

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:09.07.2015

CORAM

THE HONOURABLE MS. JUSTICE R. MALA

S.A.No.1356 of 2008

Judgment reserved on 01.07.2015	Judgment pronounced on 09.07.2015
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Uthammappan

.... Appellant/1st Defendant

Vs

1.S.Rajannan

2.S.Rajagopal

3.Vijayalakshmi

.... Respondents 1 to 3/Plaintiffs

4.Kandasamy

5.Sidhappan

6.Selvi

.... Respondents 4 to 6/Defendants 2 to 4

(Respondents 4 and 5 herein
given up as unnecessary parties)

Prayer: Second appeal filed under Section 100 of CPC against the judgment and decree dated 10.02.2006 made in A.S.No.158 of 2005 on the file of the Additional Sub-Court, Salem, modifying the judgment and decree dated 06.07.2005 made in O.S.No.879 of 2004 on the file of the Principal District Munsif Court, Salem.

For Appellant : Mr.T.Murugamanickam

For R1 to R3 : Mr.V.R.Rajasekaran

For R6 : Mr.S.Parthasarathy senior counsel
for Mr.A.P.Srinivas

R4 and R5 : Given up

JUDGMENT

The second appeal arises out of the judgment and decree dated 10.02.2006 made in A.S.No.158 of 2005 on the file of the Additional Sub-Court, Salem, modifying the judgment and decree dated 06.07.2005 made in O.S.No.879 of 2004 on the file of the Principal District Munsif Court, Salem.

2.The averments made in the plaint are as follows:-

(i)The plaintiffs 1 and 2, the first defendant and one Balasubramanian are the sons of Siddappa Chettiar. Balasubramanian, eldest son of Siddappa Chettiar died about six years back leaving behind the third plaintiff, wife of Balasubramanian as his only legal heir.

(ii)Siddappa Chettiar and his sons partitioned the joint family properties under the registered partition deed dated 20.06.1960. The first defendant was a minor aged about 14 at the time of partition. 'A' schedule property was allotted to the share of Siddappa Chettiar and the first defendant. After the death of Siddappa Chettiar, the plaintiffs 1 and 2, Balasubramanian (since dead), Lakshmi Ammal/mother of the plaintiffs 1 and 2 and the first defendant had succeeded to the half share of the deceased Siddappa Chettiar.

(iii)Since there was misunderstanding among the sharers in the enjoyment of 'A' schedule properties described in the partition deed, there was a family arrangement in the year 1975 and with the help of elders related to both the parties, the property in schedule 'A' was divided and the first defendant and mother Lakshmi Ammal were allotted the properties in Item No.1, Item No.2 described in the half share of the first defendant in A schedule properties and also for an 1/4th share of Siddappa Chettiar that has been inherited by the first defendant and Lakshmi Ammal.

(iv)The plaintiffs 1 and 2, Balasubramanian were allotted the remaining 3/8th shares of Siddappa Chettiar in the 'A' schedule of the partition deed and the same were described as Item No.3. The property in the third item is the subject matter of the suit. It is only a house site, wherein the plaintiffs put up a thatched shed for running a small mutton stall by the second defendant by paying monthly rent of Rs.100/-. The defendants in order to defraud the legitimate share of the plaintiffs in the suit property, were negotiating the sale of the suit property in favour of the second defendant. The plaintiffs are the absolute owners of the suit property and the second defendant is only a tenant. Therefore, the plaintiffs filed a suit for the following reliefs:

- a) declaring the plaintiffs' absolute title to the suit property;
- b)restraining the defendants and their men by means of permanent

injunction from in any manner interfering with the plaintiffs' absolute possession and enjoyment of the suit property, bearing the thatched shed measuring 10' X 15' facing north-south main road;

c) directing the second defendant to pay the arrears of rent amounting to Rs.200/-;

d) directing the second defendant to pay the future rent from 01.06.1995 till delivery of possession of the thatched shed at the rate of Rs.100/- per month;

e) directing the second defendant to deliver vacant possession of the thatched shed in the suit property facing north-south main road; Thus, the plaintiffs prayed for decree.

3.The gist and essence of the written statement filed by the first defendant are as follows:

(i) Subsequent to the partition deed dated 20.06.1960, the deceased Siddappa Chettiar and the first defendant alone had been living jointly in 'A' schedule property in the said partition deed till the death of his father. As there has already been a division and each of the other three sons had been given their due shares, none of the plaintiffs 1 and 2 or said Balasubramanian can be said to be sharers in the eye of law. There was no family arrangement either in the year 1975 or at any point of time. Therefore, he prayed for dismissal of the suit.

4.The Learned Trial Judge after considering the averments both in the plaint and written statement and arguments on either side counsel, has framed necessary issues and on perusing the oral and documentary evidence viz., P.W.1 to P.W.6, D.W.1, D.W.2 and Exs.A1 to A24 and Exs.B1 to B13 and Courts' Exhibits X1 to X6, Exs.C1 and C2 and dismissed the suit. Aggrieved against the judgment and decree passed by the trial court, the plaintiffs preferred an appeal in A.S.No.158 of 2005 on the file of the Additional Sub-Court, Salem.

5.The learned First Appellate Court has considered the arguments advanced on either side and framed necessary point for consideration and modified the Judgment and Decree passed by the Trial Court by holding that the plaintiffs are declared only 3/8th shares in the suit properties and in other aspects the suit is dismissed. Against the Decree and Judgment passed by the first Appellate Court, the present second appeal has been preferred by the first defendant/appellant.

6.At the time of arguments, the following substantial questions of law have been framed:

" 1.When certain members of a coparcenary separate themselves from a coparcenary, but others remain to continue to remain joint, and, one of the undivided coparceners dies intestate, whether his

share will devolve on the surviving coparcener as provided for under Explanation 2 of Section 6 of the Hindu Succession Act, or will it devolve on the legal heirs as provided for under Section 8 of the Hindu Succession Act?

2. Whether the preliminary decree passed by the first appellate Court without including other properties mentioned in 'A' schedule property in Ex.A10 is sustainable? "

7. Challenging the reversal judgment of the first appellate Court, learned counsel for the appellant/first defendant submits that the plaintiffs/respondents 1 to 3 filed the suit for declaration of title and injunction stating that originally the suit property and other properties are owned by their father Siddappa Chettiar. His wife is Lakshmi Ammal. As per Ex.A10, there was a partition between the family members on 20.06.1960, in which, 'A' schedule property was allotted to Siddappa Chettiar. As Siddappa Chettiar died intestate on 04.06.1972, there was a family arrangement in the year 1975, in pursuance of the same, suit property was allotted to their shares. Since the defendants attempted to interfere with their possession, the plaintiffs/respondents 1 to 3 filed the suit for declaration of title and injunction and also directing the second defendant to pay the arrears of rent, future rent and recovery of possession from the second defendant and other reliefs. Both the Courts below rightly held that there is no family arrangement as averred by the plaintiffs in the year 1975. However, the trial Court has dismissed the suit, whereas the first appellate Court has granted preliminary decree of partition, which is against law. He further submits that as per Section 6 of the Hindu Succession Act, divided sons are not entitled to shares in the property and they are not coparceners. Hence, he prayed for setting aside the decree and judgment passed by the first appellate Court. To substantiate his arguments, he relied upon the following decisions:

- (i) 1998 (II) CTC 146 (Arunachalam Pillai v. Ramu Mudaliar (died) and three others;
- (ii) (1971) Vol.84 LW 280 (W.S.Sivachakravarthi and others v. W.S.Sivasankaran and others);
- (iii) 2014-2-SCC 269 (Union of India and others v. Vasavi Co-operative Housing Society Limited and others);
- (iv) CDJ 1972 KAR 109 = AIR 1973 KAR 113 (M.V.Shivaji Rao Kore v. Rukminiamma);

8. Resisting the same, learned counsel for the plaintiffs/respondents 1 to 3 submits that once partition took place as per Ex.A10, there is no joint family property and there is no coparceners. After Siddappa Chettiar died intestate, as per Section 8 of the Hindu Succession Act, all the legal heirs of the deceased

Siddappa Chettiar inherited his properties. The first appellate Court has rightly held that the plaintiffs/respondents 1 to 3 are entitled to 3/8th shares in the suit property. So Section 6 of the Hindu Succession Act is not applicable to the facts of the present case. Even though the plaintiffs/respondents 1 to 3 sought for declaration of title and other reliefs, the first appellate Court has granted lesser relief as per Order 7 Rule 7 of C.P.C. To substantiate his arguments, he relied upon the following decisions:

- (i) 1958 2 MLJ 189 (Kesavalu Naidu v. Doraiswami Naidu (died) and others);
- (ii) AIR 2002 SC 136 (Rajendra Tiwary v. Basudeo Prasad and another);
- (iii) S.B.Civil First Appeal No.70/1982 dated 26.03.2014 in (Smt.Umrao Devi alias Amrao Devi and others v. Hulas mal and another);

9. Mr. S. Parthasarathy, learned senior counsel for the sixth respondent submits that it is true, Section 6 of the Hindu Succession Act is not applicable to the facts of the present case. As soon as partition took place, Section 8 of the Hindu Succession Act alone is applicable to the facts of the present case. As per Ex.A10/partition deed, 'A' schedule property was allotted to the father Siddappa Chettiar and first defendant. But 'A' schedule property was not only comprising with suit properties, it also comprised with other properties, at this stage, the plaintiffs/respondents 1 to 3 can very well file the suit for partition and separate possession of their shares in the property mentioned in "A" schedule property under Ex.A10. But one item cannot be partitioned in the present suit. He further submits that he is supporting the case of the first defendant/appellant herein. To substantiate his arguments, he relied upon the decision reported in 2014 (1) CTC 797 (Singaravel v. Murugesu Udayar (died) and others).

10. Considered the rival submissions made on both sides and perused the materials available on record.

Substantial question of law 1:

11. Originally, the suit property and other properties are owned to Siddappa Chettiar, his wife is Lakshmi Ammal. Their children are Balasubramanian, Rajannan/first plaintiff, Rajagopal/second plaintiff and Uthammappan/first defendant. Since Balasubramanian died, his wife Vijayalakshmi/third plaintiff is his only legal heir and they have no issues. The plaintiffs 1 to 3/respondents 1 to 3 herein filed the suit against the first defendant for declaration of title and other consequential reliefs stating that there was a partition under Ex.A10 on 20.06.1960. 'A' schedule property in the partition deed was allotted to the share of Siddappa Chettiar and first defendant, who

was then minor. The said Siddappa chettiar died intestate on 04.06.1972.

12. According to the plaintiffs/respondents 1 to 3, there was a family arrangement in the year 1975 and that has been disbelieved by the trial Court and it has dismissed the suit with costs. Even though the first appellate Court has disbelieved the family arrangement, it granted preliminary decree of partition stating that the plaintiffs/respondents 1 to 3 are entitled to $3/8^{\text{th}}$ shares in the suit property since their father died intestate.

13. Learned counsel for the appellant/first defendant argued that as per Section 8 of the Hindu Succession Act, plaintiffs/respondents 1 to 3 are not entitled to any shares. After arguments advanced by both sides counsel, this Court is of the view that once the partition took place, there is no co-parcener. Since the father Siddappa Chettiar died intestate, Section 8 of the Hindu Succession Act alone is applicable. Therefore, the substantial question of law 1 is answered accordingly.

Substantial Question of law No.2:

14. Learned counsel for the plaintiffs/respondents 1 to 3 submits that even though the plaintiffs have filed the suit for declaration of title, injunction and for recovery of possession, the first appellate Court has rightly granted lesser relief of partition. For the reason, he relied upon the following decisions:

(i) In 1958 2 MLJ 189 (Kesavalu Naidu v. Doraiswami Naidu (died) and others), wherein it was held that a prayer for larger relief, claim not made out, claim to lesser relief made out and hence, lesser relief can be granted. In para-8, it is held as follows:

"16. To sum up in all cases in which a Court is called upon to give a relief different from that claimed by the plaintiff, the test is to see whether the defendant is not taken by surprise and there can be no surprise if the relief granted is consistent with that claimed and with the case raised by the pleadings or is less than that claimed by the plaintiff. The plaintiff need do no more than suggest the relief to which he is entitled and it is for the Court to determine what relief could be given on the facts found. Where all the facts are stated in the plaint and the plaintiff claims only one relief although he could have claimed another alternative relief the Court can grant the latter relief. When necessary facts are stated in the plaint which if established entitle the plaintiff in law to obtain certain reliefs, it is open to the Court to

grant him such reliefs if established although the reliefs asked for and the issues raised may be inartistically framed. *Judicis est judicare secundum allegare et probata*, it is the duty of a Judge to decide according to facts alleged and proved."

(ii) For the same proposition, he relied upon another decision reported in AIR 2002 SC 136 (*Rajendra Tiwary v. Basudeo Prasad and another*), in para-14, it is held as follows:

"14. Where the relief prayed for in the suit is a larger relief and if no case is made out for granting the same but the facts, as established, justify granting of a smaller relief, Order VII Rule 7 permits granting of such a relief to the parties. However, under the said provisions a relief larger than the one claimed by the plaintiff in the suit cannot be granted."

(iii) In S.B. Civil First Appeal No. 70/1982 dated 26.03.2014 in (*Smt. Umrao Devi alias Amrao Devi and others v. Hulas mal and another*), it was held as follows:

"In the present case, the plaintiff had filed a suit for possession; he was claiming his right and title to the suit property; the same being unpartitioned and he being the sole surviving male member pre 1956, the suit property was found to have been succeeded by both plaintiff Hulas Mal and defendant Amrao Devi jointly and once such a finding was returned, the plaintiff was entitled to a decree for possession. The relief for partition had necessarily to follow from it being a joint property, the decree of possession alone could not be effective without following it with a decree for partition. However, the trial court fell in error in merely declaring the share and directing the plaintiff to file a separate suit. The substance of the matter had necessitated the passing of the decree for partition and possession although it was not specifically prayed for in the plaint, to that extent case for exercise of power under Order XLI, Rule 31 CPC is made out and the cross-objections filed by the respondents to the said extent deserve to be allowed."

15. Per contra, learned senior counsel for the sixth respondent relied upon the decision reported in 2014 (1) CTC 797 (*Singaravel v. Murugesu Udayar (died) and others*) and submits that once the suit has

been filed for declaration and injunction on the basis of oral partition, if the oral partition was not proved, the plaintiff is not entitled to partition. So it is appropriate to extract para-13, which runs as follows:

"13. In the cases cited above by the learned counsel for the appellant, the principle stated is where a party cannot be exact in asking for a relief, it is wiser to claim much rather than too little as a Judge does not give more than what the plaintiff requires. However, in the case on hand, the plaintiff has asked for relief of declaration of title based on an oral partition which has not been proved. When the plaintiff failed to establish the oral partition, based on which he has claimed title to the suit items, the relief of declaration cannot be granted and the Courts below also rightly pointed out that it is open to the plaintiff to sue only for partition. No doubt, it is a settled principle that when plaintiff claims a larger interest and is able to establish a lesser extent, to that extent, a decree can be granted. The plaintiff has established his title only regarding item No. 7 and regarding the other items, his entitlement itself has to be proved. Therefore, the Court cannot grant a relief not specifically claimed in the plaint as granting a relief of partition would be a relief inconsistent with what has been pleaded."

16. Learned counsel for the appellant/first defendant has relied upon the following decisions:

(i) In 1998 (2) CTC 146 in (Arunachalam Pillai v. Ramu Mudaliar (died) and three others), wherein it was held that relief to be granted by a Court must be based on pleadings. The relief which does not flow either from the plaint claim or on the basis of admission of the defendant cannot be granted. Granting of such relief would be in excess of jurisdiction of Civil Court. Para-14 is extracted hereunder:

"14. It is clear from the above decisions, that the jurisdiction of the Court to grant a relief must be based on pleadings or at least the opposite party must have admitted the right of the plaintiff in respect of the portion of the same. In this case, both the plaintiff and 1st defendant claimed exclusive title. There is no alternative case for either of the parties. The 1st defendant has also not filed any counter claim and he has filed only written statement denying the

right of the plaintiff. He claim exclusive right only as a defence to the plaintiff's claim and what he prayed for is only the dismissal of the suit. The question whether the plaintiff and defendant are entitled to equal right over the suit lane was not a matter in issue nor evidence let in that regard. Only because the suit lane lies in between the properties of the plaintiff and the 1st defendant, the Lower Appellate Court though that it has been commonly enjoyed by both of them. When the parties are not at issue and the relief granted by the lower Appellate Court is neither incidental to the main relief, following the decisions cited supra, I think that the relief granted was in excess of its jurisdiction. The relief does not flow either from the plaint claim or on the basis of any admission of the defendants. In such cases, the Court cannot grant a relief, as has been granted by the lower Appellate Court. "

(ii) In 2014 (2) SC 269 (Union of India and others Versus Vasavi Co-op. Housing Society Ltd. and others), wherein it was held that plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title and that could be done only by adducing sufficient evidence to discharge the onus on it irrespective of the question whether the defendants have proved their case or not. Para-19 is extracted hereunder:

"19. The legal position, therefore, is clear that the plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title and that could be done only by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendants have proved their case or not. We are of the view that even if the title set up by the defendants is found against, in the absence of establishment of plaintiffs own title, plaintiff must be non-suited."

17. At this juncture, it is appropriate to extract Order 7 Rule 7 C.P.C., which reads as follows:

"7. Relief to be specifically stated- Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for.

And the same rule shall apply to any relief claimed by the defendant in his written statement."

18. It is true, once the larger relief sought for, a lesser relief can be granted, so there is no bar to grant lesser relief. In the case on hand, the suit has been filed for declaration of title, injunction, recovery of possession and also for damages. As per Ex.A10 partition deed, 'A' schedule property was allotted to the appellant/first defendant and his father deceased Siddappa Chettiar. As soon as he died, as per the Hindu Succession Act, his legal heirs are entitled to share his properties. In such circumstances, entire 'A' schedule property is the subject matter of the suit. Without including other items of 'A' schedule property, the first appellate Court has granted preliminary decree of partition in respect of one item of suit property is barred by partial partition.

19. According to the plaintiffs/respondents 1 to 3, other two items of the properties have already been sold. Once family arrangement has not been proved by the plaintiffs, if they sought for partition, they have to include all the items mentioned in 'A' schedule property. But the first appellate Court has committed an error in granting preliminary decree of partition of 3/8th shares in the suit property without considering the above aspect. Hence, findings of the first appellate Court is hereby set aside. Therefore, substantial question of law 2 is answered against the plaintiffs/respondents 1 to 3.

20. In view of the answers given to substantial questions of law 1 and 2, as stated supra, as per Ex.A10, there was a partition took place on 20.06.1960, 'A' schedule property was allotted to the share of Siddappa Chettiar and the first defendant. In the year 1972, Siddappa chettiar died intestate leaving behind the appellant and respondents as his legal heirs. But the plaintiffs/respondents 1 to 3 put forth their case on the basis of the family arrangement took place in the year 1975 and the same has not been proved by them. Both the Courts below have also disbelieved the family arrangement and there is no cross-appeal on this aspect. The appellant/first defendant has preferred this second appeal challenging the preliminary decree of partition of 3/8th shares granted by the first appellate Court. Under such circumstances, I am of the view, without including other items in 'A' schedule property, the first appellate Court cannot grant preliminary decree of partition of 3/8th shares to the respondents 1 to 3/plaintiffs. Therefore, the decree and judgment passed by the first appellate Court are unsustainable and they are liable to be set aside and they are hereby set aside. The decree and judgment passed by the trial Court are restored.

21.In fine,

- Second Appeal is allowed.
- The decree and judgment passed by the first appellate Court are hereby set aside.
- The decree and judgment passed by the trial Court are hereby restored.
- Considering the relationship of both the parties, they are directed to bear their own costs.
- Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

kj

To

1.The Principal District Munsif Court,
Salem.

2.The Additional Sub-Court,
Salem.

3.The Record Keeper,
V.R.Section,
High Court, Chennai.

+1cc to Mr.T.Murugamanickam, Advocate, S.R.No.34649

+1cc to Mr.V.R.Rajasekaran, Advocate, S.R.No.34432

S.A.No.1356 of 2008

NM(CO)

CA(22/07/2015)

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