

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.10.2019

CORAM:

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.392 of 2016
and
C.M.P.No.6957 of 2016

1.Vasu @ Anbalagan Naicker
2.Rajamani Naicker
3.Ambujammal

...Appellants/Appellants/
Defendants

Vs.

Veeramani

...Respondent/Respondent/Plaintiff

PRAYER: Second Appeal filed under Section 100 of C.P.C., to set aside the judgment and decree dated 05.02.2016 made in A.S.No.11 of 2013 on the file of the Court of the II Additional District Judge, Tindivanam, confirming the judgment and decree dated 29.03.2012 made in O.S.No.35 of 2001 on the file of the Court of the Additional Subordinate Judge, Tindivanam.

For Appellants : Mr.R.Agilesh

For Respondent : Mr.J.Jayanth
for Mr.D.Ravichander

J U D G M E N T

The defendants in O.S.No.35 of 2001 on the file of the Additional Subordinate Judge, Tindivanam who had suffered a decree for partition and separate possession of the plaintiffs 5/16th share in the suit properties are the appellants.

2. According to the plaintiff, the suit properties were allotted to Devaraj Naicker, father of the plaintiff and the defendants 1 and 2 and the husband of the 3rd defendant at a partition that took place between him and his brothers. He enjoyed the same along with the defendants by constituting a joint hindu family. The said Devaraj Naicker died intestate on 02.03.1997. Therefore, according to the plaintiff, the plaintiff and the defendants 1 and 2 are entitled to each 5/16th

share and the 3rd defendant is entitled to 1/6th share. Claiming that the defendants are excluding the plaintiff from enjoyment of the suit properties, the plaintiff sought for partition and separate possession of the his 5/16th share.

3. The suit was resisted by the defendants contending that there was a partition soon after the death of Devaraj Naicker and the said partition was also recorded by way of a written instrument dated 23.03.1997. The defendants would further claim that the plaintiff is in possession and enjoyment of the property that was allotted to him in the said oral partition.

4. The courts below on a consideration of the evidence on record disbelieved the said oral partition that is said to have been taken place immediately after the death of Devaraj Naicker. The partition list dated 23.03.1997 was rejected as an inadmissible instrument since it was neither registered nor stamped in accordance with law.

5. The courts below found that the partition pleaded having not been proved and the character of the property having been admitted, the plaintiff would be entitled to 5/16th share and also mesne profits. Accordingly, the courts below granted preliminary decree for partition. Aggrieved the defendants are on appeal.

6. I have heard Mr.R.Agilesh, learned counsel appearing for the appellants and Mr.J.Jayanth, learned counsel appearing for the respondent.

7. Mr.R.Agilesh, learned counsel appearing for the appellants would vehemently contend that the courts below were not right in rejecting the partition list dated 23.03.1997. He would also submit that the plaintiff even in the plaint had alleged that he had been excluded from possession of the property and therefore he should have paid court fees under Section 37(1) of the Tamil Nadu Court Fees and Suits Valuation Act and not under Section 37(2) of the Tamil Nadu Court Fees and Suits Valuation Act.

8. The courts below have on appreciation of the evidence and the partition list dated 23.03.1997 rejected the same as inadmissible in evidence. The defendants have admittedly not taken any steps to challenge the rejection of the said document as inadmissible. Once the partition list dated 23.03.1997 is rejected, the claim of oral partition made by the defendants falls to ground. Therefore, the courts below were right in granting a decree for partition.

9. On the question of court fees also, the courts below have concluded that the plaintiff being a joint owner entitled to be in joint possession, he can pay court fees under Section 37(2) of the Tamil Nadu Court Fees and Suits Valuation Act and seek partition. Once the joint ownership is conceded, the plaintiff is deemed to be in joint possession and as such he is entitled to pay court fees under Section 37(2) of the Tamil Nadu Court Fees and Suits Valuation Act. I do not find any perversity in the findings of the courts below on the question of court fees.

10. Mr.R.Agilesh, would further contend that the courts below were wrong in awarding mesne profits when the defendants claim that the plaintiff is in possession of his share of the properties. The claim of the defendants relating to oral partition and the same being recorded under partition list dated 23.03.1997 has been disbelieved by the courts below. Therefore, the courts below were right in granting a decree for mesne profits also.

11. I do not see any infirmity or illegality in the conclusions of the courts below so as to enable me to interfere with the same sitting in the Second Appeal. I do not see any question of law much less a substantial question of law in order to enable me to entertain the appeal.

12. Hence, this Second Appeal is dismissed without being admitted. However, in the circumstances, there shall be no order as to cost. Consequently, the connected miscellaneous petition is also closed.

Sd/-
Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

dsa
To

1. The learned II Additional District Judge,
Tindivanam.
2. The learned Additional Subordinate Judge,
Tindivanam.

Copy to:

The Section Officer, V.R. Section,
High Court of Madras, Chennai 600 104.

+1cc to Mr.R.Agilesh, Advocate SR.90531
+1cc to Mr.D.Ravichander, Advocate SR.90350

S.A.No.392 of 2016

GJ(CO)
CB(10/03/2020)



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