



S.A.(MD).No.323 of 2019

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 01.11.2023

CORAM:

THE HONOURABLE MRS.JUSTICE S.SRIMATHY

S.A.(MD).No.323 of 2019

and

C.M.P.(MD)No.6574 of 2019

Amala

... Appellant

/Vs./

1.Ronickam

2.Mariammal

3.Anitha

4.Alexander

5.Aruldas

6.Augustin

7.Alloysious

8.Anto Marlin

...Respondents

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code against the Judgment and Decree dated 26.11.2018 rendered in A.S.No.1 of 2008, on the file of the Principal District and Sessions Judge, Kanyakumari at Nagercoil, partly allowing the decree and the judgment dated 29.06.2007 rendered in O.S.No.8 of 2005, on the file of the Subordinate Judge, Padmanabhapuram, by allowing this Second Appeal.



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For Appellant : M/s.P.Jessi Jeeva Priya

For Respondents : Mr.R.Devaraj

JUDGMENT

The suit in O.S.No.8 of 2005 is filed by the plaintiff namely, Amala for partition claiming 1/9th share out of 2/3 be partitioned by metes and bounds and allotted.

2. The first defendant is the mother of plaintiff and defendants 2 to 9. The plaintiff and the defendants 2 to 9 are siblings. The first defendant has three daughters and six sons. The plaintiff is one among the daughters of the first defendant. The defendants 2 and 3 are other daughters of the first defendant and the defendants 4 to 9 are sons of the first defendant. For the sake of convenience, the rank of the parties shall be referred as plaintiff and defendants as stated in suit.

3. The suit schedule properties are purchased by the plaintiff's father namely, Ambrose, son of Arulapan and he died on 27.03.2001 leaving behind his wife and children as legal heirs. Since some of the siblings were residing separately, taking advantage of the same, the fifth



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defendant who was staying with the first defendant, started creating documents in his name and his brothers i.e. defendants 6 to 9 without including his sisters and fourth defendant. The plaintiff has narrated the facts how the fifth defendant had created the documents. The fifth defendant involved in execution of Will dated, 26.08.1985 and other two wills dated 15.12.1993 and 05.12.1996. Based on the said wills, the beneficiary of the Wills (the other siblings of the fifth respondent) are claiming right over certain properties.

4. The contention of the plaintiff is that the said Will was not probated, but the siblings have taken over possession of the said property. Hence, the plaintiff has filed a suit for partition. The suit was decreed regarding six properties by granting 1/9th share to the plaintiff. Aggrieved over the same, the plaintiff has preferred the first appeal. In the first appeal, the parties tried to compromise the issue and the plaintiff has also agreed for the said compromise, which is evident from the judgment of the First Appellate Court. But unfortunately, the parties could not record the compromise, since at the final stage, the plaintiff was not inclined to compromise the issue. Further the plaintiff has changed the counsel, which has also been recorded in the A.S. Judgment and the same is extracted hereunder:



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மேற்படி குறிப்பாணையில் இந்த

மேல்முறையீட்டாளரானவர் தான் ரூ.18,000 / - த்தை தனக்குச் சேரவேண்டிய பங்கிற்காக மேற்படி 4 பேரிடமிருந்து பெற்றுக் கொள்வதாகவும், வழக்குச் சொத்துக்கள் எதிலும் தனக்கு உரிமையில்லை எனவும் குறிப்பு செய்திருக்கிறார். இந்தக் குறிப்பாணையைப் பதிவுதற்கு முன்பு வாதி தனது வழக்கறிஞரை மாற்றி மூத்த வழக்கறிஞர் ஒருவரை தன் சார்பாக நியமித்திருந்தார். மேற்படி மூத்த வழக்கறிஞரும் இந்தச் சமாதான உடன்படிக்கையின் ஓரத்துக்களைத் தெரிந்துகொண்டு, தாவா சொத்துக்களை தானும் பார்த்தபின்பு இந்தக் குறிப்பாணையை பதிவு செய்யும்படி வேண்டுகோள் விடுத்ததன் அடிப்படையில் இந்த நீதிமன்றம் அவருக்கு போதிய வாய்ப்புகள் அளித்தது. அதன்மீன்னர் அவர் இந்த வழக்கின் தான் வாதிட விரும்புவதாக தெரிவித்தார். இந்தக் குறிப்பாணை இருதரப்பு ஒப்புதலின்பேரில் எழுதப்பட்டது என்பதை அவர் ஒப்புக்கொண்டார்.

The contention of the plaintiff is that the Will was not probated and therefore she is not inclined to compromise the issue.

5. The contention of the plaintiff that without conducting enquiry on the compromise, a decree cannot be granted and the said plea is absolutely right. Further the plaintiff contended that the Will ought to be probated. Accepting the said contentions of the plaintiffs, this Court is of the considered opinion that when the compromise has not been accepted by the plaintiff, then the judgment cannot be rendered, as if the plaintiff



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has compromised the issue. Therefore, this Court is inclined to set aside the judgment and decree rendered by the First Appellate Court and accordingly set aside. The case is remitted back to the First Appellate Court for hearing the case on merits.

6. Therefore, the Second Appeal is allowed by setting aside the judgment and decree of the First Appellate Court and the matter is remitted back to the first appellate Court for hearing the case.

7. In view of the above, the Second Appeal stands allowed as stated supra. No costs. Consequently, connected miscellaneous petition is closed.

01.11.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes / No

Nsr



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TO:

- 1.The Principal District and Session Judge,
Kanyakumari at Nagercoil
- 2.The Subordinate Judge,
Padmanabhapuram.
- 3.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SRIMATHY, J.

Nsr

Judgment made in
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Dated:
01.11.2023