

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.12.2017

CORAM :

THE HONOURABLE Mrs. JUSTICE PUSHPA SATHYANARAYANA

S.A.No.847 of 2017

1.Selvam

2.Gandhimathi

3.Sumathi

4. Murugan ... Appellants/Plaintiffs

versus

Somu ... Respondent/defendant

Prayer: This second appeal is filed under Section 100 of C.P.C. against the Judgment and Decree dated 22.11.2016 made in A.S.No.82 of 2016, on the file of the Additional District Judge, Ariyalur confirming the Judgment and Decree dated 20.03.2013, made in O.S.No.2000 of 2009 on the file of the District Munsif, Jayankondam.

For Appellants : Mr.M.V.Krishnan

J U D G M E N T

The unsuccessful plaintiffs before the Courts below have preferred the above second appeal, challenging dismissal of the suit for partition and separate possession.

2. The suit in O.S.No.200 of 2009 was filed by one Sivasamy for partition and separate possession. During the pendency of the first appeal the said Sivasamy died and therefore her legal heirs were brought on record as appellants 2 to 5 in the first appeal.

3. The suit in O.S.No.200 of 2009 was filed against the sole defendant/respondent herein. As per the plaint averments, the deceased plaintiff Sivasamy and the defendant are children of one Manickam. According to the plaintiff, the suit property

was the ancestral property and it was not divided by metes and bounds. The father of the plaintiff and defendant, Manickam died intestate and on his death the plaintiff and defendant are entitled for half share each in the suit property. The plaintiff sought for partition claiming that the suit property was not partitioned. Hence, the suit has been filed.

4. The defendant contended that earlier there was an oral partition which had taken place 43 years ago between the plaintiff and the defendant and the suit property had fallen to the share of the defendant. The plaintiff was in possession and enjoyment of the western side of the property as his share. Therefore the defendant prayed for dismissal of the suit. The Trial Court dismissed the suit against which the legal heirs of the sole plaintiff have filed A.S.No.82 of 2016 (A.S.No.28 of 2013) before the Additional District Court, Ariyalur. The first Appellate Court dismissed the appeal by confirming judgment and decree passed by the Trial Court. Aggrieved by the same, the above appeal is preferred.

5. This Court heard the learned counsel for the appellants.

6. It is the specific defence of the defendant that even 20 years prior to the institution of the suit there was an oral partition between the plaintiff and the defendant and pursuant to such partition both of them are in possession and enjoyment of the respective share of the property left by their father. In fact, during the course of cross examination of the plaintiff, he has specifically admitted that there was a partition between him and the defendant 20 years back and on the basis of such partition they have been in possession and enjoyment of the respective shares. When such admission was made by the plaintiff, it is not open to him to seek for partition. Even otherwise, when it is the defence of the defendant that there was an oral partition took place between him and the plaintiff and both of them are in possession and enjoyment of respective share of the property the burden lies on the plaintiff to disprove the same. On the other hand in the present case, the plaintiff himself in his cross examination has admitted as regards the factum of partition took place between him and the defendant. In such view of the matter, this Court is of the view that plaintiff is estopped from file the present suit for partition. The Trial Court as well as the Appellate Court has rightly appreciated the oral and documentary evidence made available and came to a correct conclusion that the plaintiff is not entitled for the relief sought for.

7. There is no reason to interfere with the concurrent findings of the Courts below.

8. In the result, the Second Appeal is dismissed, confirming the judgment and decree dated 22.11.2016 passed by the Lower Appellate Court in A.S.No.82 of 2016. No Costs.

Sd/-
Assistant Registrar(CS VI)

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Sub Assistant Registrar

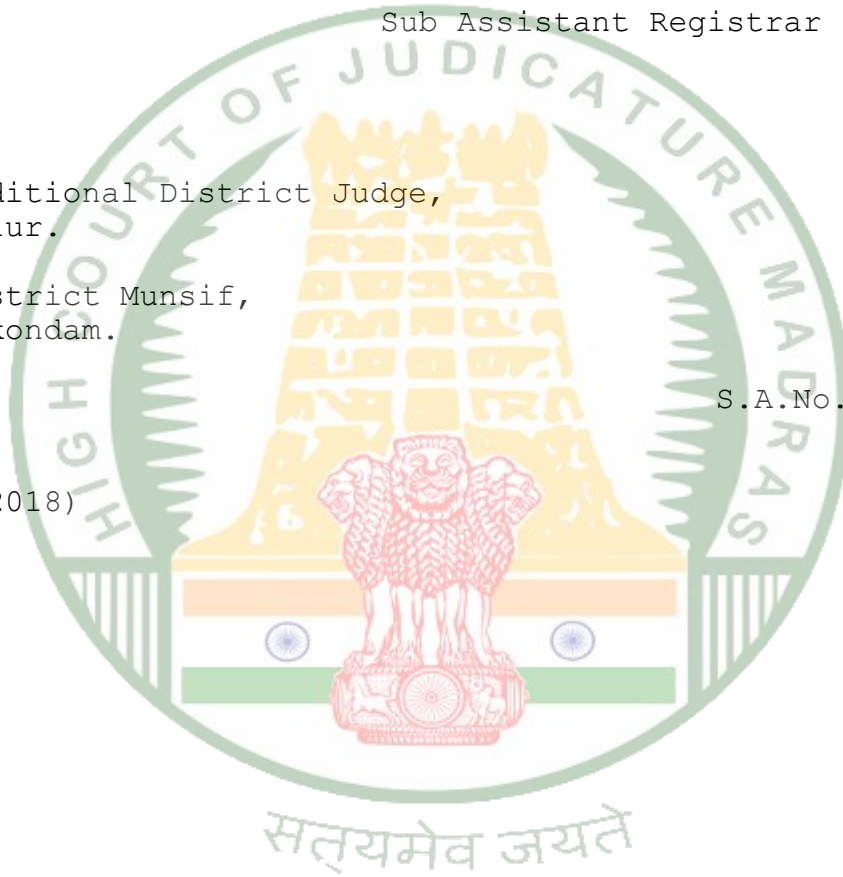
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To

1. The Additional District Judge,
Ariyalur.
2. The District Munsif,
Jayankondam.

S.A.No.847 of 2017

KS(CO)
GN(12/02/2018)



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