

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 08.02.2017

CORAM

THE HON'BLE DR. JUSTICE G.JAYACHANDRAN

S.A. No.57 of 1993

1. A.Nabhi Khan
 2. Vahidh Khan
 3. A.Mahaboob Khan
 4. A.Junsunlisa Begam
 5. Tajunnissa
 6. Rahjumunnisa
- ... Appellants

versus

1. Abdulla Khan
 2. Ankara Bi
 3. Minor Khadar Khan
 4. Minor Asmath Bi
- (Minors 3 & 4 by guardian and mother Askara bi)
5. The District Educational Officer,
Vridhachalam
 6. The Commissioner,
Vridhachalam
 7. Sellammal
 8. Victoria
 9. Bhaskaran
 10. Devadoss
 11. Manonmani
 12. Gunasekaran
 13. Habimunnissa

14. Syed Sanchar
15. Syed Sherfuddin
16. Ijinath Bi
17. Syed Bazalu Rahman
18. Minor Samsunnisa
19. Minor Mehrunnisa
20. Minor Mubarak Unnisa .. Respondents
(Minors 18 & 20 rep. by guardian Syed Sherfuddin)

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code against the judgement and decree passed in A.S.No.70 of 1985 dated 19.02.1991, on the file of the Sub Court, Vridhachala, recersing the Judgment and decree passed in O.S.No.74 of 1976 daed 23.12.1983, on the file of the District Munsif Court, Vridhachalam.

For Appellant : Mr.Kingston Jerald
for Mr.K.Raghunathan & V.Prabhakar

For Respondents : Mr.Antony Jesus for R1
Mr.V.Raghavachari for R2 to R4
N.D.W for R5 to R8
No appearance for R7 to R12
No appearance for R6, R13, R14, R15,
R18, R19
R16 & R20 Dismissed

J U D G E M E N T

This appeal is filed against the judgment and decree passed in A.S.No.70 of 1985 reversing the judgment and decree passed in O.S.No.74 of 1976 in respect of Item-3, Part 1 of the schedule of the suit property.

2. The sum and substance of the facts, leading to this appeal is that, the suit property originally owned by Jaffer Khan, who died on 29.05.1974, intestate leaving behind his mother, the first plaintiff and wife and children, who are arrayed as defendants. As one of the legal heir of Jaffer Khan the plaintiff is entitled for 1/6th share in the suit property. The 4th defendant and the 5th defendant are the sons of the plaintiff. The Trial Court after considering the evidence let in by the respective parties held that except Part I, Item 3, the plaintiff is entitled for 1/6th share in all other items of the properties shown in the schedule and in so far as this property, the trial Court as held that it is exclusive property of Peer Khan, the 5th defendant in this suit. Aggrieved by the said judgment the plaintiff preferred first appeal challenging the exclusion of the Item 3 property. Before the appellate Court,

an application to receive additional document issued by the Deputy Tahsildar, Vridhachalam was filed. The said application to receive additional document under Order 41, Rule 21 CPC filed by the appellant was opposed through counter by the respondents 7, 9 to 12, 13, 17, 18, 19 to 26, however, the appellate Court allowed the application, received the document and assigned Ex.No.A39. It went on relying upon this document and held that in the light of the additional document exhibited as Ex.A39. Part I, Item 3 of the property shown in the schedule has been sub divided into three parts and therefore, that property cannot be an exclusive property of Peer Khan, the 5th Defendant and consequently, granted relief of partition to this item also.

3. Aggrieved by the judgment and decree of the first appellate Court, the legal heirs of 6th defendant Ameer Khan have preferred this appeal raising the following substantial questions of Law:

"a. Is the lower appellate Court right in holding that item No.3 of Part I of schedule "A" of the suit property is available for partition on the premises that the said property belong to the Peer Khan the 5th defendant?"

b. Is the Court below right in admitting additional documents evidence without calling for proofs and establishing relevancy?"

4. This Court finds that after allowing the application to produce additional document, the Appellate Court instead of following the procedure contemplated under Order 41, Rule 28 has straight away admitted the document and assigned exhibit number, relied the document and passed judgments giving a go by to the procedures contemplated under Law for admitting an evidence and the procedure for proof of a document without examining the author of document or any person competent to speak about this document.

5. When this Court posed the question to the learned counsel for the respondents as to how such a document can be relied upon to arrive at a conclusion without testing the genuineness of the document and the content of the document, the learned counsel for the appellant submitted that Ex.A39

being a public document and a certified copy of the said document it is admissible in evidence and there is no error in admitting the document and relying upon it. Further, the learned counsel also relying upon Section 79 of the Indian Evidence Act submitted that the Court shall presume the genuineness of the document purported to be a certified copy or other document, which is by Law declared to be admissible as evidence before any Court and purports to be duly certified by any Officer, who is authorised to do so.

6. A similar submission was made by the learned counsel appearing for respondents 2 and 4 also. This Court is unable to appreciate the said submission for the simple reason that presumption of genuineness of the certificate copy is one thing and proof of the content of the document is another thing. The presumption of the genuineness of the document is a rebuttable presumption, the opportunity to rebut the presumption will enure to the adverse party only if such a document is first introduced through a witness to show that prima facie it is a certificate copy issued by a person competent to issue it and such document is the true version of the record kept under the custody of a competent person. Without any proof to show

that this document is a certified copy issued by a competent person, the presumption of its genuineness does not arise. This Court finds grave procedural error committed by the first appellate Court in relying upon Ex.A39, which has not been exhibited in the manner known to Law.

7. This Court finds that the lower Appellate Court as a matter of fact entertained the document assigned in Ex.A39, relied upon the document and reversed the findings of the Trial Court without any witness to speak about its authenticity and content of that document. This is totally contrary to the provision of Civil Procedure Code under Order 41 , Rule 27 and 28.

8. In the normal course, under the above circumstances, the appeal ought to be remanded to the trial Court, so as to do so, this Court ventured to look at the relevancy of the document marked as Ex.A39. This document only reveals that Survey No.149/2A1 has been sub divided into three portions viz., 149/2A1B1, 149/2A/1C and 149/2A/1A, the total extent is about 4 acres 39 cents and that has been sub

divided into 3 parts. The subject matter of this appeal is pertaining to item 3 of the suit property, bearing survey No.149/2A/1A to an extent of 6 cents. The appellate Court had relied upon this document to ascertain the title of the property and possession of the property. The Appellate Court should have given proper appreciation of the entire document. Had that been done, it could have clearly seen that the survey number in dispute is allotted to Peerkhan and the total extent allotted to Peer Khan, the 5th defendant is 2 acres and 81 cents. Even according to Ex.A39, there is no reason for the Appellate Court to disbelieve the case of the defendant and grant relief to the plaintiff in respect of item 3 of the property by reversing the findings of the Trial Court. Therefore, remanding the matter back, is of no purpose. The lower Appellate Court reversed the judgment of trial Court based on a document, which has not been produced during trial cannot be produced during the appeal and admitted contrary to the manner known to law. The findings of the lower Appellate Court is reversed. Accordingly, the appeal is allowed. No order as to costs. It is clarified that this appeal is only against the judgment and decree of the first appellate Court reversing the judgment

and decree of the Trial Court judgment in respect of item 3 of the suit property alone inasmuch as no appeal is preferred against the item 2 of the property by the aggrieved parties.

08.02.2017

Intex : Yes/No
Internet : Yes/No

elp

To

1. The District Educational Officer,
Vridhachalam
2. The Commissioner,
Vridhachalam

DR.G.JAYACHANDRAN, J

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