

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 09.06.2017

CORAM

THE HONOURABLE MR. JUSTICE M.SATHYANARAYANAN

SA.No.119/2017 & CMP.No.2444 of 2017

T.V.Balasubramaniam

.. Appellant /
Appellant/2nd Defendant

Versus

1.U.Rajathi

.. 1st Respondent /
Respondent/Plaintiff

2.T.V.Manoharan

.. Respondent /
Respondent/1st Defendant

Prayer: Second Appeal filed under section 100 of the Code of Civil Procedure against the judgment and decree dated 07.07.2015 in A.S.No.187 of 2014 on the file of XVI Additional City Civil Court, Chennai, confirming the Judgment and Decree dated 29.11.2013 made in O.S.No.3757 of 2011 on the file of VIII Assistant City Civil Court, Chennai.

For Appellant : Mr.R.Ganesh Kumar
For Respondents : Mr.C.Veeraraghavan

JUDGMENT

The 2nd defendant, who lost before the Courts below, is the appellant herein.

2 The 1st respondent/plaintiff filed O.S.No.3757/2011 on the file of the Court of VIII Assistant City Civil Court, Chennai, against the defendant praying for preliminary decree for partition of 1/3rd share in the suit schedule property and also for separate possession.

3 The Trial Court, after contest of the suit, has granted preliminary decree in favour of the 1st respondent/plaintiff vide judgment and decree dated 29.11.2013. The 2nd defendant aggrieved by the preliminary decree passed by the Trial Court filed an appeal in A.S.No.187/2014 on the file of the Court of XVI Additional City Civil Court, Chennai.

4 The Lower Appellate Court vide Judgment and decree dated 07.07.2015, has dismissed the said appeal and thereby confirmed the preliminary decree passed by the Trial Court. The 2nd defendant/appellant before the Lower Appellate Court, aggrieved by the dismissal of the appeal suit, has filed this second appeal.

5 Facts narrated in brief, necessary for disposal of this second appeal are as follows :-

6 This Court, for the sake of convenience is adopting the array of parties, as adopted by the Trial Court.

7 The plaintiff and the defendants are sister and brothers and they are the children born to T.Vedachala Mudhaliar and T.V.Kanniammal @ T.V.Kannabai. The mother of the Plaintiff and defendants died intestate on 06.10.2010, leaving behind the plaintiff and defendants as her legal heirs to succeed to her estate.

8 It is further averred by the Plaintiff that the suit property was originally belong to Rajarathina Mudaliar who is the grand father of the plaintiff and the defendants and he executed a registered Will dated 17.06.1951 in favour of his wife Govindammal, bequeathing the suit property and the said Will dated 17.08.1951 was also probated by this Court in O.P.No.40 of 1961 and eversince he was in possession and enjoyment of the said property. Govindammal, in turn executed a registered Release Deed on 13.06.1998 (Ex.A1) in favour of her daughter T.V.Kannaiammal @ T.V.Kannabai who is the mother of the plaintiff and defendants in respect of the suit property which has been shown as 'A' schedule property in the said Release Deed. T.V.Kannaiammal @ T.V.Kannabai died intestate on 06.10.2010 leaving behind the plaintiff and defendants to succeed to her estate and by virtue of succession, the plaintiff and the defendants are entitled to 1/3rd share in the suit properties and they are also in joint possession and enjoyment as co-owners. Though, the plaintiff made an attempt to partition the property amicably, it was resisted by the defendants. In this regard, she is also sent Lawyer's notice under Ex.A2, demanding partition. Though, it was acknowledged under Ex.A3, the 2nd defendant did not come forward to partition the suit property and therefore, she was constrained to file the suit.

9 The first defendant has filed the written statement expressing no objection for partition. The appellant / 2nd defendant has filed the written statement denying the averments made in the plaint and took a stand that his mother T.V.Kannaiammal @ T.V.Kannabai while was alive had expressed that after her life time, the 1st item of schedule mentioned property is to be allotted to the 2nd defendant and 2nd item of the

schedule mentioned property is to be allotted to the share of the 1st defendant. The 2nd defendant would further state that the marriage of the plaintiff was celebrated in a grand manner and the 3rd item of the property in the Release Deed has been allotted to the share of the plaintiff and in furtherance of the same, his mother has also put the defendants 1 and 2 in physical possession of the respective properties. The plaintiff in order to settle the dues in respect of the property purchased, where she is presently residing, has sold the 3rd item of the property allotted in her favour and as such, the plaintiff is not entitled to partition and separate possession and therefore prays for dismissal of the suit.

10 The Trial Court based on pleadings, has framed the following issues:-

- Whether the plaintiff is entitled for partition as claimed in the plaint?
- To what other reliefs the plaintiff is entitled to?

11 During the course of trial, one Udayakumar examined himself as PW.1 and on behalf of the plaintiff, Ex.A1 to A.6 were marked. The 2nd defendant examined himself as DW1 and T.K.Sundararaja Perumal was examined as DW2 and marked Ex.B1, copy of the Charge Sheet in C.C.No.4372 of 2010.

12 The Trial Court, on a consideration of the pleadings and appreciation of oral and documentary evidences, has granted the preliminary decree vide judgment and decree dated 29.11.2013 and aggrieved by the same, the 2nd defendant preferred an appeal in A.S.No.187/2014 on the file of the XVI Assistant, City Civil Judge at Chennai.

13 The Lower Appellate Court on going through the materials, has formulated the following points for determination :-

- Is it correct that apart from the suit schedule properties Door No.25, Perambur High Road, Perambur, Chennai was allotted to the share of Kannaiaammal, the mother of the appellant and the respondents?
- Is it correct that there was an oral partition in which 1st schedule property was allotted to the share of appellant /2nd defendant?
- Is it correct that door No.25, Perambur High Road, Perambur, Chennai was sold by the defendants along with their mother and sale proceeds was handed over with the 1st respondent/ plaintiff?
- Is it correct that door No.25 , Perambur High Road, Perambur, Chennai was sold by the defendants along with their mother and sale proceeds was handed over with the 1st respondent / plaintiff?
- Whether the 1st respondent / plaintiff is entitled for

preliminary decree for partition to declare her 1/3rd share in the suit schedule properties?

- Whether the appellant is entitled to set aside the judgment and decree of the Trial Court?
- To what relief, the appellant /plaintiff is entitled?

14 Mr.Ganesh Kumar, learned counsel for appellant / 2nd defendant would content that the Courts below have not at all appreciated the oral and documentary evidences in proper prescriptive and considering the nature of relationship between the parties, one cannot accept for everything, but there should be a documentary proof and would further urge that the overall consideration would clearly point out about the oral partition as well as the arrangements in the form of allotting the 3rd item of the Release Deed in favour of the plaintiff and she in turn, sold the same and purchase the property where she is residing. In the light of the fact, oral partition took place and it has also been acted upon, the suit for partition is not at all maintainable and therefore, prays for interference.

15 Per contra, Mr.C.Veeraraghavan, learned counsel for 1st respondent/caveator has invited the attention of this court to the impugned judgment passed by the Courts below and would submit that both the Courts below had recorded the concurrent findings, holding that there was no oral partition and there was no iota of evidence on the disposal of the 3rd item of the property mentioned in the Release Deed by the plaintiff and also invited the attention of this Court to the testimonies of DW2 wherein, he has admitted that there is no oral partition and since the admission is best form of evidence and that the findings recorded by the Courts below cannot be said to be perverse, this Court may not interfere with the same in exercise of its jurisdiction under section 100 of Code of Civil procedure and prays for dismissal of this Second appeal with cost.

16 This Court paid its best attention to the rival submissions and also perused the impugned judgments passed by the Courts below.

17 It is a specific plea of the appellant/ 2nd defendant that an oral partition did take place and subsequently, a Release Deed was executed and registered for the 3rd item under Ex.A1 in favour of the 1st respondent/ Plaintiff and she has sold the same and purchased the property in which she is residing. As rightly pointed out by the Courts below, in the event of oral partition in respect of item No.1 in respect of the appellant, it should have been followed by some more evidence in the form of records, namely, mutation; payment of statutory levies etc., would have been produced by the appellant and

admittedly, no such records in the form of documents have been filed.

18 Inso far as the arrangement as to the allotment of the 3rd item of the property marked under Ex.A1-Release deed in favour of the Plaintiff and disposal of the said property and purchasing of the property by the 1st respondent/ plaintiff where she is residing, is concerned, the Courts below had found that there is no register or certified copies of the sale deed, evidencing the said sale, has been filed. The Courts below had also take note of the admission on the part of DW2, wherein, he would admit that in respect of suit property so far no partition took place and untill the demise of his mother, it was treated as a joint family property and that his mother did not execute any Deed or Testament with regard to parties. Since the appellant /2nd defendant pleaded oral partition, the burden lies heavily on him to prove and probabalise the said fact and unfortunately, he failed to adduce any evidence. In the considered opinion of the Court, the Courts below had gone through the materials, both oral and documentary evidences in proper perspective and reached the conclusion granting preliminary decree and other consequential reliefs in favour of the 1st respondent/ plaintiff and in the absence of any infirmity or perversity attached to the said findings, this Court cannot interfere with the same.

In the considered opinion of this Court, there are no questions of law, leave alone the Substantial questions of law arise for consideration in the second appeal.

19 In the result, the second appeal is dismissed at the admission stage confirming the judgments and decrees passed by the Courts below and the connected miscellaneous petition is also closed. No costs. This Court considering the relationship between the parties, is not inclined to award cost.

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Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To

1.The XVI Additional Judge,
City Civil Court,
Chennai.

2.The VIII Assistant Judge,
City Civil Court, Chennai

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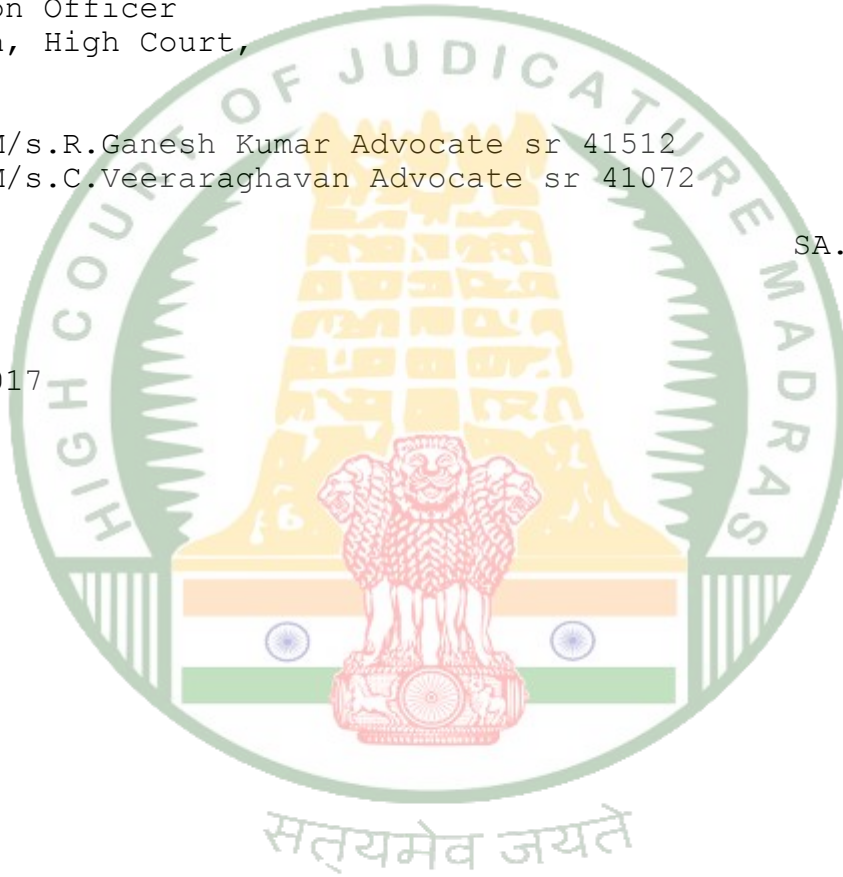
The Section Officer
VR Section, High Court,
Madras.

+1 cc to M/s.R.Ganesh Kumar Advocate sr 41512

+1 cc to M/s.C.Veeraraghavan Advocate sr 41072

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