

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.02.2017

CORAM

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

A.S.No. 630 of 2008

- 1 .Suseela Ammal (Deceased)
2. B.Ramesh
3. G.Prema
4. S.Kasturi
5. D.Sathya
6. C.B.Jayanthi
7. B.Sandhiya

(Appellants 2 to 7 brought on record as Lrs of the Deceased sole appellant Vide order of this Court dt: 18.01.2017 made in C.M.P.No. 19580 to 19582/16 in A.S.No.630/2008)

..Appellants

...Vs...

1. Saroja (Deceased)
2. Sulochana (Deceased)
3. A.Vijayabharathi
4. S.Ravindran

(Respondents 3 & 4 brought on record as Lrs of the Deceased R1 Vide order of this Court dt: 18.01.2017 made in C.M.P.No. 19583 to 19585/16 in A.S.No.630/2008)

5. Girija
6. S.Geetha
7. J.Manohar Reddy
8. Janathana Reddy
9. J.V.Suryanarayana Reddy

(Respondents 5 to 9 brought on record as Lrs of the Deceased R2 Vide order of this Court dt: 18.01.2017 made in C.M.P.No. 19586 to 19588/16 in A.S.No.630/2008)

...Respondents

PRAYER: Appeal suit filed under Section 96 of Civil Procedure Code against the judgment and decree dated 28.06.2007 in O.S.No.454 of 2004 on the file of Additional District Judge,

Fast Track Court 1, Chengalpattu.

For Appellants : Mrs.P.Bagyalakshmi
For Respondents : Mr.T.P.Manoharan (R3 and R4)
Senior counsel
for Mr. Jotheeswarn
Mr.G.Dhilipkumar (R9)

J U D G M E N T

The first defendant in O.S.No.172 of 2001, is the appellant. The said suit was filed for partition and separate possession of 1/3rd share of the suit properties.

2. According to the Plaintiff, the Suit properties belonged to her father Venugopal Reddiar who died on 07.08.1946, leaving behind his wife , one son and three daughters.

3. It is claimed that the deceased Venugopal Reddiar had left a will dated 09.05.1946, under which he made several bequeths. He also appointed his wife Jayalakshmiammal as a guardian of the minor children viz., Gurusubramaniam, son of Venugopal Reddiar and his three minor daughters viz., Suseela, Saroja and Sulochana. Venugopal Reddiar died during the year 1946 itself. The mother Jayalakshmiammal died on 28.11.1989. The plaintiff would place her claim that will was said to be executed by Venugopal Reddiar on 09.05.1946 and claimed 1/3rd share in the suit properties as daughter of Venugopal Reddiar. The suit properties are shown in 4 schedules and each schedule has got various sub items also.

4. The suit was resisted by the defendants. The first defendant filed a written statement admitting the relationship. She would also admit execution of the will by Venugopal Reddiar on 09.05.1946.

5.As per the said will, the properties that were described in schedule 'A' of the will were bequeathed to his minor son Gurusubramaniam and in the event of his death without leaving any heir, the said properties would devolve on the daughters namely the plaintiff and the defendants equally. It is also admitted that Venugopal Reddiar died on 07.08.1946 and his minor son Gurusubramaniam also died without issues. Therefore, by virtue of the will, the plaintiff and the defendants were each entitled to 1/3rd share in the suit properties. It was also contended that some of the properties were bequeathed to the daughters under the will with a direction to the mother Jayalaksmiammal to enjoy the income from the said properties.

6.The defendants would also claim that the suit 'A' and 'B' Schedule properties were acquired by the Government during the year 1975 and the compensation was received by Jayalakshmiammal and the same was distributed among the daughters equally. The first defendant would contend that in the year 1976, a partition was effected with regard to the properties mentioned in the schedule 'A' excluding the land acquired by the State of Tamil Nadu and according to her in the said partition, the said properties were divided by metes and bounds between the plaintiff and the defendants, each of them was allotted 1/3rd share. It is also contended that the house property at Nandambakkam was also divided, equally among the daughters of Venugopal Reddiar.

7.On the above pleadings, the first defendant sought for dismissal of the suit. The 2nd defendant filed a separate written statement contending that the suit for general partition is not maintainable. According to her, there had been several partition in the family with reference to the various items of the properties. She would give details of such partitions, in her written statement and contend that all the properties are not available for partition as claimed by the plaintiff.

8.On the above pleadings, the Learned Trial Judge framed the following issues:

a)Whether the oral partition pleaded by the 1st defendant is true and valid?

b)Whether the suit is bad for partial partition?

c)Whether the suit is bad for nonjoinder of necessary parties?

d)Whether the Court fee paid is correct?

e)Whether the plaintiff is entitled for the preliminary decree as prayed for?

f) To what other reliefs the plaintiff is entitled to?

9.PW.1 and PW.2 were examined on the side of the Plaintiffs and Ex.A1 was marked. DW.1 and DW.2 were examined on the side of the defendants and Exs.B1 and Ex.B2 were marked.

10. On the consideration of the oral and documentary evidence, the Learned Trial Judge concluded that the oral

partitiion pleaded by the defendants has not been established and it was also found that the compensation awarded for the land acquired was not equally divided between the parties. It was also found that the first defendant had obtained certain pattas based on the alleged division without notice to the plaintiff and the 2nd defendant

11. Taking note of certain admissions in the oral evidence of DW2, to the effect that all the properties still remain as joint properties and the issuance of pattas alone cannot be a ground to conclude that there has been a partition, the learned Trial Judge decreed a suit and granted preliminary decree for partition in respect of the suit 'A', 'B' and 'C' schedule properties and Item Nos. 3, 5 to 7 and 9 of the D schedule properties. In other aspects, the suit was dismissed. Aggrieved by the same, the first defendant has preferred the above appeal.

12. I have heard Mrs.P.Bagyalakshmi, learned counsel for appellants, Mr.T.P.Manoharan, learned senior counsel for Mr.Jotheeswaran for respondents 3 and 4 and Mr.G.Dhilipkumar, learned counsel for the 9th respondent. All the three sisters namely the plaintiff as well as defendants died pending suit. Their Legal heirs have been impleaded in this appeal.

13. Mrs.P.Bagyalakshmi, learned counsel for the appellant would vehemently contend that there were several oral partitions effected at various points of time, with reference to each of the properties and even during the life time of Jayalakshmiammal, separate pattas have been issued to the parties. She would also contend that the parties have alienated various properties, which were allotted to them under oral partition. Therefore, according to the learned Counsel, the trial Court erred in granting Preliminary decree of partition of properties that were admittedly acquired.

14. Mr.T.P.Manoharan, learned Senior counsel appearing for the legal representatives of the plaintiff would submit that some of the properties have been partitioned and allotted to the parties and some of the properties were even sold by the parties. There was no proper partition by metes and bounds. Therefore, according to the learned counsel, the learned trial Judge was justified in granting a decree of partition in respect of some of the properties.

15. On the basis of the above submission, the following issues were framed for determination in this appeal:

a) Whether there was a complete oral partition dividing all the properties by metes and bounds between the parties?

b) Whether the plaintiffs and the defendants are entitled to

stake their claim under Will dated 09.05.1946, said to have been executed by Venugopal Reddiar in the absence production and proof of the said Will?

c) Whether some of the properties remain undivided, if so what is the relief that could be granted to the plaintiff?

16. Though, the first defendant, herself in the written statement has claimed that all the properties have been divided in the oral partition between the parties and separate portions were allotted to her, there is no tangible evidence to substantiate the said contention. The first defendant herself would contend that in respect of some other properties, the compensation was received by Jayalakshmiammal and the same was distributed among the sharers. There is no proof of amounts actually received by Jayalakshmiammal and the distribution of the same among the parties after they had attained the majority. It is also seen from the evidence and record that some of the properties have been sold by the parties both jointly as well as individually. The purchasers are not made parties to the suit. It won't be proper and correct to decide on the shares in the properties to be sold in the absence of the purchasers. Therefore, the suit can even fail for want of impleading of proper and necessary parties. I find that there is no plea regarding non-joinder of necessary parties was taken by the defendants, before the Trial Court. In view of Order I Rule 9 of Civil Procedure Code which provides that the Court may in every suit deal with the matter in dispute, so far the rights and interest of the parties actually before it, I proceed to deal with the merits of the claim that the plaintiff and defendants, in so far as it relates to the properties which are not alienated or acquired. Though, the first defendant would contend that there has been a partition of all the properties as already pointed out, the evidence on record does not satisfy the requirements of proof of partition. Merely because certain pattas have been obtained by the parties according to their convenient enjoyment and the same cannot be construed as having been issued pursuant to a regular partition.

17. Though the parties have claimed their rights, on the basis of the alleged will dated 09.05.1946, the said will has not been produced before the Court. Though it is claimed that it is a registered instrument, a will requires a special proof as per Section 68 of the Evidence Act. Even if the will is not disputed it has to be produced and proved in accordance with law. Therefore, in the absence of the same, the Court cannot give effect to the so called legacies made under the will by Venugopal Reddiar. We have to necessarily proceed on the footing with Venugopal Reddiar had died intestate. It is a admitted case that Venugopal Reddiar died on 07.08.1946. He had left behind his wife, Jayalakshmiammal, three daughters and one

son. On the date of death of Venugopal Reddiar as per law then prevailing the properties being a ancestral properties of Venugopal Reddiar would devolve only on his son Gurusubramaniam and Jayalakshmiammal. It is also admitted that Gurusubramaniam died as a bachelor after 6 months from the date of death of Venugopal Reddiar. As on the date of his death Gurusubramaniam was a sole surviving coparcenor, under the Mithakshara law applicable to the parties. Hence, his mother Jayalakshmiammal alone would be a heir. On the death of Gurusubramaniam, Jayalakshmiammal became the owner of the entire property. Jayalakshmiammal had died only 28.11.1989. Therefore if at all the plaintiff and the defendants have any right to claim, they can claim right to the properties that were remaining on the death of Jayalakshmiammal i.e. On 28.11.1989.

19. It is seen from the oral and documentary evidence that the suit 'A' and 'B' Schedule properties were acquired by the Government even during the life time of Jayalakshmiammal. Therefore the question whether there was a division of A and B schedule properties does not arise. She was the owner of the properties as on date of acquisition. Therefore the suit 'A' and 'B' Schedule properties were not in the hands of the Jayalakshmiammal at the time of her death and neither the plaintiff nor the defendants can claim any right to the same. In so far as the suit 'C' schedule properties are concerned, it is claimed that Venugopal Reddiar was entitled to 3.42 acres in the suit 'C' Schedule properties. According to the plaintiff there has been no partition of suit 'C' Schedule properties. But the first defendant would contend that she had got a patta for her share after oral partition of the suit property and therefore 'C' Schedule property is not undivided. The Learned Trial Court has rejected the said claim of the first defendant, on the ground that the patta has been granted without any reference to the plaintiff and the 2nd defendant. From a perusal of the patta it is very clear that the partition claimed by the first defendant, wherein the first defendant has been allotted the property situated in extreme south abutting the road whereas the portions allotted to the plaintiff and the 2nd defendant have no access whatsoever from the road. The patta issued to the first defendant also does not justify the claim of partition as pleaded by the first defendant.

20. The Learned counsel for the appellant would contend that in the counter affidavit filed C.M.P.Nos. 19579 to 19588 of 2016, the legal representatives of the plaintiff had not admitted that the 'C' Schedule properties were divided in 6 portions i.e. Eastern portion situated at road level and the western portion situated at a lower level measuring 52 cents each. Out of the 3 portions measuring 65 cents each, the eastern portion was given to the share of the plaintiff, the western portion was given to the share of the Legal Heirs of the first

defendant and the middle portion was given to the legal Representatives of the deceased second defendant. In respect of 3 portions measuring 52 cents each, the allotment has not been decided between them. Therefore, according to the learned counsel, the 'C' Schedule property has also been divided. It is seen that 'C' schedule property is abutted by a road on the south and river on the west. A proper division in the 'C' Schedule properties would be only made by dividing the same in the North-south direction, so that each of the sharers will get land which abuts the road on the southern side. Even as per the counter affidavit referred to by the Learned Counsel for the appellant there has been no complete partition. Hence, I find that the 'C' Schedule properties are available for division and the plaintiffs and defendants 1 and 2 would each be entitled to $1/3^{\text{rd}}$ share in the 'C' Schedule properties. As regards 'D' schedule properties Item No.1 relates to house site that consists of 3 grounds with houses constructed on it. The first defendant/appellant was given $1 \frac{1}{2}$ grounds of land along with house constructed on the northern side facing Mount-Poonammallee Road remaining $1 \frac{1}{2}$ grounds on the southern side facing Bajanai Koil Street was given to the 2nd defendant.

21. The first defendant as well as 2nd defendant have accepted the said allotment and after demolishing the existing structures, they have put up new construction and first defendant has also let out the same for commercial purpose.

22. Item No.2 of *'D' schedule which measures about 2 grounds has been allotted to the plaintiff. The plaintiff has also constructed a small building therein and leased out the same. Though the first defendant would claim these items and also had partitioned, she herself in the Written statement contended that as per the oral partition she was allotted $1 \frac{1}{2}$ grounds and the second defendant was allotted $1 \frac{1}{2}$ grounds each in item No.2 of the suit 'D' Schedule property. Therefore the 1st and 2nd item of 'D' schedule are not available for partition. In so far as Item No.3 of 'D' shedule properties are concerned it measures in 1 acre 38 cents each of the parties are entitled to 46 cents, towards their $1/3^{\text{rd}}$ share. It appears that an extent of 38 cents was acquired by the Government and in remaining 1 acre, the first defendant herself has sold 33 cents, 2nd defendant and the plaintiff have sold 33 cents each. Therefore there is no land available for partition. It is however contended by the plaintiff that the compensation for 38 cents of land was received by the 1st defendant alone and therefore she cannot have sold 33 cents in Item No.3. Admittedly the said compensation was paid over during the life time of Jayalakshmiammal. Since whatever properties that are available in the hands of Jayalakshmiammal at the time of death can alone be claimed by the plaintiff and defendants, in view of non production of the

will, I do not find any justification in the claim of the plaintiff that the first defendant sold 25 cents in excess of her share in Item No.3 of the suit 'D' schedule properties. Therefore Item No.3 of 'D' schedule is not available for partition. As far as, item No.4 of 'D' Schedule properties is concerned, 4.36 acres, the plaintiffs and the defendants 1 and 2 each entitled to 1.453 acres towards their shares. It is seen that the plaintiff and the 1st defendant have sold 1.45 acres to the third parties even in the year 1994. The 2nd defendant has sold 75 cents and retaining the remaining 70 cents with her since the plaintiff as well as the first defendant have sold their respective shares, there is no need for partition of the said property.

23.Item No.5 of the suit 'D' Schedule properties relates to 1.22 cents of land in S.No.62/2 in Ramapuram village, the suit property is not divided, each of the parties would be entitled to the 1/3rd share. In so far as Item No.6 of 'D' Schedule in Ramapuram Village in S.Nos.70/2 and S.No.68/2 are concerned, the same is also available for partition and each of the parties would be entitled to the 1/3rd share in the same. In Item No.7, which relates to 3.24 acres in S.No.140/3C and 145/2A is concerned, each of the parties are entitled 1/3rd share i.e. 1.07 acres each. It is an admitted case that the first defendant has sold 1 acre and 07 cents to the third parties. Therefore only extent of 2 acres and 17 cents are remaining in the said properties. The plaintiff and the 2nd defendant alone would be entitled to 1/3rd share in the said properties.

24.Item No.8 of 'D' schedule properties measuring 11.83 acres is concerned, the same has been acquired by the Government and the compensation awarded has been shared equally between the parties. Therefore the same is not available for partition. Item No.9 relates to 1.20 cents in Alandur village, Venugopal Reddiar was entitled 1/3rd share namely 40 cents. It is also admitted that this property is available for partition and each of the parties will get 1/3rd share in the properties. As regards Item No. 10 of 'D' Schedule properties, it is seen that Survey No.104/5 has been sold by the parties and the same is also not available for partition. Therefore, in view of the above discussion the Trial Court was not right in granting a decree for partition in respect of suit 'A', 'B' schedule properties and Item Nos.3, 5 to 7 and 9 of 'D' Schedule properties the Judgment and the Decree of the Learned Trial Judge stands modified and the plaintiff and defendants 1 and 2 would be entitled to 1/3rd share in the suit 'C' schedule properties and in Item Nos.5, 6 and 9 of the suit 'D' Schedule properties. In Item No.7 of the suit 'D' Schedule properties the ***plaintiff** and 2nd defendant would be entitled to 1/3rd share each. In other respects the suit will stand dismissed.

In the result, the appeal is partly allowed. The Judgment and Decree of the Trial Court, dated 28.06.2007, are modified as indicated above. In the facts and circumstances, the parties are directed to bear the costs.

-s/d-
Assistant Registrar(CSVI)
Dated: 27.04.2017

***Corrected as per order dated
11.07.2017 in A.S.No.630 of 2008**

**sd/-
Assistant Registrar(CS VI)
Dated: 17.07.2017**

True Copy

Sub-Assistant Registrar

arr
To
The Additional District Judge,
Fast Track Court 1,
Chengalpattu.

To be substituted the order
already despatched on
30.05.2017

+2 Ccs to Mr.K.P. Jotheeswaran, Advocate sr 48412
+1 cc to Mr.P.Bagyalakshmi Advocate sr 13224

A.S.No.630 of 2008

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