

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.01.2019

CORAM

THE HONOURABLE MR. JUSTICE N.SESHASAYEE

S.A.No.357 of 2008

and

M.P.No.1 of 2008

1. S.N.Meiyyarasu

2. Kiruthika

(1st and 2nd appellants declared
as major represented by their
Guardianship Vide Order of Court

dated 02.01.2019 made in

C.M.P.No.22484 of 2018

in S.A.No.357 of 2008 (NSSJ)

... Appellants/Respondents 1 & 2/Plaintiffs

versus

1. Thilagavathi

2. Sudha

3. Samiyathal ... Respondents 1 to 3/Appellants 1 to 3/
2 to 4 Defendant

4. S.Nagarajan ... 4th Respondent/3rd Respondent/
1st Defendant

Prayer: Second Appeal is filed under Section 100 of code of Civil Procedure against the Judgment and Decree dated 18.07.2007 made in A.S.No.23 of 2007 on the file of the Additional District Court / Fast Track Court No.I, Erode reversing the Judgment and Decree dated 05.09.2006 made in O.S.No.357 of 2004 on the file of the II Additional Sub-Court, Erode.

For Appellants : Mr.D.Balachandran

For Respondents: Mrs.S.Varsha [For R2]
No Appearance [For R1, R3, R4]

JUDGMENT

The plaintiffs in a suit for partition in O.S.No.357 of 2004 on the file of the II Additional Sub-Court, Erode are the appellants herein. The suit is laid for partition. The trial

court had decreed the suit whereas in an appeal preferred by the defendants 2 to 4, plaintiffs were non-suited.

2. Heard the learned counsel for the appellants. This case falls within the narrow campus and hence facts would be narrated only to the extent required as furnished hereunder:

- There are five items of suit properties. According to the plaintiffs, they were the ancestral properties in the hands of a certain Subramaniam. Subramaniam died on 03.03.1993 and was survived by his son, the 1st defendant and his daughter, the 2nd defendant. The plaintiffs were born to the 1st defendant and a certain Thilagavathi @ Sivagami, (she and the 2nd defendant have the same name and hence should not be confused). Plaintiffs' parents got separated in due course of time.
- The suit is laid for partition by the mother of the plaintiffs on the allegation that the property is an ancestral property, in which their father, the 1st defendant had half share, and that they acquired right in their father's half share. As to the other half share, since Subramaniam, plaintiffs' grandfather died in 1993, his half share also devolved on their father the 1st defendant, who obtained 1/3 share in Subramaniam's share of the property and accordingly, laid a suit for partition.

3. The 1st defendant remained absent and was set exparte and the suit was contested by the other defendants, of whom the written statement was filed by the 3rd defendant and the same was adopted by the 2nd and 4th defendant. She would contend, that under Ext.B16 dated 24.05.2004, she had purchased 1.50 ares in item No.1 of the suit property from the 2nd defendant. The 2nd defendant in turn traced her right to the property she had sold under Ext.B16 to a partition deed dated 12.12.1996 which is available on record as Ext B-1. It was further pleaded that the 4th defendant, one of the sharer to the property is not a party to the partition deed, but has attested the said document with full knowledge about its contents.

4.1 When the matter went for trial, the trial court declined to accept Ext.B1 partition deed as a valid document, and rejected the same and choose to decree the suit.

4.2 In an appeal preferred by the defendants 2 to 4, the First Appellate Court accepted the findings of the trial court on the validity of Ext.B1 partition deed, yet deviated there from to hold that the share of the 3rd defendant could be adjusted against the shares that could be allotted to the 2nd defendant. However, it proceeded to set aside the entire decree instead of

modifying the decree of the trial Court. Hence, the appellants have preferred this Second Appeal.

5. This appeal is not yet admitted and heard both sides. The only substantial question of law that this Court now requires to consider is: Whether the approach of the First Appellate Court in dismissing the suit is in entirety is consistent with its finding?

6. As already stated, there are five items of suit properties and all are said to be agricultural properties. Of this, item No.1 alone is in controversy since the 3rd defendant has purchased 1.50 acres from the 2nd defendant under Ext.B16 sale deed dated 24.05.2004. Inasmuch as none of the defendants have chosen to file any cross-objection, it is evident that they have admitted the findings of the court below as to the validity of Ext.B1 partition deed dated 12.12.1996. Both sides admitted that the properties litigated were ancestral properties in the hands of Subramaniam. If so, the 2nd defendant as the daughter, can claim only 1/6 share out of one half share that would be notionally allotted to Subramaniam on his death, in all the five items of suit properties. Since the 2nd defendant had sold a specific plot of 1.50 acres in item No.1, it is necessary that she may be allotted the same plot of land that she has purchased to the extent possible subject to other equities affecting the partition, and the trial Court during the Final-decree proceedings may even consolidating the 2nd defendant's 1/6 share in all the five items of properties, if it becomes necessary, on the basis of a proper evaluation of all the properties, for adjusting the equities in favour of the 3rd defendant.

7. So far as the plaintiffs are concerned, they would be entitled to seek their shares in the 1st defendant's share in the ancestral property. In otherwise they would be entitled to 1/6 share each in 1st defendant's share in the ancestral property and nothing more. In this regard, the trial Court's decree suffer from an error as it proceeded to allot the shares in 1st defendant's share in Subramaniam's one half share. To that extent, the decree of the trial court also requires to be modified.

8. In the end, this Second Appeal is partially allowed and the preliminary decree for 1/6 share in the suit property alone has been given. So far as the 1st item is concerned, plaintiff's

share is directed to be worked out in the portion not covered by Ext.B16 sale deed. So far as the 3rd defendant's right is concerned, it has already been explained in paragraph 6 above and therefore, it does not require a specific direction again. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

ssn

To

1. The Additional District Court
/ Fast Track Court No.I,
Erode.
2. The II Additional Sub-Court,
Erode.
3. The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to M/s.S.Varsha, Advocate Sr.7397
+1cc to Mr.D.Balachandran, Advocate Sr.67010

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