

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.06.2018

CORAM

The Honourable Mr.Justice M.M.SUNDRESH
and
The Honourable Mr.Justice N.ANAND VENKATESH

Original Side Appeal No.127 of 2018

1.T.Ashok Surana

2.T.Rajesh Surana

... Appellants (Defendants 1 & 3)

Vs.

1.T.Suresh Surana

2.T.Naresh Surana

... Respondents (Plaintiff & 2nd Defendant)

Original Side Appeal is filed under Order 36 Rule 1 of O.S.Rules R/W Clause 15 of the Letter Patent against the judgment and decree passed on 24.02.2017 in C.S.No.83 of 2011.

For Appellants : Mr.V.V.Giridhar

For Respondents : Mr.K. Ramu for R 1

: Mr.T.S.Baskaran for R 2

JUDGMENT

(Judgment of the Court delivered by N. ANAND VENKATESH, J)

The present Original Side Appeal has been filed by defendants 1 and 3 in the suit aggrieved by the preliminary decree of partition passed by the learned single Judge in C.S.No.83 of 2011, dated 24.02.2017.

2.The short facts that are necessary to decide this appeal are ; the parties to the suit in C.S.No.83 of 2001 are the sons of late G.Tejmull Surana. The first respondent in this appeal as plaintiff filed the suit claiming for the relief of partition and to allot 1/4th share in the suit schedule properties. The case of the plaintiff is that the "A" schedule property belongs to the father of the plaintiff and defendants.

That apart there are HUF incomes, rental income, investment in shares, sundry debtors, cash in hand and bank which was described as schedule "B" to the plaint. Apart from that, the plaint also consist of schedule "C" which deals with certain other movable properties. It is the case of the plaintiff that after the demise of their father and mother, each of the brothers are entitled to 1/4th share in the suit properties and since his brothers were not co-operating to mutually partition the properties, the present suit was filed claiming the relief of partition.

3.The contesting defendants 1 and 3 filed a written statement wherein they did not deny the relationship between the parties and they also did not deny the fact that each of the brother is entitled to 1/4th share in the suit properties. The only effective defence that was taken by the appellants as defendants is that there are certain gold and silver articles that belongs to the HUF and their mother, which has not been brought within the preview of the suit and therefore the suit is bad on the ground of partial partition.

4.Even during the pendency of the suit the appellants filed A.No.2702 of 2013 to amend the plaint and add schedule "D" showing gold jewels and silver articles, which according to them should also form part of the partition suit. In this application an order was passed by the learned single Judge on 10.09.2013 appointing an Advocate Commissioner to break open 2 bureaus in which it was expected that the gold jewellery and similar articles will be available. Pursuant to the order, the Advocate Commissioner on completion of his job, filed a report to the effect that no gold items or jewels and no silver articles were found in any of the bureaus.

5.On the side of the plaintiff Exs.P-1 to P-19 was marked and Exs.C-1 to C-4 were marked through Court. The plaintiff examined himself as PW-1 and defendants 1 and 2 examined themselves as DW-1 and DW-2.

6.The learned single Judge on a detailed consideration of the facts and circumstances and also on appreciation of the oral and documentary evidence decreed the suit as prayed for and a preliminary decree was passed to the effect that each of the parties to the suit are entitled to 1/4th share in the suit properties.

7.While deciding the suit, a specific issue was framed with regard to the objection raised by the appellants on the ground of partial partition and the same was dealt with in detail. The learned single Judge after elaborately considering all the materials found that no such gold jewellery or silver articles were actually available. For this purpose, the learned single

Judge relied upon the evidence of the 2nd defendant who was examined as DW-1 and also the evidence of the 3rd defendant who was examined as DW-2. The learned Single Judge also took into consideration the order passed in A.No.2702 of 2013 and the report filed by the Advocate Commissioner. After elaborately considering all these materials, the learned single Judge came to the conclusion that no such gold jewellery or silver articles are available as claimed by the appellants herein and therefore the suit is not bad on the ground of partial partition.

8.The learned counsel for the appellants contended that the suit ought to have been dismissed on the ground of partial partition. To substantiate his arguments, the learned counsel brought to our notice the pleadings in the plaint at paragraph 8 which reads as follows:

"The moveable properties left behind by late Smt.Jawari Kumari Surana, except her gold and silver articles which she had already divided and given to the parties to the suit in June 2010, which are available for partition are detailed in Schedule "C" hereunder in which the plaintiff is entitled to 1/4th share. The defendants are liable to render accounts for the same and give plaintiff his 1/4th share of the same."

9.The learned counsel for the appellants also brought to our notice the evidence of PW-1 in which during cross examination, the plaintiff has stated as follows:

"I have no idea about the total quantum of gold jewels and silver articles available for partition till my mother's death. My mother during her lifetime did not partition the jewels. There was no partition regarding the silver articles."

10.The learned counsel for the appellants also brought to our notice Exs.P-6 to P-9 which are the Profit and Loss Account for the years 31.03.2007 and 31.03.2008 of the father and mother in which there is mention about the availability of gold and silver.

11.The learned counsel for the appellants by pointing out to all these materials would strenuously contend that the plaintiff was not clear as to whether gold and silver items were actually divided by the mother and given to all the parties concerned and there is contradiction between the averment made in the plaint and the statement made as a witness.

12. We do not find any strength in the arguments put forth by the learned counsel for the appellants. Exs.P-6 to P-9 pertained to the years 2007-2008 when the mother was alive. Even though these exhibits show about the availability of gold and silver articles, there is no material to show as to what happened to these articles subsequent to 2008. The evidence of DW-1 makes it clear that the mother has given all the gold ornaments, silver articles to all the legal heirs during June 2010. Therefore these gold and silver articles covered in Exs.P-6 to P-9 was already divided and given to all the children by the mother.

13. It is also relevant to point that from the evidence of DW-2 it is clear that the plaintiff was not residing in the suit property and that DW-2 was only residing along with his mother in the second floor of the 'A' schedule property and was taking care of the mother. DW-2 further stated that his mother is an illiterate and can only sign in Hindi. The entire evidence of DW-2 would go to show that he was only managing the affairs of the suit property and was taking care of the mother but he did not even know the particulars of the moveable properties that were available with the mother at the time of her death. DW-2 in his evidence would further state that there was a common auditor for the father, mother, for himself and his elder brother. When that is the case, DW-2 could have easily filed the income tax returns for the subsequent years after the mother's death. An opportunity was also given to DW-2 to produce the income tax returns of the father and mother for the subsequent years but he failed to produce any of those returns. Therefore, except for making a bald allegation that there are gold and silver articles available for partition, the appellants were not able to substantiate the said defence with any material. In other words there is not an iota of evidence to show that gold and silver articles are available with the plaintiff and/ or the other defendants.

14. We have also taken into consideration the fact that the plaintiff has added schedule 'B' and schedule 'C' in the list of suit properties which are moveable properties and if really gold and silver articles are available, it would have formed part of the list of the moveable properties.

15. A partial partition may be as regards persons who are members of the family or as regards properties which belong to it. It is a settled principle of law that a suit for partition is liable to be dismissed on the sole ground that the plaintiff has not added all the properties available, in the suit. In other words omission to include all the family property is fatal in a suit for partition. In order to apply this

principle, the property said to have been omitted to be added must be actually available. Any party who takes partial partition as a defence must be able to establish about the availability of the property by placing some material before the Court. Since in a suit for partition, the traditional understanding of the parties as plaintiffs and defendants will not apply, even a party arrayed as a defendant can file a petition to amend the plaint by adding the parties who have been omitted or adding properties which have been left out. The concept of dominus litus will not apply in a suit for partition.

16.The appellants have in fact perfectly understood this concept and have made attempts to amend the plaint by filing A.No.2702 of 2013 for adding schedule ''D'' to the plaint showing the gold and silver articles. But however, no such gold or silver articles were available or identified even after an Advocate Commissioner was appointed by this Court to break open the 2 bureaus and find out the articles available inside it. Except a bald allegation made by the appellants, there are absolutely no materials to establish the availability of gold and silver articles as claimed by the appellants. The concept of partial partition can never be applied where the very existence/availability of the property is in question. After all a property (immovable and movable) can be partitioned only based on its physical availability and not in vacuum.

17.We do not find any ground to interfere with the well considered judgment and decree of the learned single Judge and we confirm the judgment and decree of the learned single Judge by dismissing this Original Side Appeal. However, in the facts and circumstances of the case, there shall be no order as to costs. Consequently, the connected application is closed.

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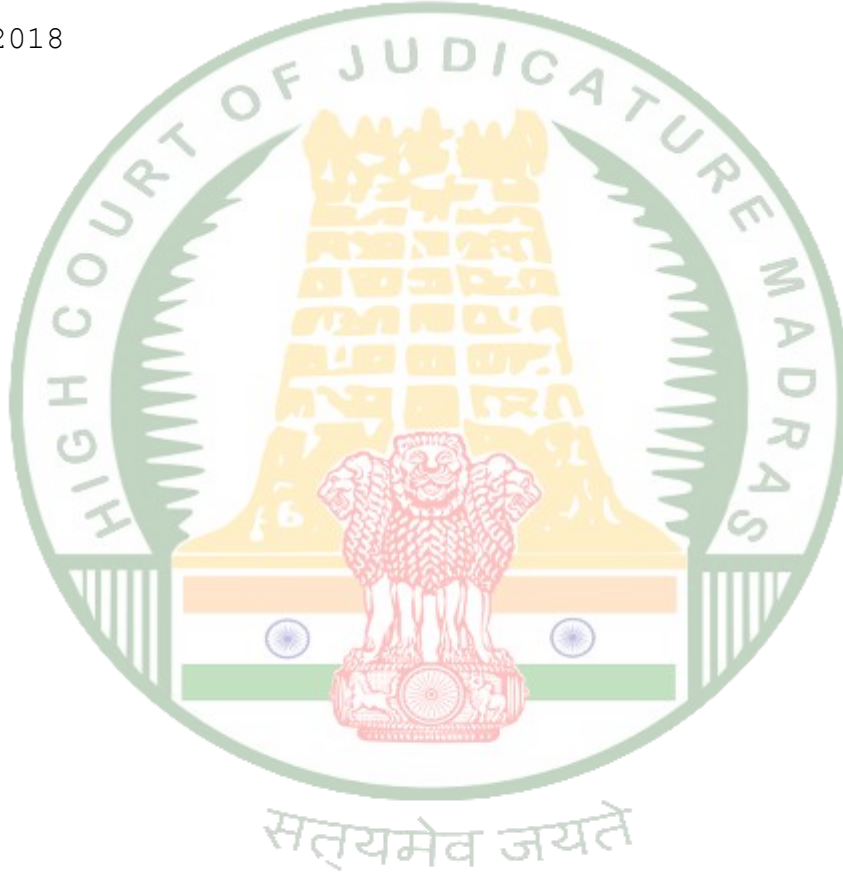
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Judgment in
O.S.A.No.127 of 2018

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