

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

WEDNESDAY, THE 11th DAY OF APRIL 2018

THE HON'BLE MR. JUSTICE N.SATHISH KUMAR

C.S. No.1037 of 2010

and

TOS. No.5 of 2012

and

A. No.6617 of 2017

C.S. No.1037 of 2010:-

1. S.Dorairaj (Deceased) (*)
rep. by Power of Attorney,
D.Udayakumar,
New No.10, Old No.67, I Block,
9th Street, Anna Nagar East,
Chennai-600 102.
2. D.Udayakumar, (*)
No.18, Manickeswari Road,
Kilpauk, Chennai-600 010.
3. D.Rajendran, (*)
No.5, Govindan Street,
West Banu Nagar, Ambattur,
Chennai-600 053.
4. D.Ramesh Babu, (*)
New No.10, Old No.67, I Block,
Anna Nagar, Chennai-600 102.
5. Manjula Raviraj, (*)
6. R.Prasad, (*)
7. R.Prasanna, (*)
Plaintiffs 5 to 7 are residing at
New No.44, Old No.96, F Block,
First Street, Anna Nagar East,
Chennai-600 102.

8. Rajeswari, (*)
Old No.67, New No.10, I Block,
Anna Nagar East, Chennai-600 102.
 9. R.Vijayakumari, (*)
No.17/8, Malaviya Avenue,
Thiruvanmiyur, Chennai-600 041.
 10. S.Umarani, (*)
No.9, Anna Avenue,
Chennai-600 020. ... Plaintiffs
- (*) Plaintiffs 2 to 10 brought on record
as legal heirs of the deceased sole
plaintiff as per order dated 05.06.2014
made in A. Nos.723 & 724 of 2014

-Versus-

1. Tmt.S.Sarojini,
No.7, Vasu Street,
Kilpauk, Chennai-600 010.
2. S.Balasubramaniam,
174/93, Poonamallee High Road,
Purasawakkam, Chennai.
3. Tmt.K.Vijayalakshmi,
4. K.Kumaran,
5. K.Anand,
6. Tmt.K.Manjula,
3 to 6 are residing at No.244,
Kilpauk Garden Road, Kilpauk,
Chennai-600 010. ... Defendants

Civil Suit filed under Order XXIV Rule 1 of O.S.
Rules read with Order VII Rule 1 CPC praying that
this Hon'ble Court be pleased to pass a judgment and
decree:-

(#)a) preliminary decree to divide the plaint 'A'

and 'B' schedule properties into four equal moieties and allot plaintiff's 2 to 4, 6 and 7, 1/4th share in the plaint 'A' schedule properties and allot the plaintiffs 1/4th share in the plaint 'B' schedule property;

b) to appoint an Advocate Commissioner and put the plaintiffs in possession of the separated share after removal of the structure standing thereon;

c) for costs of the suit.

(#) Amended as per order dated 27.10.2015 made in A. No.3999 of 2015

TOS. No.5 of 2012:-

In the matter of the
Indian Succession Act
XXXIX of 1925

and

In the matter of Last
Will and Testament of
M.Saradhambal-deceased.

S.Balasubramaniam,
residing at No.174,
Poonamallee High Road,
Chennai-600 084.

... Petitioner/Plaintiff

-Versus-

1. S.Dorairaj (deceased), (\$)
D1 rep. by his POA, D.Udayakumar,
2. K.Vijayalakshmi,
3. K.Kumaran,
D3 rep. by his POA, K.Vijayalakshmi,
4. K.Manjula,
2 to 4 are residing at No.244,
Kilpauk Garden Road, Kilpauk,
Chennai-10.

5. D.Rajeswari Ammal, (\$)

6. Vijaya, (\$)

7. D.Udayakumar, (\$)

8. D.Rajendran, (\$)

9. Manjula Ravi Raj, (\$)

10. Prasad, (\$)

11. Prasanna Kumar, (\$)

12. Uma, (\$)

13. Ramesh, (\$)

5 to 13 are at New No.10,
Old No.67, I Block, 9th Cross Street,
Anna Nagar East,
Chennai-102. ... Caveators/Defendants

**(\$)Defendants 5 to 13 brought on record
as LRs of deceased 1st defendant as
per order dated 26.03.2014 in
A. No.150 of 2014**

Testamentary Original Suit praying that this
Hon'ble Court be pleased to pass an order permitting
the petitioner to prove the Will in common form and
that probate thereof to have effect limited to the
State of Tamil Nadu may be granted to him.

A. No.6617 of 2017:-

S.Dorairaj (Deceased)
rep. by Power of Attorney,
D.Udayakumar,
New No.10, Old No.67, I Block,
9th Street, Anna Nagar East,
Chennai-600 102.

By Legal Representatives

1. D.Udayakumar,
No.18, Manickeswari Road,
Kilpauk, Chennai-600 010.
 2. D.Rajendran,
No.5, Govindan Street,
West Banu Nagar, Ambattur,
Chennai-600 053.
 3. D.Ramesh Babu,
New No.10, Old No.67, I Block,
Anna Nagar, Chennai-600 102.
 4. Manjula Raviraj,
 5. R.Prasad,
 6. R.Prasanna,
Applicants 4 to 6 are residing at
New No.44, Old No.96, F Block,
First Street, Anna Nagar East,
Chennai-600 102.
 7. Rajeswari,
Old No.67, New No.10, I Block,
Anna Nagar East, Chennai-600 102.
 8. R.Vijayakumari,
No.17/8, Malaviya Avenue,
Thiruvanmiyur, Chennai-600 041.
 9. S.Umarani,
No.9, Anna Avenue,
Chennai-600 020.
- ... Applicants

-Versus-

1. Tmt.S.Sarojini,
No.7, Vasu Street,
Kilpauk, Chennai-600 010.
2. S.Balasubramaniam,
174/93, Poonamallee High Road,
Purasawakkam, Chennai.

3. Tmt.K.Vijayalakshmi,

4. K.Kumaran,

5. K.Anand,

6. Tmt.K.Manjula,

3 to 6 are residing at No.244,
Kilpauk Garden Road, Kilpauk,
Chennai-600 010.

... Respondents

Application praying that this Hon'ble Court be pleased to pass a decree on admission and grant a preliminary decree for partition of the 1/5th share of the plaintiffs in the plaint 'A' schedule property.

This suit along with TOS and application coming on this day before this court for hearing the court made the following order:-

This application has been filed for passing preliminary decree in respect of 'A' Schedule property on the basis of the admission made by 2nd defendant in the written statement who is the only contesting defendant. Other defendants have no objection for passing such preliminary decree.

2. The suit was originally filed by one Mr.S.Dorairaj, who is the brother of 2nd defendant, for partition of the property. The relationship between the parties is not in dispute. 1st plaintiff

2nd defendant and one Mr.Krishnamurthy are the sons of Mr.T.Shanmugam. Apart from them, Mr.T.Shanmugam has one daughter. After the demise of Mr.T.Shanmugam, 1st plaintiff being one of the legal heirs has filed suit for claiming 1/4th shares in "A" and "B" schedule properties. Now this application has been filed to pass preliminary decree on the basis of the admission.

3. In the written statement filed by the 2nd defendant it is contended that the first plaintiff is entitled to only 1/5th share in "A" Schedule property and in so far as "B" Schedule property is concerned, the plaintiff is not entitled to 1/5th share since the 1/5th share in the "B" schedule property has already bequeathed in between defendants 1 and 2 by the mother Late. Saradambal. Further, it is the contention of the 2nd defendant that there are triable issues in the suit. Originally, the suit was filed by the 1st plaintiff. According to him, there was a settlement in their favour for life interest and vested reminders to the children. Hence, he is not competent to file a suit. Further the beneficiary

of the above said documents have not been made as parties in this suit. Therefore, the suit is not maintainable.

4. Another contention of the learned counsel for the contested witness is that the settlement deed dated 27.08.2006 is not settlement deed, it is only a Will. This document is purported one and hence the suit is not maintainable.

5. Admittedly, the relationship is not in dispute. The suit originally filed by Mr.Dorairaj one of the sons of Mr. Shanmugam for partition. Though in the plaint it is pleaded that his father has executed settlement deed in respect of 1/4th share in the suit property, retaining the life interest and vested reminders to the legal heirs, having executed such documents, he cannot maintain the suit. I have perused the entire proceedings and the documents. The relationship of the parties is not in dispute. The similarity character of the property was not in dispute. Only the main dispute appears to be with regard to the share of the mother of Mr.Dorai raj.

The mother of the 2nd defendant appears to have executed a Will in favour of 1st and 2nd defendants, which is the subject matter of T.O.S. Now, the plaintiff in this application has not claimed any share in respect of "B" Schedule Property. Whereas, they have restricted their claim of 1/5th share in the "A" Schedule property as admitted by the contested 2nd defendant in his written statement. Admittedly, the properties originally belonged to Late Mr. Shamugam who has three sons and one daughter and left behind his wife viz., the mother of the 1st plaintiff as well as 2nd defendant, one Mr. Krishnamurthy and a daughter. It is also admitted fact that he died intestate. Therefore, the legal heirs are entitled to 1/5th share. The 1st plaintiff is also entitled to 1/5th share which is also not disputed. It is also admitted by the defendants in their written statement. The main issue now required to be agitated is only with regard to the 1/5th share of the mother of the 1st plaintiff and 2nd defendant which is said to have been bequeathed to the 1st and 2nd defendants. The issue is left open and to be tested in T.O.S. separately. Further, in respect of other

aspects viz., the shares of the parties, this Court, in view of the specific admission made by the 2nd defendant in the written statement about the entitlement of 1st plaintiff, this Court can pass preliminary decree for 1/5th share to the applicant/1st plaintiff in the "A" Schedule property. Though the parties have projected the settlement deed, it is to be noted that the 1st plaintiff died, his legal heirs viz., sons, wife and daughter were brought on record as plaintiff Nos.2,3,4, 8,9 and 10. Similarly, the legal heirs of pre-deceased son were brought on record as plaintiff Nos.5,6,7. Therefore, dehors the settlement deed, which is said to have been executed for the undivided share, the plaintiffs 2 to 10 being the legal heirs of the 1st plaintiff are certainly entitled to preliminary decree together for 1/5th share in "A" schedule property. Therefore, in view of the admission, this issue need not be taken for trial.

6. Accordingly, this Court is inclined to pass preliminary decree declaring the rights of the plaintiffs 2 to 10 in the "A" Schedule property and

there shall be a preliminary decree of 1/5th share to plaintiffs 2 to 10 together in the "A" Schedule property. Similarly respondents 1 and 2 each are entitled to 1/5th share in "A" Schedule property and respondents 3 to 6 together entitled to 1/5th share in the "A" Schedule property.

7. In view of the above, remaining prayer with regard to the 1/5th share of the mother viz., Smt. Saradambal is to be tested in the trial. Above 1/5th share is the subject matter of the Will which is in T.O.S.No.5 of 2012.

8. As per the Judgment of a Division Bench of this Court in O.S.A.No.278 of 2014 dated 23.12.2014, the Local Commissioner is directed to take the Will along with the marked documents Ex.P8 to P13 to the Forensic Laboratory, Mylapore, Chennai-4, in a sealed cover and handover the same to the concerned officials and get back their opinion and file report to this Court. Post both the matters on 08.06.2018.

Application No.6617 of 2017 is allowed and preliminary decree is passed.

sd/.N.S.K.J

11.04.2018

//Certified to be a true copy//

Dated this the day of 2018.

COURT OFFICER

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