



A.S.(MD)No.51 of 2011

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 06.07.2022

CORAM:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

A.S.(MD)No.51 of 2011

and

M.P.(MD)No.1 of 2011

Pushpam

... Appellant / Plaintiff

-Vs-

1.R.Seenivasagam

2.R.Selvaraj

3.R.Ramakrishnan

4.Indirani

... Respondents / Defendants

PRAYER: Appeal Suit is filed under Section 96 of the Code of Civil Procedure to set aside the decree and judgment made in O.S.No.36 of 2008 dated 05.04.2010 on the file of the learned Additional District Judge, (Fast Track Court No.1), Thoothukudi.

For Appellant : Mr.J.Barathan

For R1 : Mr.M.Vallinayagam,
Senior Counsel, for Mr.D.Nallathambi

For R2 and R3 : Mr.K.Govindarajan



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JUDGMENT

The appellant / plaintiff has filed the suit in O.S.No.36 of 2008, seeking for partition to divide the suit properties into equal 5 shares and allot one such share to the plaintiff, wherein the respondents are the defendants.

2.The brief facts of the plaint are as follows:-

As per family partition dated 19.11.1968, items 1 to 19 had been allotted to the father of the plaintiff. Item 20 vacant land was allotted through family partition to one Seenivasa Naicker, who is the father of Rengasamy Naicker. After his death, as per family partition, Rengasamy Naicker got it and had constructed a house therein and lived therein. He died on 31.03.2004. Thereafter, the suit properties are in joint possession of the plaintiff and the defendants. The plaintiff's mother died in the year 2002. The defendants 1 to 3 are the brothers of the plaintiff and the 4th defendant is the sister of the plaintiff. In the suit properties, the plaintiff is entitled to 1/5th share and the defendants are also entitled to 1/5th share each. In the year January, 2007, the plaintiff asked the defendants 1 to 3 to partition her share. Since they have delayed it, the suit is filed for partition.



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3.The brief facts of the written statement filed by the 1st defendant are as follows:-

This suit is filed in collusion with the 4th defendant on the one hand and with the brothers of the plaintiff arrayed on the other side. The plaintiff and the 4th defendant got married in the year 1973 and 1972. Therefore, they cannot be deemed coparceners. He admitted that items 1 to 19 were allotted to their father. On 31.03.2004 Rengasamy Naicker died. The plaintiff and the 4th defendant have illegally transferred patta in their names, regarding the properties of their mother R.Ponnammal. Since the plaintiff and the 4th defendant got married, 20th item, family house was allotted to the 1st defendant and he is in possession and paying house tax. During the life time of Rengasamy Naicker, he had sold certain items in the suit properties. The suit is bad for non-joinder of necessary parties and non-joint of properties.

4.The brief facts of the written statement filed by the defendants 2 and 3, are as follows:-

They admitted that there was a partition in the family between the male



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members on 19.11.1968, in which items 1 to 19 were allotted to the share of Rengasamy Naicker. The estate of Rengasamy Naicker descended as per the provisions of law applicable to testamentary succession and not according to intestate succession, inasmuch as Rengasamy Naicker got the estate divided in 1968 itself with his coparcener. Thus, the mother of the plaintiff and other defendants died in the year 2001 and not in the year 2000 as stated in the plaint. As per partition, item 20, family house was allotted to the 1st defendant and he is in possession and paying house tax. The parties are not in joint possession. During the life time, Rengasamy Naicker sold items 6, 7, 9 and a portion of item 4 before executing the Will and items 12 to 17 after executing the will. In the will, Rengasamy Naicker has stated that the rest of the properties in the will shall absolutely go to the beneficiaries, namely, the defendants 2 and 3. Further, Rengasamy Naicker had received sale consideration for items 18 and 19 from the purchasers and the proposed purchasers are in absolute possession and enjoyment for more than 15 years. The properties are in the possession of the male members and they are paying kist in their names after the transfer of patta in their respective names.



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5. Based on the above said pleadings and also the documents annexed with the pleadings, the trial Court framed the following issues:-

“1. Whether the plaintiff is valued the property correctly and liable to pay Court fee under Section 37(1) of the Tamil Nadu Court Fees and Suit Valuation Act ?

2. Whether the plaintiff is entitled to partition and separate possession of 1/5th share in the schedule property?

3. To what relief the plaintiff is entitled?

6. In order to substantiate the case, during the trial on the side of the plaintiff, she examined herself as P.W.1, one witness was examined as P.W.2 and 5 documents were marked as Exs.A.1 to A.5. On the side of the defendants, three witnesses were examined as D.W.1 to D.W.3 and 10 documents were marked as Exs.B.1 to B.10.

7. On conclusion of the trial, after hearing the arguments advanced on either side, the trial Court has dismissed the suit with cost.

8. Challenging the same, the plaintiff in the suit has filed the present Appeal Suit before this Court.



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9.The learned counsel for the appellant would submit that the suit property originally belonged to father of the appellant Rengasamy Naicker, who died intestate succession, leaving behind the appellant and the respondents. The appellant and the fourth respondent are the daughters of the said Rengasamy Naicker and the respondents 1 to 3 are the sons. Their father got the suit property as per family partition in the year 1968. Therefore, the appellant and the respondents are alone legal heirs of their father and they are each entitled to 1/5th share in the suit properties. Therefore, the appellant filed the suit for partition.

10.He would further submit that though in the written statement the respondents 2 and 3 have taken a defence that the said Rengasamy Naicker executed a will in favour of the respondents 2 and 3 and in the will no right has been given either to the appellant or to the respondents 1 and 4, the reasons stated for disinheriting other legal heirs are not correct. The said Rengasamy Naicker would not have executed the will, since he has got 1/6th share from the ancestral property and he can only execute the share. Therefore, the alleged Will will not bind on the appellant. Further, the Will has not been proved in the manner known to law and they have neither examined the scribe nor any of the attester.



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11.He would further submit that in order to comply with Section 69 of Indian Evidence Act, they have not satisfied Section 68 of the Act. D.W.1 has not stated anything about the attestor and by proving the will through attestors, since the attestors are no more, they wanted to prove the will under Section 69 of the Act. Therefore, the will has not been proved in the manner known to law. Therefore, once the will has not been proved, the appellant is automatically entitled to 1/5th share in all the suit properties. The trial Court failed to appreciate the oral and documentary evidence and erroneously, held that the will has been proved, therefore, as per testamentary succession, only the respondents 2 and 3 alone are entitled to get the suit properties and the appellant is not entitled to any share, which is against the settled principles of law. Therefore, the judgment and decree have to be set aside and the appeal is to be allowed.

12.The learned counsel for the respondents would submit that the said Rengasamy Naicker got the suit properties through family partition 19.11.1968 between his brothers. Therefore, it is the separate property of the said Rengasamy Naicker and he died leaving behind surviving legal heirs i.e., the appellant and



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the respondents. During the life time of Rengasamy Naicker, he performed his daughters' / appellant and the 4th respondent's marriage and also has given all type of benefits to them and since the first respondent married other religious woman, he did not want to give any share to the first respondent. Therefore, these are the reasons to disinherit the daughters and one of the sons of Rengasamy Naicker from the will and he has given benefits through the will only to the respondents 2 and 3.

13.He would further submit that the will was proved in the manner known to law. Since the two attestors at the time of examination of the will, were no more, the sons of the attestors were examined and they identified the signatures of the attestors and even before executing the will, items 6, 7, and 9 were sold by Rengasamy Naicker himself and after executing the will, during the life time, he sold the items 12 to 17 and received sale consideration for the items 18 and 19 from the purchaser. All the purchasers from the aforesaid properties are in possession even more than 15 years. The respondents 2 and 3 alone are entitled for the rest of the property as per the will. 20th item is a family house and the family members are not entitled to regarding other items. Though in the



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original plaint, other properties have not been impleaded, subsequently, during the trial, at the time of examination of witnesses, other properties were included by way of amendment. However, there is no whisper about the character of the properties and also how the property came to be family properties of Rengasamy Naicker. Therefore, in the absence of the same, the appellant is not entitled to get any relief. Hence, the trial Court has rightly dismissed the suit and therefore, the appeal is to be dismissed.

14.Heard both sides and perused the materials on record.

15.Admittedly, the suit is for partition. The properties originally belonged to the father of the appellant Rengasamy Naicker, who got the property out of the family partition dated 19.11.1968 between his brothers and died on 31.03.2004. After that the appellant and the respondents are the legal heirs of the deceased Rengasamy Naicker and his wife died in the year 2002. Though the appellant is one of the daughters of Rengasamy Naicker, she has filed the suit for partition, whereas the respondents 1 to 3 have taken a defence that some of the properties sold out by Rengasamy Naicker during his life time and he has also



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executed a Will in favour of the respondents 2 and 3. By way of the registered will as per the testamentary succession, the respondents 2 and 3 are entitled to the properties mentioned in the will. In respect of items 21 to 30, there is no detail about the property. The trial Court has stated that as per the will, the respondents 2 and 3 are entitled to get the property and dismissed the suit.

16.A reading of the entire plaint, written statement and also the evidence shows that though in the suit items 1 to 20 have been shown as suit properties and subsequently items 21 to 30 were included, absolutely, there is no particular about the items 21 to 30 in the plaint and even in the written statement, they have not stated anything.

17.The learned counsel for the first respondent would submit that since the appellant has not stated anything about the items 21 to 30, they are not liable to answer as per the Order 7 Rule 5 of C.P.C. The contention of the first respondent is not acceptable. As per Order 7 Rule 3 of C.P.C., if the subject matter of the suit is immovable properties, the description of immovable properties has to be given with four boundaries. If that being the case, the



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schedule property is also form and part of the plaint and the defendants have to specifically deny about the plaint.

18.However, on reading of the plaint, written statement and the finding of the trial Court, this Court is not satisfied with the proceedings held before the trial Court and on the ground of technicality, innocent and illiterate litigant should not suffer. The drafting of plaint and the manner of attacking the defence is the duty of the learned counsel and we cannot blame the illiterate litigants. Therefore, absolutely, the plaint is silent about the items 21 to 30 and D.W.2 and D.W.3 are not witnesses of the parties, they are only common witnesses.

19.This Court does not understand how the trial Court accepted the proof affidavit filed by the learned counsel for the defendants. When the official witness or independent witness is summoned, they are supposed to appear before the Court, on receipt of summon. Then the party, who summoned the witness has to start with the chief examination through their counsel and the witness is to be cross-examined by the opposite counsel. In Order 18 Rule 5 of C.P.C., it is clearly stated that how the evidence shall be taken in an appealable cases. In this



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case, there are lapses in the pleadings as well as the procedures adopted in recording the evidence. Therefore, this Court finds that it is purely negligence on the part of the learned counsel appeared before the trial Court on both sides and also lapses on the part of the trial Judge also. Therefore, under these circumstances, in order to give an opportunity to the parties and also avoid multiplicity of proceedings to meet interest of justice, this Court is inclined to remit back the suit to the trial Court. Hence, the judgment and decree passed by the trial Court are set aside and the suit is remitted back to the trial Court for fresh trial.

20.It is made clear that the plaintiff is at liberty to take steps to amend the plaint and the defendant is at liberty to file additional written statement. In case the appellant amends the plaint, the defendants are at liberty to file their written statement, if any, within a period of one month from the date of filing of the plaint. Since the appeal is pending from the year 2011 and the suit is of the year 2008, the trial Court is directed to complete the trial in the manner known to law, after giving liberty to both parties, from the date of completion of the pleadings.



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21.In the result, this Appeal Suit is disposed of. No costs.

Consequently, connected miscellaneous petition is closed.

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Index : Yes / No

Internet : Yes / No

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To

1.The Additional District Judge,
Fast Track Court No.1, Thoothukudi.

2.The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.



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P.VELMURUGAN, J.

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