

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.10.2018

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

Second Appeal No.557 of 2018
and C.M.P.No.16669 of 2018

Orders reserved on
20.09.2018
Orders pronounced on
08.10.2018

1.Kamala
2.Parimala .. Appellants/Plaintiffs

vs.
Parvathi (Died)
1.Ramar
2.Krishnan
3.Eswaran
4.Muthuvel
5.Krishnaveni
6.Tamilselvi
7.Rajamanickam
8.Govindan
9.Indira .. Respondents

Appeal filed Under Section 100 of the CPC against the Judgment and Decree, dated 05.10.2017, made in A.S.No.4 of 2016, on the file of the learned Fourth Additional District Court, Bhavani, confirming the judgment and decree, dated 26.10.2015, made in O.S.No.26 of 2008, on the file of the learned Sub Court, Bhavani.

For Appellants : Mr.N.Manokaran

JUDGMENT

This appeal has been filed by the plaintiffs in O.S.No.26 of 2008 on the file of the Sub-Court, Bhavani. The suit was filed for partition and separate possession and allotment of 95 cents and 54= sq.ft., in the Suit Schedule properties.

2. The Suit was dismissed by judgment and decree dated 26.10.2015. The appellants filed appeal before the Fourth Additional District Court, Bhavani in A.S.No.4 of 2016, which was dismissed by judgment and decree dated 05.10.2017. Challenging the correctness of the judgments and decrees of the Courts below, the present appeal has been filed by the plaintiffs raising the following substantial questions of law:-

a. Whether the courts below have committed an error in non-suiting the plaintiffs on the basis of the

earlier judgment and decree dated 25.03.1968 made in O.S.No.20 of 1968 (Ex.A10 and Ex.A11), by ignoring factum of the release deeds dated 22.04.1968 (Ex.A1) and 02.05.1968 (Ex.A2), executed by the plaintiffs therein in favour their brothers?

b. Have not the courts below erred in faulting the plaintiffs in the present suit for ignoring the alienations made prior to the preliminary decree dated 25.03.1968 made in O.S.No.20 of 1968, especially when none of the parties to O.S.No.20 of 1968 have not taken steps to file final decree petition till this date?

c. Whether the courts below are right in placing the burden and blaming the plaintiffs in a suit for partition, particularly when the status of the parties are one and the same and vice versa?

d. Whether the judgment of the first appellate court is vitiated for non compliance of the mandate of Order 41 Rule 31 CPC?

3. Heard Mr.N.Manokaran, learned counsel appearing for the Appellants.

4. In this judgment, the parties shall be referred to as per the rank assigned before the Trial Court.

5. The case of the plaintiffs is that the Suit properties originally belonged to one Ayyamperumal Gounder and was his absolute property. His wife was Tmt.Irulayee, he had two sons Gurusamy and Nagappan and three daughters Pechiammal, Guruvayee and Mariyayee. Tmt.Irulayee died in 1960 and Ayyamperumal Gounder died in the year 1962 and both of them died intestate. The daughters filed a Suit in O.S.No.20 of 1968, before the District Munsif Court, Erode against their brothers for partition and separate possession. The Suit was decreed in favour of the daughters allotting 3/5th share and a preliminary decree to the said effect was passed. The first defendant is the wife of Nagappan and defendants 2 to 5 are children of Nagappan. The third daughter Mariyaye died leaving behind her husband Mariyappan and five children. Pursuant to a release deed dated 22.04.1968, the defendants 1 to 5 became entitled to = share of the Suit property i.e., 1/5th share by inheritance and 1=5 share by way of the release deed. The first plaintiff is the mother of the second plaintiff and the husband of the first plaintiff is Mariyappan. Mariyappan and 6th defendant Muthuvel are brothers, who are sons of Gurusamy.

6. It was contended that the said Gurusamy is entitled to 1/5th share by way of inheritance and on 02.05.1968, he obtained release deed from the female heirs in respect of 1=5 share and the said Gurusamy died intestate about 25 years ago leaving his wife Tmt.Thavasiyammal as his legal heir, who also died intestate.

7. The Plaintiffs would contend that the defendants 1 to 5 and husband of the first plaintiff and the 6th defendant Muthuvel were enjoying the property in common. The first plaintiff's husband along with the 6th defendant executed a sale deed dated 20.02.1991 in favour of the 8th defendant in respect of 0.14 cents of land in R.S.No.32/5. Though in the said document, four boundaries are mentioned, according to the plaintiffs, the properties were enjoyed in common. The plaintiffs would further contend that they and the defendants 6 & 7 are entitled to remaining = share of the properties. The 7th defendant is the daughter of the 6th defendant. It was further stated that out of the remaining 2-4< acres of land, 0.14 cents belonged to the 8th defendant and the remaining 1-90< acres is available and that the plaintiffs are entitled to 0.95 cents and 54= sq.ft., and the remaining 0.95 cents and 54= sq.ft., belongs to defendants 6 and 7. The plaintiffs would state that the defendants are attempting to grab the share of the plaintiffs and hence, laid the Suit for partition.

8. The third defendant filed written statement, which was adopted by the 1st, 2nd, 4th, 10th and 11th defendants. The said defendants took a stand that the allegations that the female heirs of Ayyamperumal Gounder filed the Suit in O.S.No.20/1968 and later on 22.04.1968, released 1= share out of 3/5 share in the Suit properties to Nagappan and 1= share, out of 3/5 share on 02.05.1968 to Gurusamy are absolutely false. It was further contended that Ayyamperumal Gounder is entitled to

3.71 acres of land in Uratchikottai village and another extent of 1.57= acres, totally 5.28= acres. After resurvey, Ayyamperumal Gounder was entitled to 2.66 acres of land in survey No.94A and 0.90 cents in survey No.94C and 0.95= cents in Survey No.95/A and another 0.55 cents in Survey No.95/C and totally entitled to 5.08= acres of land. On 27.05.1959, Ayyamperumal Gounder along with his two sons executed a sale deed in favour of Narayanan and Nagappan in respect of 1.00 acre of land. On 17.08.1959, Ayyamperumal Gounder executed a settlement deed in respect of his 1/3rd share in favour of Gurusamy and another 1/3rd share in favour of his another son Nagappan, retaining 1/3rd share for himself. Thus, it was stated that Ayyamperumal Gounder and his sons were entitled to 1.36= acres of land. On 12.09.1959, Ayyamperumal Gounder mortgaged his share of 1.36= acres of land in favour of one Irusa Gounder. The first plaintiff's father-in-law Gurusamy Gounder sold his 1.36= acres of land which belonged to him to Irusa Gounder on 26.10.1959, who in turn sold 0.87.1/6 acres of land to one Angayammal on 12.10.1960 and sold another extent of 0.15 cents of land on 06.04.1963 in favour of Narayanan and Nagappan and another extent of 0.15 cents in favour of Peramayee by sale deed dated 01.09.1963. The said Nagappan executed a mortgage deed on 16.10.1964 in favour of Sengoda gounder in respect of 1.36-1/6 acres of land and on 05.05.1965, another mortgage was executed in favour of Pachiyannan. The said mortgages were redeemed by the first defendant on 06.03.1972 and 27.01.1975. The first defendant purchased 0.50 acres of land from Nagappan on 27.05.1981. After the death of Ayyamperumal Gounder, Gurusamy Gounder is entitled to remaining 0.681/2 cents of land, out of 1.36.1/6 acres of land. The defendants 1 to 5 are entitled to 2.54< acres of land. The plaintiffs and defendants 6 and 7 are jointly entitled to 0.68.1/12 cents of land. On 20.02.1990, the first defendant's husband along with his children and the sixth defendant Muthuvel along with his daughter Krishnaveni executed a sale deed in respect of 14 cents of land in favour of the 8th defendant. On 16.10.2002, the defendants 6 and 7 executed a sale deed in respect of 0.04 cents of land in favour of the 9th defendant. Therefore, the plaintiffs and defendants 6 and 7 are entitled to 0.50= cents of land out of 0.68.1/12 cents of land. The plaintiffs are entitled to 0.25-1/24 cents of land and defendants 6 and 7 are entitled to 0.25.1/24 cents of land. The plaintiffs are not entitled to 95 cents and 54= sq.ft. The decree obtained by the female heirs of Ayyamperumal Gounder is not valid. Even prior to the Suit, Gurusamy Gounder on 26.10.1959, executed a sale deed in respect of 1.36= acres of land in favour of Irusa Gounder. But in turn, on 12.10.1960 sold 0.87-1/6 and on 06.04.1963 another 0.15 cents of land in favour of one Narayanan and another 0.15 cents of land on 01.09.1963 in favour of Peramayee.

9. With the above facts, the defendants prayed for dismissal of the Suit and also on the ground that necessary parties were not impleaded.

10. The sixth defendant filed a separate written statement, which was adopted by the second defendant, likewise 8th defendant filed a written statement which was adopted by the 9th defendant. The plaintiff filed a reply statement.

11. The Trial Court framed two issues for consideration:-

(i) whether the plaintiffs have got right in the Suit property and (ii) whether the plaintiffs are entitled for the relief of partition and separate possession.

The plaintiff examined herself as PW-1 and Exhibits A1 to Exhibits A11 were marked. On the side of the defendants, DW1 to DW3 were examined and Exhibits D1 to Exhibits D40 were marked. The Trial Court dismissed the Suit by judgment and decree dated 26.10.2015.

12. The correctness of the judgment and decree was challenged before the lower Appellate Court. On examination of the oral and documentary evidence, the lower Appellate Court while concurring with the Trial Court held that the plaintiffs did not file any proof to show the original extent of the properties owned by the Ayyamperumal Gounder by purchase and after considering the documents marked on the side of the plaintiffs, namely, Exhibits A1 to Exhibits A11, it was found that apart

from those documents, the plaintiffs did not file any documents to substantiate their claim and their claim was solely based upon the judgment and decree in O.S.No.20 of 1968 and the settlement deeds executed by the female heirs of Ayyamperumal Gounder. The Court noted that in the said Suit namely, O.S.No.20 of 1968, which was filed by Pechiammal, Mariyayee, Guruvayee against their brother Gurusamy and his heirs and the legal heirs of another deceased brother Nagappan and purchasers namely Narayanan, Nagappan, Peramayee and Angammal and perumal. Out of 13 defendants, defendants 1 to 8, and 11, remained ex parte. The remaining defendants namely 9,10 & 12 did not contest the case, but stated that defendants 9 & 10 have purchased 1 acre of land in the eastern side of IS No.94/A and that the same may be excluded. Accordingly, a preliminary decree was passed. The 12th defendant made an endorsement that the equities raised by her namely worked out at the time of final decree proceedings and portions in enjoyment of the defendants may be allotted to her and a preliminary decree may be passed. The Trial Court accepted the endorsement and passed the preliminary decree stating that the equities will be worked out in the final decree proceedings. The plaintiffs in O.S.No.20 of 1968, did not file any application for final decree.

13. Thus, it is seen that without filing an application by passing final decree, the plaintiffs in that suit executed release deed on 22.04.1968 and 02.05.1968 in favour of Gurusamy and to the legal heirs of Nagappan. The lower Appellate Court rightly took into consideration that even on the date of filing of the suit in the year 1968, there were several alienations made by Ayyamperumal Gounder himself and his sons Gurusamy and Nagappan and the said alienations were not brought to the notice of the Trial Court in the said Suit at the time of passing the preliminary decree. Thus, the Court rightly concluded that in the absence of final decree, the preliminary decree is not conclusive. The Court also examined whether the plaintiffs can claim right over the Suit properties under the release deed said to have been executed by the female heirs of Ayyamperumal Gounder, which were exhibited, as Exhibit A1 & Exhibit A2 and concurred with the Trial Court and held that the plaintiffs have no property for partition and they are not entitled for partition and separate possession.

14. I find that the reasons assigned by the Trial Court as confirmed by the lower Appellate Court are cogent and rendered after proper appreciation of the oral and documentary evidence placed on record.

15. Thus, I find that no question of law much less substantial question of law arises for consideration in this appeal. Accordingly, the appeal fails and it is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

08.10.2018

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Index :Yes/No

Internet:Yes/No

T.S.SIVAGNANAM, J.

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To

1. learned Fourth Additional District Court, Bhavani

2. learned Sub Court, Bhavani

Pre-delivery order made in
Second Appeal No.557 of 2018
and C.M.P.No.16669 of 2018

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