

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 09.01.2017

PRONOUNCED ON: 10.02.2017

CORAM:

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

CS.No.894 of 2010

P.Mohana

Plaintiff

Vs

T.K.Selvaraj

Defendant

Prayer:- This Civil Suit is filed under Order VII Rule 1 of CPC read with Order II Rule 1 of the Original Side Rules for the reliefs as stated therein.

For Plaintiff : Mr.S.Gopi

For Defendant : Mr.G.R.Lakshmanan

JUDGEMENT

This civil suit had been filed to pass a judgement and decree, against the Defendant:-

- (a) granting a preliminary decree for partition and allotment of half a share in favour of the Plaintiff in respect of the property at Door No.17 in Old Survey No.1962, New Survey No.1473/1, measuring 467 ¼ sq.ft. at No.17, Nattu Muthu Naicken Street, Vanniya Teynampet, Chennai-18, by metes and bounds, more fully described in the schedule to the plaint and for separate possession of the same.
- (b) granting a final decree for partition of half of a share in the suit property in favour of the Plaintiff.
- (c) directing the Defendant to furnish the accounts for the collection of the rent from August 2008 till the date of the plaint.

- (d) directing the Defendant to pay the costs of the suit to the Plaintiff.

2. The Plaintiff and the Defendant are sister and brother and also daughter and son of late Kadumbadi Naicker. The suit property was purchased by their grand father, late T.Aalayappa Naicker, under the registered sale deed, dated 29.4.1929, registered as Document No.737 of 1929, on the file of the Sub Registrar of Assurances, Mylapore, Chennai. The said T.Aalayappa Naicker had constructed a house. He died intestate and his legal heirs had effected an oral partition. The suit property came to the share of the father of the Plaintiff and the Defendant. It had been stated that the father died intestate on 16.9.1950, leaving behind the Plaintiff, the Defendant and their mother Kabali Ammal as his legal heirs. It had been stated that the Plaintiff and her mother were having a platform idly stall and contributed towards the expenses of the family. The Defendant did not contribute anything. The Plaintiff's marriage was held on 9.6.1965 and she had purchased 4 sovereigns of gold jewels out of her own income. It had been further stated that the mother Kabali Ammal died on 17.11.2005. The Defendant had rented out some portion of the suit property and is collecting rent from the tenants. It had been further stated that the suit property is the ancestral property and consequently, under the Hindu Succession (Amendment) Act, 2005, the Plaintiff became a coparcener along with the Defendant and therefore, she is entitled to one half share in the suit property. Since her attempts for partition was avoided by the Defendant, the Plaintiff had issued a notice dated 25.1.2010, for which, the Defendant had

issued a reply notice dated 12.2.2010 and the Plaintiff had issued a rejoinder on 25.2.2010. The Plaintiff had, therefore, filed this suit, seeking partition and separate allotment of one equal half share in the suit property and for accounts with respect to the rental income received by the Defendant.

3. In the written statement filed by the Defendant, the relationship among the parties was admitted. The fact that the property originally belonged to their grand father, Aalayappa Naicker was also accepted. It had been stated that after the death of Aalayappa Naicker, there was a partition among the members of the family and the property to an extent of about 500 sq.ft. was allotted to the Defendant. This partition deed is dated 15.3.1960 and registered as Document No.853 of 1960. Even prior to the partition, the father of the Plaintiff and the Defendant, Kadumpadi Naicker had died and consequently, the Defendant, as a male heir, was a coparcener in the property and was represented by his mother and natural guardian Kabali Ammal. It had, therefore, been denied that there was an oral partition as alleged in the plaint. It had been stated that Kadumpadi Naicker died on 16.9.1950 and the averments of the plaintiff were claimed to be false. It had been stated that after partition, the Defendant had been enjoying the property in his own rights and that the suit property was never treated as the joint family property and the Defendant had been enjoying the same in exclusion of every other person including the Plaintiff. The averment that the Defendant did not contribute any amount either towards the family expenses or to the marriage of the Plaintiff was specifically denied. It had been stated that their mother Kabali Ammal had inherited a property from her brother Kuppusamy, which was sold by the Plaintiff and the

Defendant and the Plaintiff had received the entire sale consideration. It had been further stated that the Plaintiff had also executed a declaration in the presence of the witnesses, affirming the partition, dated 15.3.1960 through which the Defendant obtained title. This declaration was on 15.7.2006 and a sum of Rs.50,000/- was paid by the Defendant to the Plaintiff. It had been stated that there were no merits in the case and consequently, the Defendant claimed that the suit should be dismissed.

4. On the basis of the pleadings of the parties and other materials on record, by order dated 11.04.2011, the following issues were framed for determination:-

1. Whether there is any bar to the Plaintiff from claiming her legitimate share in the suit schedule mentioned property which is being an ancestral property?
2. Whether the alleged deed of partition, dated 15.3.1960 is admissible when the coparcener is not a party to the said document?
3. Whether the alleged declaration said to have been executed by the Plaintiff is genuine one?
4. Whether the alleged deed of partition dated 15.3.1960 executed between the Defendant and his uncle will bind the Plaintiff from claiming her legitimate share in their ancestral property i.e. suit schedule mentioned property?
5. Whether the Plaintiff is entitled to the suit property?
6. Whether the suit property in the hands of the deceased late Kadumbadi Naicker, the father of the Plaintiff is an individual property?
7. To what relief the Plaintiff is entitled to?

5. During the trial, the Plaintiff had examined herself as PW.1 and

marked Ex.P1 to Ex.P11. Ex.P1 is the certified copy of the sale deed dated 29.4.1999, registered as Document No.737 of 1929 at SRO, Mylapore, Ex.P3 is the death certificate of the Plaintiff's father T.A.Kadumbadi Naicker, who died on 16.9.1950, Ex.P4 is the copy of the legal heir ship certificate dated 7.4.1992 in respect of the Plaintiff's father issued by the Tahsildar, Triplicane, Ex.P7 is the copy of the legal notice sent to the Defendant, dated 25.1.2010, Ex.P9 is the reply notice dated 12.2.2010 issued by the Defendant and Ex.P10 is the copy of the rejoinder dated 25.2.2010 issued by the Plaintiff to the Defendant. The Defendant had examined himself as DW.1 and marked Ex.D1 and Ex.D2. Ex.D1 is the unregistered declaration deed captioned as partition deed executed by the Plaintiff dated 15.7.2006 and Ex.D2 is the certified copy of partition deed dated 15.3.1960 and registered as Document No.853 of 1960 at the Office of the Sub Registrar, T.Nagar.

6. This court heard the learned counsel on either side and considered their submissions and also perused the materials placed on record.

7. **Issue (1):-** The suit property is the house and ground at No.17, Nattu Muthu Naicken Street, Vanniya Teynampet, Chennai-18, measuring 467 $\frac{1}{4}$ sq.ft. The original extent of the property, as is seen from the plaint originally filed, was 934 $\frac{1}{2}$ sq.ft. The Plaintiff had amended the plaint, by correcting the area to 467 $\frac{1}{4}$ sq.ft. as per the order dated 11.10.2011 in A.No.4313 of 2011. This amendment was pursuant to the written statement filed by the Defendant wherein the nature of the property as stated by the Plaintiff was challenged by the Defendant. It had been stated that Aalayappa Naicker, the grand father of the parties was the original owner of the suit property, having purchased the

same by registered sale deed dated 29.4.1929, registered as Document No.734 of 1929 on the file of the Registrar of Assurances, Mylapore. This document had been filed as Ex.P1. In the schedule given in the said sale deed Ex.P1, after giving the description of the property, the area is given as 934 ½ sq.ft. Subsequently, after the demise of Aalayappa Naicker, the property had devolved into his sons. The next devolution of the shares with respect to the property was in ExD.2 dated 15.3.1960, which is a certified copy of partition deed registered as Document No.853 of 1960 in the Office of the Sub Registrar, T.Nagar.

8. It must be stated that even prior to this, the father of the Plaintiff T.A.Kadumbadi Naicker had died on 16.9.1950 and the original death certificate had been filed as Ex.P3. Consequently, in 1960, when a partition was effected in the property, the son of Aalayappa Naicker, Kadumpadi Naicker was not alive. This partition deed was entered into between the Defendant, who was a minor aged 17 years old, in his capacity as the son of the pre-deceased son Kadumbadi Naicker of Aalayappa Naicker and his paternal uncle Krishna Naicker, who was described as the Kartha of the joint Hindu Family consisting of Krishna Naicker and the Defendant herein. In other words, the property, which was purchased by Aalayappa Naicker, after his death devolved on his two sons, Kadumpadi Naicker and Krishna Naicker. After the death of Kadumpadi Naicker in the year 1950, as evidenced by Ex.P3, the property came to be inherited by the surviving coparceners, namely, Krishna Naicker and the Defendant in his capacity as the son of the pre-deceased son.

9. It must be kept in mind that in the year 1960, coparceners of a

joint Hindu Family were only male members. In the year 1960, when by Ex.D2 partition was effected, it was only between the Defendant representing the first son of Aalayappa Naicker and Krishna Naicker, 2nd son of Aalayappa Naicker. Consequently, the property measuring to an extent of 934 ½ sq.ft. was partitioned into two equal half shares and the Defendant was allotted one equal half share measuring 467 ¼ sq.ft. and the other coparcener Krishna Naicker was allotted the other half share, namely, 467 ¼ sq.ft. In fact, in the schedule of the property, the Western boundary is given as the house of Aalayappa Naicker. Consequently, in the year 1960, having inherited the property through partition, the Defendant became the sole and absolute owner of the suit property to the exclusion of the Plaintiff, who as a daughter did not have any right in a joint Hindu Family in the year 1960. In the partition deed Ex.D2 it was very categorically stated that there were only two coparceners, namely, Krishna Naicker and the Defendant herein and consequently, the property of Aalayappa Naicker was divided into two equal half shares. The Plaintiff has totally suppressed these facts in the plaint. She put up a new story about the oral partition when as a matter of fact by Ex.D2 it is seen that there was a registered partition deed between the two surviving male heirs of Aalayappa Naicker. In the cross examination of DW.1, he had very categorically stated “It is correct to state that in the year 1960, as I was a minor, my mother has signed Ex.D2 as natural guardian for him in which my sister has not signed as she has nothing to do with that property.” This has come out from the mouth of the witness during the cross examination. Immediately, on execution of Ex.D2, the property was divided into two equal half shares and the Defendant became

entitled to one full half share, which is the area mentioned in the plaint and brought in by amendment to the plaint as mentioned above. In the year 1960, consequently, the Plaintiff as a female member in the joint Hindu Family, did not have any right and consequently, she does not have any share in the property and there is a bar from claiming a share in the suit property. Consequently, issue (1) is answered against the Plaintiff.

10. **Issue (2):** The partition deed marked as Ex.D2 dated 15.3.1960, is a registered document and it has not been set aside in a manner known to law. It is binding on the parties to the partition and also to anybody who claims under them. In the year 1960, only the male heirs have, as coparceners, a share in the Hindu Joint Family and it is not necessary that to make it a valid document, cosharer should be alive, as on date. In fact, in the year 1960, the Plaintiff was not a cosharer at all and she was also not a coparcener in the joint Hindu Family. Therefore, the partition deed is certainly admissible since the coparcener in the year 1960, the male member had signed Ex.D2 document and the document is perfectly valid and has conveyed valid title to the Defendant. Issue (2) is answered against the Plaintiff.

11. **Issue (3):** - This issue relates to Ex.D1. Ex.D1 is dated 15.7.2006 which has been signed by the Plaintiff. It has been typed in two twenty rupees non judicial stamp papers. It is referred to as a partition document. It is unregistered. It is an acknowledgement of the partition deed marked as Ex.D2 dated 15.3.1960 and registered as Document No.853 of 1960. This document does not convey any right. It does not create any new right. It is only an acknowledgement of the earlier partition. Ex.D2 partition

deed dated 15.3.1960 is a valid document in the year 1960, as in the year 1960, the Plaintiff was not a coparcener or even a co-owner of the suit property. Consequently, Ex.D1 conveys no meaning and the issue in this regard is answered to the effect that the declaration whether it is genuine or not does not confer any legal right over any of the parties to the suit.

12. **Issue (4):** - It is seen that as on 15.3.1960, the coparceners to the property were only the Defendant in his capacity as the son of the pre-deceased son of Aalayappa Naicker and the other son of Aalayappa Naicker, Krishna Naicker. There were only two coparceners. They effected partition among themselves. The property allotted to each one of them became their self-acquired property. The law as was prevalent in the year 1960 was that the property which was acquired through partition devolved only to the legal heirs of the person who acquires the property. In this case, the Defendant, who acquired the property, became entitled to one equal half share and this one half share will devolve further to his legal heirs only on his death. His legal heirs would be his wife and children. The sister, as a Class II heir, by no stretch of imagination, can seek any right or title or interest over the brother's share. Consequently, I hold that the partition deed dated 15.3.1960 marked as Ex.D2 executed between the Defendant and his uncle will bind the Plaintiff and preclude her from claiming any share in the suit property. This issue is answered against the Plaintiff.

13. **Issue (6):** - Late Kadumpadi Naicker, the father of the Plaintiff was the actual owner of an undivided share in the suit property. Actual property was not divided by metes and bounds between him and his brother Krishna

Naicker. Each are entitled to undivided half share. Kadumbadi Naicker died, according to Ex.P3, on 16.9.1950. On that date, the Defendant, as a coparcener, became entitled to undivided half share of Kadumbadi Naicker. Consequently, he and his uncle partitioned the property by Ex.D2. After partition, the separated property became the self acquired property of the Defendant alone. Consequently, since the property was not divided when Kadumbadi Naicker was alive, the property was not his individual property, but he only had a undivided half share as a coparcener of the property which share has to devolve to his further male legal heirs and in this case, the Defendant alone. This issue is answered accordingly.

14. Issues (5) and (7): - In view of the discussions mentioned above, it is clear that the Plaintiff is not entitled to any share in the suit property. The averment in the plaint regarding the amendment of the Hindu Succession Act will not apply to this case since even the said amendment has excluded the properties which had already been partitioned. In this case, by Ex.D2, the original property was already partitioned and consequently, the Plaintiff cannot claim any share in the suit property and consequently, the Plaintiff has to suffer dismissal of the suit. Accordingly, these issues are answered.

15. In the result, this civil suit is dismissed. No costs.

27.01.2017

Index:Yes/No
Web:Yes/No
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C.V.KARTHIKEYAN, J.

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To:

The Record Keeper, VR Section, High Court of Madras

Pre-Delivery Judgement in
CS.No.894 of 2010

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