

CORAM

THE HONOURABLE MR.JUSTICE NOOTY.RAMAMOHANA RAO

AND

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

O.S.A.No.13 of 2015

1.S.Karthikeyini
2.K.Victoria Rani ... Appellants

-VS-

R.Selvaranga Mudaliar (deceased)

1.S.Thandapanai		
2.S.Ravisekar		
3.S.Kurunamurthi		
4.S.Meera Bai	...	Respondents

Appeal under Order 36 Rule 1 of O.S.Rules read with Clause 15 of the Letters Patent against the order, dated 26.06.2014, made in C.S.No.702 of 2002, on the file of this Court.

For appellants : Sri N.Nagu Sah

For respondents 1,2 & 4 : Smt.Hema Sampath,
Senior Counsel,
for M/s.R.Meenal.

For respondent 3 : Mr.N.Chandrasekar

J U D G M E N T

(Judgment of the Court was delivered by Nooty.Ramamohana Rao,J.)

This Original Side Appeal is preferred by the two plaintiffs, aggrieved by the judgment and decree passed on 26.06.2014, in Civil Suit No.702 of 2002, instituted by them, seeking partition of the suit schedule properties, among other reliefs.

2. One Smt. Dhanakoti Ammal seems to have possessed and owned extensive properties. She had three daughters, namely, Duraikannu Ammal, Kamala Ammal and Shanmugha Vadivu. Shanmuga Vadivu was the mother of the plaintiffs as well as the defendants 2 to 5. The first defendant was her husband. Dhanakoti Ammal executed Ex.P-2, Registered Settlement Deed, dated 14.03.1959, settling item No.1 of Suit 'A' Schedule property, a house and land in Old No.23 and New No.24, South Mada Street, Mylapore, Chennai, in favour of her three daughters, namely, Duraikannu Ammal, Kamala Ammal and Shanmuga Vadivu. Dhanakoti Ammal also settled several other houses, vacant sites and agricultural lands, situated at Chengalpet, which are described as item Nos.2 to 4 of Suit 'A' Schedule properties, in favour of Shanmugha Vadivu, mother of plaintiffs and defendants 2 to 5. Shanmugha Vadivu died intestate on 29.03.1965.

Thereafter, the legal heirs of Shanmugha Vadivu, the legal heirs of Duraikannu Ammal and the surviving daughter of Dhanakoti Ammal, namely, Kamala Ammal had divided the property at South Mada Street, Mylapore, by way of a Partition Deed, Ex.P-3, dated 28.04.1980. Item No.1 of Suit 'A' Schedule properties thus fell to the share of the legal heirs of Shanmugha Vadivu. That was the reason, why the plaintiffs prayed that they are entitled for 1/7th share each in item No.1 of Suit 'A' Schedule properties.

3. Defendants 2 and 3 have resisted the said claim, on the ground that after Ex.P-3, Partition Deed, dated 28.04.1980, it is the first defendant in the suit, who has developed the property by raising commercial constructions thereon, from and out of his own funds and, hence, item No.1 of Suit 'A' Schedule properties is not available for partition. It was further contended by defendants 2 and 3 that the first defendant has executed a Will on 05.06.2002, bequeathing item No.1 of the suit 'A' Schedule properties in favour of his three sons, namely, defendants 2, 3 and 4 and excluded the two plaintiffs and the other daughter, namely, defendant No.5, from getting any share therein. Therefore, the plaintiffs are not entitled to claim partition of item No.1 of Suit 'A' Schedule properties.

4. Sri Nagu Sah, learned counsel for the appellant, has pointed out, that the Will, said to have been executed by the first defendant on 05.06.2002, was not probated and, hence, the defendants cannot set up a right under the said Will to defeat the claims of the plaintiffs. He relied upon a Full Bench decision of this Court, rendered in *Ganshamdoss Narayandoss v. Gulab Bi Bai*, reported in AIR 1927 Madras 1054, holding that the defendant cannot be permitted to establish his right under an unprobated Will, which principle was approved by the Supreme Court in *Mrs.Hem Nolini Judah v. Mrs.Isolyne Sarojbashini Bose and Others*, reported in AIR 1962 SC 1471.

5. Smt.Hema Sampath, learned Senior Counsel appearing on the opposite side/respondents 1, 2 and 4, has rightly not disputed the above proposition of law and would submit that defendants/respondents before us cannot assert any exclusive right of title in item No.1 of Suit 'A' Schedule properties.

6. In that view of the matter, since there is no dispute that the first defendant is survived by the two plaintiffs and the four defendants, namely, defendants 2 to 5, the plaintiffs would become entitled to 1/6th share each of item No.1 of Suit 'A' Schedule properties, instead of 1/7th share, as

decreed by the learned single Judge. The question as to whether the said property is developed by the first defendant all on his own, as urged by defendants 2 and 3, or was raised using the rental advances, as urged by the plaintiffs, is not required to be addressed by us now.

7. Even amongst several properties mentioned under item Nos.2,3 and 4 of Suit 'A' Schedule, there are only a few properties, which are available for partition. Learned counsel appearing on either side have filed a Joint Memo, making available the list of properties, forming part of Suit 'A' Schedule, that are actually available for partition, as of now. The Joint Memo is accepted and taken on record. The contents of the Joint Memo are as under :

“JOINT MEMO FILED BY THE APPELLANTS AND
RESPONDENTS

The Appellants and Respondents beg to submit the details of the Properties available for Partition under suit Plaint A Schedule as follows:

1.Suit Item No.1 property viz., Chennai Mylapore property is available.

2.Suit Item No.2 sub Item No.A,B and C are available viz.

A) Door No.4, Balasubrayanar street, Periya

Natham, Chenglepet,

B) Door No.5, Balasubrayanar street, Periya Natham, Chenglepet and

C) Door No.15, Kailasanathar Koil street, Periya Natham, Chenglepet,

3.Suit Item No.3 viz., Vacant Site at No.72, Balasubrayanar street, Periya Natham, Chenglepet – is available

4.Suit Item No.4 A – Serial No.1 to 4, 6, 8, 9, 13 and 17 are available in full extent.

(Serial No.17 subject matter of Mortgage for Rs.5,000/- mortgaged by the 2nd Appellant)

5. Suit Item No.4 A – Serial No.7 out of 2.61 Acres – 1 Acre is available and remaining 1.61 Acres was acquired by Highways department.

6. Suit Item No.4 C – sub Item No.1 out of 8.25 Acres – 7 Acres alone available

7. Suit Item No.4 C – sub Item No.2 entire extent of 6.30 Acres is available.

DATED AT CHENNAI THIS 21ST DAY OF MARCH 2017.

Counsel for Appellants Counsel for Respondents No.1,2

& 4

Counsel for Respondent No.3”

8. However, learned Senior Counsel for the respondents has brought to our notice the misadventure indulged in by the plaintiffs in alienating/encumbering some of the immovable properties, forming part of Suit 'B' Schedule. In so far as the Mortgage Deed, created by the plaintiffs on 15.07.2002, is concerned, it is brought to our notice, that after the aforementioned Joint Memo is filed, the mortgage is redeemed and a copy of the registered redemption deed is also produced.

9. It is no doubt true, that the plaintiffs are parties to three sale deeds executed on 17.08.2008, during the pendency of the suit and the sale consideration reflected in those documents was itself more than Rs.6.00 crores. The plaintiffs have not done an appropriate thing, by associating themselves to alienation of any of the Suit 'B' Schedule properties; all the more so, when they originally prayed for an injunction to restrain the defendants 2 to 5 from in any way alienating or dealing with any of the Suit 'A' and 'B' Schedule properties. Defendants 2 and 3 have already instituted O.S.No.73 of 2010, against such alienations that took place on 17.08.2008. It is of importance to note that when the plaintiffs have given up their claim in respect of Suit 'B' Schedule properties, they have also given up their claim

in respect of Serial Nos.(E) and (F) of Item No.2; Serial Nos.6 and 7 in respect of Item No.4 of Suit 'A' Schedule properties. In view of the pendency of Civil Suit No.73 of 2010, we are refraining from expressing any firm opinion on the overreaching tendencies, exhibited by the plaintiffs, except recording our disapproval of such a conduct of alienation of properties forming part of Suit 'B' Schedule. The parties are at liberty to work out the respective rights in O.S.No.73 of 2010.

10. In view of the settled legal position, adverted to by us supra, and, in view of the fact that the relationship amongst the parties and their respective rights to seek partition of the available Suit 'A' Schedule immovable properties having not been doubted, we modify the judgment and decree passed by the learned single Judge, by holding that Item No.1 of Suit 'A' Schedule properties is equally amenable for partition and the two plaintiffs are entitled to a share of $1/6^{\text{th}}$ each thereof. Defendants 2 to 5 are also equally entitled for $1/6^{\text{th}}$ share each thereof. Rest of the Suit 'A' Schedule properties, which are available for partition, as per the Joint Memo, dated 21.03.2017, are accepted and made part of the record of this case by us, and, accordingly, ordered for partitioning those items of the immovable properties into six separate shares and to allot $1/6^{\text{th}}$ of such share each to the

two plaintiffs and also to the defendants 2 to 5 each.

11. Subject to the above modification, this O.S.A.stands
disposed of. No costs.

Index: Yes/No
Internet : Yes/No

(N.R.R.,J.) (S.M.S.,J.)
10-04-2017

dixit

NOOTY.RAMAMOZHANA RAO, J.
AND
S.M.SUBRAMANIAM, J.

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