

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.06.2019

CORAM

THE HONOURABLE MR. JUSTICE N.SESHASAYEE

S.A.No.1262 of 2008

and

M.P.No.1 of 2008

1.Ma.Si.Balan

2.Ma.Si.Murugesan (Died)

3.Ma.Si.Arumugam

4.Ma.Si.Panneer Selvam

5. Rani

6. Padma

7. Anbu

8. Arivu

... Appellants / Defendants

(Appellants 5 to 8 brought
on record as legal representatives
of the deceased 2nd Appellant vide
Order of Court dated 03.06.2019
made in C.M.P.Nos.9368 to
9370 of 2018 in S.A.No.1262/2008.

versus

Gnana Soundari

... Respondent / Plaintiff

Prayer: Second Appeal is filed under Section 100 of code of Civil Procedure against the Judgment and Decree dated 28.02.2008 in A.S.No.85 of 2007 on the file of the Sub-Court, Tirupattur, Vellore District reversing the Decree and Judgment dated 18.07.2007 in O.S.No.316 of 2004 on the file of the District Munsif Court, Tirupattur, Vellore District.

For Appellants : Mr.V.Jeevagiridharan

For Respondent : Mr.V.Raghavachari

JUDGMENT

The plaintiff has laid a suit for partition against her brothers. The trial Court dismissed it, whereas the First Appellate Court reversed it and granted a decree to the plaintiff. Hence, the defendants have preferred this appeal.

2. The brief narration of facts as disclosed in the pleadings may be now stated:

a) The plaint schedule consists of two items of properties. The first item of property is described as a plot with three storied building. The second item of property is a site measuring 100' X 30' in Town Survey No.326 with a R.C.C building. According to the plaintiff, the property belonged to her mother Manickam Ammal and on whose death, the property devolved equally on her four sons, who are the defendants herein and herself. So far as the second item of property is concerned, the site therein belonged to Tiruppattur Town Vaisya Sangam, that her mother Manickam Ammal had obtained the same on lease and had been doing some business therein. The plaintiff along with her husband and son were doing business in a separate portion in the said property. Therefore, she claims partition of the items-1 and 2.

b) The defendants had pleaded that item-1 property was originally purchased by their paternal grand father Govindasamy Gounder, on 25.03.1917, that he had four sons namely Appadurai, Duraisamy, Venu, Srinivasan. Of the four, Duraisamy had died earlier whereinafter his widow had executed a Relinquishment Deed on 17.06.1942 in favour of Appadurai, Venu and Srinivasan and their mother Kunthiammal. Later, on 17.05.1955, the brothers of the deceased Duraisamy partitioned the property under Ext.B-2, in which Srinivasan was allotted item-1 property. In item-1 property, there was an old dilapidated house aged around 100 years, and subsequently it was demolished fully, and the property remained as a vacant plot. The plaintiff was given in marriage some 40 years prior to the suit and whatever share she had, it was given to her in terms of money. Subsequently, during the life time of their mother Manickam Ammal, all the four sons have partitioned the property. This had happened some 35 years prior to the suit. Ever since the defendants have been enjoying the property. While so, some time in 1976, all the defendants have jointly put up a three storied building in item 1 property, and on 12.11.1978, they have also conducted a house warming ceremony. At no point of time the plaintiff has objected.

- Turning to item-2 the plot was obtained in ground lease by Srinivasan, the father of the parties herein, some time in 1956, and he had been doing some business there. After his demise, in 1958, the mother of the parties had put up a thatched-roofed construction and was running a restaurant. After her demise, the defendants 1 and 2 had obtained a fresh ground lease from the Vaisya Sangam and they have put up some structure and had been enjoying different portions

of the building and doing independent business therein. While so, these defendants permitted the husband of the plaintiff to use the portion of a building in Shop No.62 as a godown for their business. The plaintiff has no right in the property and not entitled to partition.

3.1 Before the trial Court, both sides adduced oral and documentary evidence, and the trial Court has relied exclusively on the oral testimony of the plaintiff, more particularly her admission to the effect that the defendants have put up a structure even in mid 70's that she was invited to the same and at no point of time she has raised not purchased.

3.2 Turning to the 2nd item, it again relied on the evidence of the plaintiff. An attempt was made before the trial Court to build a case under the Central Act, 39 of 2005 to the effect that the plaintiff indeed has acquired right as a coparcener, and hence she has right of partition. The trial Court did not address the issue. The First Appellate Court reversed it and held that the Central Act, 39 of 2005 would apply and granted a decree.

3.3 Aggrieved by the same, the defendants have come before this Court with this Second Appeal.

4. This Second Appeal was admitted on the following substantial questions of law:

a) Whether the Plaintiff is not barred by the provisions of Hindu Succession Act from claiming partition of the dwelling house?

b) Whether the Plaintiff has got any right of partition in item No.2 of the suit properties, the leased property, in which the superstructure is solely belong to the first defendant?

5. The learned counsel for the appellants argued that even going by the case of the plaintiff, the right of partition has accrued earlier to Act 39 of 2005, and that the amended Section 6 should not be granted a retrospective effect to pending litigation. Turning to the item 2 property, since the defendants are only lessee of the Vaisya Sangam in its absence the party array, unity of lease cannot be disintegrated. Secondly, since the plaintiff has deposed that she is a tenant under the defendants, she cannot claim any right of partition over item-2.

6. Per contra, the learned counsel for the respondent would argue that much water has flown under the bridge for the defendants to contend that Act 39 of 2005 would not apply. If it is proved that the partition had not taken place, and if the

preliminary decree has not become conclusive, necessarily Sec.6 of the Hindu succession Act as amended Vide Act 39 of 2005, would apply, unless the case falls within the proviso to that provision. So far as the 2nd item goes, a leasehold right is a heritable right and will not affect the right of the lessor and hence he need not be in the party array.

7. This Court is not impressed with the reasoning of the First Appellate Court. Here is the case where the plaintiff has scheduled a plot with a three storied building as the suit property, admits that this building was put up as early as in 1975, and that the defendants are in exclusive possession thereof. This Court finds that the reason or element of disproving the plaintiff appeared to have permitted. This Court does not appreciate describing the property wrongly. Some discussions found in the judgment of the Appellate Court, wherein, it relies on Section 23 (since deleted) that Hindu Succession Act to hold that a daughter would be entitled to a share in the dwelling house. But then, she has not chosen to mention to whom it belonged to. If there was an ancestral residential property in which one of the coparcener resides, Section 23 of the Hindu Succession Act as it stood before its repeal in 2002 would go to deny the daughter a right of partition in the dwelling house. Admittedly, that dwelling house has gone, and what now remains has been entirely put up by the defendants. This Court cannot grant a decree for partition of the building put up by her brothers.

8. Turning to second item, in her testimony the plaintiff would say that she is paying the rent to the appellants for the portion that she occupies, which implies that she was only a tenant of her brother and a tenant cannot claim partition of the property belonging to the lessor.

9. On both the courses, this Court finds that the defendants are bound to succeed.

10. Accordingly, this Second Appeal is allowed and the Judgment and Decree dated 28.02.2008 in A.S.No.85 of 2007 on the file of the Sub-Court, Tirupattur, Vellore District is set aside. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

To

1. The Sub-Court,
Tirupattur,
Vellore District.
2. The District Munsif Court,
Tirupattur,
Vellore District.
3. The Section Officer,
V.R.Section,
High Court, Madras.

+1 cc to M/s.V.Jeevagiridharan,advocate,sr.53898

+1 cc to M/s.V.Raghavachari, Advocate,sr.53874.

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