(2018) 01 MAD CK 0356

In the Madras High Court

Case No : 1046 and 1047of 2008

S.Rampprasadh APPELLANT

Vs

S.Shivpprasadh RESPONDENT

Date of Decision : 02-01-2018

Acts Referred:

Code of Civil Procedure, 1908, Order 2Rule 2, Order 20Rule 12

Citation : (2018) 01 MAD CK 0356

Hon'ble Judges : R.Subramanian

Bench : Single Bench

Advocate : T.V.Ramanujam, N.C.Ashok Kumar, Hema Sampath, R.Meenal

Final Decision : Dismissed

Judgement

1. The suit for partition and separate possession of the plaintiff''s 1/2 share in the suit property.

The case of the plaintiff in CS No.1046 of 2008 is as follows:

2. The plaintiff and the defendant are brothers. According to the plaintiff, property situate at Old No.22 New No.42 Bagirathiammal Street,

T.Nagar, Chennai 17, an extent of 2 grounds 1112 sq.ft. belonged to the grandfather of the plaintiff and the defendant, viz. late R.Subramania Iyer.

By a partition deed dated 23.12.1976, the legal heirs of the deceased R.Subramania Iyer, had divided the properties among themselves. In the

said partition the property subject matter of the present suit was allotted to the paternal uncle of the plaintiff and the defendant by name

R.S.Lakshminarasimhan @ R.S.Manohar and the property at Old Door No.21, Ne Door No.44 in Bhagirathiammal Street, T.Nagar, Chennai

600 017 measuring 2 grounds and 678 sq. ft. was allotted to the father of the

plaintiff and the defendant. It is claimed that the plaintiff and the defendant had jointly purchased the suit property which was allotted to their paternal uncle under a sale deed dated 04.11.2004. According to the plaintiff, the funds for the said purchase were raised by the sale of joint properties Virugambakkam and Anakaputhur villages apart from the borrowings from HDFC Bank. It is also claimed that the suit property had been let out to a tenant for a monthly rent of Rs.45,000/- and the arrangement between the parties is that the tenant will pay the monthly rent in the joint account of the parties and the same will paid over to HDFC Bank towards the equated monthly installments of the loan availed for purchase of the property by the plaintiff and the defendant.

3. According to the plaintiff, the defendant alone is handling the affairs of schedule mentioned property and he is in possession of all the documents like Bank Pass Book, Cheque Book etc. The plaintiff is kept in dark of the affairs relating to the suit property. Therefore, the plaintiff would claim that HDFC Bank has revised the monthly EMI from Rs.35,954/- to Rs.60,785/- per month with effect from August 2008 and the defendant is liable to bare 50% of the enhanced EMI also. On the above contentions the plaintiff issued a legal notice on 06.08.2008 demanding partition, which was replied to by the defendant on 18.08.2008 with false and untenable contentions. While the defendant had admitted that the plaintiff entitled to 1/2 share in the suit property, he has not chosen to come forward to agree for the partition. Hence, the plaintiff had come forward with the above suit, seeking partition of his 1/2 share in the suit property.

4. The suit is resisted by the defendant, inter alia contending that the claim of the plaintiff that he is kept in the dark about the affairs of the property is false. The defendant would claim that both the parties have given filled up post dated cheque in favour of the HDFC Bank for payment of installments due to the Bank. All documents relating to the property has been deposited in the Bank and the plaintiff has been furnished copies of the same. The defendant would admit that the revised EMI will have to meet by the parties in equal share. The defendant would also contend that he is paying his 1/2 share of the excess amount payable over and above the rental income. The defendant would claim that the plaintiff had assured that he would pay 5% of the rental income to the defendant for managing the

suit property. The claim of the plaintiff regarding payment of the

Property Tax is denied by the defendant. Therefore, the defendant would contend that there is no cause of action for the suit and seeks for

dismissal of the suit.

5. It is also the claim of the plaintiff that the contentions in paragraph 12 to 14 of the plaint has been made with a view to side track the Issues

involved in the other suit which has been filed between the parties in CS No.1047 of 2008, with reference to the ancestral properties of the parties.

6. On the above rival contentions, the following issues were framed in the suit:

1. Whether the plaintiff is entitled to the relief of partition of 1/2 share in the suit property?

2. Whether the Plaintiff is entitled to the relief of permanent injunction restraining the defendant from alienating or encumbering the suit property

without giving plaintiff''s 1/2 share by metes and bounds?

3. To what relief the plaintiff is entitled to?

The case of the plaintiffs in CS No.1047 of 2008 is as follows : 7. This suit is also filed for partition and separate possession of the plaintiffs 5/9th

share (4/9th share for the first plaintiff and 1/9th share for the 2nd plaintiff) of the plaintiffs in the suit A Schedule property, 1/3 share in the suit B

Schedule businesses, for accounting and for other reliefs. The Genealogy of the Family is as follows:

CHART OMITTED

The claim of the plaintiffs is as follows:

8. The suit A Schedule property bearing at Old door No.21 New door No.44 of Bhagirathiammal Street, T.Nagar, Chennai 17, originally

belonged to late R.Subramania Iyer, who died leaving behind two sons, viz. R.S.Srinivasan, the husband of the second plaintiff and father of the

first plaintiff and R.S.Lakshmi Narayanan @ R.S.Manohar. On the death of the said R.Subramaniya Iyer, his legal heirs had entered into registered

partition on 23.12.1976, in and by which, the suit A Schedule property was allotted to the share of R.S.Srinivasan, father of the first plaintiff and

husband of the second plaintiff. The said R.S.Srinivasan died intestate on 28.07.1983, leaving behind his wife the second plaintiff and two sons viz.

the first plaintiff and the first defendant and his mother Rajalakshmiammal and one daughter Padmavathi @ Padma Rama subramanian. It is stated

that on 06.10.1983 a registered partition was entered into between the legal heirs of R.S.Srinivasan. It is claimed that the daughter, viz. the third

defendant had relinquished her rights over the property of the father after receiving certain property under the aforesaid partition deed. The mother

of R.S.Srinivasan, Rajalakshmi Ammal has also relinquished her right and registered a lease deed dated 19.08.1983. Therefore, according to the

plaintiff, the first plaintiff and the first defendant being the sons would be each entitled to 4/9th share and the second plaintiff would be entitled to

1/9th share. The fourth defendant is a partner in the business, viz., Sri Sai Productions, which is shown in Schedule B to the plaintiff. The plaintiffs

would further claim that the plaintiffs are residing in the first floor and the first defendant is residing in the second floor of the suit A Schedule

property. It is stated that the first defendant has unilaterally inducted the second defendant a tenant in the ground floor portion and he is collecting a

monthly rent of Rs.35,000/- from the second defendant.

9. The claim of the first defendant that the plaintiffs are in possession of larger portion of the suit A Schedule property is not correct. The suit B

Schedule business, which is shown as item I in Schedule B is agreed to be kept in common between the parties and the plaintiffs would seek 1/3rd

share in the said business as well as accounting with reference to the business Sri Sai Productions. They would also seek 2/3 share in the amounts

to be realized in respect of deceased R.Srinivasan''s share in the dissolved Firm M/s.Meeraa Productions as well as certain shares in M/s.Facit

Asia Limited. On the above contentions the plaintiffs seek for partition and separate possession of their 5/9th share in A Schedule property and

2/3rd share in the suit B Schedule Properties, for accounts the income from A and B Schedule properties and for other reliefs.

10. The suit is resisted by the first defendant contending that the suit is barred under Order II Rule 2 of Code of Civil Procedure, in view of the first

plaintiff having filed CS No.1046 of 2008. The claim of the plaintiffs relating to the suit A Schedule property and the quantum of share is

substantially admitted by the defendant. But the claim of 1/3rd share in the businesses in suit B Schedule property is denied. The defendant would

contend that suit is bad for partial partition, he would claim that certain properties at Thiruvanmiyur, Mannivakkam and Kelambakkam were

purchased in the name of the second plaintiff out of the joint funds on 01.06.1984, 11.12.1985 and 04.03.1991 respectively. It is also claimed that

the deceased R.S.Srinivasan had left behind other properties which were sold by the parties jointly and about 1000 grams of gold and 10 Kgs of

silver were purchased out of the sale proceeds for the benefit of all the three shares. These items are in the Bank locker in the name of the second

plaintiff, each of the three sharers are entitled to 1/3rd share in these items according to the first defendant. It is also contended that the businesses

in the name of M/s.Sri Sai Productions mentioned in B Schedule are almost defunct and the film production was discontinued in 1986, only

distribution work was continued up to 1994 and there was no distribution after 1994. According to the first defendant, the amounts collected out

of the proceeds of the sale of the copy rights were distributed among the partners and the Firm account which was in Nedungadi Bank was closed,

on being taken over by Punjab National Bank, as it did not have the required minimum balance. In October 2000, all the movie and satellite rights

belonging to the firm were transferred to Kairali TV for a period of 10 years and the proceeds were distributed in proportion to the partners''

shares. The business of the Firm had come to a close and only nil returns are being filed. It is also stated that Meera Productions was dissolved

even in 1982. Therefore, the first defendant would deny the claim of the plaintiffs in the businesses of the firm. It is also contended that the second

plaintiff has no income of her own, she is only a house wife, therefore, the properties that stand in her name are also family properties and they

should have also been made subject matter of the suit.

11. The first defendant would also make a counter claim for partition of 1/3rd share in the properties situate at Thiruvanmiyur, Mannivakkam and

Kelambakkam shown in Schedule 1 to 3 as well as the movables, viz. Silver weighing about 10Kg and gold jewellery weighing about 1000gm and

investments shown in schedule 4 of his written statement.

12. The third defendant had filed a written statement, wherein she would contend that she was not aware of the business transactions. The second

plaintiff had executed a settlement deed dated 24.10.2005 settling the first floor portion of the house property at ole NO.16, Srinivasapuram, Thiruvanmiyur, Chennai 41, reserving life interest for herself and vested reminder to this defendant. According to her she is entitled the first floor

portion of the property situate at Thiruvanmiyur and the first defendant cannot claim partition of the same. It is also claimed that the second plaintiff

had executed a settlement deed on 14.09.2007 settling the property situate at Kelambakkam in favour of the third defendant. The third defendant

would only plead that as far as those properties are concerned the properties were purchased by the second plaintiff out of her own income and

therefore, the settlement deeds are valid. Hence her title under the settlement deeds dated 24.10.2005 and 14.09.2007 executed by the second

plaintiff cannot be impeached in the present suit.

13. The fourth defendant filed a separate written statement only seeking protection of her interest as a partner of the firm Sri Sai Productions.

14. The plaintiffs filed a written statement to the counter claim contending that after the partition that took place on 06.10.1983, there was no joint

funds among the parties except the house property and the business that were retained as joint properties. All the other properties were divided

even under the partition deed dated 06.10.1983, therefore, according to the plaintiffs there is no question, there being any joint family or joint

property after 06.10.1983. Hence, they would claim that the acquisition of properties by the second plaintiff in 1984, 1985 and 1991 are all out of

her own funds, as such neither the first plaintiff nor the first defendant would claim any right over the same. It is also claimed that the investments

mentioned in Schedule 4 were also made after the registered partition dated 06.10.1983, the existence of the gold and silver mentioned in schedule

4 is denied. Therefore, the plaintiffs seek rejection of the counter claim.

15. On the above rival pleadings, this Court had framed the following issues in the suit:

1. Whether the plaintiffs are entitled to the relief of partition of their 5/9th share in the plaint ''A'' Schedule property?

2. Whether the plaintiffs are entitled to the relief of partition of 1/3rd share each (in all 2/3rd share) in the plaint ''B'' Schedule property?

3. Whether the plaintiff is entitled for accounts of the rental collections from ground floor portion of ''A"" Schedule property and the income from the

''B'' Schedule business?

4. Whether the plaintiff is entitled to the relief of permanent injunction restraining the defendant from alienating or encumbering the plaint ''A''

Schedule property without giving plaintiff''s 5/9th share by metes and bounds?

5. Whether the plaintiff is entitled for mandatory injunction directing the second defendant to deposit the monthly rent into the credit of the suit?

6. Whether the first defendant is entitled for counter claim in respect of the properties mentioned in the written statement and counter claim?

7. To what relief the Plaintiff is entitled to?

16. The suit in CS Nos.1046 and 1047 of 2008 are tried together and evidence was recorded in CS No.1047 of 2008. On the side of the

plaintiffs, the second plaintiff was examined as P.W.1 and on the side of the defendant the first defendant was examined as D.W.1. Ex.P1 to P52

were marked on the side of the plaintiffs and Ex.D1 to D49 were marked on the side of the first defendant.

Issue No.1 in CS No.1046 of 2008:

17. There is no dispute regarding the factum of purchase of the suit property by the plaintiff and the defendant jointly on 04.11.2004. The shares

are also not in dispute. The dispute only relates to the rendition of accounts which is to be decided at the time of the final decree proceedings. In

view of the fact that the share of the plaintiff is admitted by the defendant, the issue No.1 in CS No.1046 of 2008 is answered in favour of the

plaintiff holding that he is entitled to the relief of partition is 1/2 share in the suit property.

Issue No.2 in CS No.1046 of 2008:

18. The plaintiff has sought for permanent injunction restraining the defendant from alienating or encumbering the suit property without dividing the

plaintiff 1/2 share by metes and bounds. Now it is found that the plaintiff is entitled to 1/2 share any alienation made by the defendant hereafter only

be subject to the rights of the plaintiff as per the preliminary decree. Therefore, I do not see any reason for grant of the perpetual injunction as

prayed for in the suit.

Issue Nos. 1 and 3 in CS No.1047 of 2008:

19. The execution of the partition deed dated 06.10.1983 is admitted. It is also admitted that the suit property is ancestral property in the hands of

R.S.Srinivasan and that it was agreed between the parties to keep it in common when the partition deed dated 06.10.1983 was entered into. The

fact that the Rajalakshmi Ammal the mother of R.S.Srinivasan and the third defendant Padma Ramasubramanian had relinquished their claim over

the suit A Schedule property is also not in dispute. On the above admitted facts the first defendant who is the contesting party does not deny the

quantum of shares as claimed by the plaintiffs. Therefore, I see no difficulty in answering Issue No.1 in favour of the plaintiffs and concluding that

the plaintiffs will be entitled to 5/9th share (4/9th share to the first plaintiff and 1/9th share to the second plaintiff) in the suit A Schedule property.

20. It is contended by the plaintiff that the first defendant alone is collecting the rents to the exclusion of the plaintiffs from the second defendant.

The first defendant would, in response, contend that the plaintiffs are in possession of a larger area of the premises and as such he is entitled to

collect the rents from the tenant. The first defendant would admit that he is collecting the rents. But he would claim a right appropriate rent to

himself on the ground that the plaintiffs are in possession of a larger area of the building, which would be more than their entitlement, viz. 5/9th

share. There is no evidence with reference to the area occupied by each of the parties. Once the shares are declared it is for the first defendant to

produce accounts and show that he is entitled to the rental collection. Therefore, the plaintiffs are entitled to a decree for accounts as against the

first defendant in respect of the rental collections. At the time of enquiry into the accounts it will be open to the first defendant to show that area in

his possession as 4/9th shareholder is within his entitlement and as such he is not liable to account for the rental collection. The same would be

decided at the time of final decree proceedings when the accounts are being looked into. The 3rd issue is answered in favour of the plaintiffs

subject to the liberty to the first defendant to show that the ground floor portion which is rented out would be within his 4/9th share in the entirety

of the suit property.

Issue No.2 in CS No.1047 of 2008:

21. Insofar as the business is concerned the shares are not denied, though voluminous documentary evidence has been produced by the parties the

controversy is limited to the transactions in the rights over the some of the movies. The parties are not at variance on the fact that there may not be

much left in the business today. Admittedly, Sri Sai Production has stopped activities even in the year 1994, therefore, whatever copy rights that

remain with the firm may not be of a significant value. It is seen from Ex.D1, the partnership deed dated 01.04.1995 relating to the M/s.Sri Sai

Productions, which is shown item I in Schedule B of the plaint, that the second plaintiff, the first defendant and the fourth defendant are the partners

of the said business. In the partition deed dated 06.10.1983 entered into between the heirs of late R.S.Srinivasan, it is stated that the said business

shown as item 5 in Schedule A to the said partition deed is allotted to the parties of the first part to the third part, viz. the plaintiffs and the first

defendant. However, the subsequent partnership deed dated 01.04.1995 shows that the second plaintiff, the first defendant and the fourth

defendant are the partners of the said Firm. The partnership deed dated 01.04.1995 marked as Ex.D1 would also recite that it is a reconstitution

of the partnership entered into on 01.04.1990 between the parties. It is conceded by the counsel for the plaintiffs as well as the first defendant that

the partnership business as well as the other businesses shown in the B Schedule are not worth anything substantial as on today. There are

Negative Rights in certain movies which had also according to the first defendant become irretrievable. If it all the parties are held to have a share

in the businesses as well as the shares in M/s.Facit Asia Llimited, they will have to undergo the process of accounting and by the time, the process

of accounting is over, there will be nothing left in the firms to be divided among the parties. Therefore, I do not see any plausible cause for granting

a decree in respect of the businesses set out in B Schedule businesses to the plaint as well as the shares in M/s.Facit Asia Limited

Issue No.6 in CS No.1047 of 2008:

22. This issue relates to counter claim made by the first Defendant it is the contention of the first defendant that the properties in Thiruvanmiyur,

Manniivakkam and Kelambakkam purchased by the second plaintiff on 01.06.1984, 11.12.1985 and 04.03.1991 were purchased out of the joint

family funds. Therefore, those properties should also be divided as if they belong to the joint family. It is not in dispute that the family properties

were partitioned under the registered partition deed dated 06.10.1983, this resulted in disruption of the joint family. It is also seen that the certain

properties were allotted to the plaintiffs 1 and 2 and the first defendant in common, while the third defendant the daughter was allotted the property

in Mumbai and it is also not in dispute that the second plaintiff had relinquished her 1/3rd share in some of the properties in Virugambakkam and

Anagaputhur which were sold by the first plaintiff and the first defendant in 2004, in order to enable them to purchase the property subject matter

of CS No.1046 of 2008.

23. The first defendant has miserably failed in his attempt to show that there were some joint family funds available with the family after

06.10.1983. The properties subject matter of the counter claim situate at Thiruvanmiyur, Mannivakkam and Kelambakkam have been purchased

by the second plaintiff on 01.06.1984, 11.12.1985 and 04.03.1991 respectively. All these purchases are after the partition dated 06.10.1983.

Therefore, unless the first defendant establishes that the first plaintiff had certain amount of money belonging to the family left with her and she had

purchased the properties out of the same, those properties cannot be termed to be joint family properties in which the first plaintiff and the first

defendant would get any right. It is also in evidence that the second plaintiff had exercised her right over the properties and executed settlement

deed in respect of the same in favour of the third defendant, viz. her daughter. The first defendant has not chosen to seek a relief of cancellation of

those documents. It is not also the case of the first defendant that the mother is holding the property in trust for himself and the first plaintiff.

24. The sum and substance of the case projected by the first defendant is that acquisitions were made out of joint funds/joint family funds, in the

absence of proof availability of joint funds or joint family funds, the properties that stands in the name of the mother viz., the second plaintiff cannot

be treated as the joint family properties.

25. Insofar as the movables mentioned in Schedule 4 to the counter claim the availability of the gold jewellery and the silverware have not been

established by the first defendant. The burden of proving the existence of movable is always on the sharer who claims partition. The first defendant

has not placed any tangible material to show the existence of the movables. The second plaintiff as P.W.1 has denied the existence of such movables. Therefore, it is found that the first defendant has not established the existence of the silver and gold which were shown as Items I & II in

Schedule 4 to the counter claim. As regards, the investments in NSC Post office deposits etc., it is seen that all those investments were made after

1983 by the second plaintiff in her name, therefore the first defendant cannot demand partition of the same. Hence, the counter claim of the first

defendant stands rejected.

Issue No.4 in CS No.1047 of 2008:

26. A relief of permanent injunction is sought for by the plaintiffs restraining the first defendant from alienating or encumbering the plaint A Schedule

property without effecting the division. Now that it is found that the plaintiffs are entitled to preliminary decree for partition and separate possession

of their 5/9th share any alienation made by the first defendant would be subject to the decree. It is open to the plaintiffs to work out their rights to

seek a final decree. Therefore, I do not see any case for grant of an injunction as prayed for by the plaintiffs.

Result in CS No.1046 of 2008:

27. In fine there will be a decree for partition and separate possession of 1/2 share of the plaintiff in the suit property. The plaintiff will also be

entitled to mesne profit if any to be determined by separate proceedings under Order 20 Rule 12 of the Code of Civil Procedure.

28. The suit in CS 1046 of 2008 is decreed. There will be a decree declaring that the plaintiff is entitled to 1/2 share in the suit properties and also

for mesne profit. The suit in other respects will stand dismissed. Considering the relationship between the parties, there will be no order as to costs.

Result in CS 1047 of 2008:

29. In fine there will be a preliminary decree for Partition and separate possession of the 5/9th share of the plaintiffs in the suit A Schedule

property. The suit in respect of the B Schedule properties will stand dismissed. The counter claim filed by the first defendant will also stand

dismissed. Plaintiffs would be entitled to mesne profit and the relief of accounting in respect of the A Schedule property alone and in other

respects, the suit will stand dismissed. Considering the relationship between the parties, there will be no order as to costs.

