

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 07.02.2018

CORAM

THE HONOURABLE MR.JUSTICE A.SELVAM
and
THE HONOURABLE MR.JUSTICE P.KALAIYARASAN

Appeal Suit No.346 of 2017
and
C.M.P.No.13070 of 2017

P.Mohanambal ...Appellant/1st Defendant
vs.

1.K.Akilandeswari ...1st Respondent/Plaintiff

2.P.Mohanraj

3.P.Selvalakshmi

4.P.Srinivasan

5.S.Kuppusamy

6.S.Jayaraman

7.S.Sundarambal

8.Kandammal

9.Rajasthan Hotel,
Pannapatti Village, Omalur Taluk,
Salem District.

10.Sona Dhaba-Hotel
its Proprietor Jayavel,
Pannapatti Village,
Omalur Taluk, Salem District.

11.Mohanraj, Proprietor Battery Shop
Pannapatti Village,
Omalur Taluk, Salem District.

12.Bharathi Air Tel Ltd.,
No.1, Nelson Mandela Road,
Vasanth Kunj, Phase-2,
New Delhi 110 070. ...Respondents 2to12/Defendants 2to12

Appeal suit filed under Section 96 read with Order XLI
Rule 1 of C.P.C. against the judgment and decree dated
28.03.2017 in O.S.No.53 of 2015, passed by the III Additional
District Judge, Salem.

For Appellant : Mr.V.Sekar

For Respondents: Mr.V.Rajasaravanan for

R2, R4 to R6, R8

No appearance for R1, R3,

R7, R10 to R12

R-9-exparte before Tribunal

JUDGMENT

(Judgment of the Court was delivered by A.SELVAM,J.)

The judgment and decree dated 28.03.2017, passed in O.S.No.53 of 2015, by the III Additional District Court, Salem, are being challenged in the present Appeal Suit.

2.The first respondent herein, as plaintiff, has instituted Original Suit No.53 of 2015, on the file of the trial Court, praying to pass a preliminary decree of partition in respect of her 1/12 share; wherein, the present appellant and other respondents have been arrayed as defendants.

3.In the plaint it is averred that one Sengodan, paternal grandfather of the plaintiff, has constituted a Hindu joint family, consisted of himself and his four sons, namely, Palanisamy, Krishnan, Kuppusamy and Jeyaraman. The said Krishnan has passed away. Likewise, Sengodan has also passed away. The plaintiff is the daughter of Kuppusamy. The suit properties are the joint family properties. Since the suit properties are the joint family properties, the plaintiff is having right of partition. Since the defendants are not amenable for partition, the present suit has been instituted for the relief sought therein.

4.In the written statement filed on the side of the first defendant, it is averred to the effect that all the suit properties are the joint family properties. Since the father of the first defendant, by name, Palanisamy, has passed away, the first defendant is also having share in all the suit properties and to that effect, Court fee has also been paid and therefore, suit may be decreed accordingly.

5.In the written statement filed on the side of the remaining defendants, it is averred to the effect that all the suit properties are the separate properties of Sengodan and he passed away in the year 2002. Since all the suit properties are the separate properties of Sengodan, the plaintiff is not having any right to claim partition and therefore, the present suit deserves to be dismissed.

6.On the basis of the divergent pleading raised on either side, the trial Court has framed necessary issues and after analysing both oral and documentary evidence, has dismissed the suit mainly on the ground that the plaintiff is not having right of partition, during the life time of her father, by name Kuppusamy, who has been arrayed as 5th defendant, by way of passing the impugned judgment and the same is being challenged in the present appeal suit.

7.The learned counsel appearing for the appellant/first defendant has contended to the effect that the contention put forth on the side of the first defendant is that all the suit properties are the joint family properties of Sengodan and his

four sons and even if all the suit properties are his separate properties, since he passed away in the year 2002, the father of the first defendant is having right of share and since the father of the first defendant has passed away in the year 2014, the first defendant and the defendants 2 to 4 are having right of partition and in fact, the first defendant has paid necessary Court fee to work out her share; but the trial Court, without considering that O.S.No.53 of 2015 has been filed for getting the relief of partition, has erroneously dismissed the same simply on the ground that the plaintiff is not having right of partition during life time of her father viz., Kuppusamy (5th defendant) and therefore, the finding given by the trial Court is liable to be set aside and the matter is liable to be remitted to the file of the trial Court.

8.The learned counsel appearing for the contesting respondents has contended to the effect that the suit properties are not the joint family properties of Sengodan and his four sons and all the suit properties are the separate properties of Sengodan and since the father of the plaintiff is alive, no right of partition accrues in favour of the plaintiff and the trial Court, after considering the present factual aspect, has rightly dismissed the suit and therefore, the judgment and decree passed by the trial Court need not be interfered with.

9.The consistent case of the plaintiff is that all the suit properties are the joint family properties of Sengodan and his four sons. The consistent defence put forth on the side of the contesting defendants is that all the suit properties are the separate properties of Sengodan.

10.It is an admitted fact that the said Sengodan has passed away in the year 2002, leaving behind him his three sons, namely, Palanisamy, Kuppusamy and Jeyaraman and his daughter(D7) and also his wife(D8). Even assuming, without conceding, that all the suit properties are the separate properties of the said Sengodan and since he passed away in the year 2002, leaving behind him the aforesaid legal heirs and also, the father of the defendants 1 to 4, by name, Palanisamy has passed away in the year 2014, it is needless to say that the defendants 1 to 8 are having right of partition.

11.The learned counsel appearing for the appellant has also argued to the effect that the appellant/first defendant has paid necessary Court fee to work out her share.

12.The trial Court has dismissed the suit in toto simply on the ground that during life time of Kuppusamy (D5), right of partition has not accrued in favour of the plaintiff.

13. Since right of partition is open to the defendants 1 to 8, after the demise of Sengodan and Palanisamy and since the first defendant has paid necessary Court fee, the dismissal of the suit in toto by the trial Court is totally erroneous. Under the said circumstances, the judgment and decree passed by the trial Court are liable to be set aside and O.S.No.53 of 2015 is liable to be remitted to the file of the trial Court.

In fine, this Appeal Suit is allowed without costs. The judgment and decree passed in O.S.No.53 of 2015, by the trial Court are set aside and O.S.No.53 of 2015 is remitted to the file of the trial Court. Both parties are entitled to adduce additional evidence. The trial Court is directed to decide the issues between the parties afresh without looking into any observation made in this judgment and dispose of the suit before the end of June 2018. The Court fee paid on the Appeal memorandum is ordered to be refunded to the appellant/first defendant forthwith. Connected miscellaneous petition is closed.

Sd/-
Assistant Registrar (CS-VI)

//True Copy//

Sub Assistant Registrar

msk

To

1. The III Additional District Judge, Salem.
2. The Section Officer, Accounts Section,
High Court, Madras.
3. The Section Officer, VR Section, High Court, Madras.

+ 1 cc to Mr.V. Sekar, Advocate Sr.9236
+2 ccs to Mr. S. Jeyaram, Advocate SR.9251

Appeal Suit No.346 of 2017

GR(CO)
EU(26/02/2018)