

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.06.2019

CORAM

THE HONOURABLE MR. JUSTICE N.SESHASAYEE

S.A.No.1047 of 2005
and
C.M.P.No.14315 of 2005

1. Chinnappan
2. Subramaniam
3. Valliammal @ Periammani ... Appellants

versus

1. Chellammal
2. Subramaniam
3. Palanisamy
4. Perianna Gounder
5. Rukumani
6. Venkitachalam
7. Chinnasamy
8. Valliammal
9. Chinnathambi Gounder
10. Muthusamy Gounder

11. Junior Engineer,
Tamil Nadu Electricity Board,
Velampalayam,
Perundurai Taluk.

12. Divisional Engineer,
Tamil Nadu Electricity Board,
Velampalayam,
Perundurai Taluk.

13. Indian Overseas Bank,
Kunnathur.

... Respondents

Prayer: Second Appeal is filed under Section 100 of code of Civil Procedure against the judgment and decree dated 31.10.2003 made in A.S.No.147 of 2001 on the file of the Ist Additional District Court, Erode, confirming the judgment and decree dated 10.08.2000 made in O.S.No.277 of 1991 on the file of the Principal Subordinate Court, Erode.

For Appellants : Mr.I.C.Vasudevan

For Respondents: Mr.Guruprasad [R1 & R2]

Mr.V.Viswanathan [R11 & R12]

No Appearance [R3,R4,R9,R10 & R13]

Given Up [R5 to R8] having been given up vide memo dated 04/03/2006

JUDGMENT

There could not be question shorter than the one involved in the present case. The suit was laid for partition, and the 1st defendant in the suit agreed to the partition, filed the written statement and paid necessary Court fee to declare his share and to pass a preliminary decree. He had put up a building in the portion of the suit-property and seeks equity in the allotment of that portion where he has put up the construction to his share. This prayer for equitable allotment was rejected successively. Hence the present appeal.

2. This appeal was admitted on the following substantial questions of law:

'1.Whether the Courts below erred in law and misdirected themselves in decreeing the suit as prayed for when the execution of the Will itself is suspicious one?

2. Whether the findings of the Courts below are contrary to the evidence especially when the joint possession and enjoyment of the suit property was not proved by the plaintiffs?

3. Whether the findings of the first appellate Court is correct in law without framing proper points for consideration to decide the appeal?

4. Whether the findings of the first appellate Court is correct in law when without analysing the case independently and dismissing the appeal on reproducing the trial Court judgment?'

3. The 1st defendant is no more and his legal representatives are appellants 1 to 3.

4. The point argued by the learned counsel for the appellants is that a co-sharer in possession of a specific portion of the property held in co-ownership for his convenient enjoyment has the right to be allotted the same to him, and this should not be denied.

5. The learned counsel for the respondents would submit that since cause of action itself was found on the construction

now made and not on the preliminary decree passed, the same cannot be raised now. He added that no co-owner is entitled to any specific portion of the property of which he is only a co-sharer along with others.

6.1 Since the preliminary decree is not in challenge, and only equitable allotment of a specific portion alone is in controversy, there is little to be decided in this case.

6.2 A property held in co-ownership does not imply a co-sharer is not entitled to possession. If a co-sharer is in possession of a specific portion of the property held in co-ownership for his convenient enjoyment, subject to other equities, he will be generally entitled to have the share allotted to him during the metes and bounds partition on lie. However, this has to be worked out during the final decree proceedings, and this Court considers that the appellants have rushed to this Court one stage too early. But then, they had raised it now and had also invited decrees rejecting it.

7. The appellants are now free to raise this point during the final decree proceedings. Since this is a decision on a finding, but certainly one that is likely to affect the substantial right of the appellant in the final decree proceedings, and not the one affecting the preliminary decree, on the preliminary decree, nothing survives in this appeal. Subject to the right of the appellants to raise the aspect now raised during the final decree proceedings, this appeal is dismissed and the judgment and decree dated 31.10.2003 made in A.S.No.147 of 2001 on the file of the First Additional District Court, Erode, is confirmed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Asst.Registrar (CO)

/true copy/

Sub Asst. Registrar

ssn

To

1. The I Additional District Court,
Erode.

2. The Principal Subordinate Court,
Erode.

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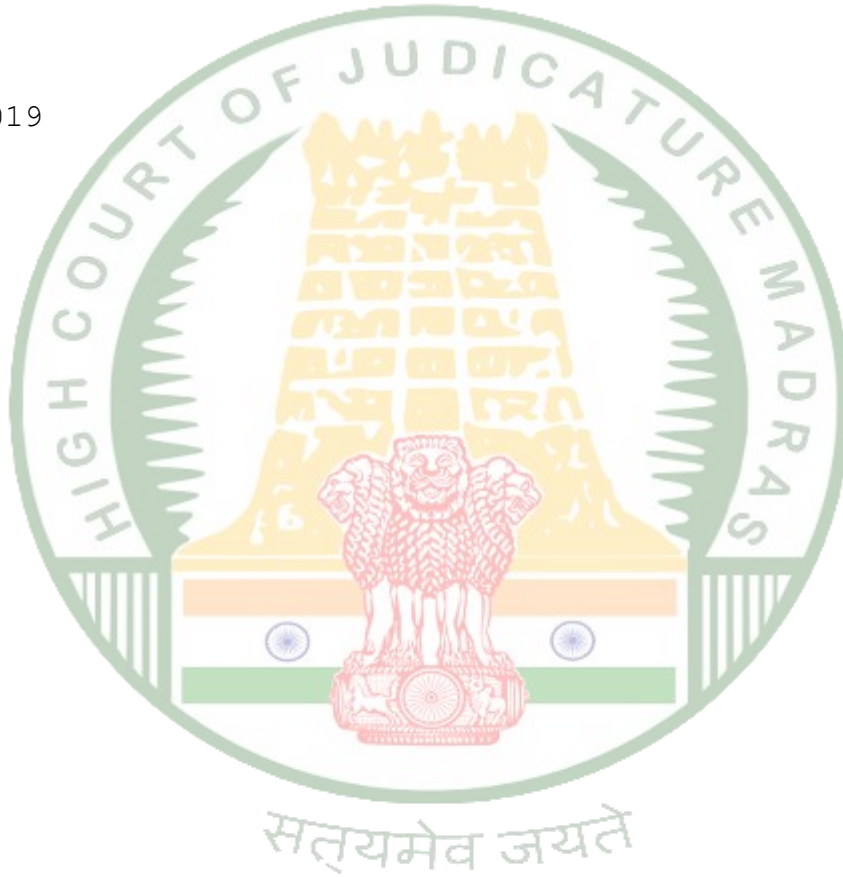
The Section Officer
VR Section High Court Madras-104

+1 cc to Mr.I.C.Vasudevan Advocate sr49293

+1 cc to Mr.M.Guruprasad Advocate sr49531

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