

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.07.2017

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

A.S.No.14 of 2016
& CMP Nos.3413 & 12802/2016

Pottayal @ Chinna Ramathal ..Appellant/5th Respondent

.Vs.

1.C.Subramaniam ..1st Respondent/Plaintiff

2.M.Eswari

3.Vasanthamani

4.Ammiammal

5.Chinna Ammani @ Ammani

..Respondents 2 to 5/
Defendants 2 to 4

[Respondents 2 to 5 herein remained
ex-parte before Trial Court and hence a
petition to dispense with notice to them
is filed].

Prayer: Appeal Suit is filed under Section 96 of C.P.C
against the Judgment and Decree of the Learned I Additional
District Judge, Tiruppur in O.S.No.150 of 2012 dated
29.06.2015.

For Appellant : Mr.A.K.Kumaraswamy
Senior Counsel
for S.Kaithamalai Kumaran
For R1 : Mr.N.Manokaran
For R2 to R5 : No Appearance
Exparte

JUDGEMENT

The appeal is filed by the 5th defendant in
O.S.No.150/2012. The said suit was filed by the 1st respondent
herein seeking partition and separate possession of 3/4th
share. According to the first respondent/plaintiff, the suit
properties originally belonged to one Rasa Gounder, who died
in the year 1981, leaving behind four daughters viz., Periya
Ramayal, Ammaniammal, Ammani and Pottayal. Out of the above
four daughters, Periya Ramayal died leaving behind the
defendants 1 and 2 as her legal representatives. The
plaintiff claims to have purchased the entire property from
the defendants 1 to 4 under a sale deed dated 03.05.2010.
The said sale deed was executed by one P.Muthusamy as the

Power Agent of the defendants 1 to 4. Though the plaintiff had purchased the entire property, he having found that the 5th defendant is also a sharer has chosen to file the suit for partition seeking 3/4th share.

2. The said suit was resisted by the 5th defendant contending that the suit properties were absolute properties of the said Rasa Gounder. The said Rasa Gounder was living with her. According to her, the said Rasa Gounder had executed a registered Will dated 04.08.1975, in and by which, he bequeathed the suit properties to her. Therefore, after the death of Rasa Gounder, the suit properties had devolved on her and she is in possession and enjoyment of the suit properties as per the Will.

3. She would also contend that the defendants 1 to 4 had earlier filed the suit for partition in O.S.No.219 of 2008 on the file of the Sub Court, Erode, and the same was transferred to Perundurai Sub Court, and re-numbered as O.S.No.239 of 2009. During the pendency of the said suit, the defendants 1 to 4 have alienated the property in favour of the plaintiff and allowed the said suit dismissed for non-prosecution. On the above pleadings, the 5th defendant sought for dismissal of the suit. The other defendants namely; the vendors of the plaintiff remained ex-parte. On the above pleadings, the learned I Additional District and Sessions Judge, Tirruppur, framed the following issues:

1. Whether the plaintiff entitled for the relief of partition separate possession and permanent injunction as claimed in the plaint?

2. Whether Rasa Gounder and Angayammal died intestate?

3. Whether Rasa Gounder executed a Will dated 04.08.1975 in favour of 5th defendant?

4. Whether the suit is barred by Resjudicate or order 2 Rule 1 of C.P.C?

5. To what relief the plaintiff is entitled to?

Issue No.2 was deleted while pronouncing Judgement, additional issue no.6 was framed.

6. Whether the suit is bad for non-joinder of necessary parties?

4. The above said issues were recast as follows at the time of pronouncing Judgement:

1. Whether the suit is barred by Resjudicate, order 2 Rule 1 of CPC?

2. Whether Rasa Gounder executed a Will dated 04.08.1975 in favour of the 5th defendant?

3. Whether the suit is bad for non-joinder of necessary parties?

4. Whether the plaintiff entitled for the relief of partition, separate possession and permanent injunction as claimed in the plaint?

5. To what relief the plaintiff entitled for?

5. The trial Court found that the suit being one partition the dismissal of the earlier suit, for partition, for non prosecution did not bar the present suit and first issue was answered in favour of the plaintiff. On the second issue relating to the Will executed by Rasa Gounder dated 04.08.1975, the learned trial Judge concluded that in absence of any reason for dis-inheriting the defendants 1 to 4 in the Will and in the light of the evidence of the D.W-2, attesting witness who had deposed that the Will attested by him contained the said reasons, the trial Court disbelieved the Will and held that the 5th defendant has not proved the Will. On the 3rd issue relating to the non joinder of parties, it was not raised in the written statement. However, in the proof affidavit filed by her the 5th defendant had taken a specific plea that the properties were purchased by Rasa Gounder and Aara Gounder jointly in the year 1945. There has been no partition between them and as such, the said Aara Gounder or his legal representatives, are necessary parties in the above suit. Considering the fact that the Will of the year 1975 describes the property as an undivided extent and the description in the partition deed of the year 1964 produced under EX.B-2 between Rasa Gounder, Aara Gounder and Subbu Vannan, wherein, the suit property was allotted to the share of Rasa Gounder and Aara Gounder the trial Court concluded the property remains undivided between Rasa Gounder and Aara Gounder, and therefore, the legal representatives of Aara Gounder are necessary parties to the suit. On the said finding, the trial Court dismissed the suit holding that the plaintiff is not entitled to the relief of partition. However, the trial Court granted permanent injunction restraining the 5th defendant from alienating or encumbering the suit property to the extent of the plaintiff's share. The 5th defendant has come forward with this appeal challenging the said decree for injunction granted against her.

6. I have heard Mr.A.K.Kumaraswamy, learned Senior Counsel appearing for Mr.S.Kaithamalai Kumaran, learned counsel for the appellant, and Mr.N.Manokaran learned counsel appearing for the first respondent. Since, the

respondents 2 to 5 who are defendants 1 to 4 in the suit have remained ex-parte in the Court below notice to them is dispensed with, in view of the Madras Amendment to Order 41 Rule 14 (4). Mr.A.K.Kumaraswamy, learned Senior Counsel would contend that the trial Court having dismissed the suit on the ground of non-joinder of necessary parties ought not to have gone into the merits of the claims of the parties and decided on the issues relating to the validity of the Will. He would further submitted that once the main prayer for partition rejected, the trial Court should not have granted the consequential relief of permanent injunction.

7. According to the learned Senior Counsel, the very frame of the suit seeking a decree for partition and separate possession as well as a decree for permanent injunction is defective and such a prayer for permanent injunction cannot be granted as a consequential relief, even if the main relief of partition is granted.

8. Mr.N.Manokaran, learned counsel appearing for the first respondent/plaintiff would contend that the trial Court was wrong in framing a issue relating to non-joinder of the parties in absence of the specific pleading. Even though in the written statement, the ^{5th} defendant had stated that the suit property is a self acquired property of Rasa Gounder, however, in the proof affidavit, she has taken a stand that the legal representatives of Aara Gounder, are necessary parties as the property remains undivided. On the above rival contentions, the following points arise for determination in the appeal.

1.After having concluded by the suit is bad for non-joinder of necessary parties, whether the trial Court was justified in going to the merits of the rival contentions.

2.Whether the trial Court was right in granting a decree for permanent injunction restraining the 5th defendant from alienating the share of the plaintiff after having dismissed the suit filed by the plaintiff for the relief of partition on the ground of non-joinder of the necessary parties?

POINT NO.1:-

9.The trial Court had concluded that the legal representatives of Aara Gounder, the other sharer are necessary parties to the suit. The said finding of the trial Court is based on documentary evidence. The sale deed of the year 1945 executed by the Velavannan in favour of Rasa Gounder and Aara Gounder would show that both of them have purchased the property measuring about 1 acre 14 cents jointly. Under the partition deed dated 10.10.1964 marked as

EX.B-2, the suit property has been allotted to the share of Rasa Gounder and Aara Gounder. Apart from the above the Will said to have been executed by Rasa Gounder on 04.08.1975, also describes the property as an undivided half ($\frac{1}{2}$) share in 1 acre 14 cents. Even the sale deed dated 03.05.2010, executed by the Power Agent, the defendants 1 to 4 in favour of the plaintiff the property in Survey No.181/A1 and Re-Survey No.204/15 is shown as undivided. In the light of the above documentary evidence available on record, the trial Court came to the just conclusion that the property remained undivided between Aara Gounder and Rasa Gounder. Therefore, a suit for partition in the absence of the legal representatives of Aara Gounder is bad for non-joinder of the necessary parties. After having reached the said conclusion, the trial Court proceeded to deal with the other rival contentions on merits. This approach of the trial Court in my considered opinion is against the law declared by this Court as well as the Hon'ble Supreme Court. In Balamani and another .vs. S.Balasundaram reported in [2009(3) CTC 760], this Court has categorically held that once the suit is found to be bad for non-joinder of necessary parties, findings rendered therein cannot be allowed to subsist. Therefore, the findings of the trial Court relating to the validity and genuineness of the Will dated 04.08.1975 said to have been executed by Rasa Gounder are liable to be set aside and are accordingly set aside. The trial Court was not justified in going into the truth or otherwise of the Will, once an issue relating to non-joinder of necessary parties have been framed and it has been upheld.

POINT NO.2:

10.After having concluded the suit itself is bad for non joinder of necessary parties, the trial Court had granted decree for permanent injunction in favour of the plaintiff. In my opinion, the very frame of the suit seeking partition and permanent injunction as a consequential relief is defective. The prayers are contrary to each other. Therefore, the trial Court was not justified in granting the relief of permanent injunction after having concluded that the suit for partition is liable to be dismissed. Hence, I have no hesitation in setting aside the decree of the trial Court.

11.Mr.N.Manokaran learned counsel appearing for the first respondent would rely upon the Judgment of this Court in Balamani and another -vs- S.Balasundaram [2009(3) CTC 760] referred supra and contend that the suit for partition cannot be dismissed on the sole ground of non-joinder of necessary parties. Drawing support from paragraph 21 of the said Judgement, which reads as follows:

"A bare perusal of the said Judgment of the Division Bench of this Court would not indicate that a case of this nature should not be remitted back to the Trial Court. The underlined portion of the above excerpt would

clearly demonstrate and evince that the Division Bench of this Court had foreseen the possibility of instituting fresh proceedings and they never held that matter of this nature should not be remitted back to the Trial Court. They also contemplated that once the Suit is found to be bad for non-joinder of necessary parties, the findings rendered therein should not be allowed to subsist. Hence, I am of the considered opinion that instead of dismissing the claim of the plaintiffs in this Appeal on the ground of non-joinder of necessary parties, the matter could be remitted back to the Trial Court and that would obviate fresh filing of a Suit for partition."

The learned counsel would contend that the suit should be remitted back to the trial Court to enable him to take steps to implead the legal representatives of the said Aara Gounder the other co-sharer and workout his rights on the basis of the sale deed. I am in entire agreement with the proposition of law laid down by Hon'ble Justice G.Rajasuria., in the above judgement. Therefore, I deem it fit to remit the suit to the trial Court to enable the plaintiff to implead the legal representatives of the said Aara Gounder, the other co-sharer, to have an effective adjudication of the suit. However, as pointed out by the Hon'ble Justice G.Rajasuria., in the very same Judgement of the findings rendered by the trial Court on merits of the issues framed cannot be allowed to subsist and they are accordingly set aside. The suit is remitted back to the trial Court to enable the plaintiff to implead the legal representatives of Aara Gounder to have an effective adjudication of the rights of the parties. Parties are at liberty to let in any fresh evidence and trial Court is directed to dispose of the suit without being influence by the findings either in this judgement or in the impugned Judgement of the trial Court which have been set aside.

12. In fine, the appeal is allowed, the Judgement and Decree of the trial Court are set aside. The suit in O.S.No.150 of 2012 is remanded to the trial Court with the above directions. No costs. Consequently, connected miscellaneous petitions are closed.

s/d-
Assistant Registrar(CS-III)

True Copy

Sub-Assistant Registrar

To

1. The I Additional District Judge,
Tiruppur.

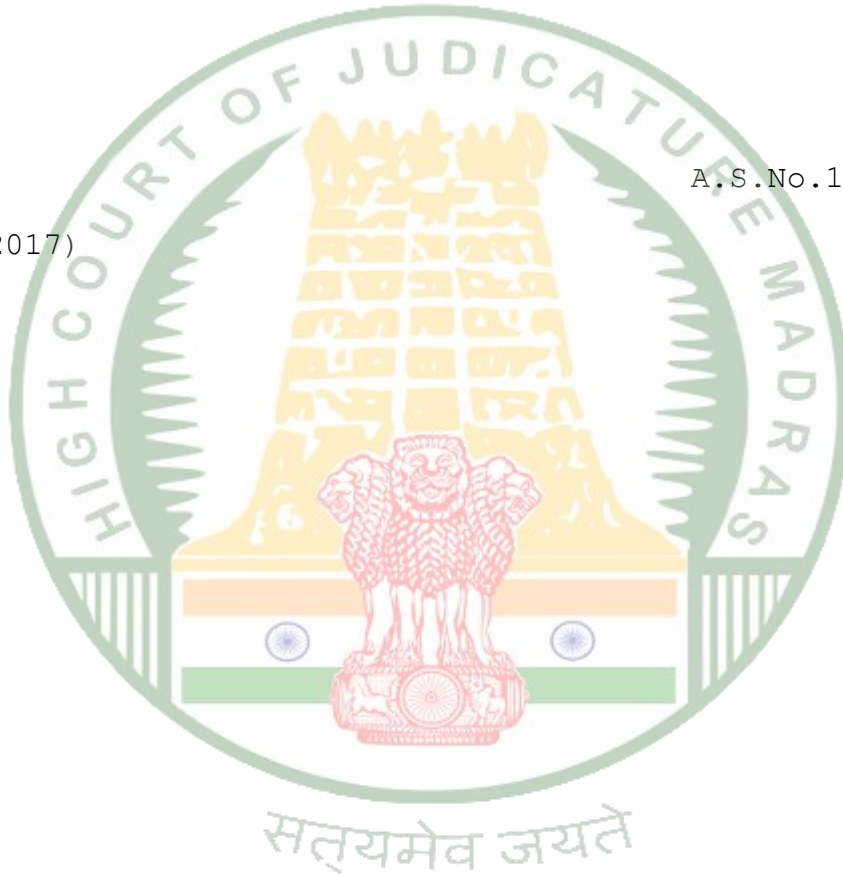
2. The Section Officer,
V.R.Section,
High Court, Madras.

+1 CC to Mr.A.K. Kumarasamy, Advocate sr 48143

+1 CC to Mr.N. Manokaran, Advocate sr 48360.

A.S.No.14 of 2016

SP(21/08/2017)



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