

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 15.12.2016

CORAM

THE HONOURABLE MR.JUSTICE M.M. SUNDRESH

S.A.No.315 of 2016

& C.M.P.No.5851 of 2016

S.Mallika

... Appellant/
Plaintiff

Vs.

1. Thirumathal
2. Venkatachalapathy
3. Santhi

... Respondents/
Defendants

Second Appeal filed under section 100 of Code of Civil Procedure against the judgment and decree dated 20.11.2015 in A.S.No.39 of 2014 on the file of the IV Additional District and Sessions Judge, Coimbatore, against the judgment and decree dated 11.10.2013 in O.S.No.211 of 2010 on the file of the Subordinate Judge, Pollachi.

For appellant : Mr.V.Nicholas

For respondents: No Appearance - R1 & R2

Mr.V.Anandhamurthy - R3

JUDGMENT

The Second Appeal is filed by the appellant-plaintiff against the judgment and decree dated 20.11.2015 in A.S.No.39 of 2014 on the file of the IV Additional District and Sessions Judge, Coimbatore, against the judgment and decree dated 11.10.2013 in O.S.No.211 of 2010 on the file of the Subordinate Judge, Pollachi.

2. The appellant herein is the daughter of the first respondent and sister of the second respondent. She has filed a suit for partition and for separate possession in so far as the two schedule mentioned properties namely A and B. It is her case that there is no partition of the suit properties and therefore, being the legal heir of her deceased father, who owns them, she is entitled for her rightful share. The trial Court dismissed the suit holding that the appellant has not proved the

factum of she being the daughter of the first respondent born out of the wedlock with her deceased husband late C.Subramaniam.

3. The lower appellate Court reversed the judgment and decree of the trial Court on the premise that the appellant / plaintiff is not the daughter of the first respondent and thus incidentally, the daughter of the deceased Subramaniam, resulting in granting the decree for 'B' schedule property. In so far as 'A' schedule property, the lower appellate Court dismissed the suit holding that the suit property having been alienated by the first and second defendants in favour of the third defendant by a registered sale deed dated 11.04.1997 under Ex.A.2 which imply that the evidence of the plaintiff that she was in possession ever since the said execution is hit by law of limitation.

4. Challenging the same and framing following substantial question of law, the present appeal has been filed.

"Having found that the plaintiff is also a legal heir of the deceased Subramaniam and that she is entitled to 1/4th share in his estate along with the other legal heirs whether the Judgment and Decree of the Courts below are not perverse and contrary to the evidence in dismissing the suit in respect of "A" schedule property?

5. The learned counsel appearing for the appellant submits that the appellant was not a party to the execution of Ex.A.2. Law presumes a jointness and therefore, the judgment and decree of the lower Court in so far as 'A' schedule property is concerned, required to be reversed and resultantly, the appellant is entitled for her rightful share.

6. The learned counsel appearing for the third respondent submits that the sale deed dated Ex.A.2 is a registered one. The appellant, though claim that the 'A' schedule property is a joint family property, she had admitted in her cross examination that she was in joint possession of the property and thus, the said admission is binding on her. Therefore, no interference is required.

7. The lower appellate Court in para 17 of the judgment has recorded a finding based upon the statement made by the appellant in the course of cross examination of P.W.1 about the possession of suit 'A' schedule property had been given to the third respondent and thus, she was not in possession of the same. She also admitted in the cross examination that the

revenue records reveals that the 'A' schedule property has been mortgaged with the Co-operative Bank. Therefore, a finding has been rendered by the lower appellate court that to the knowledge of the appellant, the third respondent was in possession of the 'A' schedule of the suit property since the date of execution of Ex.A.2.

8. The said finding based upon the admission made by the appellant does not warrant any interference. While it is true that Ex.A.2 has been executed not by the appellant, she cannot take her sweet time to challenge the same by filing a suit for a partition on the premise that she continues to be the co-owner. It is also true that no limitation would come in a case where a party is not a signatory to a document. But, when it is obviously clear that the appellant is not in possession of the 'A' schedule property, as a co-owner from 1997, she cannot be allowed to chose her own time to challenge the said allegation after more than a decade. As rightly found by the lower appellate Court, the facts would show that the appellant was aware of Ex.A.2 sale deed even on 11.04.1997. P.W.3 who has deposed in favour of the appellant has also stated that he was present when Ex.A.2 was executed. He has also further stated that he informed to the appellant from two to three months from the date of execution of Ex.A.2 about the said factum. Thus the above said facts clearly, clinch issues against the appellant. In such view of the matter, this Court does not find any substantial question of law, much less question of law, involved warranting any interference.

9. Accordingly, the Second Appeal is dismissed. The judgment and decree of the first appellate Court are confirmed and the judgment and decree of the trial Court is partly allowed as stated in the judgment of the first appellate Court. No costs. Consequently, the connected Civil Miscellaneous Petition is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

vrc

To

1. The IV Additional District and Sessions Judge,
Coimbatore.
2. The Subordinate Judge,
Pollachi.
3. The Section Officer,
V.R. Section,
High Court, Madras.

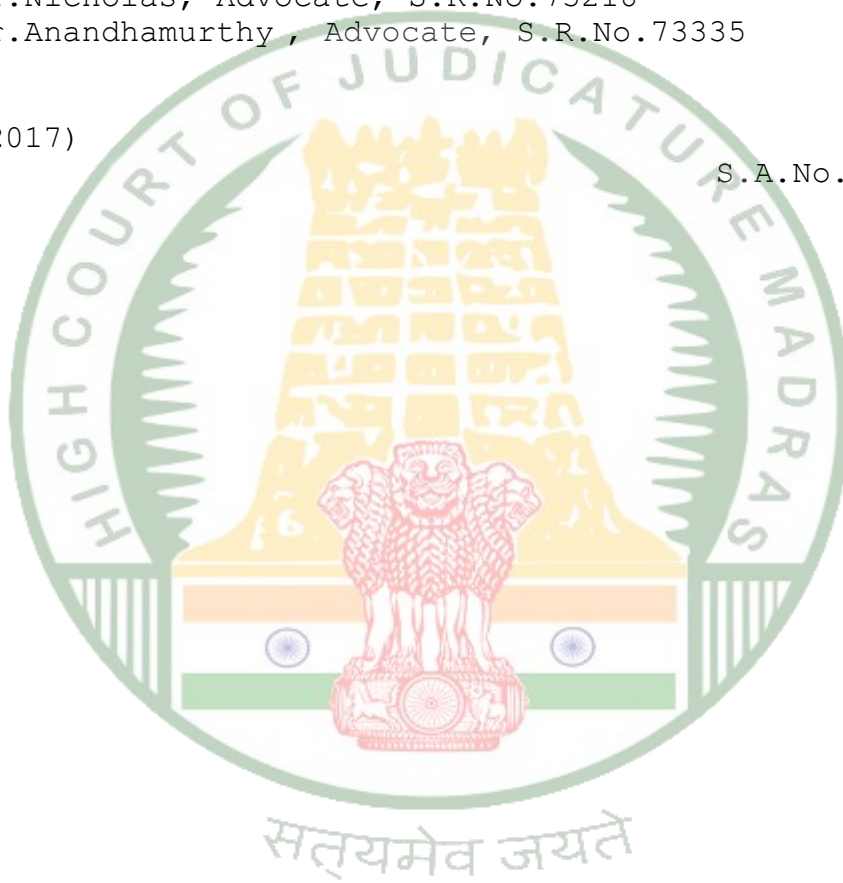
+lcc to Mr.Nicholas, Advocate, S.R.No.73218

+lcc to Mr.Anandhamurthy, Advocate, S.R.No.73335

PA(CO)

RS(25/01/2017)

S.A.No.315 of 2016



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