

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 18.12.2017

PRONOUNCED ON:04.01.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A. No.237 of 2001

Jothi Ramalingam ... Appellant/Appellant/2nd
respondent/2nd Plaintiff
Vs.
1.Kumarasamy Pillai ... 1st Respondent/1st
Respondent/Petitioner/1st Defendant
2.Shanmugam ... 2nd Respondent/2nd Respondents/
1st Respondent/1st Plaintiff

Prayer: Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree made in A.S.No.56 of 1998 dated 30.08.2000 on the file of the Additional Sub-ordinate Judge, Nagapattinam, confirming the fair and decreetal order dated 23.04.1997 for preliminary decree for partition in I.A.No.1241 of 1996 in O.S.No.87 of 1978 on the file of the District Munsif's Court, Nagapattinam.

For Appellant : Mr.T.A.Shahul Hameed

For R1 : No appearance - Set exparte

For R2 :Mr.M.Nirmalkumar

J U D G M E N T

This second appeal is directed against the judgment and decree dated 30.08.2000 passed in A.S.No.56 of 1998 on the file of the Additional Sub-ordinate Court, Nagapattinam confirming the fair order and decreetal order dated 23.04.1997 passed in I.A.No.1241 of 1996 in O.S.No.87 of 1978 on the file of the District Munsif's Court, Nagapattinam.

2. The parties are referred to as per the rankings in the trial court.

3. I.A.No.1241 of 1996 in O.S.No.87 of 1978 has been laid

by the first defendant for allotting 1/12th share in the properties by way of a preliminary decree.

4.The case of the petitioner/first defendant in brief is that in O.S.No.87 of 1978, the preliminary decree for partition of the first plaintiff's 1/4th share was passed on 17.11.1978 and in the earlier suit in O.S.No.291 of 1971, order has been passed allotting 4/9th share in favour of the petitioner in the properties concerned and accordingly the court has ordered that the party should work out their portions in the allotment of properties which remain excluded in the earlier suit in O.S.No.291 of 1971 and as according to the petitioner, after the death of the father Chidamparampillai, he derives 1/12th share in the rest of the properties mentioned in the petition and accordingly has come forwarded with this application to determine his said share by way of a preliminary decree.

5.The case of the plaintiffs' in brief is that the petitioner is not entitled to seek the allotment of 1/12th share in the properties and the second plaintiff has been given the share of Chidambarampillai under the gift settlement deed dated 29.11.1973 and further for working out the same, second plaintiff has filed the suit in O.S.No.16 of 1995 and the same is pending and therefore the petitioner is not entitled to seek allotment of 1/12th share in the properties and hence the petition is liable to be dismissed.

6.Both the Courts have held that the petitioner/first defendant is entitled to 1/12th share in the properties mentioned in the petition and assailing the same, the present second appeal has come to be laid.

7.At the time of admission of the second appeal the following substantial questions of law were formulated for consideration.

(1)Whether the judgment and decree of the first appellate dated 30.08.2000 in A.S.No.56 of 998 is liable to be set aside for violation of Order 41 Rule 31 CPC (as laid down in (1999) I MLJ 731 and (1997) ICTC 559 as only one issue which reads: Whether the fair order and decreetal order passed in I.A.No.11241 of 1996 with regard to the petitioner/first defendant's claim for partition is not correct? " has been framed?

(2)Whether an application for preliminary decree in a partition suit can be entertained, more that twelve years after finality of the decree, in the Second appeal?

(3)Whether the claim for partition can be acceded to when a subsequent suit for partition is pending between the parties?

(4)Whether a decree for partition will become incapable of execution by execution of a Will and Settlement deed by one of the branches?

8.The learned counsel for the appellant placed reliance upon the decisions reported in 1999 (1)MLJ page 730 [S.Subramanian Vs. Saraswathiammal and others] and 1997 (2)MLJ page 57 [K.M.M.Kadar Hussai Vs. O.M.R.Selvaraj and others]. The principles of law outlined in the above decisions are taken into consideration and followed as applicable to the case at hand.

9.Chidambarampillai is the father of the petitioner/first defendant and the first plaintiff. The second plaintiff is the son of the first plaintiff. The suit in O.S.No.87 of 1978 has been laid for partition by the plaintiffs. Earlier to that, another partition suit was laid in O.S.No.291 of 1971 and in the said suit, the first defendant had been allotted the 4/9th share in the properties concerned. With reference to the rest of the portions, the suit in O.S.No.87 of 1978 has come to be laid and accordingly the preliminary decree for partition has been passed as regards the 1/4th share of the first plaintiff. Claiming that on the death of Chidambarampillai, the father of the petitioner/first defendant, he has become entitled to 1/12th share in the properties concerned, the I.A.No.1241 of 1996 has come to be laid by the petitioner/first defendant. The only resistance put forth by the plaintiffs' is that inasmuch as the Chidambarampillai had gifted his properties by way of a settlement deed dated 29.11.1973 in favour of the second plaintiff, the petitioner /first defendant is not entitled to obtain 1/12th share. In this connection, the institution of the suit in O.S.No.16 of 1995 is projected by the plaintiffs. However, when it is seen that the judgment and decree passed in O.S.No.87 of 1978 had been confirmed by this Court vide Ex.A3, it is seen that as rightly determined by the Courts below, the second plaintiff cannot claim any right over the property of Chidambarampillai under the alleged settlement deed and accordingly, it is seen that as rightly determined by the Courts below, the petitioner/first defendant would be entitled to obtain 1/12th share in the properties as one of the heirs of Chidambarampillai. Merely because the suit in O.S.No.16 of 1995 is pending, that cannot be the sole factor to reject the claim of 1/12th share in the properties concerned by the petitioner /first defendant. It is thus found that the Courts below have rightly gone into the issue as to the entitlement of the shares

to which the parties are entitled to and when the same had already been confirmed by this court by way of the second appeal, the mere pendency of O.S.No.16 of 1995 would not to be a stumbling block for the petitioner /first defendant to claim his due share in the properties left behind by Chidambarampillai and in such view of the matter, I do not find any substantial question of law for disturbing the findings of the Courts below in upholding the entitlement of the petitioner/first defendant's 1/12th share in the properties concerned.

10. Considering the fact that the first appellate court has gone into all the issues involved in the matter, by formulating the main point for determination, it is seen that no serious prejudice has been caused to the plaintiffs, with reference to the failure of the first appellate court in not formulating necessary points separately for determination. It is further found that the first appellate court has considered the entire gamut of the issues pending between the parties in the matter and accordingly it is thus seen that the findings of the Courts below cannot be interfered with in any manner. When the application laid by the plaintiff is found to be in continuation of the decree already passed in the suit, it is seen that there is no question of limitation and equally it is seen that when the petitioner's entitlement to claim share in the properties concerned has been uphold by this court, even though the earlier suit for partition has been laid in O.S.No.291 of 1971, it is seen that the petitioner cannot be precluded from claiming his due share by way of a preliminary decree. When the issue of the entitlement of the petitioner to the properties of Chidamabarampillai had been already determined by the courts concerned against the plaintiffs, it is found that the plaintiffs cannot be allowed to stifle the case of the petitioner/first defendant by projecting the pendency of the suit in O.S.No.16 of 1995. The substantial questions of law formulated are answered accordingly against the plaintiffs and in favour of the petitioner/first defendant.

11. In conclusion, the second appeal fails and is accordingly dismissed with costs. Connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar (CS III)

//True copy//

Sub Assistant Registrar

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To

1.The Additional Sub-ordinate Judge's Court,
Nagapattinam.

2.The District Munsif's Court,
Nagapattinam.

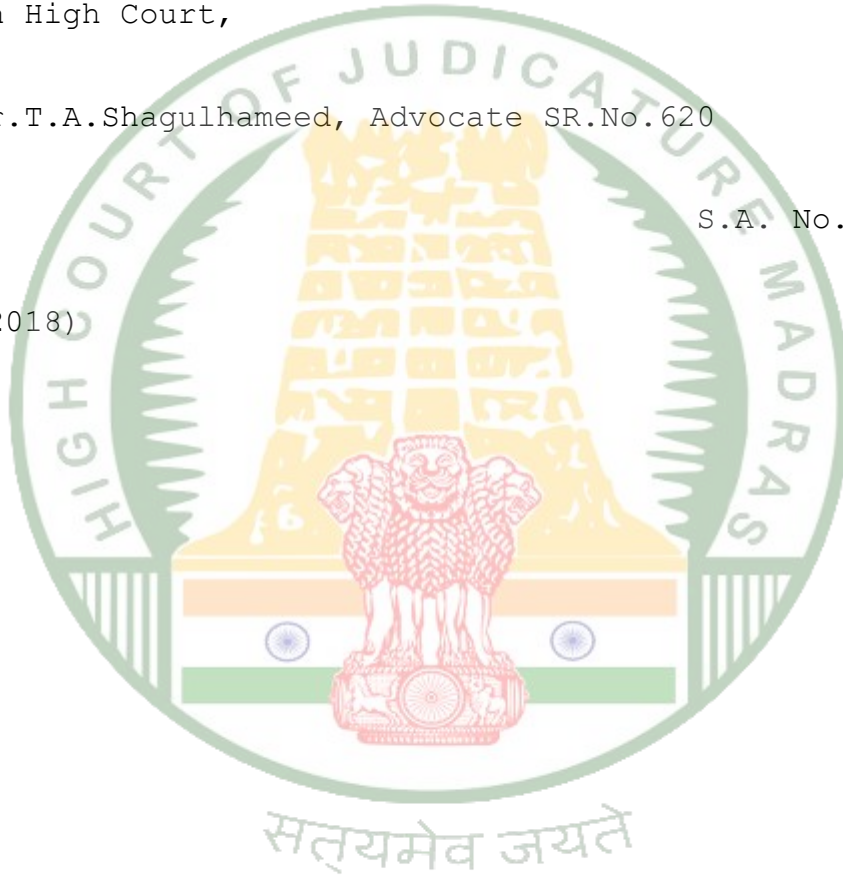
Copy TO

The Section Officer,
VR Section High Court,
Madras.

+1cc to Mr.T.A.Shagulhameed, Advocate SR.No.620

S.A. No.237 of 2001

SSD(CO)
GN(19/02/2018)



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