

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.12.2015

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

C.M.A.No.479 of 2012

Nachayammal (died)

1. Nallappa Gounder
S/o Pongianna Gounder
2. Venkatesan
S/o Nallappa Gounder
3. Gomathi
W/o Magudeswaran ..Appellants/Defendants 2-4

-Vs-

1. S.Doraisamy
S/o Subramania Gounder
2. K.S.Gopalakrishnan
3. Kannammal
W/o Duraisamy
4. Saraswathi
W/o Ponnusamy
5. T.Senthilkumar
6. C.S.Palanisamy ...Respondents/Plaintiffs/ Defendants 5-7

Memorandum of Grounds of Civil Miscellaneous Appeal under Order XLIII, Rule 1(a) read with Section 104 of the Code of Civil Procedure, against the judgment and decree dated 23.9.2011 made in A.S.No.67 of 2010 on the file of the learned Principal District Judge, Erode and OS.No.391/04 dated 12/04/2010 on the file of the Principal Sub Judge, Erode.

For Appellants :: Mrs.P.T.Asha for
M/s Sarvabhauman Associates

For Respondents :: Mr.N.Manokaran for R1 to R3
R4 to R6-No appearance

JUDGMENT

This civil miscellaneous appeal is directed against the impugned judgment and decree dated 23.9.2011 passed by the learned Principal District Judge, Erode in A.S.No.67 of 2010, in and by which the judgment and decree passed by the learned Principal Subordinate Judge, Erode in O.S.No.391 of 2004 dated 12.4.2010 were set aside.

2. Heard the learned counsel for the parties.

3. The appellants are the defendants. The respondents 1 to 3 herein, being the plaintiffs, filed the suit, O.S.No.391 of 2004 before the learned Principal Subordinate Judge, Erode for partition of the suit properties into three equal shares and allotment of one such share to them and the fifth defendant and restraining the defendants from alienating or encumbering the suit properties till final partition by way of a permanent injunction. After an elaborate enquiry, by the judgment and decree dated 12.4.2010, the trial Court dismissed the suit holding against the plaintiffs, namely, that the properties were the ancestral properties of Pongianna Gounder; that after the marriage of the plaintiffs and fifth defendant's mother, they were not in joint possession of the properties and stood ousted and that the suit was also barred by limitation.

4. Aggrieved by the said judgment and decree, the respondents 1 to 3 herein/plaintiffs filed Appeal Suit No.67 of 2010 before the learned Principal District Judge, Erode. They also filed an interlocutory application, I.A.No.126 of 2011 under Order XLI, Rule 27 of the Code of Civil Procedure to receive some documents as additional evidence. After hearing the parties, the lower appellate Court allowed the said interlocutory application holding that the valuable right of the respondents 1 to 3/plaintiffs would be affected if they are not permitted to produce the additional documents and that no prejudice would be caused to the appellants/defendants if the application was allowed. The lower appellate Court also held that an opportunity must be given to the respondents 1 to 3/plaintiffs to mark the said documents by examination and that the appellants/defendants should be permitted to cross examine the witnesses with regard to the documents which are going to be marked by the respondents 1 to 3/plaintiffs, for the purpose of deciding as to whether the suit has been filed within the period of limitation and from which date the appellants/defendants have been in enjoyment of the properties, hostile to the knowledge of the respondents 1 to 3/plaintiffs, on the plea of adverse possession and ouster. Holding so, the lower appellate Court, setting aside the judgment and decree passed by the learned trial Judge, remanded the matter back to the trial Court for disposal of the suit according to law with a further direction to the trial Court to give opportunity to the respondents 1 to 3/plaintiffs to let in evidence with regard to the documents produced under I.A.No.126 of 2011 and also to allow the appellants/defendants to cross examine the said witnesses, apart from letting in oral and documentary evidence, if any and also to cross examine the said witnesses by the other side, in the light of the

observations made thereunder. Hence this appeal by the appellants/defendants.

5. Be that as it may, by the impugned order of remand passed by the lower appellate Court, as on date, the suit for partition filed in the year 2004 is admittedly pending for a decision between the parties. In my considered opinion, taking into account the close relationship between the parties, the lower appellate Court ought not to have remanded the main suit back to the trial Court in the light of the observations made thereunder, for two reasons. Firstly, the suit for partition of the year 2004 is pending, almost for the past ten years. Secondly, when the lower appellate Court thought it fit to allow the interlocutory application, I.A.No.126 of 2011 filed by the respondents 1 to 3/plaintiffs under Order XLI, Rule 27 of the Code of Civil Procedure to receive the documents as additional evidence, in all fairness, it should have gone into their genuineness for the purpose of marking the same as acceptable evidence, on the basis of the evidence let in by the parties, and should have decided the suit for partition on merits, instead of remanding the same to the trial Court. For the aforementioned two reasons, this Court, while remanding the suit to the file of the lower appellate Court, hereby directs the lower appellate Court to receive the documents produced under I.A.No.126 of 2011 and do a little exercise to go into their genuineness, for the purpose of marking the same as acceptable evidence, on the basis of the evidence let in by the parties, both oral and documentary, and dispose of the suit for partition in accordance with law, within a period of three months from the date of receipt of a copy of this order. With these observations, the civil miscellaneous appeal stands disposed of. Consequently, M.P.Nos.1 of 2012 & 1 of 2015 are closed. No costs.

sd/-

Assistant Registrar(CO)

/TRUE COPY/

Sub-Assistant Registrar

ss

To

1. The Principal District Judge
Erode

2. The Principal Subordinate Judge, Erode.

3.The Section Officer,
VR Section, High Court, Madras

+1 CC to MR.N.Manokaran Advocate. SR.NO.67502
+1 CC to M/s Sarvabhauman Associates. SR.NO. 67335

C.M.A.No.479 of 2012

CO-SKV
JD 21/01/2016



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