

Rajalakshmi Vs. E. Balakrishnan and Others

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Court : Chennai Madurai

Decided On : Jun-16-2016

Judge : The Honourable Ms. Justice R. Mala

Appeal No. : A.S(MD)No. 14 of 2013

Appellant : Rajalakshmi

Respondent : E. Balakrishnan and Others

Judgement :

(Prayer: Appeal is filed under Section 96 Cr.P.C., r/w. O.41 R1and2 CPC., praying to set aside the Judgement and decree dated 06.08.2012 made in O.S.No.26 of 2010, on the file of District and Sessions Court, Kanyakumari at Nagercoil.)

1. The appellant / second defendant has come forward with this Appeal Suit, challenging the decree and Judgment passed by the trial Court in O.S.No.26 of 2010, on the file of learned District and Sessions Judge, Kanyakumari at Nagercoil, on 06.08.2012.

2. Respondents 1 and 2, as plaintiffs, filed a Suit for partition and separate possession for their 2/5 share in the suit property stating that the property originally belonged to one Easwara Pillai. He executed a Gift Deed in favour of his second wife / Jegadhamma and giving life estate to her and vested remainder to children born to both first wife and second wife, Sathia Bama and Jegadhamma respectively. Jegadhamma died. The first wife having one daughter and three sons

viz., Sethulekshmi/D1 and Ramachandran, Balakrishnan/P1, Sadhasivan/P2. Ramachandran died. His wife is Chandra / D3. His daughter is 5.Sathia / D4, Son is Chenthil/D5. His predeceased daughter Suja's legal heirs are Sarathy/D6, Sabari/D7 and her husband Saravanan/D8. Since the property is in possession of the 2nd defendant/appellant, she filed a Suit for partition and separate possession. Admittedly, the first item of the Suit property is agricultural property and the second item is house property, where the 2nd defendant/appellant is residing. Only the 2nd defendant / appellant herein alone contesting the suit stating that she has purchased 1/5 share from the 1st defendant in 1980 another share of 1/5 from Ramachandran on 22.09.1980. So, totally she is entitled to 3/5 share. Since she is residing in the second item of the suit property and first item of the suit property also in her possession, she wants preemptive right over the suit properties. She further submitted that the properties are incapable of division. Hence, she prayed for dismissal.

3. The 3rd defendant has also filed a written statement. He has no objection for partition.

4. The trial Court after framing necessary issues and considering the oral and documentary evidence adduced on either side, granted the decree of share, in favour of the 2nd defendant/appellant. In respect of preemptive right, which she raised in the additional issues, the trial Court held that it has to be decided at the time of final decree proceedings. Against which, the present appeal has been preferred.

5. Though the appellant / 2nd defendant preferred the present Appeal Suit against both the items of the suit properties, Mr.V.M.Balamohan Thambi, the learned counsel appearing for the appellant / 2nd defendant advancing his arguments only in respect of second item of the suit property viz., house property. The learned counsel appearing for the appellant/2nd defendant would submit that from the day one, the appellant / 2nd defendant is in possession of the Suit property and she is a major share holder and therefore, as per Sections 2 and 3 of Partition Act, 1893, she is entitled to, preemptive right. Adding further, the learned counsel would submit that mere filing of written statement itself is sufficient to grant preemptive

right. Advancing his arguments, the learned counsel would submit that petition under Sections 2 and 3 of the Partition Act, is not necessary and that factum was not considered by the trial Court. In support of his contention, the learned counsel relied on the decision of the Hon'ble Supreme Court in R.Ramamurthi Vs. Rajeswararao reported in (AIR 1973 SC 643). Hence, the learned counsel prayed for setting aside the findings in additional issues framed by the trial Court.

6. Per contra, Mr.V.MeenakshmiSundaram, the learned counsel appearing for the respondents 1 and 2 / plaintiffs would submit that even though the appellant/2nd defendant herein has not advanced any arguments in respect of first item of the suit property, insofar as agricultural agricultural property is concerned, he is not entitled to any preemptive right. In support of his contention, the learned counsel relied upon a decision of this Court in Subramaniya Gounder Vs. Eswara Gounder reported in (2011 (2) MLJ 467) for the proposition that no one can claim preemptive right in agricultural property. It his further contention that mere filing of written statement is not sufficient and only during the final decree proceedings, if the property is incapable of division, she ought to have filed an application under Sections 2 and 3 of Partition Act, 1893. Hence, the findings of the trial Court does not warrant any interference and hence, prayed for dismissal of the Appeal Suit.

7. I have heard the learned counsel appearing on either side and perused the materials available on record.

8. On the basis of the rival contentions, the following points raised before me, for consideration:-

1. Whether the appellant /second defendant is entitled to filed an application under Sections 2 and 3 of Partition Act, 1893, to claim preemptive right in the second item of the suit property?

2. Whether the findings given by the trial Court in additional issue is sustainable?

3. To what relief the appellant/second defendant is entitled to?

9. It is admitted fact that the property is owned by the said Eswarapillai and he executed a Gift Deed in favour of his legal heirs. The 2nd wife Jegadhamma was

given a life estate. At this juncture, it is appropriate to consider the genealogy, which is given as under:-

(Chart)

10. It is not in dispute that the appellant / 2nd defendant is entitled to $\frac{3}{5}$ share and each plaintiff / respondent 1 and 2 are entitled to $\frac{1}{5}$ share. So the only point to be considered is whether the appellant is entitled to get preemptive right without filing an application under Sections 2 and 3 of Partition Act, 1893. It is appropriate to incorporate Sections 2 and 3 of Partition Act, which reads as follows:-

Section 2. Power to court to order sale instead of division in partition suits:- Whenever in any suit for partition in which, if instituted prior to the commencement of this Act, a decree for partition might have been made, it appears to the court that, by reason of the nature of the property to which the suit relates, or of the number of the shareholders therein, or of any other special circumstance, a division of the property cannot reasonably or conveniently be made, and that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, the court may, if it thinks fit, on the request of any of such shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds.

3. Procedure when sharer undertakes to buy.

(1) If, in any case in which the court is requested under the last foregoing section to direct a sale, any other shareholder applies for leave to buy at a valuation the share or shares of the party or parties asking for a sale, the court shall order a valuation of the share or shares in such manner as it may think fit and offer to sell the same to such shareholder at the price so ascertained, and may give all necessary and proper directions in that behalf.

(2) If two or more shareholders severally apply for leave to buy as provided in subsection (1), the court shall order a sale of the share or shares to the shareholder who offers to pay the highest price above the valuation made by the Court.

(3) If no such shareholder is willing to buy such share or shares at the price so ascertained, the applicant or applicants shall be liable to pay all costs of or incident to the application or applications.

11. The total extent is 653.4 Sq.ft., and each sharers will get only 130 sq.ft, which is not conducive for living. Hence, the property is incapable of division. So the appellant / 2nd defendant ought to have work out his remedy only by way of filing an application under Sections 2 and 3 of Partition Act, 1893. The decision of the Hon'ble Supreme Court in R.Ramamurthi Vs. Rajeswararao reported in (AIR 1973 SC 643) relied on by the learned counsel for the appellant / 2nd defendant is not applicable to the case on hand.

12. Further, the trial Court has specifically held in para 19 that the second defendant is entitled to seek any preferential right, she having right only in final decree application. So the findings given in additional issue does not warrant any interference. As per the decision of this Court in reported in (2011 (2) MLJ 467) (cited supra), wherein it has been specifically held that for agricultural land no preemptive right . Further more, the total extent is 68 cents. The trial Court has also considered the same in the additional issue and where it has been stated that each sharer is entitled to 13.06 cents. In such circumstances, I am of the considered view that the findings on the additional issues by the trial Court does not warrant any interference and it is hereby confirmed. The appellant is directed to file an application under Sections 2 and 3 of partition Act to work out his remedy only during the final decree proceedings. Accordingly, the issue Nos. 1 to 3 are answered accordingly.

13. With the above observation the Appeal Suit is dismissed. Considering the relationship both parties are directed to bear their own costs.

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