



A.S.No.218 of 2022

THE HIGH COURT OF JUDICATURE AT MADRAS

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Date : 10.02.2025

CORAM:

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

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1. M.Venkatesan
2. V.Yogambal
3. R.Usha
4. V.Bakaran
5. V.Varalakshmi

... Appellants

Versus

1. Nirmala
2. K.Jayaraman
3. L.Jagdish Kumar
4. Mohands B.Mulchandani
5. R.Naresh Berwani
6. D.Murijmal
7. P.Namrata

... Respondents

PRAYER : This Appeal Suit has been filed under section 96 of Code of Civil Procedure to set aside the judgment and decree made in O.S.No.58 of 2012 before the Additional District Judge, Chengalpet, dated 31.08.2021 by allowing this appeal and remand back the same for re-hearing.



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For Appellants : Mr.S.Anburaja

For Respondents : Mr.S.Ramesh – R1

Mr.R.Vijayasarathy
for Mr.S.Rajasekar – R3 to R7

JUDGMENT

Challenging the preliminary decree passed for division of the suit property into two equal shares and also annulling the documents of sale deed dated 27.05.2003 and 26.05.2008 in respect of the half share of the first defendant, the present appeal came to be filed.

2. The parties are arrayed as per their own ranking before the trial Court.

3. The suit has been filed by the plaintiff contending that the property is an ancestral property and the property has been derived by her father. Her father Muthukrishnan died leaving behind the plaintiff, first defendant and one



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Rajagopal as his legal heirs. The said Rajagopal left the home during his childhood and thereafter, the plaintiff and the first defendant alone are entitled to half share in the property.

4. The first defendant has not filed any written statement

5. The defendants 3 to 7 filed a written statement to the effect that the first defendant is the absolute owner of the 32 cents and they had purchased property from the first defendant. It is their contention that the plaintiff has not produced any document declaring that their brother Rajagopal is legally dead.

6. Based on the above pleadings, the following issues have been framed by the trial Court. :

1. Whether the suit filed by the plaintiff is barred by limitation as contended by the defendants 3 to 7 in their written statement?



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2. Whether the valuation of the suit is not proper as contended by the defendants 3 to 7 in their written statement?

3. Whether the suit properties have been in joint and absolute possession of the plaintiff and the first defendant as contended by the plaintiff?

4. Whether the plaintiff is entitled to the relief of preliminary decree for partition by measuring and dividing the suit properties into 2 equal shares with metes and bounds and allotting one such share to the plaintiff as prayed for?

5. Whether the plaintiff is entitled to the relief of final decree on the basis of the preliminary decree by appointing an Advocate Commissioner by measuring and dividing the suit property into 2 shares equal in all respects with metes and bounds and allotting one such share to the plaintiff as prayed for?



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6. Whether the plaintiff is entitled to the relief of declaring the sale deed

1] 1331/2003 executed in favour of the second defendant

2] Sale deed 3035 /2008 executed in favour of defendants

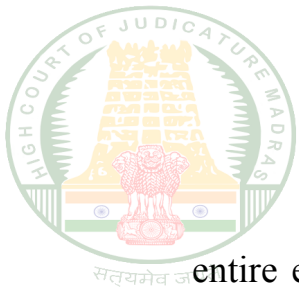
3 to 7

in the Office of the Sub Registrar, Thirukazhukundram as null and void as prayed for?

7. Whether the plaintiff is entitled to the relief of permanent injunction restraining the first defendant from any manner alinating or encumbering the suit schedule property to any third party or by any other means as prayed for?

8. To what other reliefs, if any, the plaintiff is entitled?

7. Before the trial Court, on the side of the plaintiff, plaintiff examined herself as P.W.1 and Ex.A.1 to A19 have been marked. On the side of the defendants, the third defendant has been examined as D.W.1 and no document has been filed on the side of the defendants. The trial Court, considering the



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entire evidence, has passed a preliminary decree for division of the property into two equal shares and also annulled the documents in respect of the half share of the plaintiff. Challenging the same, the present appeal has been filed.

8. The main contention of the learned counsel appearing for the appellants is that opportunity has not been given to them and summons have not been served to the defendants in the suit. Therefore, the order of the trial Court has to be set aside.

9. When this Court has questioned the learned counsel as to what is their defence, the learned counsel appearing for the appellant would submit that the property has been purchased by her father. If that being so, in the absence of any testament executed by the father, after his death, the property goes to the legal heirs. Therefore, this Court proceeds to decide the appeal.

10. The learned counsel appearing for the respondents 3 to 7 would submit that the trial Court is wrong in allotting half share, particularly in the



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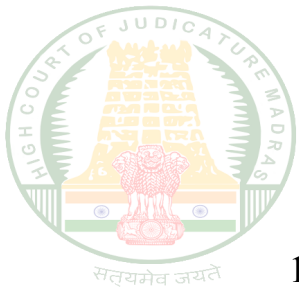
absence of any proof with regard to the civil death of the brother of the plaintiff, viz., Rajagopal, the other brother of the plaintiff.

11. The learned counsel appearing for the decree holder would submit that as the trial Court has granted the preliminary decree, the same does not require any interference.

12. In the light of the above submissions, now the points that arise for consideration are

1. Is the trial Court right in granting preliminary decree for division of the property into two equal shares, in the absence of proof with regard to the civil death of other person?

2. To what other relief, the parties are entitled?



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13. Points 1 & 2 :

As far as the contention of the appellants that the property is an ancestral property and that they were entitled to a share, though it is submitted before this Court that they are not given proper opportunity to putforth their defence before the trial Court, the property has been purchased by his father. Even assuming that such a contention is true, in the absence of any testament executed in favour of any of the parties, the property will be divided among the legal heirs of the father. Further, the very contention of the defendants that the property has been purchased by their father cannot be countenanced for the simple reason that Ex.A.1 document executed by the appellant makes it clear that the property is an ancestral property. Therefore, the contention of the appellant that the plaintiff is not entitled to a share has no legs to stand.

14. The trial Court has proceeded to pass a preliminary decree for division of the property into two equal shares. This Court is of the view that such an approach of the trial Court is not proper based on any materials. Though the plaintiff has stated that one of her brother was missing from his



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childhood, as long as his whereabouts are not known for more than 7 years has been established under law, civil death cannot be presumed. It has to be established in the manner known to law. Without establishing civil death as mandated under law, merely on the basis of the submissions of the plaintiff and without any proof of her submissions, the Court cannot presume that the other brother of the plaintiff is missing and his rights in the property will go to others. In the absence of any evidence with regard to the missing of the other brother, merely on the basis of pleadings, the Court cannot presume civil death, unless the same has been established in the manner known to law and the same has to be proved as required under section 107 of Evidence Act.

15. In such view of the matter, the plaintiff is entitled to 1/3 share in the suit property. If the plaintiff and the defendants are able to establish that their other brother is not alive and his whereabouts are not known and the same is established in the manner known to law, the plaintiff as well as the first defendant are entitled to half share in that property. As far as finding of the trial Court in setting aside the sale in respect of share of the first defendant is



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concerned, the same cannot be valid in the eye of law as there is no bar for the co-owner in dealing with the property as per Section 44 of the Transfer of Property Act. Hence, the finding of the trial Court in respect of the sale of the half share has to be set aside. The purchaser will step into the shoes of the vendor and he can work out equity in the final decree proceedings. The points are answered accordingly.

16. In the result, this Appeal Suit is allowed and the judgment and decree of the suit in O.S.No.58 of 2012, dated 31.08.2021 is modified to the effect that the plaintiff is entitled to 1/3 share. In respect of other aspects, the judgment of the trial Court is Confirmed. There shall be no Order as to costs. Consequently, connected miscellaneous petition is closed.

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Index : Yes / No
Internet: Yes
Speaking/non speaking order

VRC

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To,

The Additional District Judge,
Chengalpet.



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N. SATHISH KUMAR, J.

vrc

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