

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.01.2017

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

A.S.No.630 of 2007

and

M.P.No.1 of 2007 & C.M.P.Nos.8613 & 8614 of 2016

M.Thanasekaran ... Appellant/2nd Defendant

Vs.

1.Mayilambal

2.Kalpana

3.Kalaiselvi

... Respondents 1 to 3/Plaintiffs

4.Muthusaminathan (deceased)

5.Anbu Nilavan

6.Arul Thiru Murugan

... Respondents 5 & 6/ LRS of the
1st Defendant

(R5 & R6 brought on record
as LRs of deceased R4 vide
order of Court dt 19.2.2016
made in M.P.1003/15)

This Appeal has been filed under Section 96 of Civil Procedure Code against the decree and judgment dated 30.08.2016 made in O.S.No.19/2003 on the file of the Court of the Additional District Judge, Pondicherry at Karaikal, insofar as the same is relating to the Item-2 of the Suit Properties.

For Appellant : Mr.K.P.Jotheswaran

For Respondents : Mr.R.Natarajan

* * * * *

JUDGMENT

The 2nd defendant in O.S.No.19/2003 on the file of the Court of the Additional District Judge, Pondicherry at Karaikal, is the appellant.

2.The suit was filed for partition and separate possession by the 2nd wife and her two daughters of late Muthukrishnan. The defendants are the sons through the first wife of the said Muthukrishnan. The plaintiffs claimed 3/5th share in five items of properties, claiming that all the properties are self-

acquisition of late Muthukrishnan, who died on 24.08.1999. It is also admitted by the plaintiffs that Muthukrishnan's first wife Veerammal died in the year 1970 and he married the 1st plaintiff-Mayilambal (1st respondent herein) on 07.07.1973. As the 2nd wife & daughters of the late Muthukrishnan, the plaintiffs claimed 3/5th share in all the suit properties.

3.The defendants resisted the suit, contending that the suit Item Nos.4 & 5 properties were purchased by the 1st defendant and they are self-acquisition of the 1st defendant and as such, the plaintiffs are not entitled to any share in the said properties. So far as the suit Item Nos.1 & 2 properties are concerned, it is admitted by the parties that the land belongs to Sri Sivaloganatha Swamy Devasthanam and the 1st plaintiff/R1 herein is residing in a thatched house situated in suit Item No.1 and the 2nd defendant is residing in a titled house situated in suit Item No.2 . The defendants would further claim that the building in suit Item No.2 was constructed by the 2nd defendant out of his own funds; therefore, the plaintiffs are not entitled to claim a share in the building in Item No.2 . The claim of the plaintiffs with reference to Item Nos.1 & 3 was admitted by the defendants.

4.On the above pleadings, the learned Additional District Judge, Pondicherry at Karaikal, framed the following issues_

(1)Whether the suit is bad for non-joinder of necessary and proper party?

(2)Whether the suit has not been properly valued and proper Court Fee has not been paid?

(3)Whether only the properties mentioned under Items No.1 and 3 of the suit schedule are available for partition?

(4)Whether the plaintiffs are entitled to claim 3/5 share in all the five items of properties mentioned in the suit schedule?

(5)Whether the plaintiffs are entitled for a preliminary decree as prayed for in respect of the suit properties?

(6)To what other relief or reliefs the parties are entitled?

5.Upon consideration of the oral and documentary evidence, the learned Trial Judge accepted the case of the defendants with reference to suit Item Nos.4 & 5 and dismissed the suit with reference to the said items of properties. As regards the claim of the 2nd defendant that he had put up construction in the suit Item No.2 property, therefore, it belongs to him, the learned

Trial Judge found that the evidence on that aspect is lacking. It was further found by the learned Trial Judge that the 2nd defendant had not chosen to get into the witness box and he was satisfied with the evidence of the 1st defendant, who was examined as D.W.1. Further, there is no documentary evidence to prove that the construction in the suit Item No.2 property was put up by the 2nd defendant. The learned Trial Judge has also found that there are contradictions in the evidence of the 1st defendant, who in his chief-examination had deposed that he is also entitled to a share in the suit Item No.2 property, however in his cross-examination, he would claim that the 2nd defendant constructed the house in the year 1986-1987 by obtaining loan from his General Provident Fund; whereas the 2nd defendant got employment as Lower Division Clerk only in the year 1988. In view of the said contradictions, the learned Trial Judge disbelieved the evidence of D.W.1 regarding the claim of the 2nd defendant to suit Item No.2 and rejected the same. Upon the above findings, the learned Trial Judge decreed the suit in respect of the suit Item Nos.1 to 3 alone. Aggrieved by the said decree, the 2nd defendant alone has preferred the above appeal.

6.I have heard Mr.K.P.Jotheswaran, learned counsel appearing for the appellant/D2 and Mr.R.Natarajan, learned counsel appearing for the respondents 1 to 3/plaintiffs.

7.Pending the appeal, the 4th respondent herein/D1 had died and his Legal Representatives were impleaded as R5 & R6. Though they have been served with notice, they have not chosen to appear either in person or through counsel.

8.Considering the limited claim of the appellant/2nd defendant, following point is framed for determination in this appeal_

(i)Whether the 2nd defendant had established his claim that the building in the suit Item No.2 was constructed by him out of his own funds?

9.It is not in dispute that the land in question belongs to Sri Sivaloganatha Swamy Devasthanam and late Muthukrishnan was a tenant in the said land. The 2nd defendant claimed that he had put up the superstructure in suit Item No.2, out of his own funds. The 2nd defendant had admittedly joined as Lower Division Clerk in the year 1988 and he had taken loans from his provident funds. A perusal of Ex.B.19 would show that the 2nd defendant had taken a loan of Rs.16,640/- on 24.06.1999 from his General Provident Fund and another sum of Rs.2,800/- on 20.02.1995. Relying upon the said document, the learned counsel appearing for the appellant/D2 would submit that these loans were drawn by the 2nd defendant only for construction of the house in the suit Item No.2.

10.Per contra, Mr.R.Natarajan, learned counsel appearing for the respondents 1 to 3 / plaintiffs would submit that the 2nd defendant has not chosen to lead evidence and the 1st defendant, who was examined as D.W.1, in his chief-examination, deposed that he is also entitled to a share in Item No.2 property. The learned counsel for the plaintiffs would draw the attention of this Court to the deposition of D.W.1, wherein he had stated that the house in the suit Item No.2 was constructed during the period 1986-1987. In order to buttress the claim of the 2nd defendant that the house was constructed out of his own funds, the 1st defendant as D.W.1 would claim that the 2nd defendant has been practising Astrology since 1981 and the house was constructed out of the income earned by the 2nd defendant through Astrology. The said evidence is against the pleadings. As already stated, the specific plea of the 2nd defendant is that he got employment as LDC in the year 1988 and he had put up the superstructure in the suit Item No.2 out of the loan amounts, which were borrowed by him in the year 1995 & 1999.

11.It is seen from the records that the 2nd defendant joined as LDC in the year 1988 only; but, even according to the 1st defendant, the house in question was constructed even prior to that ie., during the year 1986-1987. There is no other documentary evidence to show that the 2nd defendant had constructed the house in the suit Item No.2, out of his own income. I find that the learned Trial Judge has considered the entire evidence on record and has rightly come to the conclusion that the claim of the 2nd defendant has not been established by reliable and cogent evidence. In the absence of any proof regarding the construction of the house by the 2nd defendant in the suit Item No.2, I am unable to countenance the submissions made by the learned counsel for the appellant/D2. The fact that the 2nd defendant/appellant herein had not chosen to enter into the witness box to depose, also speaks against him. Therefore, I am constrained to uphold the findings of the learned Trial Judge. Point raised in this appeal is answered against the appellant/D2.

12.In fine, the appeal is dismissed conforming the decree and judgment dated 30.08.2016 in O.S.No.19/2003 passed by the Additional District Judge, Pondicherry at Karaikal. Considering the relationship of the parties, there will be no order as to costs in this appeal. Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Asst.Registrar (CO)

/true copy/

Sub Asst. Registrar

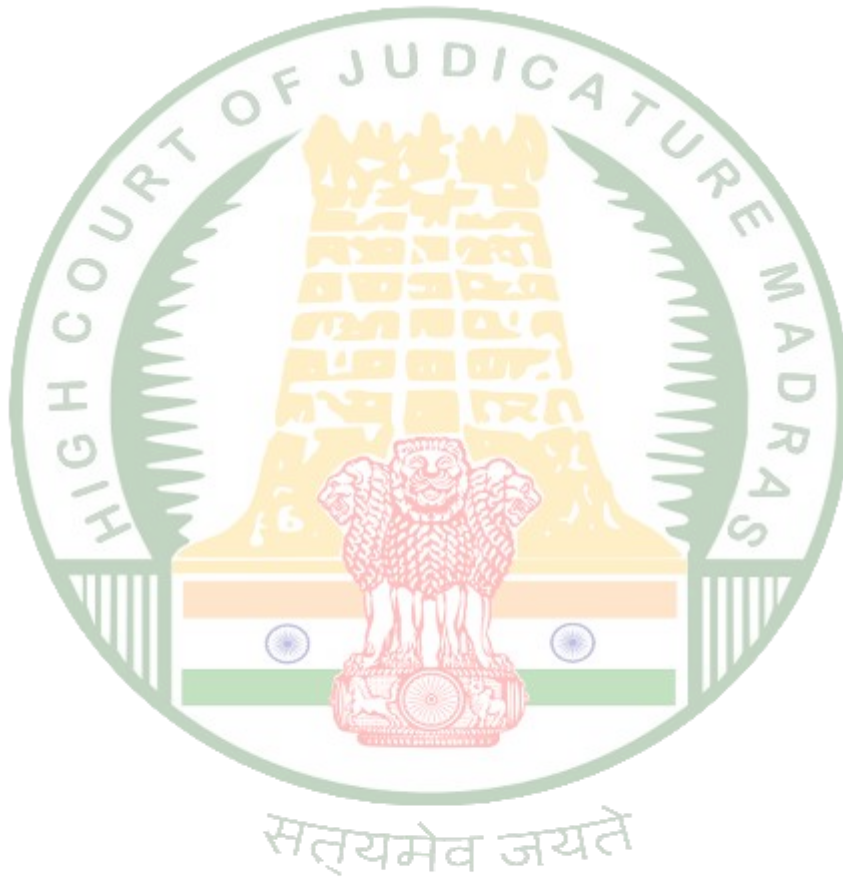
To
The Additional District Judge,
Pondicherry at Karaikal.

+1 cc to Mr.K.P.Jotheeswaran,advocate,sr.846

+2 cc's to Mr.R.Natarajan,advocate,sr.374.

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krd 15/2

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