

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders reserved on 23.03.2017

Orders delivered on 07.04.2017

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBBIAH
and
THE HONOURABLE MR.JUSTICE M.S.RAMESH

A.S.No.337 of 2016
and
C.M.P.No.7456 of 2016 & C.M.P.No.2147 of 2017

Mr.V.Shanmugam Appellant/1st Defendant

Vs.

1.Mrs.A.Vijayalakshmi ... 1st Respondent/Plaintiff

2.Mr.M.V.Viswanathan

3.Mrs.P.Kowsalya

4.P.Sowmya

..... Respondents 2 to 4/
Defendants 2 to 4

Prayer: Appeal Suit has been filed under Section 96 of C.P.C., against the judgment and preliminary decree dated 02.06.2015 passed in O.S.No.66 of 2014 on the file of the learned III Additional District Court, Thiruvallur at Ponnammallee.

For Appellant : Mr.K.Chairman Selvaraj

For Respondents : Mrs.M.G.Rajeshwari (For R1 to R4)

JUDGMENT

(Judgment of the Court was delivered by R.Subbiah, J.)

The present appeal has been filed by the appellant challenging the judgment and decree dated 02.06.2015 made in O.S.No.66 of 2014 passed by the learned III Additional District Judge, Thiruvallur at Ponnammallee, wherein and whereby the suit filed by the 1st respondent herein for partition was decreed by the Court below.

2.The appellant herein is the 1st defendant, the 1st respondent herein is the plaintiff, the respondents 2 to 4 are the defendants 2 to 4 in the suit. For the sake of convenience, hereinafter the parties will be referred to as per their rankings in the suit.

3-1.The case of the plaintiff is that all the defendants are legal representatives of one Valmoorthy, who is the owner of 38 cents of land comprised in S.No.268/1, having purchased the same from one Roop Narayanan, under the Sale Deed dated 15.02.1969, registered under Doc.No.943/1969 on the file of Sub-Registrar Office, Sembium. The appellant/1st defendant and the 2nd defendant are the brothers of the plaintiff and the defendants 3 & 4 are the wife and daughter of the plaintiff's deceased brother V.Pushpalingam, who died on 02.08.1996. The Plaintiff and the defendants jointly sold 25 cents out of 38 cents of land to a Builder and the Builder after developing the property sold all the flats. The remaining 13 cents out of 38 cents was inherited equally by all the Legal representatives of late Valmoorthy viz., the plaintiff and the defendants herein.

3-2.On 04.01.2010, the appellant/1st defendant requested the plaintiff and the defendants 2 & 3 to divide the property in four portions so that he could construct a house in the property. During that period, the appellant/D1 without the consent of the plaintiff and defendants 2 to 4 constructed a house building; however, the plaintiff did not object for the same since the 1st defendant was living in a dilapidated house during that time. However, the property has not been partitioned. Since the plaintiff is entitled for 1/4th share in the plaint schedule property, she has filed the suit for partition to allot 1/4th share due to her.

3-3.In the suit, the 1st defendant has filed a written statement by denying the statement of the plaintiff that 13 cents of land out of total 38 cents was inherited by all the Legal Representatives of late Valmoorthy in equal. He had specifically denied that the defendants and the plaintiffs are equally entitled to a share in the plaint schedule property. Thus, the 1st defendant sought for dismissal of the suit.

3-4.Before the Trial Court, though the written statement was filed by the 1st defendant, since he did not come forward to cross-examine the plaintiff-P.W.1, the Trial Court passed a preliminary decree under Order 17 Rule 3 of CPC, allotting 1/4th share to the plaintiff and the defendants. Aggrieved over the same, the present appeal has been filed.

4. When the appeal was taken up for hearing, the only submission made by the learned counsel for the appellant herein/D1 is that out of the 13 cents, 7 cents were already settled in favour of the defendants 2 & 3 and only balance 6 cents is available for partition; but, without considering this aspect, the Trial Court has passed the preliminary decree allotting 1/4th share in the entire 13 cents, in favour of the plaintiff. Further, it is stated that the respondents 3 & 4 are not entitled for any share in the property, since already 7 cents of land was settled in favour of them. Therefore, the learned counsel for the appellant/D1 sought for setting aside the preliminary decree/order passed by the Trial Court and for remanding the matter to the Trial Court, so that the appellant/D1 can adduce evidence with regard to non availability of the entire portion of 13 cents for partition.

5. But, per contra, the learned counsel for the 1st respondent herein/plaintiff submitted that it is incorrect to state that as on date, only 6 cents of land is available for partition. Except the 1st defendant, the plaintiff and the defendants 2 to 4 have no objection for allotting 1/4th share equally in entire extent of 13 cents. Therefore, there is no need for remanding the matter to the Trial Court for the purpose of recording the evidence of 1st defendant.

6. Keeping the submissions made on either said, We have carefully gone through the entire materials available on record.

7. Though the learned counsel for the appellant/1st defendant submitted that as on date, out of 13 cents, 7 cents were already settled and only 6 cents of land is available for partition and that the defendants 3 & 4 are not entitled for the plaintiff's share property, from a perusal of the materials available on record We find that absolutely there is no pleading to that effect in the written statement filed before the Court below. Moreover, the respondents 3 & 4 have also no objection to allot 1/4th share to the plaintiff. When that being so, We do not find any valid reason to remit back the matter to the Trial Court, by setting aside the impugned judgement dated 02.06.2015. We are not inclined to accept the submission of the learned counsel for the appellant. Hence, the appeal is liable to be dismissed.

8.In fine, the appeal is dismissed. Consequently, connected Miscellaneous Petitions are closed. No costs.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

(ssv)

To,

The III Additional District Judge,
Thiruvallur at Ponnammallee.

+1cc to Mr.K.Chairman Selvaraj, Advocate Sr.21910
+2cc to M/S.M.G.Rajeshwari, Advocate Sr.21131

A.S.No.337 of 2016
and
C.M.P.No.7456 of 2016
& C.M.P.No.2147 of 2017

vd[co]
srg 18/04/2017



WEB COPY