

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 24.02.2020

Coram

The Honourable Mr. Justice M.M. Sundresh
and
The Honourable Mr. Justice Krishnan Ramasamy

Original Side Appeal No. 414 of 2018
and

C.M.P. No. 18783 of 2018

Mr. S. Venkataraman,

... Appellant

Vs.

1. Prema Suryanarayanan
2. Meenakshi Raman
3. S. Rajaraman
4. K. Madhavan
5. M. Sriram

... Respondents

Prayer: Appeal filed under Order XXXVI Rule 1 of Original Side Rules read with Clause 15 of the Letters Patent against the order dated 21.03.2018, made in C.S. No. 104 of 2007, on the file of the Original Side of this Court.

Prayer in C.S. No. 104/2007: Pleased to pass a judgment and decree
a) partitioning and dividing by metes and bounds the schedule mentioned properties in equal 1/5th shares between the first and second plaintiffs, the first and second defendant and 1/5th share jointly for the 3rd and 4th defendants respectively; in the event the said schedule mentioned property is indivisible to sell the same and distribute the proceeds from such sale in equal shares in the manner aforementioned; and

b) directing the defendants to pay the costs of the suit.

For Appellant : Mr. P. Sesubalan Raja
For Respondent : Mr. R. Parthasarathy for Caveator

COMMON JUDGEMENT

Judgment of the Court was delivered by Krishnan Ramasamy, J.

This Original Side Appeal has been filed challenging the order passed by the learned Single Judge of this Court, in

C.S.No.104 of 2007, dated 21.03.2018.

2. For the purpose of convenience, the parties herein referred with the same status as referred in the plaint. Otherwise, the appellant is referred as D1. The respondents 1 and 2 in the appeal are referred as plaintiffs 1 and 2 respectively. The respondents 3, 4 and 5 are referred as D2, D3 and D4.

3. The facts of the case are as follows:

It is the case of the plaintiffs that the suit property belongs to their father Mr.Sambasivam. The defendants 1 and 2 are the brothers of the plaintiffs. The third defendant is the husband of the deceased daughter of Sambasivam and the fourth defendant is the grandson of Sambasivam. The said Sambasivam died intestate on 05.11.1971, leaving behind his wife Jayalakshmi, three daughters viz., Prema, Meenakshi and Subbalakshmi (who died in 1990) and two sons viz., Venkataraman and Rajaraman. The mother of the plaintiffs, Jayalakshmi also died intestate in 1998. Therefore, the plaintiffs filed the suit for partition claiming that each would be entitled to 1/5th share and the remaining 1/5th share of Subbalakshmi would devolve on the defendants 3 and 4 being her husband and only son. Therefore, the suit was filed seeking preliminary decree for the partition of the suit property.

4. It is the case of the first defendant that he is the eldest son of the late Sambasivam. The defendants 1 and 2 are in possession of the suit property by way of oral partition between the parties in the year 1993 and according to the oral partition, the suit property, which is the only immovable property left behind by late Sambasivam was agreed to be taken by D1 and D2. The said Sambasivam died when he was carrying on the railway contract. Therefore, the first defendant claims that being an eldest son, he had to give up his studies to take over his father's business. The first defendant was about 23 years old at the time on his father's (Sambasivam) death, the second defendant was 21 years and the second plaintiff was 15 years. The first defendant carried on his father's business and performed the marriage of second plaintiff out of funds earned from the business.

5. Further, it was the claim of first defendant that he filed O.P.No.8 of 1972, before this Court seeking letters of administration. As per the order of this Court in the above O.P, the first defendant deposited a sum of Rs.16,572/-, in fixed deposit, being 1/6th share of minor Meenakshi. After attaining majority, the said amount was withdrawn by the second plaintiff.

Therefore, he contended that she is not entitled to any share in the suit property. It was his further contention that he purchased Balaji Avenue property in the year 1969 and also put up a building measuring an extend of 2000 sq.ft in the said land. The said property was sold in the year 1976 for a consideration of Rs.19,000/-. The fund received from the sale consideration was utilised for discharging the debts of late Samabasivam and for performing the marriage of second plaintiff. Therefore, according to the first defendant, the oral arrangement in the year 1993 was entered into taking into account all the circumstances, including the sale of the property belonging to the first defendant. The said oral arrangement was agreed by the plaintiffs as well as other sister Subbulakshmi as they will not claim any share in the suit property.

6. Further, it is also the case of the first defendant that the defendants 1 and 2 are in the possession of the suit property for the past 35 years exclusively. Therefore, the plaintiffs lost their right to claim partition by ouster. The mother Jayalaskhmi, who died in the year 1998 had left a registered will dated 20.01.1989, which is also attested by the first plaintiff Prema Surynarayana, bequeathing all her rights over the suit property in favour of the first defendant. However, the said Will was not probated in view of the partition which was agreed to be reduced to writing. Therefore, the first defendant prayed for dismissal of the suit.

7. The second defendant, other son did not participate in the proceedings before the learned Single Judge and remained exparte.

8. The defendants 3 and 4 had filed the written statement accepting the claim of plaintiffs with reference to the 1/6th share. They would also contend that they never stood in the way of any amicable division of the property and claimed that it is actually a dispute between the brothers which delayed the process for all these years.

9. After hearing both the parties, the learned Single Judge framed the following issues on 10.07.2020.

"1.whether the plaintiffs are entitled to 1/5th share in the suit property?

2.Whether the plaintiffs are entitled to partition and separate possession as claimed in the plaint?

3.To what other relief, the parties are entitled to?

10. Further, the following additional issues were framed by the learned Single Judge on 02.07.2009.

"1. Whether the oral partition dated 29.07.1993 as pleaded by the 1st defendant is true and valid and acted upon?

2. Whether the plaintiffs and other female heirs were ousted from enjoying the suit property, which was alleged to have been allotted to the share of the first defendant and if so, whether first defendant acquired prescriptive title by adverse possession also over it?

3. Whether the second defendant was allotted her 1/6th share as per the order of this Court in O.P.No.6 of 1972?

4. Whether the purpose of solemnising the marriage of the second plaintiff and for discharging the debts of late Sambasivam, the defendant sold his personal property, viz., Balaji Avenue property and met those marriage expenses and discharged the debt respectively?

5. Whether D1 spent a sum of Rs.5 lakhs for making additions, alterations and for re-construction of the schedule mentioned property?"

11. On behalf of the plaintiffs, PW1 and PW2 were examined and Exs.P1 to P4 were marked and on behalf of the defendants DW1 was examined and Exs.D1 to D7 were marked.

12. The learned Single Judge was pleased to decide all the issues against the defendants 1 and 2 and granted preliminary decree declaring that the plaintiff 1 and 2 are entitled to only 1/5th share of the suit property. Against the said judgment and decree the first defendant/appellant herein preferred the present original side appeal.

13. The learned counsel appearing for the first defendant/appellant would contend that there was an oral partition between the plaintiffs and defendants 1 to 4 on 29.07.1993. As per the oral partition, the suit scheduled property was allotted exclusively in favour of the defendants 1 and 2, who are the son of late Sambasivam. The fourth defendant, who is the son of the third defendant, executed a power of attorney in favour of his father on 04.08.1993, to sign necessary papers whenever the oral partition is reduced to writing. The plaintiffs also accepted the factum of oral partition. In fact, the first defendant being an eldest member of the family sacrificed his education to take care of his

father's business and performed the marriage of his sisters and brother. The second plaintiff has already allotted 1/6th share i.e a sum of Rs.16,532/- as per the order of this Court in O.P.No.8 of 1972. The said sum was deposited in a fixed deposit since the second plaintiff was minor at that point of time. Upon attaining majority, the second plaintiff had withdrawn the said amount. Under these circumstances, without considering all these aspects, by referring Ex.P1, the learned Single Judge held that the power of attorney does not have the details of oral partition and P.W.1 and P.W.2 have not agreed for the oral partition, which is totally contradictory to the facts. The learned Single Judge ought to have considered that the first defendant sacrificed his education for the sake of the family. With respect to the 1/6th share, to the extent of Rs.16,532/-, the learned Single Judge wrongly came to the conclusion that the said money was received by the first defendant being an eldest member of the family.

14. Further, the first defendant/appellant contended that the Will executed by the mother (Jayalakshmi) was not probated, since the oral partition was made in the year 1993 and all these facts were not considered by the learned Single Judge. Further, the property was sold and entire expenditure of the plaintiffs was meted out from the income derived from the sale. Further, he contended that the husband of the second plaintiff being the business men, the first defendant has helped him by providing his own property as security to avail loan and several times the cheques issued by the husband of the second plaintiff to the appellant were dishonored. The said facts have been admitted by the second plaintiff during the cross-examination. Further, he contended that there was an oral partition and it was proved by way of Exs.D2 to D4. In support of this contention he referred the judgment of the Hon'ble supreme Court reported in CDJ 1976 SC 263 in the case of Kale & Others Versus Deputy Director of Consolidation Other, wherein it has held as follows:

"In other words to put the binding effect and the essentials of a family settlement in a concretised form, the matter may be reduced into the form of the following propositions:

- (1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family
- (2) The said settlement must be voluntary and should not be induced by fraud, coercion or

undue influence:

(3) The family arrangement may be even oral in which case no registration is necessary;

(4) It is well-settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement had already been made either for the purpose of the record or for information of the Court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of S.17(2) of the Registration Act and is, therefore, not compulsorily registrable; (5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property 'It which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has not title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the Courts will find no difficulty in giving assent to the same.

(6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement."

15. By referring the above judgment, he contended that the partition can be oral and promisable. He would further contend that the first defendant/appellant had acted upon in pursuance of the assurance given by the plaintiffs and other family members and sold the property standing in his name believing their promise that the suit property would be allotted to him and his brother. Though the above fact was clearly stated in the reply notice itself, the plaintiffs have not chosen to deny the same in their plaint. Thus, the plaintiffs, who got benefit out

of the sale, now estopped from denying the oral partition, Above all, the fourth defendant has not given any explanation as to why he had executed the said Power of Attorney and what are details of the concluded oral partition that he had mentioned in the said Power of Attorney. It is obvious that no instrument is necessary if all the parties had accepted to divide the property equally among themselves. Hence, in the absence of any explanation from the defendants 3 and 4, the details given by the Advocate Mr.Mahadevan, regarding the partition has to be accepted.

16. It is further submitted that the plaintiffs have not raised any plea in their plaint that the business left by their father is a flourishing one and the appellant had earned a lot of money out of the said business and hence, they are entitled to the properties purchased by him. In fact, PW1 has categorically stated that we do not raise any claim in respect of the works benefits taken by the 1st defendant/appellant on his own or individual capacity. Hence the plaintiffs are not entitled to claim any share in the suit property on the ground that several properties were purchased by the appellant and his brother about a decade after the death of their father. Therefore, he contended that the judgment and decree passed by the learned Single Judge is liable to be dismissed.

17. On the other hand, the counsel appearing for the plaintiffs/respondents 1 and 2 contended that the judgment and decree passed by the learned Single Judge is in accordance with law. If there is any relinquishment of right on the suit schedule property, it can be done by way of registered deed of relinquishment. In the present case, no such relinquishment was made in the year 1993. Ex.P1 would clearly disclose that there was no oral partition in the year 1993. The Court below has rightly come to the conclusion by referring Ex.P1 and held that there was an absence of relinquishment. The question of oral partition does not arise when there existed registered Will executed by the plaintiffs mother. With regard to the 1/6th share, the learned Single Judge rightly came to the conclusion that the Will is registered within the jurisdiction of this Court. Therefore, it is required to be probated or letters of administration has to be obtained for its use. In the present case, no such probate or letters of administration has been obtained by the parties. Therefore, in view of the prohibition under Section 213 of the Indian Succession Act, the said Will was not relied upon by the learned Single Judge. Therefore, they would contend that findings of the learned Single Judge are correct and hence judgment and decree granting preliminary

decree declaring that the plaintiffs are entitled to 1/5th share in the scheduled mentioned property need not be interfered.

18. None appeared for the third respondent. The counsel appearing for the defendants 3 and 4/respondents 4 and 5 admitted the submission made by the counsel appearing for the plaintiffs/respondents 1 and 2.

19. Heard the learned counsel for both sides and perused the materials available on record.

20. The suit was filed by two sisters for the partition of the schedule mentioned property. The third defendant is the husband of the Subbulakshmi, one of the sisters of the appellant, who passed away and fourth defendant is the son of the deceased sister of the appellant. The father of the appellant passed away in the year 1972. Admittedly, he died intestate and the mother of the plaintiffs also died in the year 1990. According to the first defendant, the mother executed a Will on 20.01.1989 and the said Will was registered by the Sub-Registrar office at T.Nagar, which is within the jurisdiction of this Court.

21. The learned Single Judge came to the conclusion that there was no oral partition with regard to the suit schedule property since there was no relinquishment by sisters in favour of the brothers. In the present case, the defendants 1 and 2 claims right over the suit schedule property as they are entitled to by an oral partition. The contention of the first defendant/appellant is that the oral partition made among the parties has been clearly admitted by the P.W.1 and P.W.2 at the time of cross examination. Further Ex.D1/power of attorney and Ex.D2/Will also clearly reveals that there was an oral partition. Further Ex.P1 also talks about the oral partition. However, the learned Single Judge rejected the contention of the defendants 1 and 2, holding that in case of oral partition, there should not be any dispute among parties and the relinquishment made by the parties should have been reduced in writing and the same should have been registered with the Sub-Register office. In the present case, no such relinquishment was found. Further, as per Ex.P1, the plaintiffs have claimed right over the properties. Therefore, it is clear that the plaintiffs have not agreed for the oral partition and that is the reason why the dispute arises and one Mr.Mahadevan sent a letter by virtue of Ex.P1, in order to solve the dispute amicably. In these circumstances only the learned Single Judge comes to the conclusion that there was no oral partition.

22. On perusal of the order of the learned Single Judge as

well as the documents and the submission of the counsel, we are also not able to find out anything about the relinquishment of the property by way of registered document. Admittedly, on the perusal of Ex.P1, it appears that there was a dispute with regard to the property. Therefore, we do not find anything wrong in the findings of the learned Single Judge holding that there was no oral partition among the plaintiffs and the defendants. It was an admitted fact that there was an order passed by this Court in O.P.No.8 of 1972 directing the first defendant to deposit a sum of Rs.16,532/-, being an 1/6th share of the property in favour of second plaintiff. Since the second plaintiff was minor at that point of time it was deposited in the bank.

23. Further, on the perusal of Ex.D7, it appears that second plaintiff had withdrawn the said amount but P.W.2 in her evidence stated that the cheque was issued in her name and the same was encashed by the first defendant. In the cross examination of the first defendant he claim that he does not remember about the withdrawal of the amount since the matter was 40 years old. Further, it appears that the counsel who represented in O.P.No.8 of 1972 also represented that the second plaintiff to file application seeking withdrawal of money. Therefore, the learned Single Judge came to the conclusion that though the amount was deposited, second plaintiff being an unmarried one, the first defendant being the eldest male member of the family, the cheque was encashed by the first defendant. Under these circumstances, the learned Single judge came to the conclusion that the payment of a sum of Rs.16,532/-, which represented 1/6th of the asset value of the father of the second plaintiff will not dis-entitle her from claiming a share in the property of the father, in the absence of any document to show that she has relinquished the right over the property. Therefore, we do not find any error in the finding in the learned Single Judge with regard to the entitlement of the second plaintiff in the suit schedule property.

24. As far as the Will executed by the mother of the first defendant is concerned, the learned Single Judge refused to rely upon the Will, as the same was not probated in term of prohibition under Section 213 of the Indian Succession Act. Admittedly, the Will was executed by the mother of the plaintiff and the first defendant at Chennai. The property is also situated at Chennai. Therefore, it is just and necessary to probate the Will in terms of Indian Succession Act. In the present case, the Will executed by the mother of the first defendant was not probated. Therefore, the learned Single Judge has rightly refused to rely upon the Will and we do not find any error over the same. Accordingly, we are of the view

that as the Will of the mother of the first defendant was not probated as per the provisions of the Indian Succession Act, the Will cannot be relied upon.

25. As far as Balaji Avenue property is concerned, it was purchased in the name of first defendant in the year 1969. At the time of purchase, the age of the first defendant was 21 years and at that point of time, there was no income for the first defendant to purchase the said property. Admittedly, it was purchased by the father of the first defendant in his name. Further, the facts remains that the first defendant was pursuing his chartered accountant course at the age of 21 years. Under these circumstances, the learned Single Judge has come to the conclusion that the Balaji Avenue property was purchased not from and out of the earning of the first defendant. The first defendant had not produced any evidence before the learned Single Judge to prove that the said Balaji Avenue property was purchased from and out of his own income, but, it was purchased by his father in the name of the first defendant. Therefore, we do not find any error in the finding of the learned Single Judge that the Balaji Avenue property was not acquired by the first defendant from and out of his own earning.

26. The appellant claimed that he spent a sum of Rs,5,00,000/- for doing alteration and for reconstruction of the scheduled mentioned property. To substantiate the same the first defendant failed to produced any documentary evidence. Therefore, the learned Single Judge rejected his contention. We also do not find any error in the finding of the learned Single Judge in the absence of any material to show the expenditure for a sum of Rs.5,00,000/- towards alterations and reconstruction of the schedule mentioned property. Hence the Original Side Appeal is liable to be dismissed.

27. Accordingly, the Original Side Appeal is dismissed and the judgment and decree made in C.S.No.104 of 2007 dated 21.03.2018 on the file of the Original Side of this Court stands confirmed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

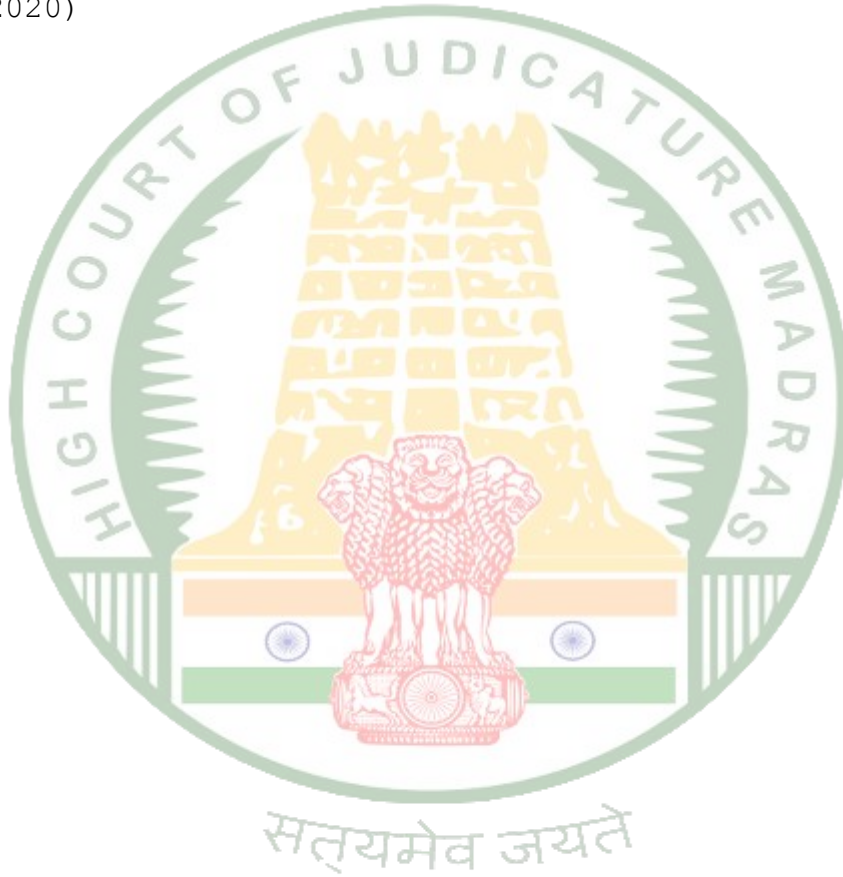
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To
The Sub Assistant Registrar (Original Side),
High Court, Madras.

+lcc to Mr.R.Parthasarathy, Advocate SR.16634

Original Side Appeal No.414 of 2018
and
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