

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders reserved on 23.03.2017

Orders delivered on 05.04.2017

CORAM:

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

**A.S.No.505 of 2013
and
M.P.No.1 of 2013
and
C.M.P.No.4573 of 2017**

1.Mrs.C.Chitralekha

2.Mr.C.Vishnupraba

3.Mr.c.Sathyaprakash Appellants

Vs.

1.Mrs.R.Ranganayaki

2.Mr.R.Vijayakumar

3.Mrs.R.Kalaivani Respondents

Prayer: Appeal Suit has been filed under Section 96 r/w Order 41 Rule 1 of C.P.C., against the judgment and decree passed in O.S.No.498 of 2010 on the file of the learned I Additional District Judge, Coimbatore.

For Appellants : Mr.M.Santhanaraman

For Respondents : Mr.C.Veeraraghavan (For R1)
Mr.J.Ramakrishnan (For R2 & R3)

* * * * *

JUDGMENT

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

Aggrieved by the judgment and decree dated 28.03.2013 passed by the learned I Additional District Judge, in the suit filed by the 1st respondent herein/plaintiff for partition in O.S.No.428 of 2010, the present appeal has been filed by the appellants/defendants 2 to 4.

2.The appellants herein are the defendants 2 to 4, the 1st respondent herein is the plaintiff and the respondents 2 & 3 herein are the defendants 1 & 5 respectively in the suit.

3.For the sake of convenience, the parties will be referred to as per ranking in the suit.

4.The case of the plaintiff in brief is as follows_

4-1.The plaintiff is the wife of one deceased Ranganathan. The 1st defendant R.Vijayakumar, one R.Chandramohan (deceased) and the 5th defendant R.Kalimani are the sons and daughter of the plaintiff. The defendants 2 to 4 (appellants herein) are the legal heirs of the deceased Chandramohan viz., wife and sons.

4-2.It is the case of the plaintiff that her husband Ranganathan owned three items of properties mentioned in the suit schedule as Item 1 to 3. The said properties are self-acquired properties of the deceased Ranganathan and he was doing transport business under the name and style

of 'Coimbatore Palghat Transport', having its office at Uppara Lane , Thomas Street, Coimbatore. He purchased the said three properties out of his own earnings. Suit Item 1 property is situated at Koppam Village, Palghat Town, Kerala. The said property was purchased by the deceased Ranganathan under a registered Sale Deed dated 24.07.1983 registered as Doc.No.880/1983 before the DRO, Palghat and it is a residential building measuring to an extent of 6 cents. Suit Item No.1 property was used by the deceased Ranganathan as transport office-cum-delivery point at Palghat.

4-3.Suit Item No. 2 property is a building situated within the Coimbatore Corporation limit, measuring to an extent of 675 sq.ft and the said property was used as collection centre cum office at Coimbatore. The said property was purchased under registered Sale Deed dated 29.08.1991 registered as Doc.No.3804/1991. This property was also purchased by the said Ranganathan out of his own earnings and savings.

4-4.The said deceased Ranganathan had also purchased two vacant sites at Kuniyamuthur by way of registered Sale Deeds dated 15.11.1990 and 23.07.1993 respectively. The said Ranganathan had constructed RCC Terrace house in the said property and the said property has been mentioned in the suit schedule as Item No.3 property.

4-5.The said Ranganathan died on 03.08.1995. After the demise of the said Ranganathan, his wife-plaintiff and sons & daughters namely defendants 1 & 5 and the deceased Chandramohan succeeded to his properties and they were in joint possession and enjoyment of the same.

The plaintiff and the defendants 1 & 5 are Class-1 legal heirs of the deceased Ranganathan. The defendants 2 to 4, who are the legal heirs of the deceased Chandramohan, are also entitled to their shares in the suit schedule properties, as per the Hindu Succession Act.

4-6. The plaintiff, being the mother of the defendants 1 & 5 and grand-mother of the defendants 3 & 4 respectively, tried to make an amicable partition of the properties. But, all her efforts for amicable partition of the properties became futile. Hence, she sent a legal notice to the defendants 1 to 5 for amicable partition on 31.07.2009 and 09.10.2009. The defendants 1 & 5 in their reply consented for partition. But, the defendants 2 to 4, who are the legal heirs of the deceased Chandramohan, sent a reply dated 05.08.2009, with false averments. Hence, left with no other alternative, the plaintiff, wife of the deceased Ranganathan, filed the suit in O.S.No.498 of 2010 for dividing the suit item Nos.1 to 3 properties in four equal share by metes and bounds and to allot 1/4th share in her favour and also for separate possession.

5. Before the Trial Court, the defendants 1 & 5 (the respondents 2 & 3 herein) have filed a memo submitting to the decree stating that they have no objection for granting a decree to the plaintiff as prayed for in the suit.

6. But, the defendants 2 to 4 (appellants herein), who are the legal heirs of the deceased Chandramohan, filed a written statement before the

Trial Court, contending that during the life time of late Chandramohan, husband of the the 2nd defendant, there was a panchayat between the members of the family with regard to the properties in dispute and in the said panchayat, an oral partition was made, in which the deceased Chandramohan was allotted with a house at Door No.9/B, IInd Avenue, Rangasamy Naidu Layout, situated at Kuniamuthur, Coimbatore, where they are now residing. Further, as per the said oral partition, the defendants 2 to 4 are in possession and enjoyment of the house property and transport business at Palghat and Coimbatore and they are willing to abide by the said oral agreement, which was made in front of the family members relating to division of the properties.

7.Before the Trial court, in order to prove his claim, on the side of the plaintiff, the plaintiff examined herself as P.W.1 and marked 30 documents as Ex.A.1 to Ex.A.30. On the side of the defendants 2 to 4, the 2nd defendant examined herself as D.W.1, but no document was marked.

8.On the above pleadings, the trial Court framed the following issues:-

- i)whether the oral partition alleged by the defendants 2 to 4 is true?
- ii)whether the plaintiff is entitled to the partition as prayed for/
- iii)what other reliefs?

9.After hearing both sides and considering the oral evidence of P.W.1 & D.W.1 and also analysing the documents marked on the side of the plaintiff, the Trial Court has rejected the case of the defendants 2 to 4 that

there was an oral partition; thus, decreed the suit by allotting 1/4th share in the Item No.1 to 3 properties in favour of the plaintiff. Aggrieved over the same, the present appeal has been filed by the defendants 2 to 4.

10. When the matter was taken up for consideration, the learned counsel for the appellants/defendants 2 to 4 submitted that all the properties are self-acquired properties of the deceased Ranganathan, husband of the plaintiff. During his life time itself, there was an oral partition, but the oral partition made by the husband of the plaintiff had wilfully been suppressed in the plaint. In this regard, the learned counsel for the appellants/D2 to D4 has also submitted that the transport business, which the deceased Ranganathan was running as Proprietor at Coimbatore & Palaghat, was entitled to his deceased son Chandramohan, during his life time. That apart, the Item No.3 property is situated at Kuniyamuthur and it was allotted to the share of the said deceased Chandramohan. Now, the appellants/D2 to D4 are in exclusive possession of the said properties. But, suppressing these facts, the suit has been filed. Hence, according to the learned counsel for the appellant/defendants 2 to 4, without properly appreciating the evidence, the trial Court has wrongly allotted 1/4th share in favour of the plaintiff.

11. That apart, the learned counsel for the appellants/D2 to D4 has also submitted that the Trial Court has passed the judgment and decree in the suit on 28.03.2013, but just five days prior to the pronouncement of the

judgment, Item No.1 property at Kerala was sold by the plaintiff. Since the property has been sold to the 3rd party including the share of the appellants herein, now by setting aside the judgment and decree passed by the Trial Court, the matter has to be remanded back to the Trial Court for passing a fresh preliminary decree by impleading the subsequent purchaser.

12.The learned counsel for the 1st respondent/plaintiff submitted that though the appellants/D2 to D4 have taken a defence of oral partition alleged to have taken place during the life time of Ranganathan, they have not chosen to adduce any evidence to substantiate the same. Hence, by correctly rejecting the case projected by the appellants, the Trial Court has allowed the suit and allotted 1/4th share to the plaintiff. Moreover, the Transport business is a joint family business and the said deceased Chandramohan had only been asked to look after the business and that said business has also been now closed.

13.Further, the learned counsel for the 1st respondent/plaintiff submitted that on the date of sale of Item No.1 property, there was no interim order in the suit for partition; and hence only 3/4th share of the property was sold to the 3rd party purchaser; therefore, there is no need to remand the matter to the Trial Court by setting aside the judgment and decree of the Trial Court, for passing fresh preliminary decree.

14.Further, it is further submitted by the learned counsel for the 1st respondent/plaintiff that the plaintiff has filed an application for passing the final decree. In the said application, the appellants have filed a counter. Now, in view of the pendency of the appeal, the Trial Court has not proceeded with the final decree application. Thus, the learned counsel for the 1st respondent/plaintiff sought for dismissal of the appeal.

15.Keeping in view the submissions made on either side, We have carefully perused the materials available on record.

16.The sum and substance of the submissions made by the learned counsel for the appellants are on two fold_

(1)earlier there was an oral partition among the family members during the life time of the said Ranganathan; but, suppressing the said fact, the present suit has been filed.

(2)when the suit is pending, just five days prior to passing of the preliminary decree, the plaintiff has sold the suit Item No.1 property; since third party interest has been created, now by setting aside the impugned judgment, the matter has to be remanded back to the Trial Court for passing fresh preliminary decree.

17.From a perusal of the material available on record, We find that in order to prove the defence of oral partition, absolutely no evidence was adduced by the appellants/defendants 2 to 4 before the trial Court.

Therefore, the Trial Court has correctly come to the conclusion that the appellants/defendants 2 to 4 have not established the theory of oral partition as well as their physical possession of the 3rd item of property. We do not find any infirmity in the said findings of the Trial Court.

18.The next fold of submission of the learned counsel for the appellants/defendants 2 to 4 is that the plaintiff has sold the 1st Item of property to the third party when the suit is pending. Since the property has been sold, third party interest has been created; therefore, the matter has to be remanded back by setting aside the order of the Trial Court, to implead the 3rd party purchaser.

19.But, from the perusal of the materials placed on record We find that what was sold by the plaintiff is only a 3/4th share of the property, not the entire property. Therefore, absolutely there is no need to set aside the judgment and decree of the Trial Court and to remand the matter to the Trial Court. In fact, the present appeal has no merits and the same is liable to be dismissed.

20.For the foregoing reasons, the Appeal is dismissed. However, the parties are at liberty to take appropriate application before the Trial Court to implead the subsequent purchaser in respect of the suit Item No.1 property in the final decree proceedings before the Court below and to get appropriate

relief. Consequently, connected Miscellaneous Petitions are closed.

No costs.

(R.P.S.J.,) (M.S.R.J.,)
05.04.2017

Internet : Yes / No
Index : Yes / No
ssv

To,
1.The learned I Additional District Judge,
Coimbatore.

**R.SUBBIAH, J.
AND
M.S.RAMESH, J.**

(ssv)

Pre-delivery judgment
in

**A.S.No.505 of 2013
and
M.P.No.1 of 2013
and
C.M.P.No.4573 of 2017**

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