

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.12.2018

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

A.S.No.910 of 2004

Chelladorai

... Appellant/3rd Defendant

Vs.

1.Rukmani

2.Vasantha

3.Vembu

4.Padmavathy

5.Thayyalnayaki (Died) ... Respondents 1 to 5/Plaintiffs 1 to 5

6.Nagarajan

7.Paramasivam ... Respondents 6 & 7/Defendants 1 & 2

R6, R7 - Given up

PRAYER: Appeal Suit filed under Section 96 of the Code of Civil Procedure against the Judgment and Decree passed in O.S.No.95 of 1991 on the file of the learned Subordinate Judge, Mayiladuthurai dated 10.11.1992.

For Appellant : Mr.M. Muthukumar

JUDGMENT

The 3rd defendant in a suit for partition is the appellant before this Court.

2.The parties are described in the same array as in the suit.

3.The brief facts which are necessary for disposing of the above appeal are as follows:

The respondents 1 to 5 herein had filed O.S.No.95 of 1991 on the file of the learned Subordinate Judge, Mayiladuthurai, for a Partition and separate possession of their 5/7th share in the suit properties. The suit properties were assigned by the

Government to their father Somu and he had died intestate leaving behind him surviving the defendants 1 and 2, who are the sons. The plaintiff would contend that the 3rd defendant was arranging a transaction with the 1st and 2nd defendant in respect of the suit properties and therefore, in order to safeguard the said properties the plaintiffs 1 to 4, who are living in different places, have appointed their relative as Power Agent to manage the lands. The 5th defendant, who is the mother has also authorised him as a Power Agent and he has been in possession and enjoyment of the suit property by raising gram crops.

4. In this background, the 1st and 2nd defendants had threatened that they would alienate Item - I of the suit properties to the 3rd defendant, this constrained the defendants to issue a Lawyer notice to the plaintiffs dated 28.01.1991, directing the 3rd defendant to give an undertaking that he would not interfere in the plaintiff's possession and enjoyment of the suit properties. The 3rd defendant had dated 14.02.1991 wherein the 3rd respondent had questioned the plaintiffs' relationship with the said deceased Somu. Therefore, the plaintiffs have come forward with the suit.

5. The suit was contested only by the 3rd defendant who, in his Written Statement, would contend that he had entered into a Sale Agreement on 25.05.1985 with the 5th plaintiff and defendants 1 and 2 for purchasing the suit Item - I of the property for a total consideration of Rs.15,000/-. On the date of Agreement, a sum of Rs.4,800/- was paid by the 3rd defendant to the 5th plaintiff and defendants 1 and 2 and the balance was to be paid to the Land Ceiling Officer at Mayiladuthurai.

6. It is the case of the 3rd defendant that the 5th plaintiff and defendants 1 and 2 had managed the suit properties but since they were not able to realise a good yield due to weather conditions and they have decided to sell the 1st item of property so as to enable them to utilize the sale proceeds for clearing the land ceiling fees and to meet out the family expenditure. It was also the case of the 3rd defendant that pursuant to the Agreement of sale, he was put in possession of the 1st item of the suit property. He would further contend that he had erected a bore pump and installed 5 HP motor and obtained electricity connection in his name. He would further contend that he has been paying kist in respect of the suit property. The defendant would raise other defences as well.

7. The learned Subordinate Judge, Mayiladuthurai, had framed the following issues:

"(1) Whether the plaintiffs are entitled to the relief of Partition as prayed for?

(2)Whether the 1st item of the suit property is not liable for Partition as contended by the 3rd defendant?

(3)To what relief the plaintiffs are entitled?"

8.In respect of Issue Nos.1 and 2, the learned Subordinate Judge, Mayiladuthurai, had returned a finding that the plaintiffs were entitled to a 5/7th share in the suit property and had further observed that the allotment of the 1st item of the property to the 3rd defendant cannot be considered at the Preliminary Decree stage and that it can be decided only at the time of Final Decree. The suit was therefore decreed as prayed for and the finding with reference to the 3rd issue was that the questions as to who should be allotted to the 1st item of the property has to be considered at the time of Final Decree proceedings. Challenging the said Judgment and Decree, the 3rd defendant is before this Court.

9.The point for consideration in the above First Appeal is whether the 3rd defendant can claim an allotment of the suit 1st item of properties in the Preliminary Decree itself?

10.Heard M. Muthukumar, learned counsel for the appellant/3rd defendant and perused the material on record.

11.The learned counsel for the appellant would argue that the trial Court has failed to observe that the entire payment to the Government has been made only by the 3rd defendant and since he has paid the entire value to the Government for the assignment, the learned Subordinate Judge, Mayiladuthurai, ought to have considered passing a preliminary decree allotting the suit 1st item of the property to the appellant/3rd defendant.

12.In the Preliminary Decree, it is only the shares of the parties that are declared the actual allotment of the shares by metes and bounds in done only the Final Decree proceedings. The learned Subordinate Judge, in his Judgment, has clearly observed that the allotment of the 1st item of the property and the person to whom the same is to be allotted should be dealt with in the final decree proceedings. The interest of the 3rd defendant is therefore protected to that extent and this Court finds no infirmity in the Judgment and Decree of the learned Subordinate Judge, Mayiladuthurai. In the result, the point for consideration is answered against the appellant.

This Appeal Suit is dismissed. However, there shall be no order as to costs.

Sd/-
Assistant Registrar (CS-III)

//True copy//

Sub Assistant Registrar

mps

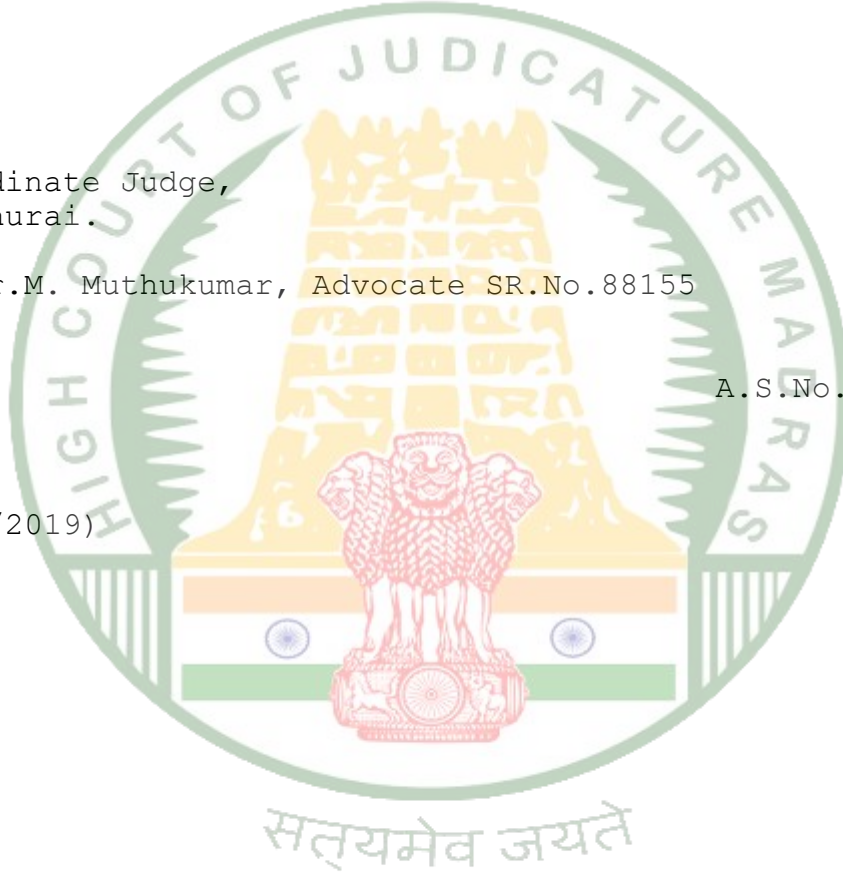
To

The Subordinate Judge,
Mayiladuthurai.

+1cc to Mr.M. Muthukumar, Advocate SR.No.88155

A.S.No.910 of 2004

SJ (CO)
GMY (17/06/2019)



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