

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 31.03.2015  
Delivered on : 09.06.2015

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

A.S.No.398 of 2008

&

M.P.No.1 of 2008

Abdul Jabbar

... Appellant/Defendant

-Vs-

Kamarunisha

Represented by her husband and duly constituted  
Attorney Mohamed Ismail Thambi  
S/o. Mohamed Zackria  
Aged 45 years, Muslim Merchant  
No.7, Vazhakollai Street  
Neravy

... Respondent/Plaintiff

Appeal filed under Section 96 of the Civil Procedure Code against the judgment and preliminary decree of the learned Additional District Judge, Pondicherry at Karaikal dated 31.10.2007 in O.S.No.102 of 2003.

For Appellant : M/s.Sai Bharath and Ilan

For Respondent : Mr.T.P.Manoharan

JUDGMENT

The defendant in the original suit is the appellant in the appeal. Kamarunisha, the respondent herein filed the suit O.S.No.102 of 2003 on the file of the Additional District Judge of Pondicherry at Karaikal against Abdul Jabbar, the appellant herein for partition claiming  $\frac{1}{2}$  share in the suit property.

2. The appellant herein/defendant did not dispute the contention of the respondent/plaintiff that she is having an undivided share in the suit property. At the same time, it was his contention that the respondent/plaintiff did have only  $\frac{1}{3}$ <sup>rd</sup> share whereas the appellant/defendant was entitled to  $\frac{2}{3}$ <sup>rd</sup> share in the suit property. The appellant/defendant also sought for a decree for partition claiming that he was entitled to  $\frac{2}{3}$ <sup>rd</sup> share in the

suit property. Necessary Court fee was also paid by him for allotment of his share.

3. The learned trial judge passed a preliminary decree directing the division of the suit properties into two equal shares and allotment of one such share to the respondents herein/plaintiff. Not stopping with that, the trial Court proceeded further to incorporate a direction in the preliminary decree that the respondent/plaintiff should file a petition for passing a final decree based on the commissioner's report filed in the suit and also directing the appellant/defendant to pay costs. Aggrieved by the said decree of the trial Court dated 31.10.2007, the appellant/defendant has come forward with the present appeal.

4. Kamarunisha, the respondent herein filed the suit praying for partition claiming  $\frac{1}{2}$  share in the suit property based on the averments in the plaint which are, in brief, as follows:-

i) The suit property, a dilapidated house situated in Karaikal Melaveedhi (now called as Kazi Veedhi) was purchased by the mother of the respondent/plaintiff under a notarized sale deed dated 13.01.1944 and at the time of the marriage of the respondent/plaintiff, her mother made a declaration by virtue of a Kalyana kaditham that she had gifted the said property to the respondent/plaintiff. About 10 years prior to the filing of the suit, the boundaries of the property had changed because of the change in name of the street from Kaziya Street into Dr.Amedkar Street. The house had also virtually disappeared reducing the property into a house site. In both the notarized sale deed and Kalyana Kaditham, the subject matter of transfer had been shown as  $\frac{1}{2}$  share in the suit property. Extent of the suit property is Hec. 0.03.50 and re-survey patta was granted in favour of the respondent herein/plaintiff in respect of half of the extent of the suit property. In addition, in the Kalayana Kaditham measurements have also been furnished. After re-survey, patta came to be granted in favour of the respondent/plaintiff in respect of  $\frac{1}{2}$  of the suit property measuring Hec. 0.03.50

ii) During the year 1995 and 1996, the respondent/plaintiff started putting up 3 vehicle sheds and she was given to understand that the owner of the other half was one Aissa Ummal. The said Aissa Ummal, who had put up some construction in portions of the suit property, made an attempt to prevent the respondent / plaintiff from putting up the car shed by filing O.S.No.272 of 1994 on the file of Principal District Munsif, Karaikal for injunction and mandatory injunction. After contest, the said suit came to be dismissed by the Court accepting the plea of the defendant therein, who is the respondent herein/plaintiff in the suit concerned in this appeal. Thereafter, the efforts made by the respondent/plaintiff to have the property measured and have her  $\frac{1}{2}$  share separated from the rest of the portion belonging to Aissa Ummal was not successful since she did not co-operate. However,

the respondent / plaintiff was using the open southern end of the property as entrance. Suddenly in September 2003, Aissa Ummal put up a barricade and prevented the plaintiff from entering into the rest of the property through the southern opening. Consequent to the said act on the part of Aissa Ummal, oral demands for removal of the obstruction were unsuccessfully made and hence, a notice was issued. At that point of time, Aissa Ummal died and the appellant herein/plaintiff, being her only legal heir, succeeded to her estate. The appellant herein/defendant is entitled to half share in the undemarcated suit property. The respondent/plaintiff is entitled to a partition and allotment of Hec. 0.01.75 for her enjoyment in equity.

5. The suit was resisted by the appellant/defendant on the basis of the averments made in the written statement, which are, in brief, as follows:

The respondent /plaintiff cannot claim a larger share in the suit property by way of notarial sale deed dated 13.01.1944. The total extent of the suit property is Hec. 0.03.50. Out of the said extent, except the portion over which the respondent/plaintiff has put up the car sheds, which account for 1/3<sup>rd</sup> of the total extent, the balance extent of the suit property is in the possession and enjoyment of the appellant/defendant. His mother purchased three shares from three persons in the year 1965 by way of notarized sale deed. According to the documents held by the appellant/defendant, his mother was entitled to 2/3<sup>rd</sup> share in the total extent of suit property and she was in possession of the suit property. The respondent/plaintiff is also one of the shareholders of the suit properties. But, she is not entitled to ½ share as claimed by her. She is entitled to 1/3<sup>rd</sup> share alone and the balance 2/3<sup>rd</sup> share belongs to the appellant/defendant. In the Kalyana kaditham of the year 1984, measurements came to be furnished according to their own convenience and the same is not binding on the appellant/defendant. Patta was obtained fraudulently for an extent of 0.01.75 Hectares in the name of the respondent/plaintiff and the same will not take away or reduce the right of the appellant/defendant. The earlier suit filed by the purchaser of the appellant/defendant for mandatory injunction and permanent injunction came to be dismissed on the ground that both parties to the suit were co-owners. The dismissal of the earlier suit is sought to be wrongly interpreted that the respondent herein/plaintiff took a stand that she was entitled to ½ share and the said contention was negatived. The appellant/defendant is prepared for a partition provided his claim of 2/3<sup>rd</sup> share in the suit property is accepted. The appellant/defendant also seeks a decree for partition declaring his entitlement to 2/3<sup>rd</sup> share and allotment of such share to him, for which necessary Court fee is paid.

6. In the reply statement filed by the respondent/plaintiff, the claim of the appellant/defendant that he is entitled to 2/3<sup>rd</sup> share was disputed and the plaintiff averments that both the plaintiff and the defendant were entitled to ½ share each came to be reiterated.

7. Based on the above said pleadings, the learned trial Judge framed the following issues;

- 1) What is the extent of property available for partition between the parties to the suit?
- 2) Is any portion of the suit property to be enjoyed in common without partition and if so, what is the extent of such common property?
- 3) To what share the plaintiff and the defendant are entitled in the event of partition?
- 4) To what reliefs the parties are entitled?

8. Based on the above said issues framed by the trial Court, the parties went for trial, in which one witness was examined as PW1 and 15 documents were marked as Exs.A1 to A15 on the side of the respondent herein/plaintiff, whereas one witness was examined as DW1 and 7 documents were marked as Exs.B1 to B7 on the side of the appellant herein/defendant. The report and plan filed by the Advocate Commissioner appointed by the trial Court were marked as Court documents as Exs.C1 and C2.

9. The learned trial judge heard the arguments and considered the evidence in the light of the points urged in the arguments. Upon such consideration, the learned trial Judge came to the conclusion that the mother of the respondent/plaintiff purchased ½ of the suit property under Ex.A2 notarized sale deed dated 13.01.1944 and the mother of the appellant/defendant purchased parts of the tiled house and its appurtenant land (suit property) under Ex.B3 dated 12.11.1949, Ex.B2 dated 31.05.1956 and Ex.B1 dated 07.07.1965. The learned trial Judge also relied on Ex.B6 measurement report of the Tahsildar and Ex.B7 sketch prepared by Tahsildar, Karaikal and came to the conclusion that the mother of the appellant/defendant purchased only a portion of the suit property, whereas under Ex.A2, the mother of the respondent / plaintiff purchased ½ share in the suit property and that only ½ share was available to the mother of the appellant/defendant to be purchased by her under the documents relied on by him. Holding that the earliest document being the title deed of the mother of the respondent/plaintiff which recited that what was purchased was ½ of the suit property described within boundaries, the trial Court held that the respondent/plaintiff was entitled to ½ share as claimed by her and the appellant/defendant was not entitled to 2/3<sup>rd</sup> share as claimed by him and on the other hand, he was entitled to ½ share alone. Accordingly, the learned trial judge chose to pass a preliminary decree holding the plaintiff to be entitled to ½ share

in the suit property and directing division of the suit property into two equal shares and allotment of one such share to the respondent/plaintiff.

10. However, without assigning any reason and simply relying on Exs.C1 and C2, the report and plans submitted by the Advocate Commissioner appointed for the purpose of noting the physical features of the property, the learned trial Judge chose to direct the plaintiff to file a final decree petition on the basis of the report of the Commissioner. The learned trial Judge also awarded costs against the appellant herein/defendant.

11. Aggrieved by the same, the appellant/defendant has come forward with the present appeal on various grounds set out in the memorandum of grounds of appeal.

12. The points that arise for consideration in this appeal are;

1. Whether the finding of the Court below that the plaintiff and the defendant are entitled to  $\frac{1}{2}$  share each in the suit property and the appellant/defendant is not entitled to  $\frac{2}{3}$ <sup>rd</sup> share as claimed by him is erroneous?
2. Whether the Courts below committed an error in directing the filing of a final decree application for division on the basis of the Commissioner's report filed in the suit without relegating the question of allotment of shares to an enquiry in the final decree applications?
3. Whether the Court below is wrong in awarding costs?

13. The arguments advanced by the learned counsel for the appellant and by Mr.T.P.Manoharan, learned counsel for the respondent were heard and the materials available on record were also perused.

Point No.1:-

14. Admittedly, both the appellant/defendant and the respondent/plaintiff are co-owners of the suit property, namely an extent of 0.03.50 Hectares of house site with dilapidated structure. It is also an admitted fact that no partition by metes and bounds took place between them and that due to absence of consensus regarding the extent of shares held by each one and mode of division, the parties had to approach the Court for the relief of partition and separate possession. It is the contention of the respondent/plaintiff that she is entitled to  $\frac{1}{2}$  share in the suit property and the other  $\frac{1}{2}$  share belongs to the appellant/defendant. Except the husband of the respondent/plaintiff, who figured as PW1, no independent witness was examined on her side. Similarly, except DW1, the defendant himself, no other witness was examined on the side of the appellant/defendant.

15. The respondent/plaintiff bases her claim that she is entitled to  $\frac{1}{2}$  share of the suit property on the notarized sale deed dated 13.01.1944 and Ex.A3 dated 13.09.1984 Kalyana Kaditham under which a declaration has been made to the effect that her mother made a Hiba of the said property to her, namely the respondent/plaintiff. In addition, the respondent/plaintiff also relies on the patta issued in the re-survey, wherein she was given patta in respect of 0.01.75 Hectares. On the other hand, the appellant/defendant relies on Ex.B3 dated 12.11.1949, Ex.B4 dated 08.08.1951, Ex.B2 dated 31.05.1956 and Ex.B1 dated 07.07.1965 as the documents under which portions of the suit property came to be purchased by his mother Aissa Ummal. The said deeds simply recite portions with reference to rooms, varandha etc., without making it clear as to what proportion the properties were sold bone to the total extent of the suit property. It is also not clear as to on what basis the appellant/defendant claims that he is entitled to  $\frac{2}{3}$ <sup>rd</sup> share and the respondent /plaintiff is entitled to  $\frac{1}{3}$ <sup>rd</sup> share alone. The earliest document is Ex.A2, notarized sale deed dated 13.01.1944 under which the mother of the respondent/plaintiff purchased  $\frac{1}{2}$  share in the suit property. The said property purchased by her came to be gifted to the respondent / plaintiff and the same was confirmed by the declaration under Ex.A3. It also stands confirmed by the resurvey patta issued in the name of the respondent/plaintiff marked as Ex.A4.

16. The measurement report of Tahsildar and the sketch prepared by the Tahsildar marked as Exs.B6 and B7 shall not be enough to prove that the mother of the appellant/defendant purchased  $\frac{2}{3}$  share in the suit property. An attempt was made on behalf of the appellant/defendant to show that in a previous suit filed by Aissa Ummal in O.S.No.272 of 1994 on the file of the Principal District Munsif, Karaikal, her claim that she was entitled to  $\frac{1}{2}$  share in the suit property was negated. However, it has been clarified by the respondent/plaintiff that the said suit was only for mandatory injunction for the removal of the obstruction put up by her on the southern entrance and for permanent injunction and that the said suit came to be dismissed on a technical ground that such relief against a co-owner could not be maintained. Certified copies of the judgment and decree passed in the said former suit have been produced as Exs.A5 and A6. From Exs.A5 and A6, it is obvious that the question of extent of shares held by each co-owner was not in issue and that the suit came to be dismissed on the ground that both the plaintiff and the defendant in the said suit were co-owners and one co-owner could not maintain a suit for injunction against the other co-owner in respect of enjoyment of the property. Hence, the attempt made by the appellant/defendant that the question of extent of shares held by the parties was decided by the Principal District Munsif in a former suit was rightly rejected by the learned trial Judge. The

said decree cannot also constitute a res judicata for the present suit.

17. Both the parties do admit that they are co-owners and the property remains joint. From the evidence adduced on both sides, it is obvious that the appellant/defendant put up certain construction in a portion of the suit property and the parties are in enjoyment of separate portions for the sake of convenience, keeping some portions for common use called "Samudhayam". On a proper appreciation of evidence and applying proper provisions of law and principles of law, the learned trial Judge rendered a finding that the plaintiff is entitled to  $\frac{1}{2}$  share in the suit property and the defendant is entitled to  $\frac{1}{2}$  share and not  $\frac{2}{3}$ rd share as claimed by him in the suit property. Accordingly, the preliminary decree granted by the trial Court directing division of the suit property into two equal shares and allotment of one such share to the plaintiff cannot be found fault with. The said part of the preliminary decree deserves to be confirmed.  
Point Nos.2 and 3:-

18. Not stopping with granting such a preliminary decree directing division of the suit property into two equal shares and allotment of one such share to the respondent/plaintiff, the learned trial Judge proceeded further to decide the question of equity and allot specific shares in the preliminary decree stage itself, without relegating it to be decided in the final decree enquiry. Relying on the Commissioner's report, without even giving an opportunity to the parties as to the claim of equity and allotment of shares by metes and bounds, the learned trial Judge has chosen to give a direction to the respondent/plaintiff to file a final decree petition on the basis of the Commissioner's report filed in the suit. The normal course to be adopted would be the declaration of shares, direction of division of the property into particular number of shares and allotment of the particular number of shares to the party/parties claiming partition in the preliminary decree and leaving the rest to be canvassed in the final decree enquiry. The learned trial Judge deviated from the said procedure and chose to issue a direction that the final decree application should be based on the report of the Commissioner's report filed in the suit prior to the passing of the preliminary decree and thereby leaving little scope for consideration in the final decree application. The said direction also came to be made without even framing an issue regarding equity and allotment of the particular portions to the share of the respondent/plaintiff. Hence, that part of the decree of the trial Court deserves to be interfered with and set aside.

19. Both the parties were not in a position to effect an amicable partition out of Court and that was the reason why they had to approach the Court. Of course, the respondent/plaintiff

claimed  $\frac{1}{2}$  share and the appellant/defendant claimed  $\frac{2}{3}$ rd share. Ultimately, the claim of the respondent/plaintiff regarding the extent of share is upheld. The appellant/Defendant also came forward with the written statement conceding the prayer for partition, while disputing the extent of share claimed by the respondent/plaintiff. The appellant/defendant also paid necessary Court fee for allotment of his share and he also prayed for passing a preliminary decree in his favour. The trial Court, besides directing the division of the suit property into two equal shares and allotment of one such share to the plaintiff, should have also directed the allotment of the other  $\frac{1}{2}$  share to the appellant/defendant. Hence, Clause 1 of the decree deserves to be suitably modified by including a direction to allot one out of two shares to the appellant/defendant. Considering the nature of the case and the facts and circumstances, the learned trial Judge ought not to have imposed cost on the appellant/defendant. Hence, that part of the decree also deserves to be interfered with and modified.

20. For all the reasons stated above, this Court comes to the conclusion that the appeal shall succeed in part and the preliminary decree of the trial Court is liable to be modified as indicated above.

21. In the result, the appeal is allowed in part without costs. The preliminary decree of the trial Court made in O.S.No.102 of 2003 is modified as follows:

i) A preliminary decree is passed without costs directing division of the suit property into two equal shares and allotment of one such share to the respondent/plaintiff and the other share to the appellant/defendant.

ii) The question of working out equity is left open to be canvassed and decided in an application to be filed by either of the parties, under Order XX Rule 18 CPC. The observations made in the judgment regarding allotment of particular portions to the plaintiff shall stand expunged.

iii) The case shall stand adjourned sine die to be taken up when a final decree application is filed by either of the parties. Connected miscellaneous petition M.P.No.1 of 2008 is closed.

Sd/-  
Assistant Registrar(CS II)

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Sub Assistant Registrar

gpa

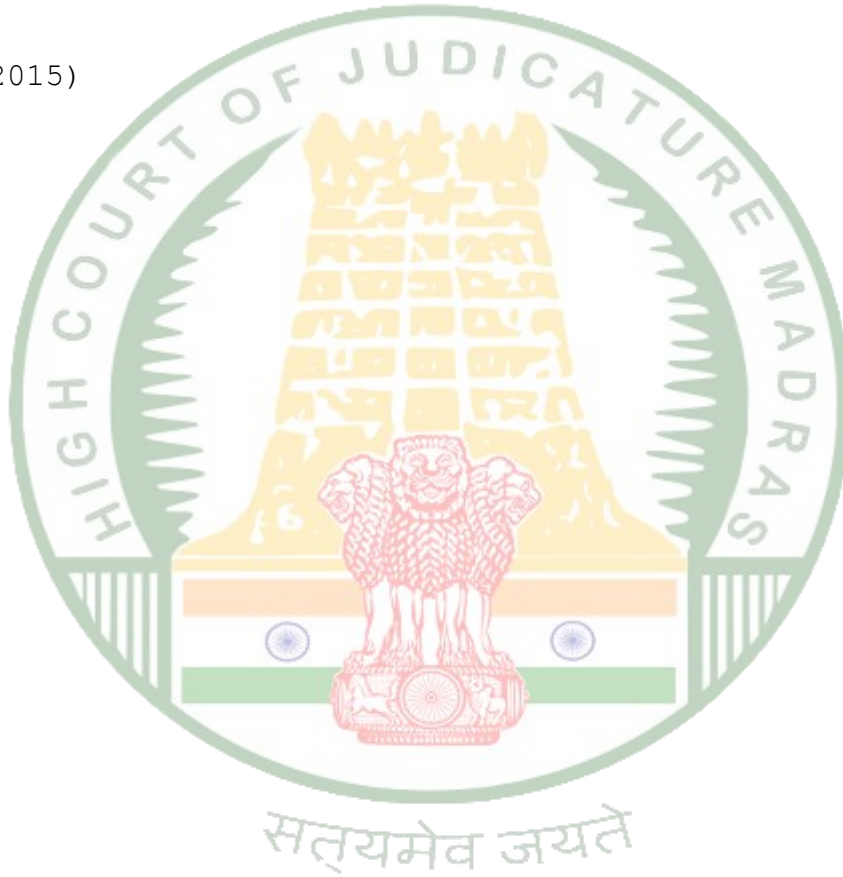
To

The Additional District Judge  
Pondicherry at Karaikal

+1cc to M/s.Sai Bharath & Ilan, Advocate, S.R.No.27973  
+1cc to M/s.T.P.Manoharan, Advocate, S.R.No.28028

A.S.No.398 of 2008 &  
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