

G. Radhakrishnan Vs. Jagadambal

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Court : Chennai

Decided On : Sep-26-1988

Reported in : (1989)2MLJ515

Appellant : G. Radhakrishnan

Respondent : Jagadambal

Judgement :

Bellie, J.

1. The defendant is the appellant in this Letters Patent Appeal. The plaintiff is the sister and the defendant is her younger brother.

2. One Kanaka Kavandar had three daughters viz., Kamlambal, Valambal and Meenakshi. He executed a will and died on 23-7-1923. In this will he gave certain properties to this two younger daughters Valambal and Meenakshi on condition that they should enjoy the same without any power of alienation till their life time and after their death the properties should go to heirs absolutely. Valambal and Meenakshi partitioned the properties between them and each of them was in possession of separate portions in that partition the plaintiff 'A' schedule property was allotted to Meenakshi. The plaintiff is the daughter and the defendant is the son of the said meenakshi.

3. It is the plaintiffs case that after the life-time of Meenakshi the properties were being enjoyed on leasing out the same on warm basis and dividing the income between the plaintiff and the defendant. The plaintiff is entitled to half share in these properties, i.e., plaint 'A' schedule properties. The defendant is not agreeable for an amicable partition. The plaint 'B' and 'C' schedule properties are ancestral joint family properties in the hands of the defendant. In the undivided half share of their father the plaintiff is entitled to half share. 'C' schedule properties are ancestral joint-family properties in the hands of the defendant. In the undivided half share of their father the plaintiff is entitled to half share. 'C' schedule property is house. The defendant is enjoying the entire income from the 'B' schedule properties and she is entitled to accounts for her share of the profits made therefrom by the defendant. As regards 'B' and 'C' schedule properties also the defendant is not agreeable for an amicable settlement. On these grounds the plaintiff has prayed for partition of three schedule properties and for accounting for the income from 'B' schedule properties from 1970-71 and future profits.

4. As pointed out by the learned single judge in the appeal in A.S. No. 105 of 1979 there is no dispute as regards the share claimed by the plaintiff. It was argued with regard to 'A' schedule properties that there was no partition between Valambal and Meenakshi and therefore the suit is bad for non-joinder of Valambal. As regards 'B' and 'C' schedule properties it is contended that these properties belonged to the father and his three brothers along with other properties and they did not partition the properties and therefore the partition of the suit properties between the plaintiff and the defendant alone cannot be maintained and particularly with regard to 'C' schedule properties it is contended that this house property is not partible.

5. The learned trial Judge accepted the case of the plaintiff that she is entitled to the shares claimed by her in the three properties and he further held with regard to 'C' schedule that whether it is partible or not will be decided by the Commissioner who would be appointed for effecting division and in case it is not partible the plaintiff will be paid money compensation. Therefore he decreed the suit for partition declaring the plaintiffs share in the 'A' schedule properties and 1/4 share in 'B' and 'C' schedule properties and also decreed for profits from 'B' schedule properties and also for accounting for the income from 'B' schedule properties from

1970-71 till date of decree, further ordering that the future profits will be decided after enquiry under Order 20, Rule 12 of the Code of Civil Procedure.

6. On appeal by the defendant Singaravelu, J., as stated above found that there was no dispute with regard to the share claimed in the properties. The learned Judge further stated that the only argument advanced was that there was no partition between the plaintiffs father and his (father's) three brothers and therefore without impleading the said brothers the present suit is bad for nonjoinder of necessary parties. This contention was not accepted by the learned single Judge.

7. The learned Counsel for the appellant-defendant attempted to advance the same argument before us also, but as found by the learned single Judge two of the four brothers have been examined in the case and they have clearly stated that there had already been a partition among the four lieve them. It is not in dispute that 'B' schedule properties are in exclusive possession of the defendant and therefore there is no substance in the contention of the first defendant that there was no partition among the said four brothers. Hence we find there is no case for the appellant-defendant as regards 'B' schedule properties also.

8. Vigorous argument was advanced only with regard to 'C' schedule house property. Mr.P.Seshadri, learned Counsel for the appellant-defendant contends that admittedly this house is in possession of the defendant, and the plaintiff being a female she cannot ask for partition of this property in view of Section 23 of the Hindu Succession Act. Section 23 is:

23. Special Provision Respecting Dwelling House 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 heirs shall be entitled to a right of resident 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 been separated from her husband or is a widow'. Mr. Seshadri argues that unless the

defendant himself wants partition of the dwelling house, i.e., 'C schedule property, in view of Section 23, the plaintiff cannot ask for partition. To this argument, Mr.K.Chandramouli, learned Counsel for the respondent-plaintiff submits that this plea has not been taken by the defendant throughout and only for the first time in the Letters Patent Appeal during arguments this point has been raised and therefore this argument must be rejected. In support of this contention, Mr.K.Chandramouli relies on a Supreme Court decision in Shanbaggakannu v. Muthu Bhattar : AIR 1971 SC2468 wherein it has been held, as the Headnote correctly denotes, that:

In an appeal under the Letters Patent and point involving not only question of law but also that of facts cannot be allowed to be agitated when that point has never been taken even in plaint or before trial court, first appellate court and High Court in second appeal.

It is not in dispute that this question has not been raised in any court before. A reading of Section 23 shows that disablement of a female heir claiming for partition arises only when among other conditions the dwelling house is wholly occupied by the members of the intestate deceased Hindu. Whether the house is wholly occupied by the members of the intestate to deceased Hindu's family is question of fact. Therefore the point now raised by Mr. Seshadri involves a mixed question of law and fact. Hence that question cannot be allowed to be raised now.

9. In the result therefore the Letters Patent Appeal is dismissed. Considering the circumstances of the case there will be no order as to costs.

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