

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 07.04.2022

Pronounced on : 29.04.2022

Coram

The Hon'ble Mr. Justice C.V.KARTHIKEYAN

A.S.No.2 of 2018

1.Saraswathi

2.R.Dineshkumar

3.Paranidara @ Sivakumar

... Appellants / Plaintiffs

Vs

1.K.Poonkothai

2.M.Shanthi

3.N.Seethalakshmi

4.Krishnaveni

5.M.Raju

6.Jayabalan

7.S.Nirmala

... Respondents / Defendants

Appeal Suit filed under Section 96 of CPC to set aside the judgment and decree dated 31.07.2017 in O.S.No.36 of 2010 on the file of the I Additional District Judge, Salem.

For Appellants .. Mr.R.Nalliyappan

For R1 to R4 .. Mr.M.Velmurugan

For R5 .. No Appearance

For R6 .. Mr.Ashok Kumar

JUDGMENT

The plaintiffs in O.S.No.36 of 2010 on the file of the I Additional District Court, Salem, are the appellants herein, aggrieved by the judgment and decree dated 31.07.2017, whereby their suit, seeking partition and separate possession of the suit mentioned properties, was dismissed.

2.O.S.No.36 of 2010 had been filed by the plaintiffs / appellants herein, widow and two sons of late V.Rathinam, seeking partition and separate possession of 6/10th share of Item Nos.1 and 2 of the suit properties and 1/4th share in Item No.3 of the suit property and to put them in possession and for consequential relief of injunction and for costs. The pleadings in O.S.No.36 of 2010 (I Additional District Court, Salem):-

3.In the plaint, it had been stated that the 1st plaintiff was the daughter-in-law of the 1st defendant. The 2nd to 4th defendants were the daughters of the 1st defendant. The 5th defendant was the daughter of the 1st wife of the father-in-law of the 1st plaintiff. The 6th to 8th defendants are third parties.

4.It had been stated that the properties described in the schedule, originally belonged to Ponnusami Gounder who had one son Marimuthu. Marimuthu had three sons, M.Venugopal, M.Ramamoorthi and M.Ranganathan. Ponnusami Gounder died intestate and Marimuthu succeeded to his properties. Thereafter, Marimuthu and his three sons divided the entire properties into four equal shares by a registered partition deed dated 26.07.1961.

5.The property mentioned as B Schedule in the partition deed was allotted to M.Venugopal, the husband of the 1st defendant and father of 2nd to 5th defendants and also the father of Rathinam / husband of the 1st plaintiff. The properties which had been allotted to M.Venugopal consisted of 7.77 acres of land in S.No.22/1 and 5.59 acres of punjai land in S.No.36/2 and 3.89 acres of punjai land in S.No.44/3 situated at Kottamettupatti Village, Omalur Taluk, Salem District. M.Venugopal, sold all the properties more than thirty years prior to the institution of the suit, but retained an extent of 0.39 cents of land in S.No.44/3. It was stated that the 5th defendant, Krishnaveni was the daughter of the 1st wife of M.Venugopal. Later, M.Venugopal married the 1st defendant and through her had one male son and three daughters. The son was the husband of the 1st plaintiff and the three daughters are the 2nd to 4th defendants.

6.It had been stated in the plaint that since the 1st defendant was the 2nd wife of Venugopal, she cannot claim any

right in the ancestral or in the joint family property. It was also stated that M.Venugopal died intestate on 22.12.1997. It was claimed that the ancestral property namely, Item No.1 to the plaint schedule had devolved equally to M.Venugopal and Rathinam, the husband of the 1st plaintiff. Due to the death of the M.Venugopal, his 1/5th share further devolved to his son and to the 2nd - 5th defendants. It was under those circumstances that the plaintiffs claimed 6/10th share in the 1st Item of suit property. It was stated that the 6th defendant had paid an advance for purchase of the Item No.I of the property. It had been stated that subsequently, out of the 39 cents, 9 cents had been sold and as on the date of the plaint was only 30 cents was available. It was also stated that the husband of the 1st plaintiff had constructed a building from his own income. The plaintiffs had demanded partition and separate possession of the suit schedule properties, but since the defendants refused, the plaintiffs had to file the suit seeking the reliefs as stated.

7.The 2nd defendant had filed a written statement. It was adopted by the 1st, 3rd, 4th and 5th defendants.

8.In the written statement, it had been stated that M.Venugopal had already partitioned the suit property into two equal shares by an oral partition in the year 1995. According to the said oral partition 0.24 cents in Item No.1 had been allotted to M.Venugopal and balance 0.15 cents had been allotted to Rathinam, the husband of the 1st plaintiff. It had been stated that a registered settlement deed was executed by M.Venugopal in favour of the 5th defendant on 20.01.1997 as per Document No.99 of 1997 registered before the Sub-Registrar, Omalur, with respect to 4.00 cents out of the 24 cents which he had retained. It had been claimed that the 5th defendant was in possession of the 4.00 cents. Thereafter, the 5th defendant had sold the said 4.00 cents to the 7th defendant by a registered sale deed, registered as Document No.2500 of 1998 on 18.11.1998 and registered before the Sub-Registrar, Omalur. It had been stated that the 7th defendant was in possession of the said property. It had been further stated that M.Venugopal had executed a registered sale deed in favour of the 3rd defendant on 23.01.1997 by Document No.126 of 1997 registered before the Sub-Registrar, Omalur, with respect to another 4.00 cents and thereafter, the 3rd defendant had sold the said property to the 8th defendant by a registered sale deed dated 23.08.2006 registered as Document No.4220 of 2006 before the Sub-Registrar, Omalur. It had been further stated that M.Venugopal had executed yet another settlement deed in favour of the 4th defendant on 30.01.1997 by Document No.203 of 1997 registered before the Sub-Registrar, Omalur, with respect to a further 4.00 cents and the 4th defendant had sold the same to the 8th defendant by a registered sale deed dated 12.12.2005 and registered as Document No.5104 of

2005 in the office of the Sub-Registrar, Omalur. It had been stated that M.Venugopal had executed a further registered settlement deed with respect to the balance 12.00 cents of his holding to the 2nd defendant on 28.01.1998 by Document No.126 of 1998 registered before the Sub-Registrar, Omalur and the 2nd defendant executed a sale deed with respect to the said 12.00 cents on 21.12.2009 in favour of the 6th defendant by Document No.8045 of 2009 registered in the office of the Sub-registrar , Omalur.

9.It had been thus stated that M.Venugopal had dealt with 24 cents out of Item No.1 of the suit property and they are not available for partition. It had been further stated that Rathinam, the husband of the 1st plaintiff, who had been allotted 15 cents by way of the oral partition in the year 1995 had constructed a house in land to an extent of 4 cents and was residing there till his death along with the plaintiffs. The balance 11 cents had been sold by Rathinam to a third party by a registered sale deed. It was therefore stated that the issue of partition of the properties would not arise with respect to Item No.1 of the suit property.

10.The purchasers namely, 6th, 7th and 8th defendants also filed written statements separately affirming the fact that they had purchased the properties as stated in the written statement of the 2nd defendant. They also claimed title over the respective properties purchased by them and further claimed that they are in possession and therefore, disputed the right of the plaintiffs to seek partition. They also asserted that their purchase was much prior to the institutions of the suit and therefore, stated that the suit should be dismissed insofar as the properties purchased by them are concerned.

11.The 2nd defendant filed an additional written statement which was also adopted by the 3rd, 4th, 5th and 6th defendants. It was specifically stated that the plaintiffs have no manner of right or title to seek partition over the 1st Item of suit property and also over the 2nd Item of suit property. With respect to the 3rd Item of suit property, it had been stated that it had been purchased on 18.02.2000, by the 1st defendant in her name. In that particular sale deed, the husband of the 1st plaintiff, Rathinam had appended his signature as a witness. Further the 1st defendant had bequeathed the said suit property to the 2nd to 4th defendants. The Will had come into effect after the death of the 1st defendant. It was therefore claimed that the plaintiffs cannot seek share in the said 3rd item of suit property.

12.The 1st plaintiff filed a reply and wherein, she denied and disputed the settlement deed executed by M.Venugopal with

respect to the 1st Item of suit property in favour of the 2nd to 5th defendants. It was stated that the 1st defendant had no right to execute the settlement deed with respect to 12 cents of land in the 1st Item of suit property.

13.The 1st plaintiff filed a further reply statement reiterating the fact that they are entitled to a share in the 1st Item of suit property. It was stated that Rathinam, the husband of the 1st plaintiff and his father M.Venugopal are co-parcenors and they are entitled to share of the properties which fell to Rathinam. It was also stated that the settlement deed executed by M.Venugopal would not bind them.

The Issues:-

14.On the basis of the above pleadings, the following issues were framed:

- "i).Whether the plaintiffs are entitled to undivided 6/10th share in the suit property?
- ii).Whether the father-in-law of the 1st plaintiff had executed settlement deeds in favour of the 2nd to 5th defendants?
- iii).Whether the husband of the 1st plaintiff, Rathinam had already sold 11 cents of land to third parties?
- iv).Whether the plaintiffs are entitled to preliminary decree as claimed?
- v).Whether plaintiffs are entitled to a decree of permanent injunction as claimed?
- vi).To what other reliefs are the plaintiffs entitled to?"

15.The Trial Court also framed the following additional issues:-

- "i).Whether the sale deed executed in favour of the 8th defendant are binding and whether, there has been due consideration paid in the said sale deeds?
- ii).Whether the 8th defendant had purchased the property by way of two sale deeds for adequate consideration?
- iii).Whether the part of the suit property is in possession of the 8th defendant?"

The Trial:-

16.During trial, the 1st plaintiff was examined as PW-1 and the 2nd defendant was examined as DW-1. Two independent witnesses

were examined as DW-2 and DW-3 and the 7th defendant was examined as DW-4.

17. On the side of the plaintiffs, Exs.A1 to A28 were marked. Ex.A1 was the copy of the partition deed dated 27.06.1961. Exs.A2, A3 and A4 were the settlement deeds executed by M.Venugopal and Exs.A5, A6, A7, A8 and A10 were the settlement deeds / sale deeds executed by Kuzhanthaiammal and others. Exs.A12, A13, A14, A15, A16, A17, A18, A19 and A20 were documents relating to Advocate notices issued and replies received. Ex.A23 was the copy of the Encumbrance Certificate. Exs.A24, A25, A26 and A27 were the sale deeds in favour of Kuzhanthaiammal and 7th and 8th defendants.

18. On the side of the defendants, Exs.B1 to B13 were marked. Ex.B1 was the patta in the name of Vadivel and Ex.B2 was the patta in the name of Rajarathinam. Ex.B3 was the patta in favour of Maheswari. Ex.B4 was the patta in favour of 8th defendant. Ex.B5 was another patta. Ex.B10 was Will executed by Kuzhanthaiammal and Ex.B13 was a settlement executed in favour of the 7th defendant.

The issues answered:-

19. The learned Trial Judge proceeded to determine the issues and observed that the evidence revealed that the 1st and 2nd item of suit properties were claimed to be ancestral properties and the 3rd item of suit property was in the name of the 1st defendant. Thereafter, the Trial Court proceeded to examine whether the 1st and 2nd Items of suit properties were actually ancestral property.

20. The Trial Judge examined whether M.Venugopal the father-in-law of the 1st plaintiff had settled the properties, which had fallen to his share in the partition between himself and his son Rathinam, in favour of the 2nd to 5th defendants and whether Rathinam, the husband of the 1st plaintiff had sold 11 cents of the lands allotted to him by the same partition to 3rd parties.

21. The Trial Judge held that the Item Nos.1 and 2 properties had already been dealt with and were not available for partition. With respect to 3rd Item of suit property, it was held that it was also not available for partition. The suit was therefore dismissed.

22. Questioning such dismissal, the plaintiffs are in the present Appeal Suit before this Court.

23. Heard arguments advanced by Mr.R.Nalliyappan, learned counsel for the appellants and Mr.M.Velmurugan, learned counsel

for R1 to R4 and Mr.Ashok Kumar, learned counsel for R6.

24.For the sake of convenience the parties would be referred as plaintiffs and the defendants.

The points for consideration:-

25.The points which arise for consideration under Order 41 Rule 31 CPC are as follows:

i).Whether the 1st Item of suit property is available for partition?

ii).Whether as legal representatives of Rathinam, the plaintiffs can claim a share in the 2nd Item of suit property, which had devolved on to all the legal representatives of M.Venugopal?

iii).Whether the 3rd Item of suit property in the name of the 1st defendant can be partitioned among the legal representatives overlooking the Will executed by the 1st defendant?

iv)Whether the judgment of the Trial Court required to be interfered with?

The points answered:-

26.The entire extent of Item No.1 of the property was 39 cents and they were situated in S.No.44/3. M.Venugopal had originally married one Alamelu and through her the 5th defendant, Krishnaveni had born. Thereafter, M.Venugopal had married 1st defendant, Kulanthaiyammal. Their children were the husband of the 1st plaintiff, Rathinam and the 2nd to 4th defendants, K.Poongothai, M.Shanthi and M.Seethalakshmi. The fact that the said item had been allotted to M.Venugopal by a partition deed dated 26.07.1961 has not been disputed by anyone of the parties. However, since M.Venugopal married the 1st defendant, even when the earlier marriage with the Alamelu was subsist, the 1st defendant cannot be recognized as the lawfully wedded wife of M.Venugopal.

27.However, Rathinam and 2nd to 4th defendants can claim a share, in the property, as children of M.Venugopal. It is seen from Exs.A6, A7, A8 and A10 substantial portion of Item No.1 of the property had been dealt with by Rathinam and 1st to 4th defendants. M.Venugopal had also dealt with the share allotted to him by way of settlement deeds granting absolute right through the defendants. It had been held by the learned Trial Judge that Rathinam was a divided son and therefore has to be

excluded from the self acquired property of the father.

28.However, it is to be noted in the 2nd Item of suit property, a house had been constructed and the son Rathinam will get the reminder share of his father's share. The 1st item of suit property, had been dealt with by M.Venugopal and Rathinam. It is not available for partition. The 3rd item of suit property was in the name of the 1st defendant and she also executed a Will bequeathing it. The said property is thus not available for partition. However, the 2nd item of suit property, wherein, a house had been built would fall to all the co-sharers, in equal measures to all the children of M.Venugopal, which would include his son Rathinam and the 2nd to 5th defendants.

29.In view of the fact that the plaintiffs are the legal representatives of the deceased Rathinam, they would also be entitled to an undivided share. The denial of a share in the 2nd item of suit property by the Trial Court will necessarily have to be interfered with by this Court and to that extent, the reasoning of the learned Trial Judge will have to be interfered with.

30.The 1st Item of suit property is not available for partition having been dealt with by both Venugopal and Rathinam. The dismissal of the suit with respect to that particular item of property is upheld by this Court. The 1st point is answered accordingly.

31.The 2nd Item of suit property which is a house, measuring 1211 Sq.ft. has to fall equally to the shares of all the children of M.Venugopal and Rathinam, cannot be excluded merely because he is a divided son. It has to be seen that only an oral partition was effected between M.Venugopal and Rathinam. No doubt such partition had been put into effect. But the 2nd Item of suit property, still stood in the name of M.Venugopal and even though Rathinam had dealt with the share allotted to him and M.Venugopal had also dealt with the properties allotted to him, still in the 2nd Item of suit property all the children will have a residual right. Therefore, I would hold that the plaintiffs are entitled for preliminary decree with respect to the 2nd Item of suit property. To that extent, the judgment of the Trial Court will have to be interfered with. The 2nd point is answered accordingly.

32.The 3rd Item of suit property stood in the name of the 1st defendant and in turn, she had executed a Will, by which, she had bequeathed the property to the 2nd to 4th defendants. Therefore, the plaintiffs cannot seek any right over the said property, unless specifically they contest the right of the 1st defendant to execute a Will and also question the veracity and

genuinty of the Will and its execution. The dismissal of the suit with respect to the 3rd Item of suit property is upheld by this Court. The 3rd point is answered accordingly.

33. In view of the aforementioned reasons, the 4th point framed for consideration is answered that the Appeal is partly allowed only with respect to the 2nd Item of suit property, but dismissed with respect to the 1st and 3rd Items of suit properties.

34. During the course of argument, Mr. M. Velmurugan, learned counsel for the 1st to 4th respondents had, as a matter of fact, produced a demand draft for Rs. 5,00,000/-, claiming that this amount would indicate the shares of the appellants / plaintiffs over the 2nd Item of suit property. It is the contention of the learned counsel that the 2nd Item of suit property totally measured 1211 sq.ft. He also contended that all the parties had become quite advanced in age and it would only be proper that the litigation is put to an end and a settlement reached.

35. It is also contended that the building is in dilapidated condition and the roof tiles are also damaged. Even inside the building, it is damaged and dusty. It had been stated that the guideline value of the property comes to around Rs. 4,23,850/- at Rs. 350/- per sq.ft.

36. The learned counsel therefore offered a sum of Rs. 5,00,000/- to the appellants / plaintiffs as their share in entirety. But however, the said appellants / plaintiffs were not agreeable in receiving the said amount.

37. Anyway the facts as transpired in court is recorded and if at all, final decree application is filed, in view of the impracticality of dividing a house of 1211 sq.ft among the sharers, I hope that prudence will prevail upon the parties and the Trial Court may direct that the value may be determined. It would be appropriate if either one of the parties pay the value equivalent to the others, in accordance with the market value of the property. This would be a far sensible approach to take.

38. I would only urge that if at all a final decree application is filed, the Trial Judge might offer this proposal instead of dividing the property into metes and bounds. If it is to be so divided each party would get only a small portion, and that would be of no effective use to anyone of them. However, it is the prerogative of the litigants to take a considered decision as to what would be a just division of the said property.

39. In the result, the Appeal Suit is partly allowed, only

with respect to 2nd Item of suit property and dismissed with respect to 1st and 3rd Items of suit properties. A preliminary decree as sought is accordingly granted only with respect to the 2nd Item of suit property. In view of the relationship between the parties, there shall be no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

smv

To

- 1.The I Additional District Court, Salem.
- 2.The Section Officer, VR Section, High Court of Madras.

+1cc to Mr.M.Velmurugan, Advocate, S.R.No.30489
+1cc to Mr.R.Nalliyappan, Advocate, S.R.No.30174

A.S.No.2 of 2018

RSI(CO)
SB(27/07/2022)