

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.03.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.M.SUNDRESH
AND
THE HONOURABLE MR.JUSTICE C.SARAVANAN

A.S No.90 of 2015

M.Palanisamy

... Appellant/1st
Defendant

Vs.

1.P.Arun
2.Minor P.Arthi
(Rep.by Next Friend and mother P.Shanthi)

... Respondents 1 & 2/Plaintiffs

3.M.Jalapathi
4.Kandhammal
5.Alamelu
6.V.R.Govindaraju
7.P.Sumathi

... Respondents 3 to 7/
Defendants 2 to 6

Prayer:

Appeal filed under Order 41 Rule 1 r/w Section 96 of C.P.C.
against the judgment and decree made in O.S.No.139 of 2010 dated
16.07.2014 on the file of II Additional District Judge, Salem.

For Appellant : Mr.V.Sekar

For Respondents: Dr.P.Jagadeesan for R1 & R2
R3 - given up

JUDGMENT

(Delivered by M.M.Sundresh,J.)

The appellant is the father of the plaintiffs, who are his son and daughter respectively. The plaintiffs filed suit for partition against the appellant and the other defendants. On contest, the trial Court granted two-third of the share in first item of the schedule mentioned properties situated in Survey No.256/2B2 to an extent of 1.15 acres. Treating the other item as the ancestral property, specific shares have been allotted. The present appeal is filed by the appellant only with regard to

the first item of the schedule mentioned property.

2. Before the learned trial Judge, the respondents 1 and 2/plaintiffs marked Exs.A1-A19. Ex.A5 is the sale deed executed by the appellant in favour of the defendant no.6. Similarly, under Ex.B3 and B4, sale deeds executed by the appellant in favour of defendants 6 and 5 respectively. The first respondent and the wife of the appellant examined themselves on behalf of the plaintiffs. On behalf of the defendants, the appellant examined himself as DW1. Totally six witnesses have been examined. The appellant also marked Exs.B1 to B7 in support of his contentions.

3. Before the trial Court, the following issues were framed:-

- "1.Whether the plaintiffs are entitled to get share in the suit 1st and 2nd item of the suit property?
- 2.Whether the suit properties are the ancestral joint family properties or the separate property of the defendants?
- 3.Whether the defendants are restrained from alienating or encumbering the suit properties till final decree is passed?
4. To what reliefs, the plaintiffs are entitled?"

4. After considering the evidence adduced, the suit was decreed granting two-third share in the first item of the schedule mentioned property.

5. Challenging the judgment and decree with specific reference to the first item alone the present appeal is argued before us. Thus, the learned counsel appearing for the appellant is not pressing the appeal as against the second item of the schedule mentioned property.

6. Learned counsel appearing for the appellant would contend that the first item is an ancestral property. There was no objection when the sale was effected by the appellant in favour of the third defendant. Thereafter, out of his own income he purchased the said property back. In the subsequent partition made, this item was specifically excluded. Therefore, considering these documents, the appeal will have to be allowed.

7. Learned counsel appearing for respondents 1 and 2/plaintiffs would submit that even Ex.A1 clearly states about the nature of the property. Ex.A2 is nothing but re-conveyance in a different form which is to prevent the plaintiffs from getting their respective shares. The appellant has got divorce

and thereafter re-married. That was the reason why these documents were executed. Even before the divorce, the relationship got strained. The Court below rightly took into consideration of the conveyance made in Ex.A1 in decreeing the suit. Therefore, no interference is required.

8. The point for consideration is as to whether the appeal will have to be allowed by answering the issues in favour of the appellant.

9. As rightly submitted by the learned counsel appearing for the respondents 1&2/plaintiffs, Ex.A1 clearly states that sale is executed by the appellant on his own and on behalf of respondents 1 and 2. Therefore, it is too late in the day for the appellant to contend that the first item of the schedule mentioned property is an ancestral property. If it is an ancestral property, the appellant could not have effected the sale in favour of the third defendant. Secondly, the sale was effected by the appellant, on behalf of himself and respondents 1 and 2, being the minor children, as the Karta. Therefore, even according to the appellant, the appellant and respondents 1 and 2 constituted a Hindu Undivided Family. If that is the case, certainly both the appellant and respondents 1 and 2 are entitled to one-third share. If the appellant is karta of the family, it is for him to establish that the re-purchase was made by him from his own earning.

10. Admittedly, the other item of the property was treated as a joint-family property. Even according to the appellant, the subsequent partition was in the year 2008 though the first item was not included. The relationship between the appellant and his wife, who represented respondents 1 and 2, was strained at that relevant point of time. These factors were taken note of by the learned trial Judge. The appellant cannot be allowed to go against the recording made in Ex.A1 in view of the Sections 91 and 92 of the Indian Evidence Act, 1872. In such view of the matter, we do not find any error in the decree granted by the trial Court.

11. Learned counsel appearing for the appellant has submitted that equity will have to be seen particularly when documents have been executed by the appellant in favour of his mother and subsequently purchased by him using his own income. We cannot take note of the aforesaid factors in this appeal. Perhaps, the appellant can plead before the trial Court seeking equities to be worked out at the time of final decree being passed.

With the above said observation, the appeal stands dismissed. No costs. Consequently, connected M.P.No. 1 of 2015 is closed.

Sd/-
Assistant Registrar(Insp.Cell)

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Sub Assistant Registrar

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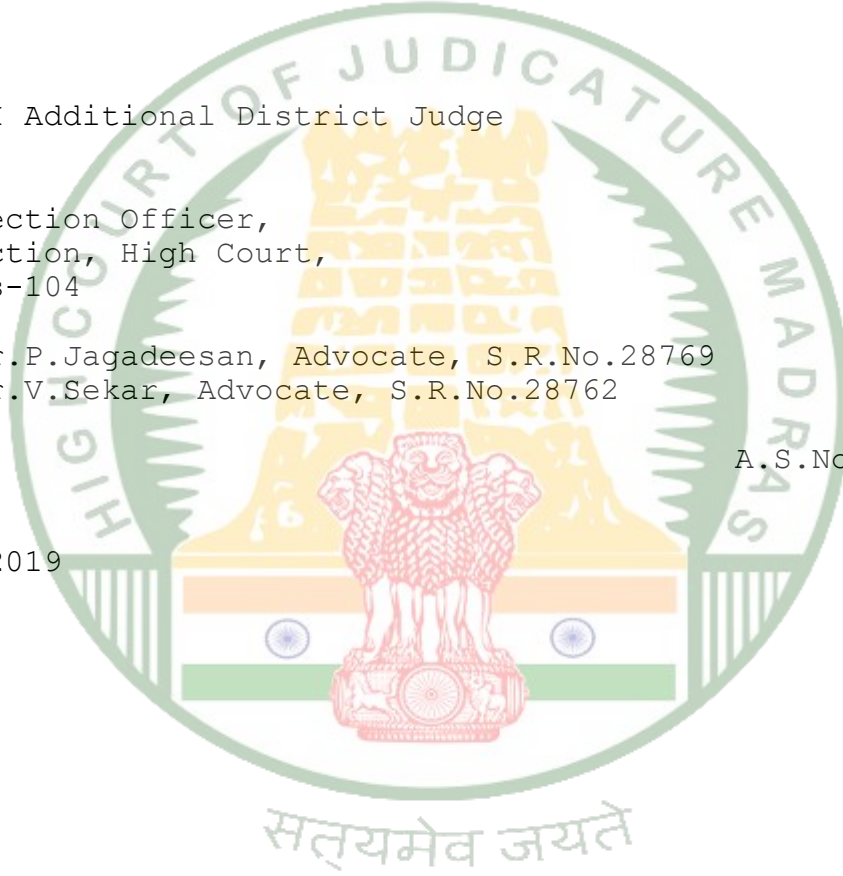
1. The II Additional District Judge
Salem.
2. The Section Officer,
VR Section, High Court,
Madras-104

+1cc to Dr.P.Jagadeesan, Advocate, S.R.No.28769

+1cc to Mr.V.Sekar, Advocate, S.R.No.28762

A.S.No.90 of 2015

AK(CO)
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