

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 21.11.2017

CORAM

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

Appeal Suit No.510 of 2017
and
C.M.P.No.16222 of 2017

K.Srinivasan ... Appellant/Plaintiff
Vs

1.Manjula
2.K.Jayanthi
3.K.Manikandan
4.Sindhuja ... Respondents/Defendants

First Appeal preferred under Section 96 read with Order 41 Rule 1 of CPC against the judgment and decree dated 30.11.2016, made in O.S.No.719 of 2014, on the file of the XV Additional City Civil Court, Chennai.

For Appellant : Mr.S.Parthasarathy
For Respondents : Ms.Bhuvaneswari

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 30.11.2016, passed in Original Suit No.719 of 2014, by the XV Additional City Civil Court, Chennai.

2.The appellant herein, as plaintiff, has instituted Original Suit No.719 of 2014 on the file of the trial Court, praying to pass a preliminary decree of partition, in respect of suit properties, wherein, the present respondents have been arrayed as defendants.

3.The material averments made in the plaint are that the plaintiff is the brother of the first defendant and their father name is Kumaresan and he passed away leaving behind him, the plaintiff and defendants 1 and 3. The second defendant is the third wife of the said Kumaresan and fourth defendant is the daughter of the second defendant born through the said Kumaresan. The suit properties are the separate properties of

said Kumaresan and he passed away on 19.06.2006. Under the said circumstances, in both the suit properties, the plaintiff is having partible interest. Since the defendants are not amenable for having amicable partition, the present suit has been instituted for the relief sought therein.

4. In the written statement filed on the side of the contesting defendants, it is averred that both items of properties are separate properties of Kumaresan. The second defendant is his wife. The fourth defendant is the daughter of the second defendant born through the said Kumaresan. During his lifetime, he executed a mortgage deed in respect of suit second item. Without discharging mortgage, the plaintiff is not entitled to get any partition in respect of suit second item 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 both oral and documentary evidence, has decreed the suit only in respect of first item and dismissed the suit in respect of suit second item. In respect of disallowed portion, the present Appeal Suit has been preferred, at the instance of the plaintiff, as appellant.

6. The learned counsel appearing for the appellant/plaintiff has sparingly contended to the effect that the suit second item is the absolute property of the father of the plaintiff, by name, Kumaresan. Even in the written statement filed on the side of the contesting defendants, in paragraph No.3, it is clearly averred to the effect that both items of the suit properties are separate properties of the said Kumaresan. But, the trial Court, without considering the clear admission made on the side of the contesting defendants, has erroneously given a finding to the effect that no document, which stands in the name of the said Kumaresan, has been filed on the side of the plaintiff and ultimately, dismissed the suit and therefore, the judgment and decree passed by the trial Court in respect of suit second item is liable to be set aside and the suit is liable to be decreed in toto.

7. The learned counsel appearing for the respondents has contended to the effect that in respect of suit second item, the original owner of the same, by name, Kumaresan, has executed a mortgage and the same has not been discharged. Under the said circumstances, the plaintiff is not having any partible interest over the same and the trial Court, after considering the lack of evidence on the side of the plaintiff, has rightly dismissed the suit in respect of suit second item and therefore, the judgment and decree passed by the trial Court are not liable to be set aside.

8.Before considering the rival submissions made on either side, the Court has to look into the averments made in paragraph No.3 of the written statement, wherein, it has been clinchingly stated to the effect that both items of the suit properties are separate properties of the said Kumaresan.

9.Even though on the side of the contesting defendants, it is averred to the effect that in respect of suit second item, a mortgage has been created by the said Kumaresan, no document has been filed for the purpose of proving the same. Since no document has been filed for the purpose of proving the alleged mortgage executed by the said Kumaresan, it is needless to say that the defence taken on the side of the contesting defendants is of no use.

10.On the side of the appellant/plaintiff, an application under Order 41 Rule 21 of C.P.C. has been filed in C.M.P.No.16222 of 2017. Along with the said application, property tax receipt and water tax receipt have been annexed.

11.Considering the issue involved in the present appeal, the petition filed in C.M.P.No.16222 of 2017 is liable to be allowed and the same is allowed and the documents annexed there on are marked as Exs.A6 and A7.

12.It has already been pointed out that in paragraph No.3 of the written statement, it has been clinchingly averred to the effect that both items of the suit properties are separate properties of Kumaresan. Further, it is pointed out to the effect that no document has been filed on the side of the contesting defendants for the purpose of proving the alleged mortgage created by the said Kumaresan in respect of suit second item.

13.Considering the fact that on the side of the appellant/plaintiff, abundant documents have been filed for the purpose of proving that the said Kumaresan is the absolute owner of the suit second item and also considering the clear admission made in the written statement with regard to character of the suit second item, it is needless to say that the plaintiff is entitled to get relief of partition in the suit second item also. The trial Court, without considering the clear admission made in the written statement, has erroneously dismissed the suit in respect of suit second item. In view of the discussion made earlier, this Court has found considerable force in the contention put forth on the side of the appellant/plaintiff, whereas, the contention put forth on the side of the respondents, is really sans merit and altogether the present Appeal Suit is liable to be allowed.

In fine, this Appeal Suit is allowed without costs. The judgment and decree dated 30.11.2016, passed by the trial Court in Original Suit No.719 of 2014 are modified as follows:

The appellant herein /plaintiff is also entitled to get the relief of partition as prayed for and consequently, the suit is decreed in toto without costs.

-s/d-

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

To

1. The XV Additional City Civil Court,
Chennai.

2. The Section officer
VR Section, High Court, Madras.

+1 CC to Mr.M. Bhuvanewari, Advocate sr 82845.

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and

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EV(CO)
SP(09/01/2018)

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