



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 08-08-2016

Coram:

The Hon'ble Mr. Justice A.SELVAM
and
The Hon'ble Mr. Justice P.KALAIYARASAN

O.S.A.No.22 of 2011

1. Tmt. G. Geetha
2. Tmt. G. Saradamani .. Appellants/Plaintiff

Vs.

1. Tmt. B. Santha
2. G. Baskar
3. G. Sugumaran .. Respondents/Defendants 2to4

Original Side Appeals preferred under Clause 15 of Letters Patent read with Order XXXVI Rule 1 of Original Side Rules against the order of this Court dated 29-10-2010 made in C.S.No.413 of 2004.

For Appellant : Mrs. Hema Sampath for
for M/s.G. Sundaram and S. Murugan

For Respondents : Mr. W.M. Abdul Majeed for RR1 and 2
No appearance for R3

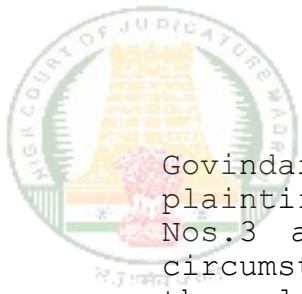
JUDGMENT

(JUDGMENT OF THE COURT WAS DELIVERED BY A.SELVAM, J.)

This Original Side Appeal has been directed against the judgment and decree dated 29-10-2010 passed in C.S.No.413 of 2004 by the learned Single Judge of this Court.

2. The appellants herein, as plaintiffs, have instituted C.S.No.413 of 2004 on the file of this Court praying to pass a preliminary decree of partition wherein the present respondents have been shown as defendants.

3. In the plaint, it is averred that the plaintiffs and defendant Nos.3 and 4 are the children of Govindarajan. The said Govindarajan has passed away on 07-06-1997 leaving behind him, the plaintiffs and defendant Nos.2 to 4 as his legal heirs. The suit property is the separate property of the said



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Govindarajan. Since he passed away on 07-06-1997, each plaintiff is entitled to get one-fifth share. The defendant Nos.3 and 4 are not amenable for partition. Under the said circumstances, the present petition has been filed for getting the relief sought therein.

4. In the written statement filed by the third defendant adopted by the fourth defendant it is averred that the relationship mentioned in the plaint is correct. But, it is false to say that the suit property is the separate property of the deceased Govindarajan and in fact, he got the same by way of partition among himself and his brother by name Krishnan. Therefore, the suit property is nothing but an ancestral property. The deceased Govindarajan has also left some separate properties. In respect of his separate properties, a Will has been executed by him and further, it is averred in the written statement that the plaintiffs have sold the property mentioned in the Will and altogether, the plaintiffs are not entitled to get the relief sought in the suit and therefore, the same is liable to be dismissed.

5. On the basis of the rival pleadings raised on either side, the learned Single Judge has framed necessary issues and after analysing both the oral and documentary evidence has dismissed the suit mainly on the ground of partial partition. Against the judgment and decree passed by the learned Single Judge, the present appeal has been preferred at the instance of the plaintiffs, as appellants.

6. The sum and substance of the case of the plaintiffs is that the suit property is the separate property of Govindarajan, who is none other than the father of the plaintiffs, defendant Nos.3 and 4 and husband of the second defendant and since he passed away in the year 1997, each of them is entitled to get one-fifth share and the defendant Nos.3 and 4 have refused to effect partition and therefore, the present suit is filed to effect partition.

7. The main defence put forth on the side of the contesting defendants is that the deceased Govindarajan has had some self-acquired properties and in respect of the same he executed a Will. But the plaintiffs have sold the property mentioned in the Will and further, the share claimed by the plaintiffs is erroneous.

8. The learned Single Judge as pointed out earlier has dismissed the entire suit mainly on the plea of partial partition.



9. The learned counsel appearing for the appellants/plaintiffs has sparingly contended that even though on the side of the contesting defendants a written statement has been filed, no plea has been raised with regard to partial partition and further, there is no specific issue in respect of the said aspect and the learned Single Judge even without considering the vital evidence available on record has simply dismissed the suit on the ground of partial partition and therefore, the judgment and decree passed by the learned Single Judge are liable to set aside.

10. Per contra, the learned counsel appearing for the contesting respondents has raised the following points:

(1) The suit property is nothing but an ancestral property and as per Act 1 of 1990 the plaintiffs are not having any right of partition.

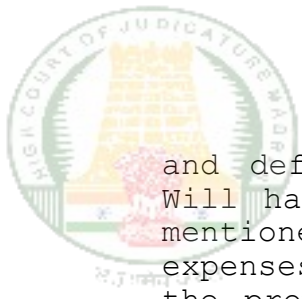
(2) The deceased Govindarajan has already executed a Will wherein it has been specifically stated that the property mentioned therein should ultimately go to the son of the third defendant and the plaintiffs without mentioning about the Will executed by Govindarajan has erroneously filed the present suit.

(3) The share claimed by the plaintiffs is erroneous.

11. As stated earlier, the learned Single Judge has dismissed the entire suit mainly on the ground of partial partition, even though specific issue has not been framed to that effect. Under the said circumstances, this Court has to meticulously analyze as to whether the present suit can be dismissed on the ground of partial partition.

12. As rightly pointed out on the side of the appellants/plaintiffs, there is no specific plea in the written statement filed on the side of the contesting defendants in respect of partial partition in the present suit. Even though no such plea has been raised in the written statement, the learned Single Judge has suo motu come to a conclusion that the present suit is bad for partial partition and ultimately, dismissed the suit.

13. At this juncture, this Court has to look into the sworn statement given by the third defendant, who has been examined as D.W.1, wherein it has been specifically stated to the effect that after execution of Will, a family arrangement has come into existence and accordingly, properties mentioned in the Will have been sold for marriage expenses of the fourth defendant. From the materials found in the sworn statement filed by D.W.1, the Court can easily discern that after the demise of Govindarajan, a family arrangement has come into existence between plaintiffs



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and defendants. Due to that, the properties mentioned in the Will have been sold. Considering the fact that the properties mentioned in the Will have been sold only for the marriage expenses of the fourth defendant, this Court is of the view that the properties mentioned in the Will have already been sold by mutual agreement/family arrangement.

14. As rightly pointed out on the side of the appellants/plaintiffs, no specific plea has been raised with regard to partial partition and no issue has also been framed with regard to that aspect. Even though no specific plea has been raised in the written statement and no specific issue has been framed, the learned Single Judge has erroneously dismissed the entire suit mainly on the ground of partial partition. Since no such plea has been raised in the written statement and no issue has been framed, the finding given by the learned Single Judge with regard to partial partition cannot be accepted.

15. Now the Court has to analyze the main point raised on the side of the defendants. On the side of the defendants it has been specifically contended to the effect that the suit property is not the separate property of Govindarajan and the same is nothing but an ancestral property. It is true that one Kathirvel Naicker has got the suit property and its adjoining property by way of partition and the said Kathirvel Naicker is none other than the father of Govindarajan and Krishnan. The said Kathirvel Naicker has passed away in the year 1954. After his demise, the said Govindarajan and Krishnan have effected a partition in the year 1983 wherein the suit property has been allotted to the share of Govindarajan and its adjoining portion has been allotted to the share of Krishnan. Therefore, it is quite clear that the suit property is nothing but ancestral property. The entire plaint proceeds on the basis that the suit property is separate property of Govindarajan and therefore, each sharer is entitled to get one-fifth share.

16. The learned counsel appearing for the contesting defendants has contended that the plaintiffs are not entitled to get any share in view of Act I of 1990.

17. It is an admitted fact that the said Govindarajan has passed away on 07-06-1997. It has already been pointed out that the suit property is an ancestral property at the hands of Govindarajan and his two sons namely, the defendant Nos.3 and 4. Therefore, each of them is having one-third share. Since the said Govindarajan, has passed away in the year 1997, leaving behind him, his wife, sons and daughters viz., the defendant Nos.3 and 4 and the plaintiffs, each of them is having one-fifth share from one-third share of Govindarajan. As pointed out supra, the said Govindarajan has had one third share in the suit



property and since he passed away in the year 1997, his shares should be divided into five shares and total shares come to one-fifteen(1/15). Therefore, each plaintiff and defendant No.2 is having one-fifteenth share in the suit property. Whereas the defendant Nos.3 and 5 are each entitled to get 6/15th share.

18. It has already been pointed out that the learned Single Judge has erroneously dismissed the suit mainly on the ground of partial partition and the same has not been pleaded in the written statement nor any issue has been framed. Further, the father of the plaintiffs and defendant Nos.3 and 4 viz., Govindarajan has passed away in the year 1997 and out of his one-third share, each plaintiffs is having one-fifteenth share and to that effect a preliminary decree of partition can be passed in the present suit and therefore, the judgment and decree passed by the learned Single Judge are liable to be set aside.

In fine, this Original Side Appeal is allowed without costs. The judgment and decree passed in C.S.No.413 of 2004 are set aside. The plaintiffs are each entitled to get one-fifteen (1/15) share in the suit property and to that extent, a preliminary decree of partition is passed.

Sd/-
Assistant Registrar(CS VII)

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Sub Assistant Registrar

glp

O.S.A.No.22 of 2011

To

The Sub Assistant Registrar,
O.S. Section, High Court, Madras.

+ 1 cc to M/s. W.M. Abdul Majeed, Advocate SR.45285
+ 2 ccs to M/s. S. Murugan, Advocate SR.45416

CTK(CO)
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