

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 03.01.2017

CORAM

THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN

A.S.NO. 814 of 2006

1. Parvathy (Deceased) ...Plaintiff
2. M.N.Jayaraman
3. M.J.Murali Rajan
(Appellants 2 & 3 brought on record
as LRs of the deceased sole appellant
vide order of this Court dated 23.11.16
in CMP.No.18570 to 18572/16
in AS.814/2006Appellants

Vs.

1. D.K.Padmanabhan
2. G.N.Rajagopal
(2nd respondent herein is given up
an an un-necessary party) ...Respondents/Defendants

Prayer:- This first Appeal is filed under Section 96 of the Code of Civil Procedure, 1908, against the judgement and decree dated 07.07.2004 made in O.S.No.59 of 2003 on the file of the Additional District Judge, Fast Track Court No.I, Salem.

For Appellants : Mr.T.Muruga Manickam

For Respondents : Mrs.S.Hemalatha for R1
R2 : Given up

JUDGMENT

The plaintiff in O.S.No.59 of 2003 on the file of the Additional District Judge, Fast Track Court No.1, Salem is the appellant. Originally the suit was filed in O.S.No.133 of 2002 on the file of the Sub-Court, Salem and later it was transferred and re-numbered as above. The plaintiff has sought for partition and separate possession of her 1/3rd share in the suit property which is a dwelling house belonging to the joint family.

2.The case of the plaintiff is that the property belongs to the joint family consisting of one Krishna Iyer and his three sons namely, Janarthanan, Padmanabhan, Jayagopi and

two daughters-plaintiff and one Jayalakshmi. One of the sons namely Padmanabhan is the first defendant. The second defendant Rajagopal is the husband of another daughter namely Jayalakshmi, who died in 1996. It is the further case of the plaintiff is that the said Janarthanan, son of Krishna Iyer had released his right over the suit property under Ex.A.2-release deed dated 01.10.1971 in favour of his father and other two brothers. Jayagopi, the other son of Krishna Iyer had also released his right over the suit property under Ex.A3 release deed dated 19.12.1973, in favour of his father and his brother-first defendant. Therefore, the plaintiff would claim that the first defendant, herself and the second defendant, who is the legal representative of the deceased Jayalakshmi are entitled to get 1/3rd share each.

3. The first defendant alone contested the suit. According to the first defendant, the deceased Krishna Iyer had executed a Will in his favour on 22.09.1982 and therefore as per the said Will, he is entitled to the entire property and the plaintiff is not entitled to any share. Krishna Iyer had died prior to enactment of Hindu Succession (Amendment) Act (TN Act 1 of 1990) and Hindu Succession (Amendment) Act, 2005 (Central Act 39 of 2005) Therefore from the date of death of Krishna Iyer i.e., 25.09.1982, the Will came into effect and the first defendant became the owner of the property. The first defendant has also contended that as per Section 23 of Hindu Succession Act 1956, the plaintiff being a female heir, she is not entitled to partition of the property which belongs to joint family.

4. On a consideration of the oral and documentary evidence, the learned Additional District Judge, Salem framed the following issues for Trial:

1. "Whether the plaintiff is entitled to 1/3rd share in the suit property?
2. Whether the plaintiff is entitled to a preliminary decree for partition as prayed for?
3. To what other relief is the plaintiff is entitled to?"

5. Before the trial Court, the plaintiff was examined as P.W.1 and two other witnesses were examined as P.Ws.2 & 3. Exs.A. 1 to A.6 were marked. The first defendant was examined as D.W.1 and one Rathnavel, attester of the Will dated 22.09.1982 was examined as D.W.2. Exs.B.1 to B.11 were marked. Considering the oral and documentary evidence, the learned trial Judge came to the conclusion that the Will dated 22.09.1982, executed by the Krishna Iyer is true and valid and therefore the plaintiff is not entitled to any share in the suit property. The learned trial Judge has also denied the share to the plaintiff on the

basis of Section 23 of Hindu Succession Act, 1956. On the above reasoning, the learned trial Judge dismissed the suit. Aggrieved by the said dismissal, the plaintiff has preferred the present appeal.

6. I have heard Mr.T.Murugamanickam, learned counsel appearing for the appellant and Mrs.S.Hemalatha, learned counsel appearing for the first respondent. The second respondent was ex-parte in the trial Court and was given up in the appeal.

7. Mr.T.Murugamanickam, learned counsel for the appellant would contend that the denial of the share to the plaintiff on the basis of the Section 23 of the Hindu Succession Act, 1956 is not valid in view of the amendment of Section 23. The prohibition enacted by Section 23 on the female heir from claiming share in the dwelling house, has been now removed by amendment introduced by Section 4 of the Hindu Succession (Amendment) Act 2005 (State Amendment 39 of 2005). Therefore, the learned counsel has contended that denial of the share to the plaintiff on the basis of the prohibition of Section 23 is not correct. Unless the plaintiff is able to show that the claim of the first defendant with regard to the Will dated 22.09.1982 executed by Krishna Iyer is unacceptable, the plaintiff will not be able to succeed in the suit.

8. The learned counsel for the appellant would invite my attention to certain discrepancies found between the evidence of D.W.1 and D.W.2 and contend that the Will dated 22.09.1982 has not been proved in accordance with law. He would further claim that the suspicious circumstances have not been taken note of by the Trial Court. I am unable to agree with the said contention. It is true that there are certain discrepancies with regard to the hospitalisation of Krishna Iyer. He died immediately after the execution of Will. It should be borne in mind that the witnesses were examined 22 years after the execution of the Will and the death of Krishan Iyer. Due to passage of time there may be certain discrepancies. I do not think that such minor discrepancies can be taken into account to disbelieve the document. The evidence of D.W.2 the attester is cogent with regard to the execution of the Will dated 22.09.1982 and the trial Judge who had the benefit of observing witnesses and has accepted the evidence. I do not find any material to substantiate the case of the plaintiff with regard to the truth and validity of the Will dated 22.09.1982. Once the Will is proved, the plaintiff cannot succeed in the suit for partition.

9. Therefore, the judgment and decree of the trial Court are liable to be confirmed and they are accordingly confirmed and

the appeal is dismissed. However, considering the relationship of the parties, there will be no order as to costs.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

rts

To

The Additional District Judge,
Fast Track Court No.I, Salem.

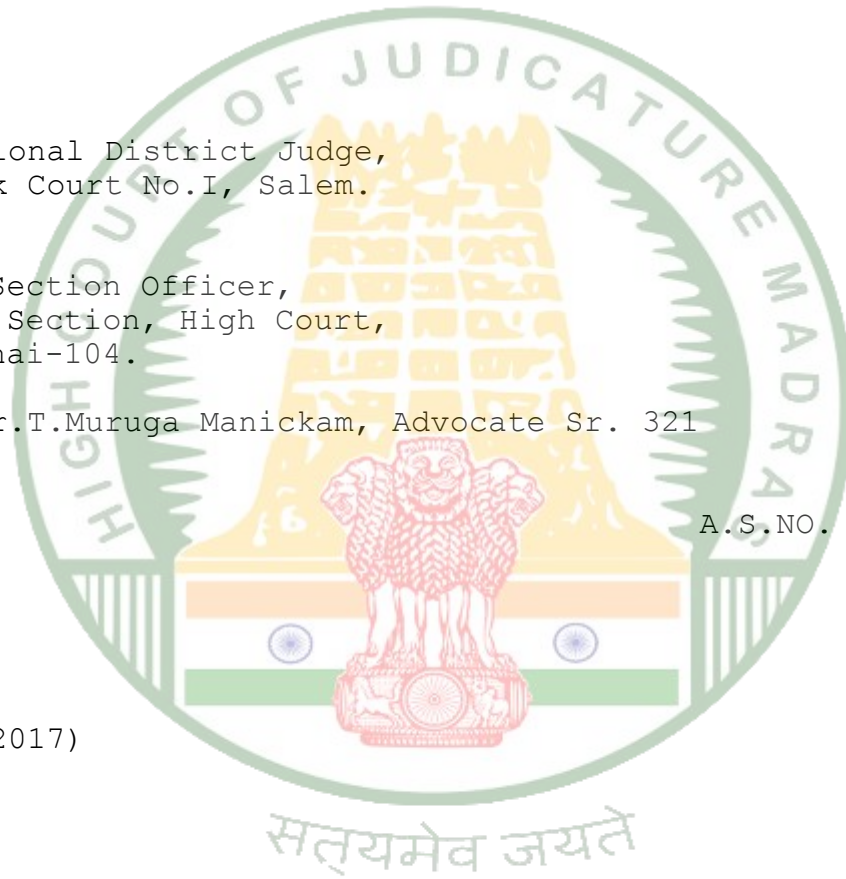
Copy to:-
The Section Officer,
V.R. Section, High Court,
Chennai-104.

+1cc to Mr.T.Muruga Manickam, Advocate Sr. 321

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PVS (CO)

VR(08/06/2017)



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