

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:15.02.2017

CORAM:

THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN

A.S.No.905 of 2010

1.Mrs.C.M.Padmavathy

2.Mrs.M.Krishnaveni

... Appellants/Plaintiffs

Vs

1.Mr.V.Shanmuga Gounder (Deceased)

2.Mr.K.S.Sivaraj

... Respondents/Defendants

This appeal is filed under Section 96 C.P.C. against the judgement and decree dated 16.12.2009 made in O.S.No.172 of 2008 on the file of the 1 Additional District Judge at Coimbatore.

For Appellants : Mr.Kumar

For Respondents : Mr.P.Jagadeesan

J U D G E M E N T

The plaintiffs in O.S.No.1172 of 2008 on the file of the 1 Additional District Judge at Coimbatore are the appellants. The suit was filed for partition and separate possession of plaintiffs $\frac{1}{4}$ share each in two items of properties.

2. According to the plaintiff, both the properties are ancestral properties belonging to the family of Shanmuga Gounder, the 1st defendant in the suit. The plaintiffs are daughters and 2nd defendant is the son of the 1st defendant. Contending that the plaintiffs have become coparcener along with their father after the introduction of Act 2005, they claimed $\frac{1}{4}$ share each as coparcener.

3. The suit was resisted by the defendants contending that the properties are ancestral properties. There was a partition between the defendants 1 and 2 on 24.07.1991, under which the 1st defendant was given a sum of Rs.10,000/- for his maintenance and the entire item No.1 was allotted to the 2nd defendant subject to a life estate in favour of the 1st defendant. Therefore, according to the defendants, the plaintiffs cannot claim any

right over the suit properties since, partition had already been taken place which has resulted in several status.

4. As regards item No.2, the defendants would contend that the suit property was the subject matter of partition between the 1st defendant and his brother Ramasamy Gounder, which happened on 03.07.1987. It is also contended that Ramasamy Gounder released his half share by way of a registered instrument on 26.08.1988. Therefore, according to the defendants, the share obtained by the 1st defendant by way of release is self acquisition. It was also claimed that an extent of 780 sq.ft along with a building measuring 728 sq.ft., out of the suit 2nd schedule was sold by the defendants prior to 20.12.2004 and therefore, the plaintiff cannot question the validity of the said sale. Therefore the defendants have sought for dismissal of the suit.

4. Upon consideration of the above pleadings, the learned Trial Judge, the 1 Additional District Judge at Coimbatore framed the following issues:

- 1) Whether the partition deed dated 24.07.1991 is sham and nominal?
- 2) Whether the plaintiff is entitled to partition as prayed for?
- 3) Whether the plaintiff is not entitled to claim any share in the property?
- 4) Whether the suit is barred by non-joinder of transferee Palanisamy Gounder?
- 5) Whether the plaintiffs are not in joint possession of the property?
- 6) To what other relief, is the plaintiff entitled to?

5. Upon consideration of oral and documentary evidence, the learned Trial Judge, accepted the partition dated 24.07.1991 and held that as per the said partition, the 1st defendant is the absolute owner of item No.1 of the suit properties and the said partition having been taken place prior to coming into force of the Hindu Succession (Amendment) Act 2005, cannot be questioned by the plaintiffs. On the said findings, the learned Trial Judge dismissed the suit in respect of item-1. In so far as Item-2 is concerned, the learned Trial Judge rejected the claim of the defendants that half of the property, which the 1st defendant had got under the release deed dated 25.8.1988 executed by his brother Ramasamy Gounder should be treated as his self acquired property. Therefore, the learned Trial Judge treated the property Item No.2 as ancestral property and after excluding 780 sq.ft. of land along with 728 sq.ft. built up area sold by the defendants on 17.03.2004 in favour of one Krishnasamy and the said sale having taken place prior to 20.12.2004 also cannot be questioned by the plaintiffs.

6. The Trial Court also concluded that in the absence of

purchaser namely, Krishnasamy, the validity of the sale cannot be gone into. On the above findings, the learned Trial Judge granted a decree in respect of remaining portion of the suit 2nd item only.

7. Aggrieved, the plaintiffs are on appeal.

8. I have heard Mr.N.Kumar for M/s. Kumar and Baskar, the learned counsel for the appellants and Mr.P.Jagadeesan, the learned counsel appearing for the respondents.

9. The 1st respondent Sanmugam Gounder died pending appeal and his wife Thayammal was impleaded as 3rd defendant. It is represented that the said Thayammal also died on 12.04.2016. The appellants as well as 2nd respondent are the legal representatives of the deceased 1st respondent. It is not the case of either of the parties that their parents namely, Sanmuga Gounder and Thayammal had made any testamentary or non-testamentary dispossession of their property. Therefore, devolution of the property on the parties after the death of their parents should also be taken into account.

10. The following points arise for determination in this appeal:

- 1) Whether the Trial Court was right in up-holding the partition dated 24.07.1991?
- 2) Whether the Trial Court was right in dismissing the suit with reference to a portion of the property that was alienated by defendants 1 and 2 ? and
- 3) What is the share that the plaintiffs are entitled to as on date?

11. The plaintiffs faced their claim only on the rights that were conferred under the Hindu Succession (Amendment) Act 39 of 2005. Though the said Act makes the daughters also coparceners, the rights conferred on them are subject to certain exceptions which are enumerated under the said Act. The proviso to Section 6 (1) (c) saves any disposition or alienation including any partition or testamentary dispossession of the property that had taken before a 20th December, 2004. Explanation to Section 6 defines the word partition to mean a "partition" effected by a duly registered instrument.

12. It is not in dispute that the partition deed dated 24.07.1991 marked as Ex.A4 is a registered instrument. Therefore, the plaintiffs cannot question the validity of the said instrument. It is open to the parties to accept lesser shares in the suit properties. The recitals in Ex.A4 would show that Shanmuga Gounder considering his age had decided to take cash of Rs.10,000/- and the entire property was allotted to his son namely, 2nd defendant and the Shanmuga Gounder had only retained the life estate. In the absence of any evidence to show that the

partition came about under certain invalidating circumstance, I do not find any reason to interfere with the findings of the Trial Court on the validity of the partition deed dated 24.07.1991. Therefore, in view of the partition, the plaintiffs cannot claim any shares in the suit item No.1 of the properties.

13. So far as, the 2nd item is concerned, the defendants would claim that a portion of it was sold on 17.3.2004. Here again, proviso Section 6(1) (c) prohibits the plaintiffs from questioning the said alienation. More over, the alinee namely, Krishnamurthi has not been added as a party to the suit. Of course, the defendants would contend that the half share in item No.2 was obtained by Shanmuga Gounder by way of the release deed and his half share should be treated as a self acquire property. It is settled law that the release executed by one coparcener will be deemed to be for the benefit of the family and as such it is also a joint family property. Therefore, I do not find any merit in the contentions of the defendants that the half share subject matter of release deed be treated as self acquisition of Shanmuga Gounder. Therefore, the findings of the Trial Court will stand confirmed.

14. The death of Sanmuga Gounder and his wife Thayammal during the pendency of the appeal will result in alteration of the shares of the parties. Since Sanmuga Gounder died leaving behind the plaintiffs, 2nd defendant and Thayammal, his $\frac{1}{4}$ share will devolve on all of them equally i.e. they will get $\frac{1}{16}$ share each. On the death of Thayarammal, her $\frac{1}{16}$ share will devolve on her children namely, the plaintiffs and the 2nd defendant i.e. $\frac{1}{3}$ of $\frac{1}{16}$ equivalent to $\frac{1}{48}$ share.

15. The plaintiffs and defendants would get $\frac{1}{4} + \frac{1}{16} + \frac{1}{48}$ which will be again equivalent to $\frac{1}{3}$ share. In the light of the above, the judgement and decree of the Trial Court will stand modified. There will be a preliminary decree in favour of the plaintiffs declaring their $\frac{1}{3}$ share in the suit 2nd item, after deducting 780 sq.ft of land sold by defendants 1 and 2 under Ex.A5 dated 17.03.2004. In other aspects, the judgement and decree dated 16.12.2009 made in O.S.No.172 of 2008 on the file of the 1 Additional District Judge at Coimbatore is confirmed. Considering the relationship between the parties, I make no order as to costs. Consequently the connected miscellaneous petitions are closed. The appeal is partly allowed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

To

1. I Additional District Judge at Coimbatore.

2. The Section Officer

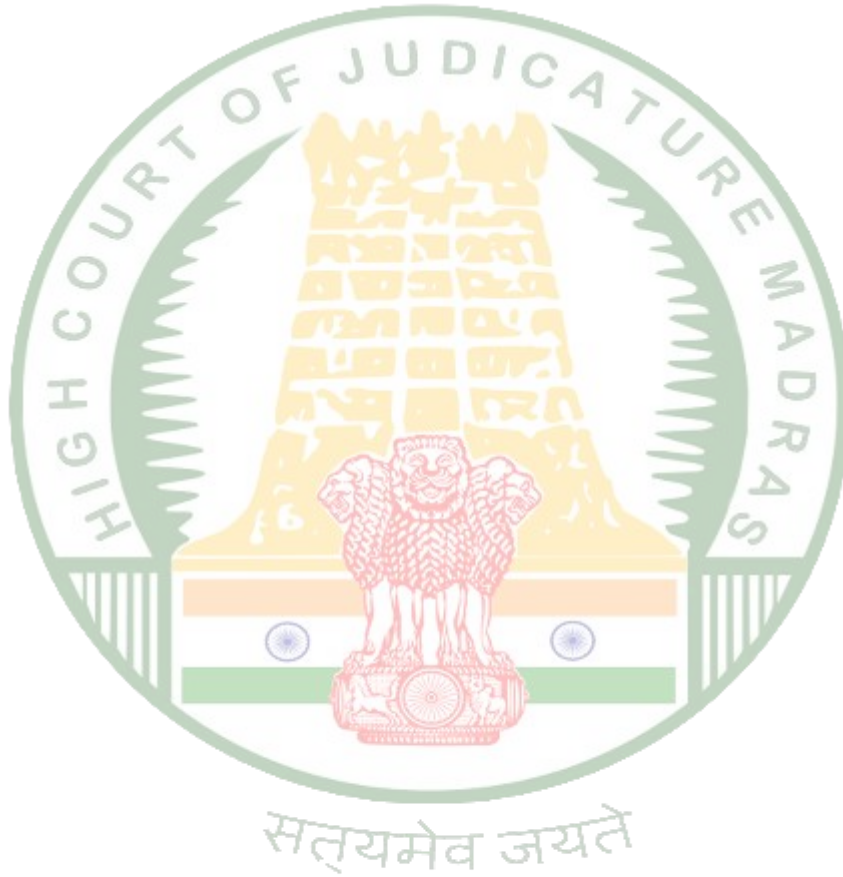
VR section, High Court, Madras

+1 Cc to Mr.M.N. Balakrishnan, sr 10190

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