

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.01.2019

CORAM :

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

S.A.No. 297 of 2000

And

C.M.P.No. 2615 of 2000

Mirabai

.. 3rd Defendant

Vs.

1. Komalayvalli
2. R.Rajasekar
3. Manimekalai
4. Sasikala
5. Jayalakshmi
6. Sivaprakasam
7. Indirani
8. Thayyalnayaki
9. Thavamani @ Meenatchi
10. Pandirani
11. Sethurani
12. Krishnamurthy
13. Ganapathy

.. Respondents/Plaintiffs & D1, 2 & 4 to 9

PRAYER: This Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and Decree made in A.S.No. 66 of 1998 and A.S.No. 138 of 1998 dated 16.03.1999 on the file fo the Court of Additional Subordinate Judge, Mayiladuthurai in modifying the Judgment and Decree made in O.S.No. 421 of 1983 on the file of the Court of District Munsif, Sirkali, dated 27.01.1998.

For Appellant :Mr. A.Muthukumar

For 7th Respondent :Mr. S.Sounthar

For R3,R4,R6,R7,
R10 to R12 :No appearance

JUDGMENT

The third defendant in O.S.No. 421 of 1983 on the file of the District Munsif, Sirkali, is the appellant herein.

2. O.S.No. 421 of 1983 had been filed by five plaintiffs seeking partition and separate possession of one half share in the suit property and also for mesne profits of Rs.1,000/- till date of handing over of possession by the defendants and also for costs.

3. The first item of suit property was Door No.7, Andal Street, Vaitheeswaran Kovil Village in Re.S.No. 131/3, Sirkali, Mayiladuthurai. The second item of suit property was vacant land measuring 19 cents in Re.S.No. 131/3, Vaitheeswaran Kovil Village, Sirkali, Mayiladuthurai. The first plaintiff Komalayvalli was the mother of the second to fifth plaintiffs. The husband of the first plaintiff and father of the second to fifth plaintiffs by name Rajangam died in August 1975. The first defendant Sivaprakasam was the brother of Rajangam. The second defendant Indrani was the sister of Rajangam and Sivaprakasam. The third defendant Meerabai is the stranger to the family. The fourth to ninth defendants had been impleaded by order of the Sub Court, Mayiladuthurai in A.S.No. 27 of 1992.

4. It was stated that the suit properties were purchased by Kuppusamy Pillai, the father of Rajangam and Sivaprakasam and Indirani. He died in 1954. The plaintiffs as legal heirs of Rajangam claimed one half share in the suit property. It was also stated that the first defendant had sold the second item of suit property, namely, vacant land to an extent of 19 cents to the third defendant. It was stated that the second defendant was in permissive possession of the first item of suit property. An Advocate notice dated 10.06.1983 had been issued seeking partition and possession.

5. In the written statement of the first defendant, it was stated that even though the father, Kuppusamy Pillai died in the year 1954, he was survived by his wife Kavery Ammal, who died on 26.09.1974. She was entitled to 1/3rd share of the share of Kuppusamy Pillai. It was also stated that there were two other sisters by name Thayyalnayaki and Nachiyar, who had not been impleaded as defendants. The second defendant in her written statement stated that as daughter of Kuppusamy Pillai, she was entitled to a share in the property. She also stated that she was residing in the first item of suit property. She had put up construction over the first item of suit property. The third defendant in her written statement stated that pursuant to an oral partition, the second item of suit property was allotted to the first defendant and she had purchased the said second item of suit property from the first defendant. The second defendant also filed an additional written statement claiming 1/3rd share in the share of the mother Kavery Ammal. It was stated that the plaintiffs were not entitled to ½ in the suit properties.

6. After trial, by Judgment dated 27.01.1998, the District Munsif, Sirkali, passed a preliminary decree allotting 6/15th share to the plaintiffs, 6/15th share to the first defendant, 1/15th share to the second defendant, 1/15th share to the fourth defendant and 1/15th share to the fifth to ninth defendants. It was also held on the Judgment that since the first defendant had sold the second item of the suit property to the third defendant, the property must be valued as a vacant site and the third defendant was entitled to the 6/15th share of the first defendant and to adjust the value, moiety can be paid.

7. Challenging this Judgment, the plaintiffs filed A.S.No. 66 of 1998 and the third defendant filed A.S.No. 138 of 1998 before the Additional Sub Court, Mayiladuthurai. The learned First Appellate Judge reappraised the evidence and framed points for consideration. By Judgment dated 16.03.1999, the learned Special Judge found that the third defendant had purchased the property even before partition of the same between the two brothers and rejected the stand of the third defendant that there was an oral partition. The learned First Appellate Judge also found that the third defendant was not a bona fide purchaser. Finally, the appeal filed by the plaintiffs challenging non grant of costs and mesne profits was allowed and the appeal filed by the third defendant was dismissed.

8. The third defendant has filed the present Second Appeal challenging the Judgment of the First Appellate Court. This Second Appeal has not yet been admitted. Notice of motion alone was ordered. After service of notice, counsel had entered appearance on behalf of the second defendant, who was shown as the seventh respondent.

9. Heard arguments advanced by Mr.A.Muthukumar, learned counsel for the appellant and Mr.S.Sounthar, learned counsel for the seventh respondent. It was pointed out that the plaintiffs are not represented. However since the Second Appeal has not been admitted, arguments advanced by Mr.Muthu Kumar for the appellant were heard.

10. The learned counsel stated that the third defendant is a bona fide purchaser and insisted that the Judgment of the Trial Court should be upheld and that the Judgment of the First Appellate Court should be set aside. However, it is the contention of Mr.S.Sounthar that having filed an appeal as against the Judgement of the trial Court, it would now not lie arguments for the appellant to seek upholding of the Judgment of the trial Court.

11. I have carefully considered the arguments advanced.

12. It is a fact that the third defendant had purchased the second item of suit property from the first defendant even prior to the institution of the suit. It is also a fact that the first defendant is entitled to an undivided 6/15th share in both the items of the suit property. It therefore follows that the third defendant can be stated to be entitled to the said 6/15th share which fell to the share of the first defendant.

13. It is the contention of Mr.Muthukumar that the third defendant had also put up construction over the vacant site of 19 cents on the second item of the suit property and is also in possession. It is also his further contention that the second defendant is in possession of the first item of suit property. Both contesting parties do not dispute the merits of the preliminary decree granting 6/15th share to the plaintiffs, 6/15th share to the first defendant, 1/15th share to the second defendant, 1/15th share to the fourth defendant and 1/15th share to the fifth to ninth defendants in both items of suit properties.

14. In view of all this facts, it is only just and proper that though the Second Appeal is dismissed, the shares of the respective parties are determined and affirmed as laid down by the Trial Court and it is also affirmed that the appellant / third defendant is entitled to the 6/15th share which had been granted to the first defendant. Whenever a final decree application is filed, it would only be in the interest of all the parties that the third defendant is permitted to participate in the final decree application and seek allotment of the second item of suit property and if the value is to be equalised then moiety may be calculated and paid to the respective parties. Similarly the seventh respondent/second defendant may also seek allotment of the first item of suit property.

15. In view of the above, though the Second Appeal is dismissed, under Order 41 Rule 33, the Judgment and Decree of the First Appellate Court are appropriately moulded and the Judgement of the trial Court is affirmed. No costs. Consequently, connected Civil Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

vsg

To

1. Additional Subordinate Court,
Mayiladuthurai.
2. District Munsif Court,
Sirkali.

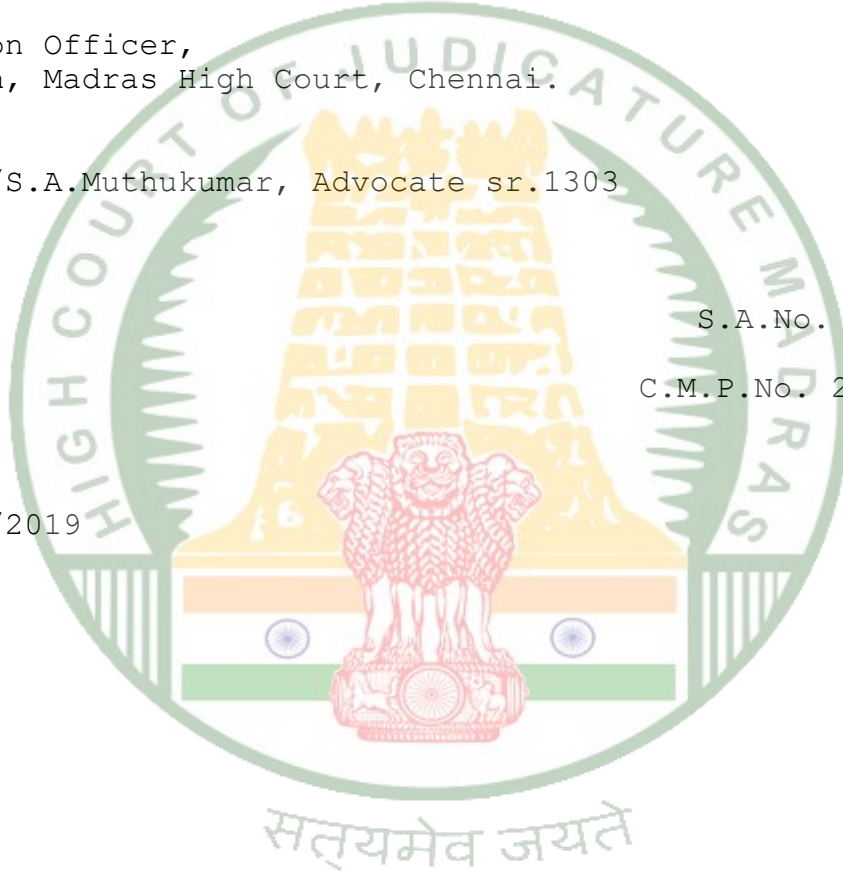
Copy to

The Section Officer,
VR Section, Madras High Court, Chennai.

+lcc to M/S.A.Muthukumar, Advocate sr.1303

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And
C.M.P.No. 2615 of 2000

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