

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.12.2019

Coram

The Hon'ble Mr. Justice M.M.SUNDRESH
and
The Hon'ble Mr. Justice KRISHNAN RAMASAMY

A.S.No.256 of 2003

1.Srinivasan
2.Kannamani

..Appellants/Defendants 1 & 2

Vs

1.Meenakshi Ananda
2.Selvakumaran
3.Ramakrishnan
4.Jayalakshmi
5.P.Sriprakash
6.Vijayashri
7.Jayakumar
8.R.Jayasankar

..Respondents 1 to 3/
plaintiffs 1 to 3

.. Respondents 4 to 8/
Defendants 3 to 7

Appeal filed under Section 96 r/w Order XLI Rule 1 of CPC against the judgment and preliminary decree dated 29.08.2002 in O.S.No.173 of 1998 on the file of the Principal Subordinate Judge, Pondicherry.

For Appellants ... Mr.Ashoka Pathy
for Mr.D.Saravanan

For Respondents.. Mr.Dalit Tiger C.Ponnusamy
for R1, R2, R7 and R8
Mr.P.Srinivas for R5 and R6
R3 and R4 - died

JUDGMENT

(Judgment of the Court was delivered by M.M.SUNDRESH, J.)

The unsuccessful defendants 1 and 2 in the suit filed for partition and separate possession on the file of the Principal Sub Court, Pondicherry in O.S.No.173 of 1998 are the appellants.

2.The suit property originally belonged to one Narayanaswamy, who is the great grandfather of the first appellant. The second appellant is the mother of the first appellant. After the death of the said Narayanaswamy in the year 1920, it devolved upon his son Srinivasaperumal. The said Srinivasaperumal (since deceased) had three sons and a daughter. The appellants are the legal representatives of the deceased Adinarayanan (died in 1976), Anand Narayanan (died in 1972), Ramakrishnan (died during the pendency of the appeal) and Jayalakshmi (third defendant).

3.The appellants are the son and wife of the deceased Adinarayanan. The plaintiffs are the son and wife of the deceased Anand Narayanan. Ramakrishnan, who is the third plaintiff, died as a bachelor. Jayalakshmi, who is the third defendant, has got a son and daughter, who have been arrayed as defendants 4 and 5.

4.Before the Trial Court, the following issues have been framed:

(1)Whether the suit is bad for misjoinder of 6th and 7th defendants being the tenants and unnecessary parties to the suit?

(2)Whether the suit is bad for not seeking partition of all immovable properties of the joint family, by omitting to include the schedule of property shown in the written statement of the first and second defendants? (or)

(3)Whether the property shown in the written statement has been already sold on 10.03.1975 to one T.R.Selvarangampillai which is binding on first and second defendants and hence not available for partition?

(4)Whether the 1st and 2nd defendants are not in possession of the property shown in the written statement? If so whether the valuation or their claim in their written statement is not correct and hence they should have affixed court fees on the market value of their share?

(5) Whether third defendant is entitled to seek for partition and separate possession of one fourth share in the suit property?

(6) Whether the plaintiffs are entitled for the preliminary decree for partition and allotment of 2/3 share in the item no.1 and 2 of 'B' schedule property and for separate possession?

(7) Whether 1st and 2nd defendants are entitled for the preliminary decree for partition and allotment of 1/3 share of the property described in the schedule of their written statement and in the item 1 and 2 of the 'B' Schedule property mentioned in the plaint and for separate possession?

(8) Whether the 3rd defendant is entitled for the preliminary decree for partition and for allotment of 1/4 share in the suit properties and separate possession?

(9) To what relief is the parties to this suit entitled?

5.The plaintiffs examined themselves as P.Ws.1 and 2 and marked Exs.A1 to A13. On the side of the defendants, evidence has been let in through D.Ws.1 to 5 and Exs.B1 to B17 have been marked.

6.The Trial Court, found that the deceased Narayanaswamy was the owner of Item 3 of the B Schedule property and his son Srinivasaperumal (since deceased) was the owner of Item 2 of B Schedule property. The suit is laid for partition and separate possession. Accordingly, a preliminary decree was passed in favour of the plaintiffs and defendants 1 and 2 with respect to B schedule property for items 1 and 2 for partition and separate possession of 2/3 share to the plaintiffs and 1/3 share to defendants 1 and 2. The counter claim of the third defendant was rejected. The counter claim made by the appellants (defendants 1 and 2) was also not considered. Challenging the same, the present appeal has been filed.

7.Learned counsel appearing for the appellants submitted that though there is no grievance with respect to the shares allotted but with respect to a portion of item 1 of the B Schedule property, the Trial Court has committed an error in not allowing the counter claim for the same. It is further submitted that the first appellant is entitled to legatum right as per the customary French Code. Therefore, the very alienation by the son of Srinivasaperumal including the father of the first appellant by registered sale deed dated 10.03.1975 cannot be approved as

they do not have any right of alienation. Thus the share of Adinarayanan ought to have been devolved on the first appellant. Therefore, to that extent, the judgment rendered by the Trial Court requires interference.

8. Learned counsel appearing for respondents 1 and 2/plaintiffs 1 and 2 submitted that no such plea has been raised specifically either in the written statement or before the arguments in the suit. In any case, the alienation has taken place with respect to the specific portion in Item 1 of the B Schedule as early as 10.03.1975. The said document has been written by the father of the first appellant. The said property has also not been included in the suit. The purchaser has also not been arrayed as party defendant. Therefore, the appeal deserves to be dismissed.

9. We are only concerned with the counter claim made by the appellants. The said counter claim has been made with respect to a portion of Item 1 of the B schedule property sold way back on 10.03.1975 by way of registered sale deed by the children of the deceased Srinivasaperumal. This includes the father of the first appellant also, who died in the year 1976. That is the reason why this property which has been sold on 10.03.1975 has not been included in the suit schedule. Now, the appellants have not raised any plea with respect to the legatum right in the written statement except by saying that there is no power of alienation. That is exactly the reason why no specific issue has been framed by the Trial Court. Even otherwise, we do not find any merit in this appeal. No attempt has been made to include the property which has been sold in the year 1975. Similarly, no attempt has been made to set aside the sale deed nor they arrayed the purchaser as party defendant. It is not as if the appellants were not aware of the alienation. Pursuant to the sale deed dated 10.03.1975, the purchaser has been in possession and enjoyment of the said portion. Moreover, the matter has been crystallised as of now that between Customary French Code and the Hindu Succession Act, the latter would prevail. Therefore, looking from any perspective, the contention raised by the learned counsel for the appellants cannot be countenanced. As no plea has been raised, this appeal stands dismissed. No costs.

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10.We find that the suit has been filed way back in the year 1998. Now only the proceedings initiated for the preliminary decree has come to an end. Therefore, we direct the concerned jurisdictional Court to see to it that final decree proceedings are concluded within a period of six months from the date of receipt of a copy of this judgment.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

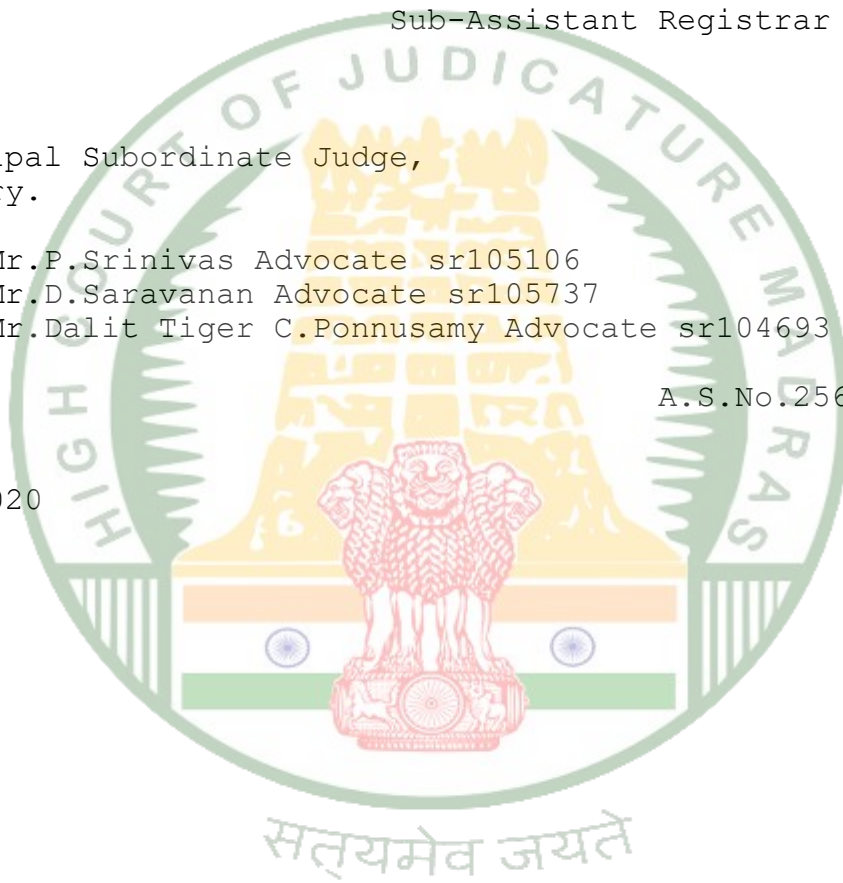
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To

The Principal Subordinate Judge,
Pondicherry.

+1 cc to Mr.P.Srinivas Advocate sr105106
+1 cc to Mr.D.Saravanan Advocate sr105737
+1 cc to Mr.Dalit Tiger C.Ponnusamy Advocate sr104693

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