

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 10.09.2015

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

A.S.No.944 of 2004

1.Raji (alias) Prabakaran
2.Baskar
3.Visu (A) Vijayakumar
4.Mrs.Lakshmi
5.Sundari
6.Suguna

...Appellants/Defendants 4 to 9

Vs

1.Krishna Veni
2.Mrs.Padmavathi
3.B.Sivakumar
4.Karunakaran
5.Saraswathi
6.Jayalakshmi
7.Dr.Sujatha
8.Rajkumar

...Respondents 1 to 8/ Petitioner/
Defendants 1 to 3, 10 to 13

Appeal Suit filed under Section 96 of the Civil Procedure Code against the judgement and decree of the Additional District Judge, Fast Track Court V, Chennai dated 26.03.2003 made in O.S.No.945 of 2000.

For Appellants : Mr.P.Srinivas

For Respondents : Mr.R.Vijayaraghavan for R1
Mr.K.V.Ananthakrishnan for
R7 and R8

Notice served [R2 to R6]

JUDGMENT

This appeal has been preferred against the preliminary decree passed by the trial court (Fast Track Court No.V, Chennai) dated 26.03.2003 made in O.S.No.945/2000. The defendants 4 to 9 in the original suit are the appellants in the appeal. The plaintiff

in the original suit is the first respondent in the appeal and the other defendants, namely defendants 1 to 3 and 10 to 13 are respondents 2 to 8 in the appeal.

2. The suit was filed by the first respondent herein for the relief of partition claiming 1/6th share in the suit properties. Partly terraced and partly tiled house bearing Door No.45, Dharmaraj Koil Street, Korukkupet, is shown as plaint 'A' schedule property. As many as 35 items of lands at Kuruvi Agaram Village, Gummidipoondi Taluk have been shown as Plaint 'B' schedule properties. Contending that the suit properties were the absolute properties of late Narayanasamy Naicker and she, as one of the legal heirs of Narayanasamy Naicker, was entitled to 1/6th share in the suit properties, the first respondent herein filed the above said suit for partition and separate possession.

3. The following facts were alleged in the plaint:- Narayanasamy Naicker died intestate leaving behind him the first respondent (plaintiff), the appellants (defendants 4 to 9) and the respondents 2 to 6 (defendants 1 to 3 and 10 and 11), as his legal heirs. The first respondent/plaintiff, defendants 1, 10 and 11 and one Nagabooshanam are the daughters of Narayanasamy Naicker. He had two sons by names Krishnan Naicker and Balasundaram Naicker. On the death of Narayanasamy Naicker intestate, all the daughters and sons, who were alive, became entitled to 1/6th share each. The legal heirs of Nagabooshanam (dead) together became entitled to 1/6th share. Similarly, the legal heirs of Krishnan Naicker (dead) together became entitled to 1/6th share and the legal heirs of Balasundaram (dead) became entitled to 1/6th share.

4. Contending that the first respondent/plaintiff was not given her due share in the income derived from the properties; that her oral demand for partition was also met with mere promise to do so, which prompted her to issue a pre-suit notice dated 12.10.1999 and that the demand thus made in writing for partition was also not met with, the first respondent/plaintiff filed the suit for partition. Since a part of Plaint 'A' schedule property had been sold by the appellants herein/defendants 4 to 9 in favour of Dr.Sujatha, the 7th respondent/12th defendant, which included the share of the first respondent/plaintiff also, the first respondent/plaintiff made the 7th respondent/12th defendant a party and sought the relief of partition in respect of 'A' schedule property also on the basis of her contention that the sale made by the appellants herein/defendants would not bind her share. The remaining portion of suit 'A' schedule property was purchased by the 8th respondent/13th defendant on the same day on which the 7th respondent/12th defendant purchased the other part. Hence

subsequently, Rajkumar the 8th respondent/13th defendant was also included as a party.

5. Except the purchasers of the plaint 'A' schedule property, namely Dr.Sujatha and Rajkumar, the 7th and 8th respondents/12th and 13th defendants, all other defendants remained exparte and they did not contest the case. The 7th and 8th respondent herein/defendants 12 and 13 alone contested the case by filing a written statement contending that they were the bonafide purchasers in respect of plaint 'A' schedule property and that the first respondent/plaintiff could not get any share in the plaint 'A' schedule property purchased by them.

6. In view of the same, the learned Trial Judge simply framed two issues, which are as follows:

1. Whether the plaintiff is entitled to preliminary decree for partition as prayed for?

2. To what relief the plaintiff is entitled?

7. One witness was examined as PW1 and five documents were marked as Exs.A1 to A5 on the side of the first respondent herein/plaintiff. One witness was examined as DW1 and 13 documents were marked as Exs.B1 to B13 on the side of the respondents 7 and 8 herein/defendants 12 and 13, who alone were the contesting defendants.

8. At the conclusion of trial, the learned Trial Judge held that both 'A' and 'B' schedule properties left by Narayanasamy Naicker, who died intestate, on his death, devolved on his daughters and sons and the legal heirs of deceased daughter and deceased sons; that the first respondent/plaintiff became entitled to 1/6th share; that the sale deeds executed by the appellants herein/defendants 4 to 9 conveying Plaint 'A' schedule property in entirety to the respondents 7 and 8/defendants 12 and 13 was not binding upon the first respondent/plaintiff in respect of her share and that hence the first respondent/plaintiff was entitled to the relief of partition in respect of both 'A' and 'B' schedule properties. Accordingly, the learned Trial Judge passed a preliminary decree on 26.03.2003. It is as against the said preliminary decree the present appeal came to be filed by the appellants herein/defendants 4 to 9.

9. The appellants in their grounds of appeal, besides contending that the decree passed by the trial court was only an

ex-parte against the appellants herein/defendants 4 to 9 and that such a decree came to be passed due to deliberate omission on the part of the advocate, who was engaged by the appellants, have raised the following grounds:

1) There was suppression of facts in the pleading;

2) Suit properties were not the self-acquired properties of Narayanasamy Naicker;

3) The suit was not properly valued and it should have been valued under Section 37(1) and not under Section 37(2) of the Tamil Nadu Suits Valuation and Court Fees Act, 1955;

4) There is no proper description of 'A' schedule property;

5) There is no prayer for declaration that the sales in respect of 'A' schedule property in favour of defendants 12 and 13 were null and void and not binding on the plaintiff; and

6) The plaintiff was ousted and hence she lost her right to a share in the suit property.

10. The points that arise for consideration in this appeal are:

1. Whether the appellants/defendants 4 to 9, who remained ex-parte in the trial court can take a plea for the first time in the appeal that there was ouster of the first respondent/plaintiff and she lost her right in respect of plaint 'A' schedule property?

2. Whether the preliminary decree of the trial court holding the first respondent/plaintiff entitled to 1/6th share in plaint 'A' schedule property and plaint 'B' schedule properties is erroneous and liable to be set aside in the light of the contentions raised by the appellants in the appeal that the suit properties are not the self-acquired properties of late Narayanasamy Naicker?

11. The appellants, first respondent/plaintiff, respondents 7 and 8/defendants 12 and 13 alone are represented by counsel and the other parties remain ex-parte. The arguments advanced by Mr.P.Srinivas, learned counsel for the appellants, by

Mr.R.Vijayaraghavan, learned counsel for the first respondent and by Mr.K.V.Ananathakrishnan, learned counsel for the respondents 7 and 8 are heard. The materials available on record are also taken into consideration.

Point No.1:-

12. The suit was filed by the first respondent/plaintiff for partition contending that defendants 1 to 11 were the co-sharers and co-owners of the suit properties. Respondents 7 and 8/defendants 12 and 13, who chose to purchase plaint 'A' schedule property from the appellants/defendants 4 to 9 have also been made party defendants, as the first respondent/plaintiff contended that the sales made by the appellants would not bind her share. The appellants, who figured as defendants 4 to 9, did not contest the suit and they allowed the suit to be proceeded with exparte against them. It was because they were disinterested after having executed Exs.B12 and B13 sale deeds dated 15.06.1999 in favour of the respondents 7 and 8/defendants 12 and 13 respectively purporting to convey plaint 'A' schedule property in entirety holding out that they were entitled to convey the said property in entirety to the respondents 7 and 8/defendants 12 and 13.

13. The respondents 7 and 8/defendants 12 and 13 simply contended that they were the bonafide purchasers and their right under the sale deeds, by which they purchased plaint 'A' schedule property, should be protected. No plea of ouster of the first respondent/plaintiff by their vendors had been made by the respondents 7 and 8/defendants 12 and 13.

14. So far as the properties shown in plaint 'B' schedule are concerned, there was no contest and the claim of the first respondent/plaintiff that she was entitled to an undivided 1/6th share was not disputed and in fact tacitly conceded. Hence the real contest was only in respect of plaint 'A' schedule property. On an appreciation of evidence, both oral and documentary, the learned Trial Judge came to the conclusion that the sale deeds executed by the appellants herein/defendants 4 to 9 in favour of the respondents 7 and 8/defendants 12 and 13 would not affect the share of the first respondent/plaintiff and her right to seek partition. The learned trial judge also held that the possession by a co-owner would be deemed to be a possession on behalf of all the co-owners and that hence the valuation of the suit was also properly made. Accordingly, the learned trial judge granted a preliminary decree not only in respect of plaint 'B' schedule properties, but also in respect of plaint 'A' schedule property.

15. As pointed out supra, there is no challenge to the preliminary decree made in respect of plaint 'B' schedule

properties. The contest is only in respect of that part of the preliminary decree dealing with plaint 'A' schedule property. The defendants 4 to 9 in the original suit are the appellants in the Appeal Suit. The Plaintiff in the original suit is the first respondent herein and the other defendants, namely defendants 1 to 3 and 10 to 13 are the respondents 2 to 8 in the first appeal. The suit was filed by the first respondent herein/plaintiff for partition claiming to be entitled to a share in the suit properties. The defendants 4 to 9, who are the appellants in the appeal, did not contest the suit and they remained ex-parte before the trial court. The suit Schedule 'A' property was purchased by the respondents 7 and 8 herein under two sale deeds dated 15.06.1999 marked as Exs.B12 and B13 from the appellants herein/defendants 4 to 9, who claimed to be the absolute owners of suit Schedule 'A' property.

16. The appellants, who figured as defendants 4 to 9 though remained ex-parte before the trial court, now by filing the appeal, have made an attempt to contend that they have perfected title to 'B' schedule properties in entirety by ouster. However, since they did not contest the suit by filing a written statement and since they did not take such a plea before the trial court, it is quite improbable for them to take such a plea of defence in the appeal suit. They could have very well preferred an application under Order IX Rule 13 to set aside the decree holding out that the decree passed against them was only an ex-parte decree. When they have not chosen to do so and on the other hand, have preferred an appeal, they have to either succeed or fail, based on the materials available on record. Hence this court comes to the conclusion that the appellants/defendants 4 to 9 cannot raise the plea of ouster for the first time in the appeal. Accordingly, Point No.1 is answered.

Point No.2:

17. Regarding the second point for consideration, the subsequent development after the trial court passed the preliminary decree should be taken into account. The preliminary decree passed by the trial court, insofar as it relates to plaint 'A' schedule property, was challenged in A.S.No.907/2003 by the respondents 7 and 8 herein/12th and 13th defendant in the original suit, as they were interested in Schedule 'A' of the suit property alone and they had got sale deeds from the present appellants. The present appellants, after execution of the said sale deeds, did not have any claim over the suit Schedule 'A' property. As such, the respondents 7 and 8 herein/defendants 12 and 13 entered into a compromise with the plaintiff and other defendants, pursuant to which, a judgment came to be pronounced by this court on 13.04.2009 recording the compromise. A copy of the decree passed on the basis

of the compromise memo, has also been placed before this court for its perusal.

18. The learned counsel for the appellants and the learned counsel appearing for the other contesting respondents, submit that the lis regarding suit Schedule 'A' property has been given a quietus and if at all the present appeal is to be proceeded with, it shall be only in respect of the suit Schedule 'B' properties. So far as the suit schedule 'B' properties are concerned, the claim of the first respondent/plaintiff to be entitled to a share was not disputed before the lower court by the appellants herein.

19. Mr.P.Srinivas, learned counsel, who appears for the appellants, would fairly concede that so far as 'B' schedule properties are concerned, the appellants shall have no grievance regarding the preliminary decree and that therefore, there is nothing to be adjudicated in the present appeal filed against the preliminary decree, especially in view of the fact that the lis in respect of plaint 'A' schedule property has already been given a quietus. This court is of the view that the above said submissions can be recorded and on that basis, the appeal can be disposed of confirming the preliminary decree passed by the trial court in respect of plaint 'B' schedule properties. Point No.2 is answered accordingly holding that nothing further remains to be adjudicated in respect of the plaint 'A' schedule property in the light of the compromise decree passed by this court in A.S.No.907/2003 and that in respect of the plaint 'B' schedule properties, no interference with the preliminary decree by this court is warranted.

Accordingly, the Appeal Suit is disposed of recording the above said submissions and confirming the preliminary decree dated 26.03.2003 passed by the trial court in respect of plaint 'B' schedule properties. However, there shall be no order as to cost.

Sd/-

सत्यमेव जयते
Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

asr/-

To

1. The Additional District Judge,
Fast Track Court V,
Chennai

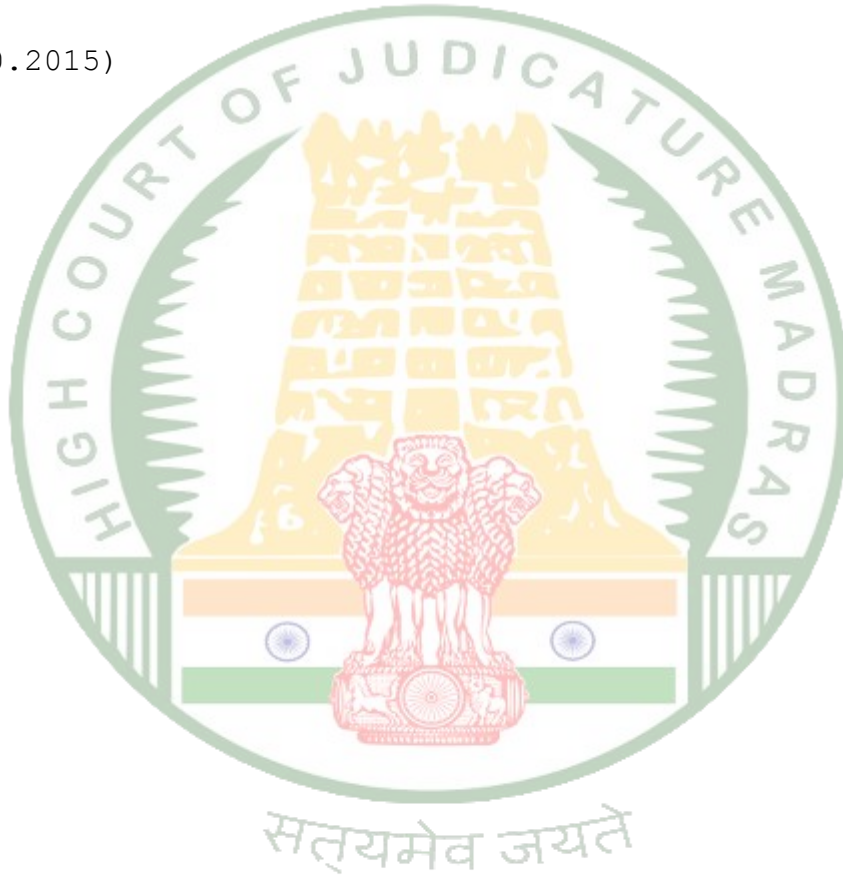
2. The Section Officer,
V.R.Section, High Court,
Madras.

1 CC to Mr.K.V.Ananthakrishnan, Advocate SR.No. 49910

1 CC to Mr.P.Srinivas, Advocate SR.No. 49733

A.S.No.944 of 2004

PUR (CO)
PSI (13.10.2015)



WEB COPY