

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 04.01.2017

PRONOUNCED ON 18..01..2017

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

C.S.NO.267 OF 2011

G.Balaraman .. Plaintiff

*Versus*

G.Kuppuswamy ... Defendant

**PRAYER:** Plaint filed under Order VIII Rule 1 of C.P.C, 1908 read with Order IV Rule 1 of Original Side Rules praying for the following judgment and decree against the defendant.

- (i) Declare the plaintiff have the right to  $\frac{1}{2}$  share in the schedule mentioned property as preliminary decree and
- (ii) to appoint an advocate commissioner to divide the schedule mentioned property and handover the possession of the  $\frac{1}{2}$  share of suit schedule property to the plaintiff without any encumbrances as final decree,
- (iii) Directing the defendants to pay the cost of the proceedings."

For Plaintiff : Mr. V.Lakshmi Narayanan

For Defendant : H.Manojin

## J U D G M E N T

The suit is filed by the plaintiff praying for ½ share in the schedule mentioned property by appointing Advocate Commissioner.

2. The brief facts of the case of the plaintiff is as follows:

The suit property originally belonged to one Aburooppammal, who is the mother of plaintiff and the defendant herein. The said Aburooppammal passed away on 28.10.1993, leaving her husband, Gopal Naicker and the plaintiff and the defendant. The said Gopal Naicker also died on 09.5.1996. After his death, the plaintiff and the defendant are in joint possession and enjoyment of the suit property. According to the plaintiff, he is entitled to half share in the suit property. It is stated that the Testamentary Suit filed by the defendant praying larger share by virtue of a Will was also dismissed by this Court. Hence the above suit.

3. The defendant had filed a written statement contending that the suit property consists of building and even during the life time of his parents, he was enjoying the suit property. As per the Will executed by his mother, the suit

property has been partitioned and the parties to the suit have been enjoying the property in such a manner. It is contended by the defendant that there is no cause of action. Hence, he prayed for dismissal of the suit.

4. Based on the above pleadings, on 12.10.2015, this Court framed the following issues:

1. Whether the plaintiff is entitled for  $\frac{1}{2}$  share in the suit schedule property?
2. Whether the suit is maintainable as prayed?
3. Whether the suit is bad for partial partition ?
4. Whether the plaintiff has cause of action to file the suit?
5. To what relief the plaintiff is entitled to?

5. Heard the learned counsel appearing for the plaintiff and the defendant and perused the records.

**Issue Nos: 1 to 6**

6. The plaintiff himself was examined as P.W.1. Exs.P1, Sale Deed between City improvement Trust and Plaintiff's mother and Ex.P2, Judgment in TOS.28 of 2002 were filed. No oral and documentary evidence adduced on the side of the defendant.

7. P.W.1 in his evidence has clearly stated about the nature of the property, as well as his entitlement of half share in the suit property. Ex.P1 is a copy of the sale deed executed between City Improvement Trust and the plaintiff's mother. Ex.P2 is the judgment in TOS.No.28 of 2011. On a careful perusal of Ex.P2, judgment, it appears that the plaintiff and the defendant's mother Aburooppammal said to have left the Will and appointed one T.Narayanan, as executor. The said Narayanan, who propounded the Will, filed Testamentary Suit being TOS.No.28 of 2002. After due contest, the above suit was dismissed. Therefore, it is clear that Will propounded by the so called Executor has not been proved in the manner known to law. In view of the dismissal of the suit, now the Will has been negated by this Court.

8. Admittedly, the suit properties belonged to one Aburooppammal. The plaintiff and the defendant are the legal heirs of the said Aburooppammal. Therefore, they are, certainly, entitled to  $\frac{1}{2}$  share. P.W.1's evidence as well as the documents filed by the plaintiff, clearly proved his claim over the suit property. Hence, the suit property has to be divided into two equal share.

9. Accordingly, the preliminary decree is passed dividing the suit property into two equal shares and to allot one such share to the plaintiff. Considering the nature of the suit and the relationship between the parties, there shall be no order as to costs.

sd/.N.S.K.J

18.01.2017

//Certified to be a true copy//

Dated this the       day of       2017.

P.M./16.06.2017

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.

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