

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.09.2018

CORAM:

THE HON'BLE MRS.JUSTICE R. HEMALATHA
S.A.No.208 2000
and
C.M.P.Nos.15393 to 15396 of 2018

1. Manickam
2. Visalakshi

.. Appellants

/Vs/

1. Ponnappa Gounder
2. Saravanan
3. Sengaliappa Gounder (died)
4. Sengaliappa Gounder (died)
(Second Appeal dismissed
against 4th respondent as
abated vide order of this
Court dated 22.12.17 made
in SA 208/2000)

5. Chinnathambi Alias Chinnasamy
6. Samiyathal
7. Venkatachalam
8. Kesava Moorthi

.. Respondents

(Respondents 6 to 8 brought on record
as LRS of the deceased third respondent
vide order of Court dated
01.08.2018 made in CMP.
No.7408 to 7410/18 in
SA.No.208/2000

PRAYER : Second Appeal filed under Section 100 of C.P.C., against the decree and judgment dated 15.09.1999 rendered in A.S.No.14 of 1999 on the file of the Subordinate Judge, Gobichettipalayam, upholding the decree and judgment dated 24.12.1998 rendered in O.S.No.510 of 1996 on the file of the District Munsif Court, Sathyamangalam.

For Appellants : Mr.R.T.Doraisamy
Mr.B.Mutharasu

For Respondents : Mr.Mohamed Ismail for R3 & R5
R1 & R2 - set exparte vide Court
order dated 01.08.2018
R4 - abated.

JUDGMENT

The unsuccessful plaintiffs in O.S.510/1996 before the District Munsif, Sathiyamangalam and in A.S.No.14/1999 before the Sub-Judge, Gobichettipalayam in A.S.No.14/1999 have filed this present appeal.

2. For the sake of convenience, the parties are called as per their ranking in the trial Court.

3. The plaintiffs had filed a suit for partition in O.S.No.510/1996 before District Munsif Court, Sathiyamangalam to divide the suit properties into two equal shares and to allot one such share to the plaintiffs and also to direct the second defendant to pay a sum of Rs.200/- towards maintenance to the first plaintiff till her death and to pay arrears of maintenance of Rs.7,200/- to the second plaintiff. They have further prayed for payment of past and future mesne profits in the suit property and also for a permanent injunction restraining the first defendant not to bring the suit property in Court auction sale.

4. The suit properties are described under two heads:- The suit first item is an agricultural land situate in R.S.F.No.367/11, of Shenbakkaputhur Village, while the second item is a vacant site in R.S.F.No.339/9 of Shenbakkaputhur Village measuring 91/2 cents in which two houses are built.

5. The second plaintiff is the daughter of the first plaintiff and the second defendant Ponnappa Gounder. According to the plaintiffs, the suit property was allotted to the share of the second defendant through a partition deed dated 05.09.1985 (Ex.A1) and that the second defendant is leading a wayward life. It is further contended that they came to know about the Court auction sale in E.P.No.27/1991 in O.S.No.279/1973 in respect of the property during September 1996 and that their interest over the suit property must be protected.

6. The suit was resisted by the first defendant on the ground that the plaintiffs and the second and third defendants are living in the same house and the plaintiffs have not also specifically mentioned in their plaint that they are living separately. It is also contended by them that since the suit property was allotted to the share of the second defendant on 05.09.1985 much before the Amendment to the Hindu Succession Act, 1956 the second plaintiff cannot claim any share in respect of the said property. According to him, the plaintiffs have filed the suit with an ulterior motive to stall the proceedings in E.P.No.27/1991 in O.S.No.279/1973.

7. The trial Court framed the following issues:-

1. Whether the plaintiffs are entitled for partition and recovery of possession has prayed for by them?

2. Whether the plaintiffs are entitled for maintenance has prayed for by them?

3. Whether the plaintiffs are entitled for maintenance property has prayed for by them?

4. What relief the plaintiffs are entitled to?

8. In the trial Court, the plaintiffs examined themselves and one another witness and marked Ex.A1. The first defendant's son and one another witness were examined as DW1 and DW2 and Ex.B1 and Ex.B2 were marked. The defendants 2 and 3 remained absent and were set exparte.

9. After full contest, the suit was dismissed by the trial Court. The first Appeal in A.S.No.14/1999 filed before the Subordinate-Judge, Gobichettipalayam, was also dismissed on 15.09.1999.

10. Chinnappa Gounder (first defendant) died during the pendency of the first appeal and his legal heirs were brought on record as defendants 4 to 6. Similarly, the respondents 3 and 4 also died and the second appeal was dismissed as abated as against the fourth respondent for not taking steps to implead the legal heirs of the deceased third respondent. The legal heirs of the third respondent were brought on record as respondents 6 to 8.

11. Now, the plaintiffs have filed the present Second Appeal on the following substantial questions of law:-

"1. Whether the Courts below are correct in holding that the second plaintiff is not entitled to claim half share in the suit property in the hands of second defendant without considering the fact that as per the amended Hindu Succession Act 1 of 1990 the second plaintiff became a co-parcener of a Joint Family consisting of a self and the father?

2. Whether the Courts below are correct in holding that the second plaintiff cannot claim partition without including the property belonging to the third defendant also, without considering that the third defendant was excluded from a Joint Family in the year 1985 by entering into a partition between the second defendant and the third defendant?"

12. A perusal of the certified copy of the partition deed dated 05.09.1985 (Ex.A1) shows that the second and third defendants have partitioned the suit properties. The third defendant is the son of second defendant. The source for purchase of the said properties is mentioned as income derived from their ancestral properties and also their joint exertion. It is also seen from Ex.A1 partition deed that the suit properties were purchased by the second defendant. The plaintiffs have not adduced any evidence to show as to how the second defendant became entitled to the said properties. The evidence of the first plaintiff would clearly go to show that both the plaintiffs are residing in the same house with the defendants 2 and 3. The defendants 2 and 3 conveniently remained absent and were set exparte. It also emanates from the evidence that the first defendant has purchased the suit properties in the Court auction sale. Therefore, the possibility of the filing of the suit by the plaintiffs only to stall the proceedings for confirmation of sale in E.P.No.27/1991 in O.S.No.279/1973 before District Munsif Court, Sathiyamangalam as alleged by the first defendant cannot be simply brushed aside.

13. Even according to the plaintiffs, the properties stand in the name of the second defendant and during his life time, the second plaintiff cannot claim any right over the same. The plaintiffs have not also filed the suit for partition immediately after the execution of partition deed (Ex.A1) between the defendants 2 and 3 and had filed the suit only in the year 1996 i.e., after a lapse of 11 years, from the date of execution of the partition deed. The plaintiffs, who are residing with the second and third defendants cannot feign complete ignorance about the Court auction sale in favour of the first defendant in respect of the suit properties.

14. Both the Courts below have concurrently held that the suit filed by the plaintiffs cannot be decreed as prayed for by them, since they have not established any of their contentions. The findings of both the

Courts below are also well founded and I therefore, do not see any reason to interfere with the findings of both the Courts below. The Second Appeal fails and is therefore dismissed. No costs. Consequently, connected Miscellaneous Petitions are dismissed.

Sd/-

Assistant Registrar(CS viii)

//True Copy//

Sub Assistant Registrar

vkr/dna

To

- 1.The Subordinate Judge, Gobichettipalayam.
- 2.The District Munsif Court, Sathyamangalam.

+1cc to Mr.R.T.Doraisamy , Advocate SR.No. 60806

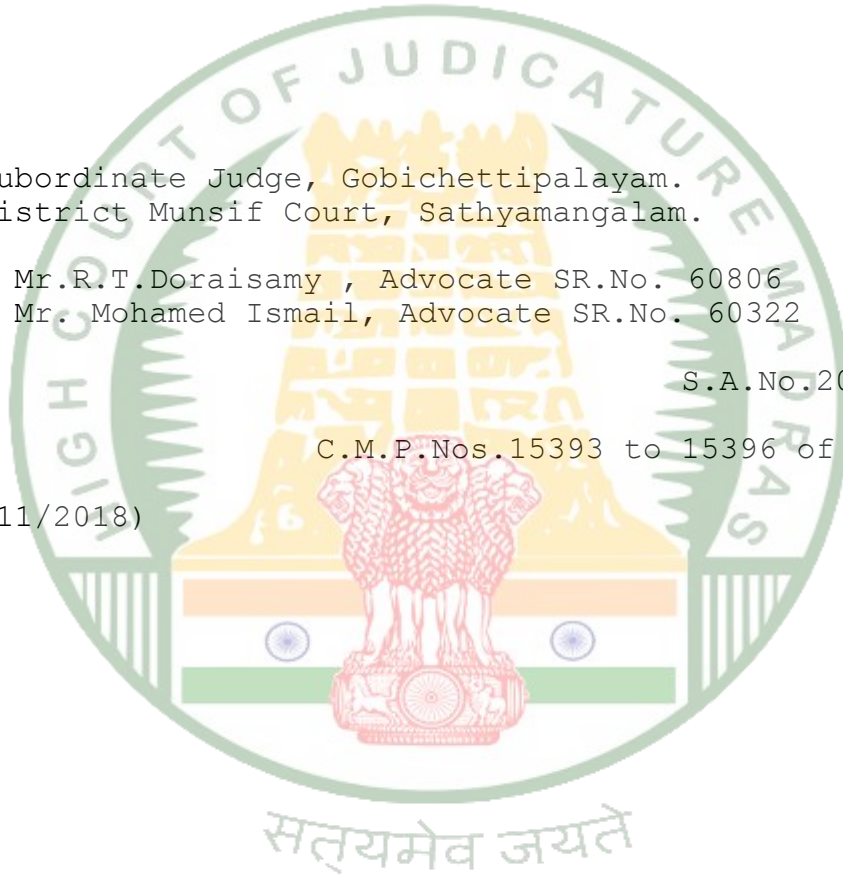
+1cc to Mr. Mohamed Ismail, Advocate SR.No. 60322

S.A.No.208 2000

and

C.M.P.Nos.15393 to 15396 of 2018

ASK(08/11/2018)



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