

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 09.10.2017

CORAM

THE HON'BLE Mr.JUSTICE A.SELVAM
and
THE HON'BLE Mr.JUSTICE P.KALAIYARASAN

Appeal Suit No.275 of 2017
and C.M.P.No.10496 of 2017

J.Karthikeyan ... Appellant/Defendant

Vs

1.J.Shanmugham
2.J.Ganesh .. Respondents/Plaintiffs

First Appeal preferred under Section 96 and Order XLI Rule 1 of the Code of Civil Procedure, 1908, against the judgment and decree dated 11.11.2016 made in O.S.No.837 of 2015 on the file of the XVII Additional City Civil Court, Chennai.

For Appellant : Mr.J.R.K.Bhavanantham

For Respondents : Mr.G.Saravanan

J U D G M E N T

[Judgment of the Court was delivered by A.SELVAM, J.]

This appeal suit has been directed against the judgment and decree dated 11.11.2016, passed in Original Suit No.837 of 2015 by the XVII Additional City Civil Court, Chennai.

2.The respondents herein as plaintiffs, have instituted Original Suit No.837 of 2015 on the file of the trial Court, praying to pass a decree of partition to an extent of 2/3rd share in the suit property, wherein, the present appellant has been shown as sole defendant.

3.In the plaint, it is averred that the plaintiffs and defendant are the sons of one Jayachandran and he passed away intestate. The suit property has been purchased out of joint family nucleus on 28.04.1975. In the suit property, the plaintiffs and defendant are each having 1/3rd share. Since the defendant has refused to effect partition, a legal notice has

been issued on 21.11.2014 to the defendant and the same has not been served and under the said circumstances, the present suit has been instituted for the relief sought therein.

4. In the written statement filed on the side of the defendant, it is averred that the father of the plaintiffs and defendant has sold a joint family property on 23.12.1971, wherein, the first plaintiff and defendant have been shown as minors. The purchaser has retained 2/3rd share of sale proceeds and during that sale, the second plaintiff has not been in existence and subsequently, by utilising the said sale proceeds retained by purchaser, the suit property has been purchased on 28.04.1975 and therefore, the second plaintiff is not having any semblance of right over the suit property and therefore, the present suit deserves to be dismissed.

5. On the basis of divergent pleadings raised on either side, the trial Court has framed necessary issues and after analysing the available evidence on record, decreed the suit under Order 17 Rule 2 of the Code of Civil Procedure, 1908. Against the judgment and decree passed by the trial Court, the present appeal suit has been preferred at the instance of the defendant as appellant.

6. The learned counsel appearing for the appellant has sparingly contended to the effect that on the side of the plaintiffs, the 2nd plaintiff has been examined as PW1 and documents have been marked as Exs.A1 to A4. But on the date of subsequent hearing, both the defendant and his counsel have failed to make their appearance and under the said circumstances, the trial Court has passed the impugned judgment, without taking proceedings under Order 9 of the Code of Civil Procedure, 1908 and therefore, the judgment and decree passed by the trial Court are not legally maintainable and the same are liable to be set aside.

7. Per contra, the learned counsel appearing for the respondents/ plaintiffs has contended to the effect that on the side of the plaintiffs, both oral and documentary evidence have been let in and for the purpose of adducing evidence on the side of the defendant, the case has been adjourned. On the adjourned date, both the defendant and his counsel are not present and under the said circumstances, the trial Court has passed the judgment on the basis of Order 17 Rule 2 of the Code of Civil Procedure, 1908 and therefore, the judgment passed by the trial Court is based upon merits and the same cannot be challenged, simply on the ground that the trial Court should proceed only on the basis of Order 9 of the Code of Civil Procedure, 1908 and under the said circumstances, the contentions put forth on the side of the appellant/defendant is liable to be rejected.

8. The learned counsel appearing for the appellant/defendant has drawn the attention of the Court to the decision reported in AIR 1987 Supreme Court 42 [Prakash Chander Manchanda and another Vs Janki Manchanda], wherein, the Hon'ble Supreme Court has dealt with identical facts and ultimately, given a finding to the effect that the trial Court cannot proceed under Order 17 Rule 2, but proper procedure is to proceed only under Order 9 of the Code of Civil Procedure, 1908.

9. In the instant case, as mentioned supra, on the side of the plaintiffs, both oral and documentary evidence have been let in and for the purpose of adducing evidence on the side of the defendant, the case has been adjourned. But on the adjourned date, both the defendant and his counsel are not present. However, the trial Court has passed the judgment on the basis of Order 17 Rule 2 instead of proceeding under Order 9 of the Code of Civil Procedure, 1908.

10. As per dictum given by the Hon'ble Supreme Court and on the basis of the present factual situation, the trial Court ought to have proceeded only by utilising Order 9 of the Code of Civil Procedure, 1908. But, without invoking Order 9 of the said Code, the trial Court has erroneously passed the said judgment by invoking Order 17 Rule 2 of the Code of Civil Procedure, 1908. Therefore, it is quite clear that the judgment passed by the trial Court is nothing but, an ex parte judgment. Since, the judgment passed by the trial Court is nothing but, an ex parte judgment, the same is liable to be set aside and the matter is liable to be remitted to the file of the trial Court.

11. In fine, this appeal suit is allowed without costs. The judgment and decree passed in O.S.No.837 of 2015 are set aside and O.S.No.837 of 2015 is remitted to the file of the trial Court. In the trial Court, the appellant/defendant is strictly directed to adduce evidence (both oral and documentary). The trial Court is directed to dispose of O.S.No.837 of 2015 before the end of December 2017 and report the same to the Registry without fail. The court fee paid on the appeal memorandum is ordered to be refunded forthwith to the appellant. Connected miscellaneous petition is closed.

sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

gya

To

1. The XVII Additional City Civil Court,
Chennai.
2. The Section Officer,
VR Section,
High Court.

+lcc to Mr.J.R.K.Bhavanantham, Advocate, S.R.No.72325

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