pendency of the appeal, respondent No.3, who was a spinster, died. Consequently, on an application being filed, her name came to be deleted.

24. Since appellant was appearing in person, it was thought fit to appoint an amicus curiae for the case. Accordingly, Mr. Sanjay Parikh was appointed to address this appeal. He has contended that the following questions are to be answered by us:

> 1) As per the provisions contained in Hindu Succession Act, 1956, unmarried daughter is only entitled for right to residence but not for any exclusive share.
>
> 2) Despite the registered deed of partition having been filed, the courts below committed an error in not including the other properties inherited by their father, late

Shri A.V. Venkataraman. Thus, the suit filed by respondent No.1 claiming partial partition was bad and deserved to be dismissed.

With regard to Question No.1:

25. Section 23 of the Hindu Succession Act, 1956 has since been omitted w.e.f. 9.9.2005, but before omission, it stood as thus:

> 23. Special provision respecting dwelling- houses.- Where a Hindu intestate has left surviving him or her both male and female heirs specified in class I of the Schedule and his or her property includes a dwelling- house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling-house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein: Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling-house only if she is unmarried or has been deserted by or has separated from her husband or is a widow.

26. In a recent judgment of this Court in *G. Sekar v. Geetha*[1] pronounced by one of us (Hon'ble S.B. Sinha,J.), the effect of amendment in the Hindu Succession Act, 1956 by reason of the Hindu Succession (Amendment) Act, 2005 insofar as therein Section 23 has been omitted, was considered. It was held as under: 21. The said property belonging to Govinda Singh, therefore, having devolved upon all his heirs in equal share on his death, it would not be correct to contend that the right, title and interest in the property itself was subjected to the restrictive right contained in Section 23 of the Act. The title by reason of Section 8 of the Act devolved absolutely upon the daughters as well as the sons of Govinda Singh. They had, thus, a right to maintain a suit for partition. Section 23 of the Act, however, carves out an exception in regard to obtaining a decree for possession inter alia in a case where dwelling house was possessed by a male heir. Apart therefrom, the right of a female heir in a property of her father, who had died intestate is equal to her brother. Section 23 of the Act merely restricts the right to a certain extent. It, however, recognises the right of residence in respect of the class of females who come within the purview of the proviso thereof. Such a right of residence does not depend upon the date on which the suit has been instituted but can also be subsequently enforced by a female, if she comes within the purview of the proviso appended to Section 23 of the Act.

27. However, on account of death of Respondent No.3, unmarried sister of the parties, the said question No.1 had become academic in nature and it was not necessary for us to answer the same but as it stood answered in a recent judgment of this Court in G. Sekar (supra), to put the controversy at rest, we have considered this aspect of the matter also and answered it accordingly hereinabove.

With regard to Question No.2:

28. For deciding question No.2, it is necessary to examine Section 29A of the Act which has been incorporated vide Tamil Nadu Act 1 of 1990 Sec.2 w.r.e.f. 25.3.1989 and reads as under : 29A. Equal rights to daughter in coparcenary property.- Notwithstanding anything contained in section 6 of this Act- (i) in a joint Hindu family governed by Mitakshara Law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as a son and have the same rights in the coparcenary property as she would have had if she had been a son, inclusive of the right to claim by survivorship; and shall be subject to the same liabilities and disabilities in respect thereto as the son; (ii) at a partition in such a joint Hindu family the coparcenary property shall be so divided as to allot to a daughter the same share as is allotable to a son:

> Provided that the share which a pre-deceased son or a pre-deceased daughter would have got at the partition if he or she had been alive at the time of the partition shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter:
>
> Provided further that the share allotable to the pre-deceased child of pre- deceased son or of a pre-deceased daughter, if such child had been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre- deceased son or of the pre-deceased daughter, as the case may be;
>
> (iii)any property to which a female Hindu becomes entitled by virtue of the provisions of clause (i) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force, as property capable of being disposed of by her by will or other testamentary disposition;
>
> (iv)nothing in this Chapter shall apply to a daughter married before the date of the commencement of the *Hindu Succession (Tamil Nadu Amendment) Act, 1989*;
>
> (v)nothing in clause (ii) shall apply to a partition which had been effected before the date of the commencement of the Hindu Succession (Tamil Nadu Amendment) Act, 1989.

29. Perusal of the aforesaid provision of law makes it abundantly clear that the daughters who have got married prior to 1989 may not have equal share as that of a son but the daughters who got married after 1989 would have equal share as that of a son. In other words, daughters who got married after 1989 would be treated at par with son having the same share in the property.

30. This legal position has not been disputed seriously by the learned counsel for respondents. But the question is whether all the properties left behind by late A.V. Venkataraman were included in the plaint for partition or not.

31. Critical examination of the registered deed of partition would show that all the immovable properties inherited by late A.V. Venkataraman were not included in the suit filed by respondent no.1. The courts below committed grave error in coming to the conclusion that appellant has not disclosed, with documentary proof with regard to other properties inherited by her late father.

32. In the light of the partition deed available on record, no further proof thereof was required, more so, when plaintiff himself relied on the same. According to us, this aspect of the matter has not been considered by the courts below.

33. Thus, after having considered the submissions of the learned counsel for the parties and after perusal of the records, we are of the considered opinion that matter deserves to be remanded to the trial court on the following grounds:

> 1) That all the properties that were inherited by the father of the parties by virtue of registered deed of partition dated 27.4.1954 have not been included in the partition suit. 2) The appellant herein had taken a consistent stand right from the very beginning that unless all the properties are included in the plaint, the suit would be bad and partial partition cannot be effected.

34. The courts below committed an error in giving much weight to the legal notice sent by the appellant and still ignoring the documents filed and admitted by parties wherein it was clearly mentioned that apart from the property for which partition was claimed by the respondent No.1-plaintiff, there were other properties as well.

35. In the light of the foregoing observations, judgment and decree passed by the courts below are hereby set aside and quashed. The matter is remitted to the Trial court for giving opportunity to parties to amend their respective pleadings, to file additional documents and to lead further evidence in support of the amended pleadings. The Trial Court thereafter would pass a judgment after appreciating the additional pleadings and the evidence adduced thereon.

36. Since the matter is old, parties are directed to appear before the Trial Court on 1st September 2009 and would participate in the proceedings without asking for undue adjournments. The Trial Court would also endeavour to deliver the judgment within six months from the date of completion of pleadings of the parties.

37. We also record our appreciation for Mr. Sanjay Parikh, Advocate, who appeared as amicus for rendering his valuable time in bringing correct legal position and facts to our notice.

38. The appeal thus stands allowed to the extent mentioned hereinabove, looking to the facts of the case, the parties to bear their respective costs.

[1]*(2009) 6 SCC 99*