

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:11.09.2015

CAV ON:07.09.2015

CORAM

THE HON'BLE MR.JUSTICE C.S.KARNAN

C.M.A.No.1346 of 2015

Order Reserved on 07.09.2015 Judgment Pronounced on 07 .09.2015

1.Rajamanickam

2.K.Selvi

...Appellants

vs

1.Alamelu

2.R.Madhavan

...Respondents

Prayer: Civil Miscellaneous Appeal filed under Section 104 of CPC read with Order 43 Rule 1(d) of CPC, against the Decree and Judgment of the Additional District Judge, Fast Track Court No.II, Salem dated 12.12.2008 made in I.A.No.87 of 2008 in O.S.No.102 of 2004.

For Appellants : Mr.R.Dasaratha Rao

For Respondents: Mr.P.Jagadeesan

सत्यमेव जयते
JUDGMENT

The respondents / plaintiffs namely Mrs.Alamelu and R.Madhavan have filed a Civil Suit in O.S.No.102 of 2004 on the file of Additional District Court at Salem, against the appellants / defendants herein to pass a preliminary decree for partition making provision for passing final decree and they sought the following relief:

(a) Directing the division of the suit properties into 3 equal shares and allotment of one such divided share of the plaintiffs together;

(b) Appointing a Commissioner for division of the suit properties as per the preliminary Decree;

(c) Allotting one such divided share to the Plaintiffs together and placing them in separate possession of such allotted share to the plaintiffs;

(d) Awarding costs of the suit payable by the Defendants to the Plaintiffs;

The defendants have filed written statements in the said suit and resisted the same and also proved to dismiss the suit since the plaintiff is claiming partition of the schedule mentioned property after forging a Will. The said suit came before hearing on 03.08.2005, on that day, the defendant counsel reported before the trial Court stating that no further instructions from the defendants. The plaintiff had filed a proof affidavit and adduced evidence as PW1 and marked 10 documents. After recording the proof affidavit of PW1 and on perusing the exhibits marked by him the trial Court had granted ex-parte decree in favour of the plaintiffs and relief granted as prayed for in favour of the plaintiffs that is preliminary decree was passed on 03.08.2005.

2. Aggrieved by the said ex-parte decree the defendants had filed a supplementary application in I.A.No.87 of 2008 in O.S.No.102 of 2004 to set aside the ex-parte decree passed on 03.08.2005. In the said application the second respondent namely R.Madhavan had filed a counter statement and refuted the set aside application. Thereafter, the trial Court dismissed the said application stating that the defendants had filed a set aside application after a lapse of 3 years, as such the defendants have not shown any interest.

3. Aggrieved by the said order and decree passed in I.A.No.87 of 2008 in O.S.No.102 of 2004, on the file of Additional District Court at Salem dated 12.12.2008. The highly competent counsel Mr.R.Dasaratha Rao appearing for the appellants submits that the first plaintiff Mrs.Alamelu was not a widow of Venkataraja konar, the status misconceived by the first plaintiff, actually there was no marriage that took place between the first plaintiff and the said Venkataraja konar. Further both of them were lived as husband and wife at Konar Rice Mills. The second plaintiff is the brother of the first plaintiff. The first plaintiff stated that the marriage was solemnized on 22.08.1991 and on that day Venkataraja Konar age was 53 years and the first plaintiff's age was 38 years. It clearly proves that the first plaintiff concocted the story for the purpose of

making a wrongful gain through the partition suit. Further, the Venkataraja konar was living along at Door No.79, Cuddalore Main Road, in order to prove the same ration card and voters list are documentary evidence.

4.The very competent counsel had raised a crucial point stating that the mother of the plaintiff had adduced evidence on 22.06.1992 in a Civil Suit in O.S.No.125 of 1998 on the file of the District Munsif Court. After stating that she wanted to marry the first plaintiff herein namely Alamelu to marry one Selvam. As such, there is no possibility that the marriage was solemnized between the first plaintiff and Venkataraja Konar on 22.08.1991, besides several issues have arisen in the said suit. Therefore, a comprehensive trial is necessary. Further, the exparte decree can be set aside at any stage. If the exparte decree is set aside, the plaintiffs will not be prejudiced. The appellants had filed CMA.No.SR88472 of 2011 was dismissed along with M.P.No.1 of 2011 were dismissed by this Court on 05.11.2012, the same was challenged by the appellants herein before the Hon'ble Supreme Court of India in SLP(C)No.16050 of 2013, the same was allowed on condition that the appellant herein shall pay a sum of Rs.50,000/- as per the order dated the said amount was paid on 11.02.2015 to the Registry of Madras High Court, as such the conditional order enforced by the Hon'ble Supreme Court has been complied within the stipulated period, subsequently, the above appeal has been numbered as CMA.No.1346 of 2015. The condoned petition was allowed by this Court in order to provide an opportunity for the defendants to face the trial, hence the learned counsel entreats the Court to allow the above appeal and remand the matter to the trial Court to dispose the main case on merits after setting aside the exparte decree passed on 03.08.2005.

5.The very competent counsel Mr.P.Jagadeesan appearing for the plaintiffs / respondents herein submits that the plaintiffs have filed a partition suit on the basis of Will executed by the late husband of the first plaintiff dated 02.10.1998, the plaintiff had also annexed 11 documents in order to prove that the plaintiffs are entitled to receive partition and separate possession. The said suit had been filed in the year 1985, the defendants also had filed a written statement in the year 2000, the said case posted for trial from time to time, finally the case was taken on file on 03.08.2005 for evidence, on that day the defendants did not appear, further the learned counsel for the defendants had informed the Court stating that no further instructions from the defendants. Hence, the trial Court had recorded the proof of the second plaintiff who was examined

as PW1 and he had marked 10 documents as exhibits A1 to A10. After recording the evidence of PW1 and on perusing the exhibits marked by the plaintiff, the suit was decreed on merits since there is a prima facie case on the side of the plaintiffs and the same was proved.

6.The learned counsel further submits that the defendants had filed a set aside application after a lapse of 3 years. Therefore, the trial Court dismissed the said set aside application. Aggrieved by the same, the defendants have filed the above appeal. After 18 years the case need not be set for trial since the exparte decree has been operated already and the plaintiffs have occupied to an extent of 5 acres and are cultivating the same. The highly competent counsel Mr.P.Jagadeesan makes a deep request without disturbing the plaintiffs possession the trial may be conducted since the plaintiffs possession comes from a lawful position.

7.From the above discussions, this Court is of the view that:

1.As per the averments of the plaint and written statement several issues have arisen viz. The date of marriage, place of marriage, time of marriage and type of marriage between the first plaintiff and the late Venkataraja Konar.

2.Whether the Will dated 16.09.1998 had been executed to late Venkataraja Konar to and in favour of the first plaintiff herein.

3.What are the other defendants civil rights and ownership of the property, to that effect the evidence from both sides ought to be recorded and both sides relevant documents have to be closely scrutinized by the trial Court. Therefore, a comprehensive trial is necessary.

4.If exparte decree is set aside the plaintiffs will not be prejudiced at the same time if the exparte decree is not set aside the defendants will be prejudiced and put into hardship and irreparable loss.

5.The Hon'ble Supreme Court of India after allowing the condone delay petition, trial has to be conducted otherwise the purpose will not be resolved for allowing the delayed petition.

8. Considering the facts and circumstances and circumstances of the case, the arguments advanced by the highly competent counsels on either side and on perusing the typed set of papers, the view of this Court narrated in (1) to (5) as above, the said appeal is allowed, consequently the order passed in I.A.No.87 of 2008 in O.S.No.102 of

2004, on the file of the Additional District Judge, Salem, dated 12.12.2008 is set aside. Consequently, the exparte decree passed in O.S.No.102 of 2004 dated 03.08.2005 is also set aside. Further, this Court directs the Additional District Judge, Fast Track Court No.2, Salem, to restore the O.S.No.102 of 2004, on the file of Additional District Judge, Salem and dispose the suit on merits, after giving sufficient opportunities to the parties within a period of three months from the date of receipt of this order without being influenced through this Court's comments.

9.In the result, the above appeal is allowed. No costs.

Sd/-
Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

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To

1. The Additional District Judge,
(Fast Track Court No.2),
Salem.
2. The Section Officer,
VR Section, High Court, Madras.

2 CCs to Mr.Vijay Anand, Advocate SR.No. 49783

1 CC to Mr.P.Jagadeesan, Advocate, SR.No. 49711

C.M.A.No.1346 of 2015

MSM (CO)
PSI (11.09.2015)

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