

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.02.2022

PRONOUNCED ON : 07.06.2022

CORAM:

THE HONOURABLE MR.JUSTICE A.A.NAKKIRAN

A.S.No.537 of 2016

1. Sepperumal
2. Sellamuthu
3. Subramani ...Appellants/Defendants 1 to 3

Vs

1. Papathi .. 1st Respondent/Plaintiff
2. Vairamani .. Respondent No.2/4th Defendant
3. Selvamani .. 3rd Respondent/5th Defendant

Prayer:- This Appeal Suit has been filed, under Section 96 CPC as against the judgment and decree dated 31.08.2015 passed in O.S No.29 of 2013 by the learned I Additional District Judge, Salem.

For Appellants : Mr. S.Sathyaraj

For Respondents : Mr.R.Nalliyappan for R1
No Appearance for R2 and R3

JUDGMENT

(This case has been heard through Video Conferencing)

This appeal has been filed, challenging the judgment and decree, dated 31.08.2015, passed in O.S.No.29 of 2013 by the learned I Additional District Judge, Salem.

2. The appellants are the defendants 1 to 3 and the 1st respondent is the plaintiff and the 2nd and 3rd respondents are the defendants 4 and 5. The suit was filed by the plaintiff for the following reliefs:

(a) to pass a preliminary decree directing the defendants to divide the suit property into 6 equal shares

and allot one such share to the plaintiff with all pathway and channel rights good and bad soil with metes and bounds and to deliver the possession of the same.

(b) failing which permitting the plaintiff liberty to file a petition for final decree by appointing an Advocate Commissioner for suggesting the division of the suit property and direct him to file his report along with plan within time frame fixed by this Court.

(c) declaring the partition deed entered between the defendants 1 to 3 is void and not binding upon the plaintiff's share to the suit property.

(d) restraining the defendants from creating any sorts of encumbrance over the suit property by means of permanent injunction, and

(e) awarding the cost of the suit.

3. The case of the plaintiff is as follows:

The defendants are the brothers and sisters of the plaintiff. The suit property morefully described in the schedule originally belonged to one Arumuga Padayachi, who is the father of the plaintiff and the defendants. The said Arumuga Padayachi and his brother Ayyappa Padaiyachi had acquired the suit property and other properties and they have orally partitioned the property in or about 1980. In the said partition, Arumuga Padaiyachi was allotted the suit property as his share. Thereafter, Arumuga Padayachi had been in possession and enjoyment of the suit property along with the plaintiff and the defendants. In the 2nd week of January 2013, the plaintiff came to know that the defendants 1 to 3 had entered into a partition by a registered partition deed dated 18.09.2009 to divide the suit property into 3 equal shares without the consent of the plaintiff. The plaintiff is entitled to get 1/6th share along with the defendants in the suit property. But, in order to defraud the plaintiff's share, the defendants excluded the plaintiff and the defendants 4 and 5 in the said partition. The said partition deed dated 18.09.2009 is not binding on the plaintiff's share in the suit property. When the plaintiff had questioned the illegal act of the defendants 1 to 3, they openly proclaimed that they will sell the suit property to third parties including the plaintiff's share. Hence, the plaintiff convened a panchayat on 15.01.2013, but the defendants had failed to attend the same. The plaintiff is entitled to 1/6th share and the defendants are entitled to get each 1/6th share in the suit property. The defendants 1 to 3 are colluding with the defendants 4 and 5 and the plaintiff told that she will take legal action through court of law for the division of the suit

property. Knowing the plaintiff's legal action, the defendants have been trying to create encumbrance over the suit property before the Sub Registrar office at Jalakandapuram on 30.01.2013. But, the same was thwarted by the plaintiff with great difficulties. The defendants are high handed persons and they are to be restrained only by an order of permanent injunction. Hence the plaintiff has no other option, but to file the suit for the relief of partition and separate possession of her 1/6th share in the suit property and declare the partition deed dated 18.09.2009 between the defendants 1 to 3 as null and void and for costs of the suit.

4. The averments made in the written statement filed by the 1st defendant and the same was adopted by the defendants 2 and 3 are as follows:

The relationship between the parties is correct. It is true that the suit properties are belonged to Arumuga Padyachi and Ayyappa Padaiyachi. The suit property originally belonged to the father of Arumuga Padayachi and Ayyappa Padaiyachi and they were orally partitioned the same. But, it is false that the partition took place in the year 1980. Actually 55 years ago, the suit property was partitioned and after partition, they were in possession and enjoyment of their respective shares. It is true that the defendants 1 to 3 have partitioned the suit properties on 18.09.2009 vide registered partition deed. This fact was well known to the plaintiff and other defendants at that time itself. Hence it is utter false to state that without the consent of the plaintiff, the partition deed was entered. It is also false to state that the plaintiff has 1/6th share in the suit property and in order to defraud the same, the partition was executed. The allegation that the said partition deed was executed excluding the defendants 4 and 5 and the same is not binding the plaintiff is not correct. On 14.02.2001, the 1st defendant executed a release deed in favour of 3rd defendant. On 01.02.2008, the plaintiff sold her share to the 5th defendant by an unregistered sale deed for a sale consideration of Rs.19,000/- in the presence of witnesses. From that day onwards, the 5th defendant is in possession and enjoyment of the same. These facts were suppressed by the plaintiff in order to get illegal gain. The plaintiff came to know the execution of partition deed only in the 2nd week of January 2013 and on questioning the defendants challenged to sell the property to third parties, a panchayat was convened on 15.01.2013 and on that day, the defendants did not attend the same are all false. The partition deed executed openly with the knowledge of all in the Sub Registrar's office. The plaintiff has already sold her share and got the sale consideration in cash and in order to get illegal gain, she has filed this suit and the same is not maintainable. The allegation that the

defendants on knowing the legal action of the plaintiff to create encumbrance on 30.01.2013, they were at the Sub Registrar's office at Jalakandapuram and the same was thwarted by the plaintiff are all false. It was created only for the purpose of the suit. There is no prima facie case made out to seek declaration. The plaintiff is either in individual possession or joint possession in the suit property. The plaintiff has no right to seek declaration against the partition deed dated 18.09.2009 and she cannot question the same. The plaintiff has no right to seek injunction against the real owners. The cause of action of the suit is totally wrong. There is no cause of action and the cause of action raised in the plaint is an imaginary one. The suit is not properly valued. The plaintiff has under valued the property and thereby paid the less court fee. The description of property is not correct. Since the entire property was not shown in the description of property and impleaded necessary parties to the proceedings, the suit is not maintainable. The documents filed along with the plaint will not confer any right to the plaintiff. Hence, he prays for dismissal of the suit.

5. On the pleadings of the parties, the issues were framed by the Trial Court as follows:

"1. Whether the plaintiff having 1/6th share in the suit property?

2. Whether the partition deed dated 18.09.2009 is valid and binding on the plaintiff?

3. Whether the plaintiff has executed a Release Deed dated 01.02.2008 in favour of one Selvamani, as stated by the 1st defendant?

4. Whether the defendants 1 and 2 executed a Release Deed in favour of defendant No.3 as stated by the 1st defendant.

5. Whether the plaintiff is entitled for preliminary decree for partition and separate possession?

6. Whether the plaintiff is entitled for declaration and injunction as prayed for ?

7. What other relief the plaintiff is entitled to?

"

6. Before the Trial Court, on the side of the Plaintiff, PW.1 was examined and Ex.A1 and Ex.A2 were marked. On the side of the Defendants, D.W.1 to D.W.3 were examined and Ex.B1 to Ex.B11 were marked. The Trial Court decreed the suit. Aggrieved over the same, the defendants have preferred this appeal suit.

7. This Court heard the learned counsel for the appellants/defendants 1 to 3 as well as the learned counsel for the 1st respondent/plaintiff.

8. The learned counsel for the appellants/defendants 1 to 3 would submit that the suit is not maintainable for non-joinder of necessary parties. The plaintiff has not produced any death certificate to prove the death of the Arumuga Padayachi and also not produced the legal heir certificate of Arumuga Padyachi. But, the trial Court, without any basis given a finding that the plaintiff and the defendants are the legal heirs of Arumuga Padayachi on the basis of Ex.A1 which is erroneous in law. The plaintiff without adducing any supporting documentary evidence stated that the suit properties were orally partitioned and the same was allotted to Arumuga Padayachi, but Ex.A1 is the joint patta stands in the name of legal heirs of Arumuga Padayachi and Ayyappa Padayachi. Hence, the suit schedule property is not correct and the said fact was not considered by the trial Court. On a perusal of Ex.B1, registered release deed, it is made clear that the properties are being in exclusive possession and enjoyment of the defendants and therefore, the suit should have been valued as per Section 37 (1) of the Tamil Nadu Court Fee and Suit Valuation Act and hence, the suit has not been properly valued. For the aforesaid reasons, he prays to set aside the judgment and decree of the court below and consequently allow this appeal.

9. The learned counsel for the 1st respondent/plaintiff would submit that Ayyappa Padayachi name has not been shown in Ex.B2, partition deed and therefore, his legal heirs are not necessary parties to the suit. This issue was also not raised before the trial Court. The court fee paid by the plaintiff is correct. The Court below, after analysing the oral and documentary evidence has rightly decreed the suit in favour of the plaintiff. The judgment and decree passed by the trial Court does not warrant any interference by this Court and hence, he prays for the dismissal of the appeal.

10. This Court considered the submissions made on either side and also perused the materials placed on record. For the sake of convenience, the parties herein after are referred to as they were arrayed in the suit.

11. The point for consideration is, as to whether the impugned judgement and decree of the lower court is sustainable or not?

12. The relationship between the parties are admitted one. The defendants are brothers and sister of the plaintiff and they are the children of one Arumuga Padayachi and Chellammal.

13. The case of the plaintiff is that the suit property

is the ancestral and joint family property of the plaintiff and the defendants. The suit schedule property is originally belonged to one Arumuga Padayachi, who is the father of the plaintiff and the defendants. Arumuga Padayachi and his brother Ayyappa Padayachi had been orally partitioned the property and the said Arumuga Padayachi had been allotted the suit property as his share. The said fact was admitted by the defendants. However, the defendants 1 to 3 had entered into a partition by a registered partition deed dated 18.09.2009 to divide the suit property into 3 equal shares without the consent of the plaintiff. On a perusal of Ex.B2-partition deed, it reveals that the defendants 1 to 3 have entered into a partition and thereby, they had given certain properties to the plaintiff and the defendants 4 and 5. But, the female members of the family have not signed in the aforesaid partition deed. Therefore, it is proved that without the knowledge of the female members of the family, the defendants 1 to 3 have partitioned the properties according to their own whim and fancies. On a perusal of Ex.B1, release deed dated 14.02.2001, it reveals that the same was executed by the defendants 1 and 2 in favour of the 3rd defendant. Though the release deed has been executed as early as on 14.02.2001, the aforesaid fact has not been whispered in Ex.B2 partition deed.

14. It is the case of the appellants/ defendants 1 to 3 that the property which was allotted to the plaintiff as per Ex.B2, was sold to the 5th defendant on 01.02.2008. To prove the said contention, no document has been filed on the side of the defendants. In Ex.B2, female members were not added as parties. Though the appellants/defendants contended that the suit is bad for non-joinder of necessary parties, in the written statement, the appellants/defendants 1 to 3 have not mentioned who are all the necessary parties. Therefore, the contention of the defendants 1 to 3 is not acceptable one.

15. With regard to another contention that the father of the plaintiff and the defendants 1 to 3, viz., Arumuga Padyachi died long back before 35 years, this issue was not disputed. As per the Hindu Succession (Amendment) Act, 2005 (39 of 2005) the plaintiff, as female member of the family is also have equal share over the suit property. Therefore, this Court is of the view that the Court below, after perusing the entire records had come to a proper conclusion that the plaintiff is entitled to get 1/6th share in the suit property and thus, decreed the suit in favour of the plaintiff. In view of the above, the judgment and decree passed by the Court below does not warrant any interference by this Court and consequently, the appeal is liable to be dismissed.

16. In fine, this first appeal stands dismissed. No costs.. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-V)

//True Copy//

Sub Assistant Registrar

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To

1.The I Additional District Judge, Salem.

2.The Record Keeper, VR Section,
Madras High Court.

+2cc to Mr.S.Sathyaraj, Advocate, S.R.No.32512
+1cc to Mr.R.Nalliyappan, Advocate, S.R.No.32413

A.S.No.537 of 2016

KJ(CO)
SB(22/07/2022)