

HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN
AND
HON'BLE SRI JUSTICE A.SHANKAR NARAYANA

A.S. No.822 of 2013

JUDGMENT: (*per Hon'ble Sri Justice V. Ramasubramanian*)

This regular appeal is filed by the 3rd defendant in a partition suit, questioning the correctness of a preliminary decree for partition passed in favour of the respondents 1 to 5 herein, who were plaintiffs in the suit.

2. Heard Sri K.Chidambaram, learned counsel for the appellant/D.3 and Sri Muddu Vijay, learned counsel for the respondents 1 to 5/plaintiffs. Respondents 6 and 7 were the defendants 1 and 2 in the suit and they had sold their half share in the suit schedule properties in favour of the appellant herein/D.3. Therefore, respondents 6 and 7, despite service of notice, have not appeared before us, as they have already sold their interest in favour of the appellant herein. The 8th respondent herein, who was the 4th defendant in the suit, remained *ex-parte* and the allegations in the plaint, was that he was also in collusion with the respondents 6 and 7 and the appellant herein. Therefore, the non-service of notice on the 8th respondent is of no consequence. The 8th respondent/D.4 also remained *ex-parte* in the suit.

3. Respondents 1 to 5 herein/plaintiffs, filed suit in OS No.27 of 2008 on the file of the Additional District Judge, Vizianagaram, contending *inter-alia*, that the suit schedule properties belonged to one Ch.Mangaiah Naidu. The said Mangaiah Naidu was the paternal grand father of the respondents 1 to 5/plaintiffs, as well as the Respondents 6 & 7 herein/D.1 & D.2. Respondents 1 to 5 and respondents 6 and 7 were the children of two sons of late Mangaiah

Naidu.

4. The plaintiffs claimed that out of three sons of late Mangaiah Naidu, one son died intestate as a bachelor on 27.05.1984. Therefore, the other two sons inherited the suit properties in equal shares. The half share that devolved upon one of the sons of Mangaiah Naidu was inherited by the respondents 1 to 5 and the other half share was inherited by the respondents 6 and 7. Therefore, in their suit for partition, the respondents 1 to 5 claimed a preliminary decree for partition of the suit schedule properties into two equal shares and for allotment of one such share to them.

5. The defendants 1 and 2 (Respondents 6 and 7 herein) appeared through counsel before the court below, but did not adduce any evidence either oral or documentary. The plaintiffs examined the first of them as PW.1 and filed two documents, marked as Exs.A.1 and A.2. The appellant herein as well as the 8th respondent herein (D.4) remained *ex-parte* and the trial court decreed the suit by a judgment and decree dated 26.04.2010 declaring that the respondents 1 to 5 are entitled to half share. The trial court also decreed that the defendants 1 and 2 (R.6 & R.7) are also entitled to allotment of two shares out of four shares.

6. Since the appellant herein claims to have purchased the suit schedule properties in entirety, purchase of half share of which has now become ratified by a decree in favour of the respondents 6 and 7, he has come up with the above appeal, contending that no summons were served on him to enable him to defend the suit. In other words the only ground on which the appellant has come up with the above appeal is that the suit summons was never served on him.

7. Having regard to the limited scope of the dispute raised in the appeal, we are of the view that the following issues arises for consideration in the present appeal;

1. Whether the decree for partition is liable to be set aside on the ground of non-service of notices on the appellant?

2. To what relief the appellant is entitled to?

8. The positive contention of the appellant is that he was not served with any summons in the suit. The defendants 1 and 2, who are respondents 6 and 7 herein, appear to have participated in the proceedings and also filed written statement. In the written statement filed by the 1st defendant, which was also adopted by the 2nd defendant, both of them denied the right of the plaintiffs to partition. Nevertheless, they mentioned in the written statement that they had sold the property to the 3rd defendant. Therefore, it was clear that the defendants 1 and 2 had already lost interest in the suit schedule property. Hence, the trial court ought to have seen whether the service of summons on the respondents 6 and 7 (Defendants 1 and 2) had been effected properly or not?

9. After coming to know of the decree, the appellant herein appear to have filed a petition to set aside the *ex-parte* decree. But in the meantime, the respondents 1 to 5 filed an application for final decree under Order XX Rule 12-A of the Code. Therefore, the appellant has chosen to file the above appeal.

10. In view of the fact that the suit is one for partition instituted way back in the year 2008 and in view of the fact that the above appeal itself is pending for the last three years, the respondents 1 to 5 filed an affidavit stating that they have no objection for an opportunity being given to the appellant to contest the suit on merits.

11. In fact, in para 4 of the affidavit filed in support of ASMP No.659 of 2016, the respondents 1 to 5 have stated as follows:

“It is submitted that as the respondent No.1 herein has raised the main contention that the Notices were not served upon him. The petitioners herein do not want to drag the

above appeal for longer period and the petitioners have come to conclusion that an opportunity may be given to the respondent No.1/appellant herein to defend the suit before the court below. Hence, the petitioners herein have no objection for remanding the matter to the court below by fixing time for disposal of the suit in respect of the claim of the respondent No.1/appellant herein only.”

12. Therefore, we are of the of the considered view that the decree passed by the trial court can be set aside and the matter remanded back to the trial court so as to enable the appellant to contest the suit on merits.

13. Accordingly, the appeal is allowed by setting aside the judgment and decree of the trial court and the matter is remanded back to the trial court for fresh disposal in accordance with law. The appellant/3rd defendant shall appear before the court below on 04.07.2016 and file his written statement on that day. The trial court shall verify whether the 3rd defendant is a necessary party and whether the service has already been completed on him. The respondents 1 to 5 herein shall ensure that the notice is served on defendants 1 and 2 also. Thereafter, the trial court shall endeavour to complete the trial and dispose of the suit within a period of six months. There shall be no order as to costs. Pending miscellaneous applications if any, in this appeal shall stand closed.

14. The Registry is directed to send back the records, if records have already been received, along with the copy of this judgment, within one week. The trial court shall call the suit OS No.27 of 2008 on 04.07.2016.

V.RAMASUBRAMANIAN, J

A. SHANKAR NARAYANA, J

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A.S.No.822 of 2013

(per Hon'ble Sri Justice V.Ramasubramanian)

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Date: 07.06.2016

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