

IN HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.02.2019

CORAM

THE HONOURABLE MR.JUSTICE M.M.SUNDRESH
AND
THE HONOURABLE MR.JUSTICE C.SARAVANAN

A.S.No.429 of 2018
and C.M.P.No.11206 of 2018

J.Sankar Parmeswaran ... Appellant
vs.
Chitradevi Respondent

PRAYER : Appeal Suit is filed under Section 96 of C.P.C. R/w Order 41 Rule 1 CPC to set aside the Judgment and decree dated 24.01.2017 made in O.S.No.157 of 2014 on the file of the III Additional District and Sessions Judge, Coimbatore

For Appellant : Mr.Ramamoorthy
For Respondent : M/s.S.Parathasarathy
Senior Counsel for
Mr.P.Dinesh Kumar

J U D G M E N T

(Judgment of the Court was delivered by C.SARAVANAN,J.)

The present appeal is directed against the judgment and decree dated 24.01.2017 in O.S No.157 of 2014 on the file of the III Additional District and Sessions Judge, Coimbatore. The appellant and the respondent are brother and sister.

2. Respondent/plaintiff had filed the above suit for partition and claimed half a share in schedule 'A' and 'B' properties. The said suit was unsuccessfully contested by the appellant herein. By the impugned judgment and decree of the trial Court has granted the relief to the respondent/plaintiff.

3. Aggrieved by the same, the appellant/defendant herein has filed the present appeal and seeks to assail the same primarily on the ground that the said suit for partition was barred by law.

4. Both the appellant and the respondent are the children of late Shri.Jumbulingam and late Smt.J.Muthuvel who died in the year 31.08.2006 and 14.03.1996 respectively. Schedule 'A' property was settled in the name of the mother Smt.J.Muthuvel

through a registered settlement deed dated 04.03.1970 by their father during his life time. Suit Schedule 'B' property was also registered in the name of Smt.J.Muthuvel by the Pollachi Co-operative House construction Society on which the house was constructed in which the appellant resides.

5. Originally the respondent had filed O.S.No.43 of 2007 before Sub Court, Pollachi based on an unregistered will dated 11.3.1996 allegedly executed by their mother Smt.J.Muthuvel in her favour. The said suit was filed for declaration and possession. However, the plaint was ordered to be returned pursuant to an application filed under Order 14 Rule 2 read with section 12 of the Tamil Nadu Court Fees And Suits Valuation Act for being presented before the proper Court having jurisdiction. Thereafter, the respondent filed another suit vide O.S.No.142 of 2008 on the file of Sub Court, Pollachi for partition against the appellant and his maternal grandmother claiming rights over the other properties which was dismissed after trial.

6. In the written statement, the appellant has admitted that the respondent was entitled to 50% share in the suit schedule properties but at the same time contested that the suit was barred by limitation under law in view of dismissal of O.S.No.43 of 2007. The appellant has claimed that he has perfected title to the suit schedule property as he was in continuous possession over the same and that he was the absolute owner of the property and that with effect from 14.3.2008 i.e. 12 years after the death of their mother J.Muthuvel he was entitled to have an exclusive ownership of the property.

7. The lower court framed following issues:-

I. Whether the claim of the plaintiff (respondent herein) was hit by ouster?

II. Whether the suit was hit under Order 2 Rule 2?

III. Whether the plaintiff (respondent herein) was entitled for the relief of partition?

IV. To what other relief, other party's entitled to?

8. After considering the deposition of the parties and the pleadings the court concluded that the respondent was indeed entitled to half a share in the suit schedule property and that it cannot be said that the appellant had perfected the title or that the suit was barred under Order 2 Rule 2 of the Civil Procedure Code. Against which, the appellant has preferred the present appeal.

9. We have considered the rival submissions and the pleadings in evidence before the lower court. The suit schedule property admittedly were in the name of the appellant and the

respondent's mother J.Muthuvel who died on 14.03.1996.

10. Though the respondent had claimed that the mother had left behind 'Will' and filed O.S.No.43 of 2007, the plaint was returned for presentation before the proper court on payment of appropriate court fees.

11. In the subsequent suit in O.S No.157 of 2014, the respondent has claimed partition. Therefore, though both the proceedings are in respect of the same property the respondent has claimed only 50% of her share by giving up the original stand that she was entitled to the property based on an unregistered ' Will'

12. The appellant in the written statement in paragraph-12 has also admitted that both the appellant and the respondent are the legal heirs entitled to equally share. The lower court has also concluded that it cannot be said that the appellant was in continuous possession so as to infer adverse possession.

13. The fact that the respondent had filed an earlier suit immediately after the death of the father asserting the rights shows that it cannot be said that the respondent/plaintiff had given up rights.

14. We therefore agree with the finding of the lower court that after the death of their mother Smt.J.Muthuvel, the appellant, respondent and their father became entitled to suit property as the legal heirs of late J.Muthuvel. The father died on 31.8.2006 when the property was in joint possession of the appellant and their father.

15. We are therefore of the view that the respondent was entitled to have a share in suit schedule properties. We find no reasons to interfere with the decision of the learned III Additional District and Sessions Judge Coimbatore.

16. During the course of the hearing, it was mentioned that the appellant has been in possession of the schedule B property since the date of his marriage on 01.02.1998 and therefore, same should be allotted to him.

17. Learned counsel for the respondent submits that the value of the property is much higher than the agricultural property and therefore it would be unfair to allow the appellant to allot to schedule-B property to the appellant.

18. We have given careful consideration to this aspect. The appellant has been in possession of the Schedule-B property and since same as dwelling house it would be unjust to partition the same while upholding the rights of the respondent.

19. We are therefore inclined to allot Schedule-A property to the respondent and schedule-B property to the appellant. However, the appellant has to adequately compensate the

respondent for the difference in the value between schedule A and Schedule B property to the respondent.

20. Therefore, while upholding the rights of the parties herein over the properties we deem it fit that the properties be allotted as above.

21. In view above, this Court is inclined to pass the following orders:

i) the appeal suit is dismissed .

ii) The impugned judgment and decree passed by the III Additional District and Sessions Judge, Coimbatore in O.S.No.157 of 2014 dated 24.01.2017 is hereby confirmed. Subject to payment of difference in value to the respondent. No cost. Consequently, connected civil miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

kkd

To

III Additional District and Sessions Judge,
Coimbatore.

+1cc to Mr. M.R.Kuyilan, Advocate, S.R.No. 17466

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