

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 26.06.2018	Delivered on: 11.07.2018
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THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.1674 of 2000
and
CMP.No.14465 of 2000

K. Jagannathan ... Appellant/1st Defendant

Vs.

1.K.Ramamoorthy
2.K. Jagadeesan
3.Seethammal
4.V.Rajamani

...Respondents/Plaintiff/Defendants 2 to 4

PRAYER: Second Appeal is filed under Section 100 of C.P.C., against the Judgment and decree dated 31.03.1998 made in A.S.No.175 of 1996 on the file of the First Additional District Judge-cum-Chief Judicial Magistrate, Coimbatore, modifying the Judgment and Decree dated 03.07.1996 made in O.S.No.819 of 1988 on the file of the Second Additional Sub-Judge, Coimbatore.

For Appellant : Mr.M. Sriram

For Respondents: set exparte

JUDGMENT

This Second Appeal has been filed by the first defendant against the judgment and decree passed by the First Additional District Judge-cum-Chief Judicial Magistrate, Coimbatore, in A.S.No.175 of 1996 dated 31.03.1998 modifying the judgment and decree passed by the II Additional Sub-Judge, Coimbatore in O.S.No.819 of 1998 dated 03.07.1996.

2. The first respondent herein has filed a suit in O.S.No.819 of 1998 on the file of the II Additional Sub-Judge, Coimbatore, to divide the suit properties into five equal shares with reference to good and bad soil and allot one such share to him. The learned Sub-Judge by his Judgment dated 03.07.1996 has passed a preliminary decree to divide the suit properties into three equal shares and allot one such share to the first respondent herein. He further ordered that at the time of dividing the suit properties, the plaintiff and the defendants 1

and 2 have to be allotted the portions, in which, they are in possession, on the basis of equity. Aggrieved by the same, the second respondent/second defendant has filed an appeal in A.S.No.175 of 1996 on the file of the first Additional District Judge-cum-Chief Judicial Magistrate, Coimbatore. The appellant herein has filed Cross Appeal praying to dismiss the appeal as well as the suit. The learned First Appellate Court Judge by his judgment and decree dated 31.03.1998 confirmed the trial court judgment and decree in respect of dividing the suit property into three equal shares and to allot one such share to the plaintiff and also ordered to allot one such share to the second defendant. However, he set aside the portion of the decree which directs to allot the portions, in which, the parties are in possession. Aggrieved by the same, the appellant herein has filed the present second appeal. For the sake of convenience, the parties are referred to as described before the trial court.

3. The averments made in the plaint, are in brief, as follows:

The plaintiff and the defendants 1 and 2 are brothers and they are the sons of Late C.Krishnasamy Naidu. The defendants 3 and 4 are the sisters of the plaintiff and the defendants 1 and 2. The suit properties are self-acquired property of the plaintiff's father C.Krishnasamy Naidu. He died about fifteen years ago leaving behind the plaintiff and the defendants as his legal heirs. So, the plaintiff and the defendants are entitled to equal shares in the suit properties. The plaintiff is residing in the middle portion; the defendants 1 and 2 are residing separately in the remaining portion of the suit properties. The defendants 3 and 4 are also entitled to get share in the suit properties. The plaintiff is residing only in a very small portion and the major portion of the property is in the occupation of the defendants 1 and 2. Therefore, the plaintiff made a request to the defendants 1 and 2 to divide the suit properties by metes and bounds. They have not come forward for amicable partition. Hence the suit.

4. The averments made in the written statement filed by the first defendant are, in brief, as follows:

The suit has been filed by the plaintiff in collusion with the defendants 2 to 4. The defendants 3 and 4 are not entitled for any share and they have set up the plaintiff to file the suit. The defendants 3 and 4 were given in marriage as early in the years 1945 and 1949 respectively and they are living separately with their families. They severed all connections with their parents' family and they were given in marriage by providing all necessary sreeethanas. The defendants 3 and 4 were ousted from the properties. Further, they are being female heirs, they cannot claim any share in the dwelling house, as per Section 23 of the Hindu Succession Act. The defendants 3 and 4 also were given properties under registered documents

dated 16.08.1954. The allegation that the suit properties are self-acquired properties of C.Krishnasamy Naidu is false. The suit properties are ancestral joint family property, in which, defendants 3 and 4 cannot claim equal share. Along with the ancestral house, some portions also acquired and the entire property was treated as one unit. The suit properties were improved and altered under the joint efforts. Each one of the brothers acquired distinct separate portions and independently carried out alterations, constructions and repairs at their own costs. The plaintiff is residing with his family in the middle portion. The second defendant is residing in a separate portion bearing D.Nos.225, 226, 230, 223,229 and 231. The first defendant is in exclusive possession and enjoyment of the portion bearing Door.No.232. He is in possession and enjoyment ever since 05.02.1959. The first defendant is paying house tax in his own name ever since 1972, for the portion under his occupation. The first defendant is in open, continuous and uninterrupted possession and enjoyment of the said portion for more than twelve years and perfected his title by adverse possession. Under an oral partition and arrangement, the first defendant is in exclusive possession and enjoyment of the same. Likewise, the plaintiff and the second defendant are in exclusive possession and enjoyment of their shares. Therefore, the first defendant prayed to dismiss the above suit.

5. The averments made in the written statement filed by the second defendant are, in brief, as follows:

The second defendant has no objection to pass a preliminary decree for partition of the suit properties in dividing into five equal shares and allot one such share to him. He has also paid court fees for allotment of his share.

6. Based on the aforesaid pleadings, the learned Sub-Judge has framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined himself as PW1 and also marked Ex.A1 and Ex.A2 as exhibits. On the side of the defendants, the defendants 1 and 2 were examined as DW1 and DW2 respectively. They also marked Ex.B1 to Ex.B20 as exhibits.

7. The learned Sub-Judge, after considering the materials placed before him, found that the plaintiffs and the defendants 1 and 2 alone are entitled to get share in the suit properties and the defendants 3 and 4 are not entitled to get any share. He also found that the plaintiff and the defendants 1 and 2 are in separate possession of the portions of the suit properties for a long period. Accordingly, he passed a preliminary decree directing to divide the suit properties into three equal shares and allot one such share to the plaintiff and also ordered that while dividing the suit properties as aforesaid, the parties should be allotted the shares in which,

they are in possession. Aggrieved by the same, the second defendant has filed an appeal in A.S.No.175 of 1996 and the first defendant has filed a cross appeal. The learned appellate court Judge has confirmed the judgment and decree passed by the trial court in respect of dividing the suit properties in to three equal shares and allotting one such share to the plaintiff. He also ordered to allot one such share to the second defendant. However, he set aside the trial court's decree with regard to the direction that while dividing the suit properties, the shares in which the parties are in possession should be allotted to them. Feeling aggrieved, the first defendant has filed the present second appeal.

8. At the time of admitting this second appeal, this court has formulated the following substantial questions of law:

"i) Whether the lower Appellate Court is right in granting partition, particularly when the oral partition and arrangement have been proved by separate possession and enjoyment of the properties?

ii) Whether the courts below are right in negating the oral partition when there is ample evidence available to prove the same publishing Exhibits B1 to B3."

9. Though notices were served on the respondents on 25.01.2001 itself, they neither appeared in person nor through counsel and hence they were called absent and set exparte. Therefore, after hearing Mr.M.Sriram, learned counsel for the appellant/first defendant and perusing the judgments of the courts below and other materials, judgment is being passed in this second appeal.

10. Question Nos.1 and 2:

Learned counsel for the appellant/first defendant has submitted that the courts below erred in holding that the alleged oral partition is not true. He further submitted that the trial court, taking into consideration the plaintiff and the defendants 1 and 2 have been in separate possession and enjoyment of respective portions, directed that at the time of dividing the suit properties, the parties should be allotted the portions, in which, they are in possession on equity basis, but the first appellate court without assigning any valid reason has set aside the said direction and hence, the said order of the first appellate court has to be set aside and the directions of the trial court have to be restored.

11. The courts below after considering the evidence adduced by both the parties, came to the conclusion that merely because the parties are in separate possession and enjoyment of

the respective portions, it cannot be presumed that they have divided the suit properties orally. Further the courts below came to the conclusion that the plaintiff and the defendants 1 and 2 have been in possession of the separate portions only for convenient enjoyment, but actually, the properties were not divided by metes and bounds. In the said factual concurrent findings, this court cannot interfere.

12. In so far as the allotment of shares on equity basis is concerned, the trial court in its judgment has directed to divide the suit properties into three equal shares and allot one such share to the plaintiff. It also gave directions that at the time of dividing the suit properties, parties should be allotted the shares in which they are in possession on equity basis. The first appellate court reversed the said findings. For reversing the said findings, the first appellate court gave a reason that the portion, in which, the first defendant is in possession is just abetting to the Mettupalayam - Anoor main road and would have more value. If the said portion is allotted to the first defendant, that would cause prejudice to the plaintiff and the second defendant. It is also stated that the question of allotment of shares on the basis of equity has to be decided in the final decree proceedings, after taking into consideration the Commissioner's report and arguments of both parties and if the said task is taken up at the time of passing preliminary decree itself, it would affect the rights of the parties.

13. At this juncture, it would be relevant to refer the decision in Saravanakumar and others Vs. N. Jayachandran and others 2014 (2) CTC 721 wherein this court after referring to several decisions, has observed in paragraph Nos. 16 and 17 of the judgment as follows:

"16. Following the principles laid down in the Judgments relied upon by the learned Counsel for the Appellants, I am of the considered view that the Lower Appellate Court committed an error in allotting the specific properties to the Defendants 2,3, 5 & 9 at the Preliminary Decree stage. Therefore, the finding rendered by the Lower Appellate Court, allotting specific properties to the Defendants 2, 3, 5 & 9 is liable to be set aside. Accordingly, the same is set aside.

17. Since the Lower Appellate Court found that the purchases made by the Defendants 2,3,5 & 9 are valid and that they are bona fide purchasers for value, the prayer of the Defendants that the said properties may be allotted to them, can be decided in the Final Decree proceedings. As far as the principles of equity to be followed, the Trial Court

shall take up the issue while making actual allotment in the Final Decree proceedings."

14. From the aforesaid decision, it is clear that in a suit for partition, a preliminary decree has to be passed declaring the rights of the parties and it is always obligatory on the part of the trial court to relegate to the second stage in the same proceedings to conduct an enquiry into the allotment of shares at the final decree stage. Allotment of a particular portion to the particular party on equity basis at the preliminary stage itself would affect the rights of other parties. Hence, the first appellate court has rightly set aside the directions issued by the trial court, that the portions in which the parties are in possession should be allotted to the respective parties on equity basis in the preliminary decree itself.

15. In view of the aforesaid decision, the principle of equity to be followed while making actual allotment in the final decree proceedings. Therefore, this court is of the view that the findings of the first appellate court are in accordance with law, in which, this court cannot interfere. Accordingly, the substantial questions of law are answered.

16. In the result, the second appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

s/d-

Assistant Registrar(CO)

True Copy

Sub-Assistant Registrar

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To

1. The First Additional District Judge, cum
Chief Judicial Magistrate, Coimbatore.
2. The Second Additional Subordinate Judge,
Coimbatore.
3. The Section Officer,
V. R. Section,
High Court, Madras.

+1 CC to Mr.M. Sriram, Advocate sr 45545

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SP(11/09/2018)