

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.09.2019

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A.No. 102 of 2016

1.Ambigadevi

2.Vimaladevi

..Appellants

Vs.

1.Ambujam

2.Punitha

3.Lakshmanarajaliar

..Respondents

Prayer: Memorandum of Second Appeal filed under Section. 100 of C.P.C. against the judgment and decree passed in A.S.No. 25 of 2012 dated 17.04.2015, on the file of Sub-Judge, Mannargudi, reversing the judgment and decree passed in O.S.No. 56 of 2008 dated 27.10.2010, on the file of District Munsif Court, Mannargudi.

For Appellants : Mr. S.Parthasarathy, Senior Counsel
for P.T.Ramadevi

For Respondents : Mr. S.Thiruvengkatasamy for R1 & R2
No appearance for R3

सत्यमेव जयते
J U D G M E N T

The plaintiffs in O.S.No. 56 of 2008, who succeeded in obtaining a decree for partition before the Trial Court have come forward by way of this appeal, since the decree was reversed by the lower Appellate Court in A.S.No. 25 of 2012. The suit in O.S.No. 56 of 2008 was filed by the plaintiffs seeking partition and separate possession of their $\frac{1}{2}$ share in the suit properties.

2. According to the plaintiffs, the suit properties originally belonged to the family of Narayana Vandayar, who had three sons namely, Venkatachala, Ramasamy and Rangasamy. It is

the admitted case of the parties that Venkatachala got himself separated from the family. Ramasamy died in 1941 and Rangasamy died in 1978. Ramasamy had left behind his two sons Seeman and Dakshinamoorthi. The first defendant Ambujam is the wife of Dakshinamoorthi. The second defendant, Punitha is daughter of Dakshinamoorthi. Rangasamy had married two wives namely, Kasiyammal and Ammakanu. It is not in dispute that Ammakannu died issue less. Kasiyammal had one daughter namely, Kuppammal. The plaintiffs are the daughters of Kuppammal born through 3rd defendant. The plaintiffs would further plead that there were earlier proceedings for partition between the two branches namely, Ramasamy's branch and Rangasamy's branch in the year 1948. While Rangasamy filed O.S.No.53 of 1948 seeking partition, the children of Ramasamy namely, Seeman and Dakshinamoorthi filed O.S.No. 42 of 1948 for the same relief. The said suit in O.S.No. 42 of 1948 was decreed and the suit in O.S.No. 53 of 1948 was dismissed as unnecessary. The decree in O.S.No. 42 of 1948 was challenged in A.S.No. 199 of 1950 in this Court and this Court had modified the decree. Pursuant to the modified decree, the final decree application in I.A.No. 339 of 1955 came to be filed and ultimately a final decree was passed on 03.12.1955.

3. As per the said final decree, Northern half of Item 5, Eastern half of Item 7 and Southern half of Item 8 were allotted to the plaintiffs in the said suit namely, the children of Ramasamy Vandayar. The Southern half of Item 5, Western half of Item 7 and Northern half of Item 8 were allotted to Rangasamy Vandayar, who figured as defendant in the said suit. The description of property in O.S.No. 42 of 1948 was as follows:-

Item Nos.	Survey Nos.	Cents
Item No. 5	73/5	43.5 cents
Item No. 7	22/3	27 cents
Item No. 8	52/2	1.16 cents

4. The plaintiffs would now contend that old Survey No.73/5 has now been assigned as Survey No.73/6-A and 73/6-B and Old Survey No. 24/4 has now become Survey No.22/3, while Old Survey No.52/2 remains as such. The plaintiffs would now seek partition of their half share in these four items of the properties namely, Survey No. 73/6-A measuring 16.5 cents, Survey No.73/6-B measuring 17.5 cents, Survey No.52/2 measuring 1.16 cents and Survey No.22/3 measuring 27 cents.

5. The suit is resisted by the defendants contending that since the earlier suit for partition had been decreed and final decree had been passed, the present suit for partition is not maintainable. It is the plea of the defendants that the

grandfather of the plaintiffs, Rangasamy even during his life time got the properties divided pursuant to the final decree passed in O.S.No. 42 of 1948 and he was in possession of those properties. It is their further contention that Item 1 and 2 in the present suit were not subject matter of the suit in O.S.No. 42 of 1948 and O.S.No. 53 of 1948 filed by Rangasamy himself. Therefore, according to the present plaintiff, the present suit itself is an abuse of process. The Trial Court concluded that the plaintiffs have established their claim that the suit properties remained undivided. The Trial Court had also accepted the claim of the plaintiffs that the Items 1 and 2 in the present suit really form part of Item 5 in the earlier suit namely, Survey No.73/5. It was concluded that Item 4 in the present suit was Item 8 in the earlier suit in Old Survey No. 24/4.

6. On the above conclusions, the learned Trial Judge decreed the suit granting half share as claimed by the plaintiffs. It is also pertinent to note at this juncture, the 3rd defendant Lakshmanarajaliar set up a Will said to have been executed by Rangasamy on 25.11.1967. The Trial court concluded that the Will being 30 years old is not required to be proved as required under Section 68 of the Evidence Act.

7. Aggrieved, the defendants filed an appeal in A.S.No. 25 of 2012 on the file of the Sub-Court, Mannargudi. The learned Sub-Ordinate Judge found that the plaintiffs have not co-related the survey numbers of Item 1 and 2 and they have not proved their claim that it was Old Survey No. 73/5, which has now become 73/6-A and 73/6-B. The learned Sub-Ordinate Judge also concluded that in the absence of co-relation, the Court cannot presume that Survey No. 73/5 has now become 73/6-A and 73/6-B and the Old Survey No.23/3 has now become Survey No.24/4. The learned Sub-Ordinate judge also concluded that the Will sought to be relied upon by the 3rd defendant has not been proved in accordance with law. It was also pointed out that there was no pleading with reference to the Will. The lower Appellate Court concluded that since the properties have already been divided and D.W.1 in her evidence had admitted that the parties were in possession of their respective shares as per the division made. On the above conclusions, the lower Appellate Court allowed the appeal and dismissed the suit.

8. Aggrieved, the plaintiffs have come forward with this second appeal. Notice of motion was ordered on 16.02.2016. Pursuant to the notice Mr.S.Thiruvengatasamy, learned counsel appears for the respondents 1 and 2 / defendants 1 and 2. The 3rd defendant though served is not appearing either in person or through counsel.

9. Mr.S.Parthasarathy, learned Senior Counsel appearing for the appellants would draw my attention to the evidence of D.W.1 in cross-examination wherein she had deposed that properties have been enjoyed as Northern and Southern halves right from the beginning and since she did not heed to the request of the plaintiffs for a right of way, the dispute arose. Relying upon the aforesaid evidence, Mr.S.Parthasarathy would submit that the Court could mould relief and grant a relief of possession in favour of the plaintiffs. It is also his further contention that the plaintiffs are entitled to the half share is not in dispute.

10. Contending contra, Mr.S.Thiruvankatasamy, learned counsel appearing for the respondents 1 and 2 would submit that the defendants have taken a specific plea that Items 1 and 2 in the present suit were not part of the suit properties in O.S.No. 42 of 1948. It is also pointed out that the plaintiffs herein had also filed another suit for declaration and recovery of possession against Seeman, the other son of Ramasamy Vandayar. Therefore, according to Mr.S.Thiruvankatasamy, the suit for partition is wholly misconceived.

11. I have heard the rival submissions. Admittedly, there was a suit for partition between Rangasamy and heirs of Ramasamy in O.S.No. 42 of 1948 and O.S.No. 53 of 1948. A final decree also came to be passed in the said suit on 03.12.1955. The allotment made was as follows:-

Northern half of Item 5 was allotted to the plaintiffs in the said suit namely, the heirs of Ramasamy Vandayar and the Southern half was allotted to Rangasamy Vandayar. Eastern half of Item 7 was allotted to the plaintiffs namely, heirs of Ramasamy Vandayar and Western half of Item 7 allotted to Rangasamy Vandayar. The Southern half of Item 8 was allotted to the plaintiffs namely, heirs of Ramasamy Vandayar and Northern half Item 8 was allotted to the defendants, Rangasamy Vandayar.

12. It is case of the present plaintiff that the present suit properties are Item 5, 7 and 8 in the old suit. Item 5 in the Old suit is an extent of 43.5 cents in Survey No.73/5 and Item 7 is about 27 cents in Survey No.22/3 and Item 8 is about 1.16 cents in Survey No.52/2. In the present suit, the suit properties are described as four items bearing Item 1 in Survey No. 73/6-A - 16.5 cents, Item 2 in Survey No.73/6-B - 17.5 cents, Item 3 Survey No.52/2 -1.16 cents and Item 4 in Survey No.23/3 - 27 cents. From the description, it could be seen that items 1, 2 and 4 were on the face of it no subject matter of the earlier suit. An attempt was made by the plaintiffs to show that Old Survey No.73/5 has now been assigned New Survey No.73/6-A and 73/6-B and Survey No.23/3 has now been assigned New Survey No.24/4. However, such a plea was not taken in the

plaint and there was no evidence in the form of revenue records or co-relation register to establish the said fact.

13. The lower Appellate Court has found that there was a partition of the estate of Ramasamy Vandayar and Rangasamy Vandayar even in the year 1955 and parties have taken possession in their respective shares. Therefore, the present suit for partition is not maintainable. The lower Appellate Court has also pointed out that the plaintiffs have not proved the co-relation pleaded by them and hence they are not entitled to share. Merely because, D.W.1 has stated that the properties remained undivided at one place in her cross-examination, the same will not empower the Court to grant a decree for partition of the property, which has already been divided. The evidence of D.W.1 has to be read as a whole. At a later portion of cross-examination, she has clearly stated that the parties are enjoying the properties as per the final decree in O.S.No. 42 of 1948. I am therefore, unable to see any question of law much less a substantial question of law arising in this appeal, in order to enable this Court to entertain this appeal. In view of the above conclusion, this second appeal is dismissed without being admitted. However, no order as to costs.

14. The dismissal of the second appeal however, will not preclude the plaintiffs from taking steps to recover possession of the property, if according to the plaintiffs, the defendants have trespassed into the property that has been allotted to them under the final decree in O.S.No. 42 of 1948 and it will be open to the defendants to resist any such suit on all ground available to them.

Sd/-
Assistant Registrar (CS-IV)

//True copy//

Sub Assistant Registrar

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To

1. The Sub Judge, Mannargudi.

2. The District Munsif Court, Mannargudi.

+1cc to Mr.P.T.Ramadevi, Advocate SR.No.77927

+1cc to Mr.S.Thiruvengkatasamy, Advocate SR.No.77197

S.A.No. 102 of 2016

RR(CO)

GMV(18/12/2019)