

Muthu Vs. Thulasi

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Court : Chennai

Decided On : Mar-07-2013

Judge : M.Vijayaraghavan

Appellant : Muthu

Respondent : Thulasi

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS Dated:

07. 03.2013 CORAM: THE HONOURABLE MR.JUSTICE M. VIJAYARAGHAVAN
S.A. No.298 of 2005 and C.M.P. No.7000 o

1. Muthu 2. Radha 3. Alamelu 4. Adilakshmi 5. Vennila 6. Elanchezhian ..
Appellants 1 to 6/ Defendants 2,3, 9 t

7. Shanta 8. Mallika .. Appellants 7 and 8 .. Vs..

1. Thulasi (Died) .. 1st Respondent / 2nd Plaintiff 2. Pachaiaammal 3. Amsa 4.
Nirmala 5. Ellammal .. Respondents 2 to 5 / Defendants 4 t

6. A. Kesavan 7. A. Mohan 8. Anjali .. Respondents 6 to 8 (Respondents 6 to 8
brought on record as LRs of the deceased R1 vide Order of Court dated
11.10.2011 made in CMP.No.8783/06 in S.A.No.298 of 2005) Prayer:- Second
Appeal filed under Section 100 of Code of Civil Procedure to set aside the
Judgement and Decree dated 25.3.2003 passed in A.S.No.10 of 2001 on the file

of Subordinate Court, Madurantakam confirming the Judgement and Decree dated 25.10.2000 passed in O.S.No.115 of 1995 on the file of District Munsif Court, Madurantakam by allowing this appeal with costs throughout. For Appellants : Mr. M.S.Subramanian For Respondents 2 to 5 : Mr. R. Murali For Respondents 6 to 8 : Mr. K.Govi Ganesan

The second appeal is arising out of the judgment and decree passed by the first Appellate Court in A.S.No.10 of 2001 dated 25.03.2003 in dismissing the appeal by confirming the judgment and decree passed in O.S.No.150 of 1995 dated 25.10.2000.

2. For better appreciation of this second appeal, brief averments of the amended plaint as well as the written statement are reproduced hereunder: The brief averments of the amended plaint are as follows: The plaintiffs are the daughters of one Murugappa Gounder and Pachayammal. Murugappa Gounder has one another daughter by name Alamelu, who died celebrate. Kanniappan had four sons. Murugappa Gounder is the eldest son of Kanniappan. The second son of Kannianppan is Arumugam and he had one son by name Irusappan. The third and fourth sons are Subramani and Mususwami respectively. Arumugam is no more and he has left the defendants as the only legal representatives to succeed to his estate. The father of the plaintiff pre-deceased his wife Pachaiyammal and thereafter joint patta was issued in the name of Pachaiyammal and others. Originally the suit property was jointly purchased by Murugappa, Arumugam, Subramani and Munuswamy, the sons of Kanniappan, under a registered sale deed dated 17.07.1924. The plaintiffs have also contributed their savings and income for the improvement of the joint family property and hence the plaintiffs together with the defendants and other sons of Kanniappan enjoyed their undivided share by metes and bounds. After the demise of Pachayammal, eastern part of the property has been advised to enjoy by the branch of Subramani and Muniswamy and the western part has been advised to enjoy by the plaintiffs' father Murugappan as well as the defendants' grand father. So far no division by metes and bounds has been effected and several mediations were also made but all were in vain. Now the defendants have taken a hostile attitude towards the plaintiffs and acting against the interest of the plaintiffs with intent to deprive the

legitimate share of the plaintiffs. The plaintiffs have issued notice on 21.03.1994 calling upon the defendants to allot their share, but there was no reply. The plaintiffs are entitled to one half share in the suit property. Pending the suit, the 1st plaintiff died intestate on 24.07.1995 and the defendants 4 to 7 are impleaded as the legal representatives for the 1st plaintiff. Similarly, the 1st defendant died on 04.06.1995 leaving behind the defendants 8 to 12 as his legal representatives. Therefore, they prayed to pass a preliminary decree for partition of the suit property into two equal shares and to allot one such share to the second plaintiff by metes and bounds and allot another such share to the defendants 4 to 7 and also pass a decree for past mesne profits at Rs.100/- per year for the past 2 years and also future mesne profits from the date of suit till the date of separate possession with costs.

3. The brief averments of the written statement filed by D3 and adopted by D8 and D9 are as follows: The suit for partition of suit property into two equal shares and allotment of one such share to plaintiffs as well as mense profits are not maintainable in law and on facts. The suit is bad for non-joinder of Kadumbadi D/o Parvatham and the branch of Mannankatti and Narayanaswamy. The allegation that eastern half allotted to Subramani and Munusamy and western half allotted to Murugappa Naicker and Arumugham is admitted. Murugappa Naicker had no issues. After the death of Murugappa Naicker, his legal heirs had not claimed any right over the suit property and the said Murugappa Naciker died 50 years ago. 4.Arumugha Naciker was in exclusive possession and thereafter his son Erusappa Naicker was in exclusive possession and enjoyment of the same and, after his death, the defendants divided the properties orally. The house adjoining the road was allotted to this defendant and immediate South to Muthu and thereafter to Krishnan and they are in possession and enjoyment of the same for many decades and acquired title by ouster also. The plaintiffs never claimed any right when the defendants constructed separate house. The plaintiffs are not in joint possession of the suit property. Therefore, they prayed to dismiss the suit with costs.

5. The following substantial questions of law were framed by this Court at the time of admission of the Second Appeal: " (1) Being a Dwelling House would not

Section 23 of the Hindu Succession Act be applicable since the plaintiffs are female heirs and the defendants 1,2 and 3 are male heirs in possession (2) Whether the Courts below went wrong in granting a decree for the entirety of the suit property in favour of the plaintiffs, though the plaintiffs have claimed only a half share in the suit property " 6. It is submitted by the learned counsel for the appellants that originally the suit was filed by the plaintiffs, the daughters of one Murugappan claiming half share in the suit schedule property i.e. dwelling house, to the in admitting the other half share in the suit schedule property in favour of the defendants 1 to 3 i.e. the sons of Arumugam who is the brother of the plaintiffs' father Murugappan. Further more, the learned counsel for the appellants submitted that during the pendency of the original suit the 1st plaintiff Parvatham who is claiming half share in the suit schedule property along with Thulasi her sister, died and the Legal Representatives of the 1st plaintiff were impleaded as defendants 4 to 7 and while amending the plaint before the trial Court, there is apparent error in the plaint itself i.e., in the prayer column to the effect that in the scheduled property to allot one half share to the 2nd plaintiff and the rest of the half share shall be allotted to the defendants 4 to 7 i.e., the Legal Representatives of the 1st plaintiff. Without adverting to the apparent mistake committed before the trial Court while amending the plaint, after full trial, the trial Court decreed the suit on 25.10.2000 in granting preliminary decree as prayed for. Further more, the learned counsel for the appellants also submitted that as against the Judgment and Decree the appeal in A.S.No.10 of 2001 was filed by the appellants/ defendants 1 to 3 and the first appellate Court without adverting to the apparent mistake committed by the trial Court while amending the plaint, dismissed the appeal after confirming the Judgement and Decree passed by the trial Court.

7. It is also pertinent to note that such apparent mistake committed while amending the plaint was not brought to the notice of the trial Court as well as in the first appellate Court as fairly conceded by both the learned counsels before this Court and as such without adverting to the main apparent mistake committed, the first appellate Court has also committed the same mistake and also dismissed the appeal.

8. The learned counsel for the respondents/ Legal Representatives of the original 1st plaintiff as well as the 2nd plaintiff has fairly conceded and also accepted the submissions made by the learned counsel for the appellants and also requested to correct the decree and judgment in this appeal.

9. It is also fairly submitted by the learned counsel for the appellants that though the appellants/ defendants have taken a plea before the trial Court in claiming adverse possession over the schedule of property the ouster has not been pleaded and as rightly held by the Court below concurrently the adverse possession claimed by the appellants/ defendants is rightly rejected over which there is no grievance or quarrel over the decision made concurrently. With regard to the Dwelling House as the female members/ the plaintiffs shall not claim right over the property as per Section 23 of the Hindu Succession Act 1956 which has subsequently been amended by the Hindu Succession (Amendment) Act, 2005 (39 of 2005). As per the provision of the said amended Act, no retrospective reliefs have been given and the embargo removed under the amended act shall come into effect only on and from 9.9.2005. No doubt the suit itself was filed for partition by the plaintiffs as female members in the year 1995 before the amended Act came into force with regard to the Dwelling House.

10. The learned counsel for the respondents submitted that even though before the amended Act came into force on and from 9.9.2005, the female members have no right to claim partition in the Dwelling House, but the embargo has been removed through the amended Act 2005 (39 of 2005) which came into force on and from 9.9.2005 and thereby even though the suit was filed in the year 1995 still it is pending in the Second Appeal stage and hence relief can be granted with regard to the Dwelling House since it is postponement of the right of share over the dwelling house and also cited Judgement of this Court reported in 2011(3) MWN (Civil) 769 in a case namely Ekambaram and 11 others Vs. V.Jothi. In this cited Judgement this Court has held as here under: " The learned counsel for the appellants submitted that the Hindu Succession (Amendment) Act, 2005 (39 of 2005) came into force from 9.9.2005 and the suit was filed in the year 1991 and therefore on the date of suit the respondent was not entitled to claim partition of the dwelling house and therefore the Courts below erred in granting the decree

except the dwelling house namely Item 2 of the suit property. I am unable to accept the contention of the learned counsel for the appellants. The learned counsel for the appellants may be right in submitting that having regard to the provision of Section 23 of the Hindu Succession Act 1956 prior to the Hindu Succession (Amendment) Act, 2005 (39 of 2005), a daughter was not entitled to file a suit for partition in respect of the dwelling house in the absence of any partition suit filed by a male member. It is also true that the Hindu Succession (Amendment) Act, 2005 (39 of 2005) is only prospective in nature. Nevertheless, having regard to the provision of Section 23 of the Hindu Succession Act 1956, it only deals with the procedure and it is not creating any substantive right and under the provision of Section 23 of the said Act a bar was created for the woman to apply for partition of the dwelling house so long as the male heir does not choose for partition. Section 23 of the Hindu Succession Act, 1956 did not deny the right of the female heirs to claim partition in respect of the dwelling house and their right is postponed till the son files the suit for partition. Therefore, according to me, Section 23 of the Hindu Succession Act, 1956 only deals with the procedure in claiming the relief of partition in respect of the dwelling house. It does not extinguish or create any right in respect of dwelling house and being procedural in nature the same can be applied even to a pending suit and admittedly after coming into force of Hindu Succession (Amendment) Act, 2005 (39 of 2005), certain rights were given to female members in the ancestral property and on that basis Section 23 of the Hindu Succession Act 1956 was deleted. The result is that a female member is entitled to claim partition even in respect of the dwelling house even in the absence of any partition suit filed by the male member. Therefore, having regard to the omission of Section 23 of the Hindu Succession Act, 1956 by the Hindu Succession (Amendment) Act, 2005 (39 of 2005) the bar which was operative against the female members to claim partition of the dwelling house was removed and the female members are entitled to claim partition in respect of the dwelling house also along with other members. Hence, the Courts below were right in granting the decree of partition. Therefore, the substantial question of law is answered against the appellants. " 11. I am in full agreement with the above cited Judgement of this Court. Even though the suit for partition was filed by the plaintiffs/ female members in the year 1995, since the suit itself has not been

decided by the Court and pending in the Second Appeal, the plaintiffs have right over the suit schedule property i.e. in the dwelling house.

12. As rightly pointed out about the error committed by both the Courts below concurrently in granting the decree over the schedule of property i.e., half share altogether to the Legal Representatives of the 1st plaintiff as well as another half share to the Legal Representatives of the 2nd plaintiff is not justifiable under law and the same is set aside. The appellants/ defendants 1 to 3 are entitled to the remaining half share in the schedule of property and thereby the error apparently committed by both the Courts below is also set aside.

13. As decided above, the above two substantial questions of law raised in this appeal, i.e., the 1st question of law is decided against the appellants and answered in favour of the respondents and the 2nd question of law is decided in favour of the appellants and answered against the respondents/ plaintiffs.

14. In the result, the Second Appeal is allowed in part by modifying the preliminary decree passed by the trial Court in O.S.No.115 of 1995 dated 25.10.2000 and confirmed by the first appellate Court in A.S.No.10 of 2001 dated 25.3.2003 to the extent that preliminary decree is passed in favour of the respondents/ the Legal Representatives of the plaintiffs 1 and 2 altogether in granting half share over the schedule of property only. In other aspects, the Judgement and Decree are confirmed. Considering the relationship between both the parties, there shall be no order as to costs. Consequently, the connected Miscellaneous Petition is closed.
kr/kal To 1. The District Munsif, District Munsif Court, Maduranthakam.

2. The Subordinate Judge, Subordinate Judge Court Maduranthakam

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