

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON:09.03.2017

PRONOUNCED ON:17.03.2017

CORAM

THE HON`BLE MR.JUSTICE T.RAVINDRAN

C.S.No.545 of 2011

Rangarajammal

.. Plaintiff

VS.

1.Sridharan

2.S.Ravi

.. Defendants

Civil Suit filed under Order IV Rule 1 of Original Side Rules 1956 read with Order VII Rule 1 CPC praying for the following judgment and decree against the defendants for the following reliefs:

- a)decree and judgment in favour of the plaintiff for partition of the suit schedule mentioned property into 2 equal shares and allot one such share to the plaintiff along with mesne profits and
- b) costs of the suit;

For Plaintiff :Mr.D.Rajagopal

For defendants :Mr.M.V.Venkatasheshan for

M/s.Gajalakshmi Rajendran

J U D G M E N T

The suit for partition.

2.The averments contained in the plaint are briefly stated as follows:

The first defendant is the brother of the plaintiff's husband and the second defendant is the tenant in one portion in the ground floor of the suit property under the first defendant. The suit property is the land and building bearing Door No.153, Dr Besant Road, Triplicane, Chennai, measuring 2406 sq.feet consisting of ground. The suit property and the other properties were originally owned by the mother-in-law of the plaintiff and the mother of the first defendant namely Chellammal and during her life time, Chellammal had executed a registered Will dated 26.04.1984 and bequeathed land and building measuring 1645

sq. feet out of 4056 sq.ft within specific boundaries in Door No.153, Dr Besant Road, Triplicane, Chennai-005, in favour of her grandson Sadagopan and had bequeathed the remaining land and building of an extent of 3011 sq.feet in the above mentioned property in favour of the plaintiff and the first defendant to share the same jointly and equally. The testator died on 28.05.1984 and the Will executed by her dated 26.04.1984 was acted upon. In O.P.No.66 of 1987, the Will was duly probate by the order dated 26.02.1987 and insofar as the property bequeathed to the plaintiff and the first defendant, no partition has taken place till date between the plaintiff and the first defendant. The plaintiff and the first defendant have jointly under three separate registered sale deeds dated 10.03.1994 have sold three flats of separate portions in the first floor of the above mentioned property in favour of M.P.Narasimman, Hemamalini and Indira conveying each flat measuring 762 sq.ft, 865 sq.ft and 893 sq.feet with undivided share in the land measuring 318 sq.feet, 361 sq.feet and 373 sq.feet respectively. The plaintiff and the

first defendant have also jointly reserved their right in respect of any construction in the second floor in the above mentioned property. The aforementioned three persons have released an extent of about 300 sq.feet in the total extent of undivided share sold to them in the year 1996 and thus the suit property measuring 2406 sq.feet of land and building with specific boundaries and 605 sq.feet set back area is belonging to the plaintiff and the first defendant jointly, which is exclusive of the land and building sold by the plaintiff and the first defendant in favour of the above mentioned three persons in the first floor. Till date, no partition has taken place in respect of the suit property between the plaintiff and the first defendant. While so, the first defendant had started putting up unauthorized construction in the vacant land measuring about 300 sq ft. However, the first defendant is not entitled to do so. The first defendant has also let out a portion measuring 483 sq. feet built up area in the year 1994 to a tenant and receiving rent and the first defendant has recently let out the above portion to the

second defendant and the second defendant is paying monthly rent of Rs.6500/- to the first defendant and the plaintiff is entitled to equal share out of the rent paid to the first defendant by the second defendant and so far as the first defendant has not shared any rental income with the plaintiff. As per the Will dated 26.04.1984, the plaintiff is entitled to equal share in the suit property alongwith a share in the rental income, which the first defendant is realizing from the suit property. The plaintiff issued a legal notice dated 07.01.2011 to the defendants demanding equal partition. The defendants sent a reply dated 29.01.2011 containing false and untenable allegations. The plaintiff has not made any encroachment as alleged in the reply notice. The plaintiff has shared the payments towards property tax, water tax and paying sum through the first defendant. Inasmuch as the first defendant did not come forward to effect partition as claimed by the plaintiff, the plaintiff has been necessitated to lay the suit.

3.The averments contained in the written statement filed by the first defendant are briefly as follows:

The suit is not maintainable either in law or in facts. Under the Will dated 26.04.1984, Chellammal bequeathed the suit property to the first defendant and the plaintiff, who is the wife of the first defendant's brother. The Will dated 26.04.1984 had been probated. During the year 1987, the building was demolished and the three flats were constructed and put up for sale and accordingly, three flats in the first floor were sold to M.P.Narasimman, Indra and Hema Malini as stated in the plaint. The land measuring about 300 sq.ft claimed as equal share of the property by the plaintiff was purchased by the defendant through his own fund from the owners of the first floor and the plaintiffs by way of out of court settlement in the year 1996. The flat owners above mentioned agreed to release their share of their property only after their conditions had been complied with. Accordingly, the first defendant has paid a sum of Rs.80000/- for

the release of the said property + compliance of the condition set out by them inclusive of the share of the plaintiff. The plaintiff had not contributed any amount for carrying out the conditions laid by the three flat owners for releasing the property. The first defendant had been demanding the plaintiff to partition the property peacefully. However, it is only the plaintiff, who had been refusing to accede to the same. The cost of construction put up on the property measuring about 300 sq. feet was entirely borne by the defendant and hence the plaintiff is not entitled to claim any right over the same. Since the whole structure in the said property was brought down and the property was constructed and promoted jointly by the first defendant and the plaintiff under the flat system and after the sale of three flats to three persons above mentioned, there cannot be any structural change made to the suit property. Hence, the suit for partition is not maintainable as such. The plaintiff would be entitled to only for the remaining share of undivided share in the suit property. The plaintiff had illegally encroached into a portion of the suit

property since 1988 onwards. It is only the first defendant, who has been paying property tax and water tax in respect of the suit property and the plaintiff has not contributed any amount for the same. The plaintiff is not entitled to seek the relief of partition and profits as claimed in the plaint and hence, the suit is liable to be dismissed.

4. On the basis of the above pleadings, the following issues are framed for determination in the suit:

(a) Whether the plaintiff is entitled to share the suit property as prayed for?

(b) Whether the plaintiff is in possession and enjoyment of the land and building in respect of the suit property?

(c) Whether the first defendant is in possession and enjoyment of the land and building measuring to an extent of 1392 sq. ft in the suit property?

(d) Whether the construction put up by the first defendant is unauthorised?

(e)Whether the plaintiff is entitled to mesne profits?

(f)To what other relief the plaintiff is entitled to?

5.In support of the plaintiff's case, PW1 has been examined and Exs.P1 to P12 were marked. On the side of the first defendant, DW1 has been examined and no document was marked.

Issue Nos.1 to 5

6.The first defendant is the brother of the plaintiff's husband. It is admitted that Chellammal, the mother of the first defendant and the mother-in-law of the plaintiff was the original owner of the suit property. It is also admitted that Chellammal had executed a Will dated 26.04.1984 marked as Ex.P1, bequeathing the suit property as such in favour of the plaintiff and the first defendant. It is found that the said Will had been duly probated. Further, it is also found that under the above mentioned Will,

Chellammal had bequeathed a portion in respect of the suit property in favour of the plaintiff and the first defendant excluding the portion given to her grandson S. Sadagopan. It is thus found that both the plaintiff and the first defendant claim title to the suit property as such under the Will marked as Ex.P1.

7.As seen from the case of the respective parties and the evidence adduced in the matter, it is found that both the plaintiff and the first defendant had, pursuant to the Will Ex.P1, having joint right in the property bequeathed to them under the said Will promoted flats in the property and accordingly had sold three flats in the first floor of specific measurements to Indra, Hema Malini and M.P.Narasimman by way of three separate sale deeds dated 10.03.1994 which are marked as Exs.P3 to 5. It could therefore be seen that under Exs.P3 to P5 specific built up area in the first floor alongwith undivided share in the land had been conveyed to the above mentioned three persons by the plaintiff and the first defendant.

8. Now, it is the case of the plaintiff that around 300 sq. feet had been got from the above said three purchasers by way of release by the plaintiff and the first defendant and as such it is stated that the plaintiff is entitled to $\frac{1}{2}$ share in the suit property.

9. Per contra, it is the case of the first defendant that around 300 sq feet was obtained by him exclusively from the above said three flat purchasers and also the plaintiff and as such the plaintiff is not entitled to lay any claim as regards such portion which according to the first defendant is exclusively belonging to him. However, as regards the extent of the property got released from the three purchasers above mentioned, either by the plaintiff and the first defendant as pleaded by the plaintiff or by the first defendant exclusively as put forth by the first defendant, there is no material forthcoming. The documents conveying the release of the said extent either in favour of the plaintiff and the

first defendant jointly, as per the case of the plaintiff and also in favour of the first defendant exclusively as put forth by the first defendant, there is no material forthcoming.

10.Now, according to the first defendant, he had also paid a sum of Rs.80000/- to the above said three persons and also the plaintiff for getting release of the said extent of around 300 sq feet and also complied with the other conditions set out by them. However, with reference to the above case of the first defendant, there is no material forthcoming. It could therefore be seen that neither the plaintiff nor the first defendant have adduced clear cut legal evidence in support of their claim of obtaining any valid release from the three purchasers as put forth by them.

11.Be that as it may, it is now admitted by the parties i.e., the plaintiff and the first defendant that the first defendant is in the possession and enjoyment of 1392 sq.feet ground floor in the suit property and the plaintiff is in the possession and enjoyment

of 1014 sq. feet ground floor in the suit property. The plaintiff has filed rough sketch, which has been marked as Ex.P7 and during the cross examination of PW1 also as seen from the nature of the cross examination, it is found that even the above said extent of the property in the possession and enjoyment of the respective parties is not controverted. It could therefore be seen as such the plaintiff is in the possession and enjoyment of the lesser extent of the property than the first defendant.

12.Now according to the plaintiff, the suit property has not been divided by metes and bounds. On the other hand, it is contended by the learned counsel for the first defendant that as per the oral partition effected, the parties are enjoying specific extents in the suit property as above referred to. However, there is no clear cut evidence as to under what arrangement, the parties are in the possession and enjoyment of the above said extents in the suit property. No specific plea of oral partition is also made in the written statement.

13.As adverted to earlier, there is no acceptable evidence both on the side of the plaintiff as well as on the side of the first defendant as to the extent of the property which is alleged to have been released by the purchasers of the flats to them. It is found that when under the Will, Ex.P1, both the plaintiff and the first defendant had been conveyed the property in common by Chellammal and when the said property as such has not been divided between the plaintiff and the first defendant by metes and bounds and on the other hand, it is found that on some arrangement the plaintiff is in the possession and enjoyment of a specific extent and the first defendant is in the possession and enjoyment of a specific extent and when both are entitled to get equal share in the property, it is found that the claim of the plaintiff, that she is entitled to $\frac{1}{2}$ share in the suit property, cannot be rejected as such.

14.In support of his contention, the defendants' counsel

placed reliance upon the decision reported in **2013(2) MLJ 438(P.Doraikannu Vs. P. Istalingam)**. However, it is noted that the above decision is not applicable to the facts and circumstances of the case at hand.

15.As adverted to earlier, it is found that the claim of the first defendant that he has exclusive title and enjoyment of the excess extent in the suit property and the plaintiff is not entitled to lay any claim in respect of the same is not buttressed by any legal proof. As such, it is found from the extents of the property in the possession and enjoyment of the parties concerned, it is noted that an excess extent of 378 sq.feet is found to be in the possession and enjoyment of the first defendant. The suit property is stated to be land and building consisting of ground floor and first floor measuring built up area of 2406 sq.ft 605 sq.ft set back area(open space) bearing New Door No.32, Old Door No.153, Dr Besant Road, Triplicane, Chennai-005, comprised in Old S.No.2278, New S.F.No.1512/1 comprised in CC

No.1893 bounded within the specific boundaries. It is thus found that when adding the extent of the property in the possession and enjoyment of the respective parties, it could be seen that the suit property measuring 2406 sq.ft is in the possession and enjoyment of the plaintiff and the first defendant. However, it is found that the first defendant is in the possession and enjoyment of an excess extent of 378 sq. ft. When according to Ex.P1, both the plaintiff and the first defendant are entitled to equal share in the suit property, it is evident that as claimed by the plaintiff, she is entitled to seek partition and separate possession of her $\frac{1}{2}$ share in the suit property.

16. It is the case of the plaintiff that the first defendant had let out a portion of the property to tenants and earning rental income. In this connection, the first defendant, during the cross examination has stated that at the time of filing of the suit, the property was not enjoyed by one Ravi as a tenant but he had stayed alongwith him for extending help to him. Further,

according to him, the said Ravi is a distant relative of his wife. Subsequently, he has admitted that one Gokul is now enjoying the property as a tenant. Immediately he had retracted and stated that Gokul is not enjoying the property as a tenant but staying alongwith him. On the other hand, it is the specific case of the plaintiff that at the time of filing of the suit, the second defendant was enjoying a portion of the suit property as a tenant under the first defendant and paying rental income to the first defendant. Subsequently, it is now found that as seen from the admission of the first defendant, one Giri is occupying a portion as a tenant. Though the first defendant would claim that Ravi and Gokul are occupying the property as his relatives, to establish his case or controvert the case of the plaintiff, he has not endeavoured to examine them, in support of his defence. Therefore, cumulatively seen, it could be seen that the first defendant had been letting out a portion of the suit property and earning rental income. The case of the plaintiff has not been resisted by the second defendant. As such, it could therefore be

seen that the second defendant has admitted the claim of the plaintiff that he had occupied a portion of the suit property as a tenant under the first defendant and paying rental income to the first defendant. It could therefore be seen that the plaintiff is also entitled to seek accounts from the first defendant in respect of her share in the suit property.

17.As regards the claim of the plaintiff or the claim of the first defendant regarding the payment of property tax and water tax, there is no acceptable material forthcoming on either side. Inasmuch as the suit property is found to be jointly, belonging to the plaintiff and the first defendant as per Ex.P1, Will, it could be seen that the payment of property tax and water tax in respect of the suit property as such, as per the rival contentions of the parties concerned, do not assume much significance. Inasmuch as the suit property as described in the plaint is found to be jointly owned by the plaintiff and the first defendant as per Ex.P1, Will and the same had not been divided by metes and bounds, it

could be seen that the plaintiff is entitled to seek her $\frac{1}{2}$ share in the suit property. Accordingly, it is also found that the plaintiff would be entitled to seek profits from the first defendant in respect of her $\frac{1}{2}$ share in the suit property. The determination of the profits to which the plaintiff is entitled to is relegated to the final decree proceedings. As regards the specific extent of the suit property in the possession and the enjoyment of the plaintiff and the first defendant is concerned as it is not in dispute that the parties are in the specific extent of the suit property as depicted in Ex.P7, the said issue is answered accordingly. The first defendant has not established to be in legal possession and enjoyment of the excess extent as claimed by him. Therefore, the construction put up by the first defendant in respect of the said excess extent cannot be termed as an authorised one.

18. In the light of the above discussions, I hold that the plaintiff is entitled to claim $\frac{1}{2}$ share in the suit property as prayed for and also mesne profits in respect of her $\frac{1}{2}$ share in the suit

property. Accordingly, issue Nos.1 to 5 are answered.

Issue No.6:

The plaintiff is entitled to claim partition and separate possession of $\frac{1}{2}$ share in the suit property and the plaintiff is also entitled to mesne profits, as claimed in respect of her $\frac{1}{2}$ share. The determination of mesne profits is relegated to final decree proceedings. Accordingly, preliminary decree is granted in favour of the plaintiff. No costs.

.03.2017

Speaking / Non-speaking order

Index : Yes/No

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