

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.03.2019

C O R A M

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

S.A.No.1676 of 2008
and M.P.Nos.1 and 2 of 2008

1. Kaveriappa (Deceased)
2. Muniamma
3. Yellamma
4. Asha
5. Naveenkumar

... Appellants

Appellants 2 to 5 brought on record as LR's of the deceased sole appt. Vide order of Court dated 15.03.2018 made in C.M.P.No.3282 to 3284/2018 in S.A.No.1676/2008 (MGRJ)

Vs.

1. Pappiah (Deceased)
2. Muni Ellappa
3. Ellamma
4. Venkatammal
5. Venkatama
6. Rajappa
7. Munirathna
8. Rajappa
9. Venkatesan
10. Manjunath
11. Kantharaj
12. Shaila
13. Muniamma

... Respondents

Respondents 3 to 13 brought on record as LR's of the deceased R1 vide order of Court dated 15.03.2018 made in CMP.No.5527 to 5529/2018 in S.A.No.1676/2008 (MGRJ)

Prayer: Second Appeal has been filed under Section 100 of C.P.C., against the decree and judgment in A.S.No.8 of 2004 dated 29.08.2005 on the file of the 1st Additional District Court, Dharmapuri District at Krishnagiri, setting aside the Decree and Judgement made in O.S.No.36 of 1998 dated 01.04.2003 on the file of Sub-Ordinate Judge, Hosur.

For Appellant : Mr.S.V.Jayaraman Senior Counsel for
Mr.S.P. Ravishankar

For Respondents: Mr.T.Sri Krishna Bhageval
for Mr.P.Subha Reddy for R1.
Mr.P.Mani for R2.

JUDGMENT

This appeal has been filed against the judgment of the First Appellate Court modifying the shares on the basis of the additional document filed namely, Ex.B3.

2. The suit has been originally filed by the appellant claiming 1/3rd share in the property. The defendants are none other than his own brothers. These facts are not in dispute. The suit properties are also not disputed and that all three of them are entitled to 1/3rd share in the suit property. The plaintiff himself clearly pleaded to the effect that the brothers and sister are entitled to 1/3rd share in Survey No.444 to the extent of 43 cents and an Survey No.503 to the extent of 0.57 cents in favour of the first defendant by a registered sale deed dated 12.10.1988. Similarly, the plaintiff and the first defendant jointly sold the suit properties in favour of the second defendant towards their share in Survey No.503, extent of 5 cents by executing registered sale deed dated 06.02.1988. However, before the Trial Court, only the second defendant has produced a sale deed dated 06.02.1988 to show that the above property is not liable to partition. Though the Encumbrance Certificate is filed, the trial Court not believed first defendant with regard to the sale deed dated 12.10.1988 since the above sale deed is not filed before the trial Court, the trial Court has granted the preliminary decree as prayed for, except the properties sold under sale deed dated 06.02.1988.

3. During the period of appeal stage, the appeal was filed. In the appeal, the first defendant has filed an application under order 41 Rule 27 of Civil Procedure Code to receive the additional document namely certified copy of the sale deed dated 12.10.1988. The first Appellate Court has allowed the application and received the evidence as Ex.B3 and accordingly, passed the preliminary decree except the property sold by the plaintiff, as against which, the present appeal is filed.

4. The only ground raised by the learned senior counsel appearing for the appellant is that the First Appellate Court has not followed the procedure under Order 41 Rule 28 and no opportunity was given to the plaintiff to cross examine the witness when the Appellate Court received the additional document. The First Appellate Court ought to have given a chance to cross examine the witnesses. The above said procedure has not been followed.

5. Further contention of the learned senior counsel is that only the certified copy of the sale deed has been marked. The preliminary evidence has not been produced without complying the provisions of marking the secondary evidence. The trial Court has simply allowed the petition. Hence, it is submitted that the appeal is to be allowed.

6. The learned counsel for the respondent contended that the sale deed is not in dispute. Respondent also explained the reason for producing certified copies of the sale deed and the trial Court has also noted his explanations that the original document was taken by sister of the plaintiff and defendant. Therefore, the certified copy of the sale deed has been obtained and produced. The First Appellate Court has accepted the same and passed a decree. Since execution of the sale deed is not disputed, no further opportunity is required to be given to the parties. Hence, prays for dismissing the appeal.

7. Considering the above submissions, this Court find that the relationship of the parties is not in dispute. The suit is laid for claiming 1/3rd share of the property, whereas, the defendants have taken stand that the partition of properties have been sold by the plaintiffs in their favour. The second defendant has filed a sale deed before the Trial Court to prove that 5 cents were sold by the plaintiff. The Trial Court has accepted the same. However, first defendant has not produced any document before the trial Court. Therefore, the trial Court did not accept the written statements of the defendants with regard to the sale in favour of the first defendant. It is curious to note that even in the trial Court, P.W.1 was confronted with regard to such sale deed, he has denied the execution of such sale in favour of the first defendant. The Trial Court has come to the conclusion that even above explanation for non production of sale is acceptable, nothing prevented the first defendant to produce the certified copy of the sale. However, the same has not been produced before the Trial Court. Therefore, the trial Court has decreed the suit as prayed for, by the plaintiff.

8. During the appeal, the First Appellate Court has allowed the application filed for additional evidence and exhibited the certified copies of sale deed as Ex.B3. The First Appellate Court has pronounced the judgment excluding the properties sold under Ex.B3. It is to be noted that Ex.B3 is only certified copy, no doubt, the explanations offered by the appellant that original has been taken away by her sister. Even such explanation is acceptable and the document is received when the execution of the sale deed has been denied specifically by the plaintiff. The First Appellate Court ought to have given

opportunity to the parties to adduce evidence on the basis of Ex.B3, which has not been done so, whereas, the additional evidence allowed by the trial Court, the Appellate Court ought to have taken such evidence or directed the trial Court to take such evidence and ought to have given opportunity to the parties to adduce evidence.

9. These procedures were not adopted by the Appellate Court when the party has denied the execution of such document in the evidence. The First Appellate Court ought to have given opportunity to the parties to prove the document, but, without doing so, the Appellate Court has simply received the document as Ex.B3 and modified the preliminary decree. The said procedure adopted by the Appellate Court is not according to law. In fact, Order 41 Rule 28 of Civil Procedure Code mandate the Court to take additional evidence only when the documents were not disputed by other side, no further evidence is required, whereas, during the trial, the plaintiff has in fact denied. Therefore, the execution of Ex.B3 to be proved and its proof is certainly required. Therefore, the opportunity ought to have been given to the parties to adduce the evidence. In that regard, the Appellate Court without doing so, modified the preliminary decree and the same is not in accordance with law.

10. Accordingly, this Second Appeal is allowed. No costs. Consequently, connected miscellaneous petitions are closed. The matter is remitted back to the First Appellate Court, Dharmapuri. The First Appellate Court is directed to give opportunity to the appellant and respondent to adduce oral evidence in respect of Ex.B3. The evidence shall be confined only to the proof alone. The Appellate Court shall not entertain any other evidence. The evidence shall be confined only to the proof of the document and the First Appellate Court is directed to pass a judgment fresh within a period of three (3) months from the date of receipt of a copy of this order.

11. It is also submitted by the learned counsel for the respondent that the appellants are trying to alienate the suit property. Hence, the appellants are restrained from alienating the suit property till the disposal of the appeal.

-s/d-

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

msv

To

1. The 1st Additional District Court
Dharmapuri at Krishnagiri.

2.The Subordinate Judge
Hosur.

Copy to

The Section officer
VR Section, High Court, Madras 104.

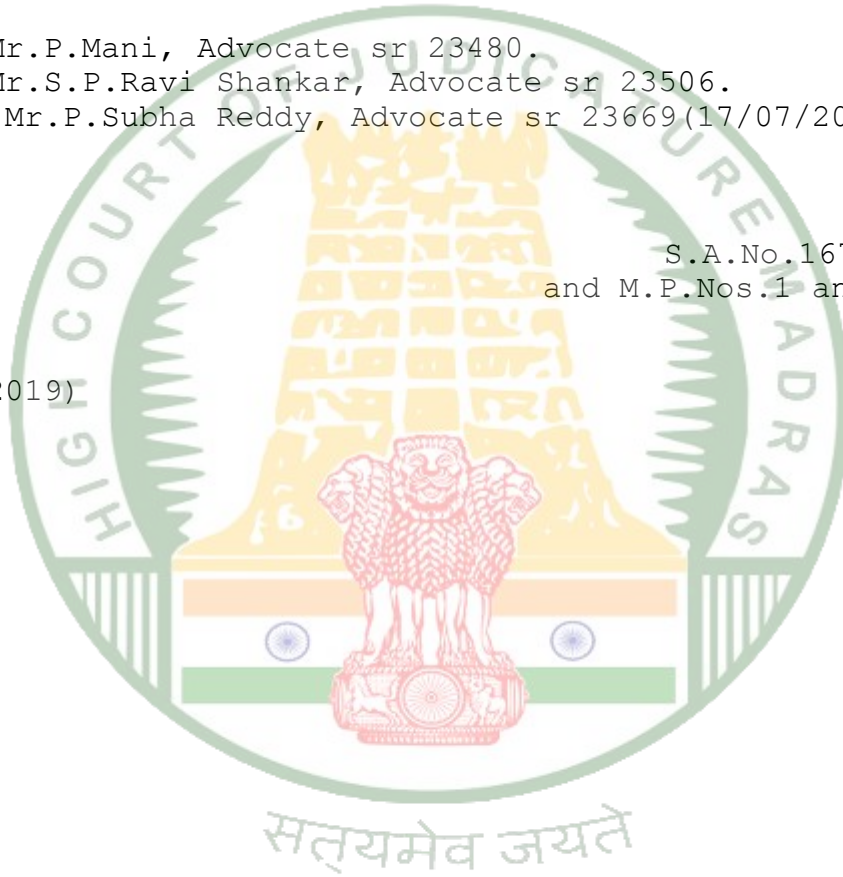
+1 CC to Mr.P.Mani, Advocate sr 23480.

+1 CC to Mr.S.P.Ravi Shankar, Advocate sr 23506.

+1 CC to Mr.P.Subha Reddy, Advocate sr 23669(17/07/2019)

S.A.No.1676 of 2008
and M.P.Nos.1 and 2 of 2008

RK(CO)
SP(24/06/2019)



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