



A.S.No.3 of 2019

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.08.2023

CORAM:

**THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MRS. JUSTICE R.KALAIMATHI**

**A.S.No.3 of 2019
and
C.M.P.No.195 of 2019**

Dhanabagyam

...Appellant

Vs.

K.M.Selvam (Died)

1.M.Balakandasamy

2.Rajammal

3.Velumani @ Chinnu

4.S.Nithyadevi

5.S.Yuganyadevi

...Respondents

Prayer: First Appeal filed under Order XLI Rule 1 r/w. Section 96 of C.P.C., against the judgment and decree dated 05.04.2018 of the learned III Additional District and Sessions Judge, Coimbatore in O.S.No.556 of 2012.

For Appellant : Mr.V.Sivakumar

For Respondents : Mr.N.Manokaran



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J U D G M E N T

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(Judgment of the Court was made by **R.SUBRAMANIAN, J.**)

Aggrieved by the dismissal of the suit for partition and separate possession in O.S.No.556 of 2012 on the file of the learned III Additional District and Sessions Judge, Coimbatore, the plaintiff is on appeal.

2. The brief facts of the case is as follows:-

i) The suit was launched by the plaintiff seeking partition and separate possession of her 1/4th share in the suit properties, which according to her, belonged to the joint family of one Maruthachala Gounder, who died on 24.06.1989, leaving behind his wife Pachiayammal, two sons namely, Selvam and Balakandasamy and two daughters, namely, Dhanabagyam and Rajammal. While Dhanabagyam is the plaintiff, the other three were shown as the defendants. The first defendant / Selvam died pending suit and his legal representatives were impleaded as defendants 4 to 6. According to the plaintiff, the suit property was allotted to Marudachala Gounder under a final decree passed in O.S.107 of 1963 on 31.10.1968. It was also pleaded that apart from the property allotted, Marudachala Gounder also acquired



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certain properties after the said allotment. Therefore, the suit Schedule A and B properties absolutely belonged to him. According to the plaintiff, though she demanded partition on the death of her father on 24.06.1989, her brother convinced her to wait till the life time of her mother. Finally, after the death of her mother on 04.10.2011, the plaintiff demanded partition and since the defendants did not comply with her request for partition, she had issued a legal notice on 27.04.2012. A reply was sent by the defendants 1 and 2 on 11.05.2012, claiming that there was an oral arrangement under which the plaintiff was given jewels and cash in lieu of her share in the suit properties. Contending that the contents of the reply notice are false, the plaintiff came up with the present suit. She also claimed that she was entitled to equal share in view of the amendments introduced by Act 39 of 2005 to Section 6 of the Hindu Succession Act, 1956.

ii) The suit was resisted by the defendants 1 and 2. While conceding that the property belonged to the joint family and Marudachala Gounder and Pachaiyammal died intestate on 24.06.1989 and 04.10.2011 respectively, the defendants would contend that since the suit property is a residential house, Section 23 of the Hindu



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Succession Act would apply and the plaintiff, being a female heir, cannot seek partition. It was also contended that Act 39 of 2005 would not apply, since Maruthachalam Gounder had died even on 24.06.1989. The plea of oral arrangement set up in the legal notice was given up in the written statement. An additional written statement was filed by the defendants 1 and 2 contending that the description of the first item of the suit property is not correct and the description of the second item is misleading.

iii) On the above pleadings, the learned trial Judge framed the following issues for consideration in the suit:-

1. Whether the plaintiff is entitled for partition as prayed for in the plaint?

2. Whether the plaintiff is entitled for mesne profit as prayed for in the plaint?

3. Whether the notional partition took place immediately after the death of Maruthachala Gounder on 24.06.1989?

4. Whether the Hindu Succession Act 2005 confers right upon the plaintiff?

5. Whether the plaintiff received 40 sovereign gold ornaments, Rs.10,000/- cash, household articles worth about Rs.50,000/- from



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joint family fund?

6. Whether the plaintiff relinquished her right of share over the suit property on 24.06.1989?

7. Whether the plaintiff is in joint possession?

8. Whether the plaintiff is entitled for any other relief?

iv) At trial, the plaintiff was examined as P.W.1 and two other witnesses, namely, plaintiff's husband as P.W.2 and one Muralidharan as P.W.3 are examined and exhibits A1 to A15 were marked. On the side of the defendants, the first defendant was examined as D.W.1, one Aruchamy was examined as D.W.2 and exhibits B1 and B2 were marked. The learned trial Judge took up issues 3 and 4 together and concluded that the plaintiff is entitled to 1/12th share in the property, applying the law as it stood then, relying upon the judgment of the Hon'ble Supreme Court in ***Prakash Vs. Pulavathi*** reported in **2016 (2) LW 865**. On issues 5 and 6, the trial Court held that the oral partition claimed by the defendants cannot be accepted and claimed that the plaintiff was given 40 sovereigns of gold, Rs.10,000/- in cash and also household articles worth about Rs.50,000/- from the joint family funds at the time of her marriage, has not been proved. The



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learned District Judge also answered the issue No.7 regarding valuation of the suit in favour of the plaintiff. Adverting to the first issue, the learned District Judge unfortunately erred and concluded that the plaintiff had not described the suit properties properly and therefore, she is not entitled to partition. We have to, at this juncture, point out that there was no plea in the written statement that the suit properties have not been properly described, except the vague denial in the statement and in the an additional written statement. The defendants did not contend that the suit properties cannot be identified with the description available in the plaint. We must also point out that no issue was framed regarding the description of properties. The learned District Judge however took it upon himself to examine the same while examining the first issue as to whether the plaintiff is entitled to partition or not and unfortunately, misdirected himself and concluded that the plaintiff's suit has fail for want of proper description of the property.

3. We have heard Mr.V.Sivakumar, learned counsel appearing for the appellant and Mr.N.Manokaran, learned counsel appearing for the respondents.



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4. Mr.V.Sivakumar, learned counsel for the appellant would vehemently contend that in the absence of any specific denial regarding the identity of the property or the title of Marudachala Gounder to the property as described in the plaint, the learned District Judge was not justified in dismissing the suit on a highly technical ground. We would also point out that being a suit for partition, final decree has to be passed on measurements to be done by a Commissioner and the Court can always issue suitable directions to the Commissioner in the final decree proceedings relating to identification of the property.

5. Contending contra, Mr.N.Manoharan, learned counsel for the respondents would submit that Order 7 Rule 3 of the Code of Civil procedure imposes certain obligations or duty on the plaintiff to describe the property with reasonable certainty so that it can be identified. He would also rely upon Order 20 Rule 9 which imposes an obligation on the Court to give a description of such property so as to sufficient to identify the same. In the absence of such description, the decree for recovery cannot be granted. He would also rely upon the



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judgment of the Hon'ble Supreme Court in ***Zarif Ahmad (Dead) through Legal Representatives and another Vs. Mohammed Farooq*** reported in ***2015 (13) SCC 673***. We must at the outset point out that the submissions of the learned counsel for the respondents overlook the fact that the suit on hand is neither a suit for injunction nor a suit for recovery of possession, it is a suit for partition and the Court, at the preliminary decree stage in a suit for partition decides only the shares to which the parties are entitled to. There are further proceedings contemplated in the form of a final decree proceedings, where a Commissioner is appointed and he will inspect the property and suggest modes of division. If the Commissioner is unable to identify the property with the description that is available, he can always make a report to the Court and the Court can pass appropriate orders at that time. To pre-suppose an inability on the part of the Commissioner and to dismiss the suit for partition in our opinion is wholly unjustifiable. Order 20 Rule 9 will not apply, since it deals with the decree for possession of immovable property. The judgment of the Hon'ble Supreme Court relied upon by the learned counsel also relates a suit for permanent prohibitory injunction, mandatory injunction for restoration of possession. In such cases, there can be no doubt that,



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the description of the property must be with reasonable certainty so as to enable the Court to comply with the provisions of Order 20 Rule 9. A suit for partition cannot be equated to a suit for recovery of possession or a suit for mandatory injunction. At the risk of repetition, we must point out that there is no plea in the written statement regarding the identity of properties. A very vague statement is made in the additional written statement to the effect that the description of the suit B Schedule property is misleading. The description of B Schedule property in the plaint is as follows:

*“Further the tiled house property
situate on the western side to the above
properties at an extent of 3 ½ cents with
its electrical fittings, water connection and
its deposits inclusive etc.,*

*The property situate within the
limits of Coimbatore Corporation.”*

6. As far as the suit A Schedule property is concerned, it has four boundaries and linear measurements are also given. B Schedule property is described as a tiled house situated on the western side of the A Schedule property of an extent of 3 ½ cents. We do not foresee any difficulty for identifying the properties as such and hence, we see



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no merits in the contentions of the learned counsel for the respondents. As we have already pointed out that the dismissal of a partition suit on such technical ground is unfortunate. We are therefore unable to uphold the judgment and decree of the learned District Judge. Hence, this appeal is allowed. The judgment and decree passed by the learned III Additional District and Sessions Judge, Coimbatore in O.S.No.556 of 2012 dated 05.04.2018, are set aside. Though the learned District Judge has found that the plaintiff would be entitled to only 1/12th share, in view of the recent pronouncement of the Hon'ble Supreme Court in **Vineeta Sharma vs. Rakesh Sharma and Others** reported in **2020 (9) SCC 1**, the plaintiff would be entitled to 1/4th share in the suit property. There will be a preliminary decree, declaring that the plaintiff is entitled to 1/4th share in the suit property. Consequently, connected Miscellaneous Petition is closed. There shall be no order as to costs.

(R.S.M.,J.) (R.K.M.,J.)
17.08.2023

Internet:Yes
Index:No
Order :Speaking
Neutral Citation : No
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To

The III Additional District & Sessions Court,
Coimbatore.



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R.KALAIMATHI, J.

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