

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.03.2019

CORAM:

THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

S.A.No.427 of 2019
& C.M.P.No.6366 of 2019

Irudayaraj

... Appellant

-VS-

1. Jothi Robert
2. G.Kirubakaran @ Udayakumar
3. K.Bakiaprakash
4. Franklin Chandrabose
5. Violet Pushpam
6. Asha
7. Usha
8. Mohan
9. Kutty
10. Shakila
11. Annie
12. Johan
13. K.Sangumurthy

... Respondents

Second Appeal is filed under Section 100 of the Civil Procedure Code against the judgment and decree passed by Subordinate Court, Poonamallee in A.S.No.77/2001 dated 16.07.2018 and by confirming the Decree and Judgment of District Munsif Court, Poonamallee in O.S.No.556/2004 dated 30.06.2011 and allow the above second appeal with costs.

For Appellant : M/s.V.Shanmugasundaram

For Respondents : Mr.J.Chelladurai, for R5

No Appearance, for RR1 to 4 and R6 to R13

J U D G M E N T

The third defendant, who suffered a decree concurrently before the Courts below, has come up with the present Second Appeal.

2. The first respondent herein / plaintiff, filed a suit for partition claiming 1/6th share in the suit properties. The Trial Court partly decreed the suit granting partition in respect of the first item in the schedule properties and dismissed the suit in respect of the second item. Challenging the judgment and decree passed by the Trial Court, the appellant herein filed an appeal in A.S.No.77 of 2011 on the file of the Subordinate court, Poonamallee. The Appellate Court has concurred with the judgment of the Trial Court and dismissed the appeal. Now challenging the same, the present Second Appeal has been filed.

3. The case of the plaintiff is that the suit schedule properties were absolutely belonged to one Gnanaprakasam, father of the plaintiff and the defendants, and he had purchased the suit properties out of his own earnings, through an absolute sale deed dated 20.09.1956. The said Gnanaprakasam has 3 sons and 4 daughters and he died intestate, and the plaintiff being a

daughter is entitled for 1/6 share. Hence, she filed a suit for partition. The appellant / third defendant, who is the nephew of the plaintiff, had contested the suit by filing a written statement, wherein he has stated that the suit properties are not self acquired property of Gnanaprakasam, and it was purchased from out of the income derived from the joint family property, and the sons of Gnanaprakasam have contributed equally for the purchase of the suit properties. In the year 1978, there was a oral partition between the members of the joint family, which was also reduced into writing. By virtue of the above said oral partition, the properties were divided between the sharers and they are enjoying their shares in the property. Hence, the property is not available for partition and the plaintiff also cannot have any right over the same.

4. The Trial Court, after considering the above, came to the conclusion that the plaintiff has established that the first item of the suit schedule property is a self acquired property of Gnanaprakasam and disbelieving the oral partition alleged to have taken place in 1978, decreed the suit holding that the plaintiff is entitled for 1/6th share and insofar as the second item of the suit property, the Trial Court dismissed the suit holding that the description of the property was not rightly given and she was not entitled for decree.

5. Challenging the above judgment and decree, the third defendant filed an appeal in A.S.No.77 of 2011 before the lower Appellate Court. After considering the entire materials available on record, the lower Appellate Court concurred to the findings of the Trial Court and dismissed the appeal. Now challenging the same, the present Second Appeal has been filed.

6. Heard Mr.V.Shanmugasundaram, learned counsel for the appellant and Mr.J.Chelladurai, learned counsel for the fifth respondent and perused the materials available on record.

7. When this Second Appeal came up for admission today, the learned counsel appearing for the appellant would contend that the Trial Court failed to consider that the property has been partitioned between the parties in the year 1978 itself and to prove the same, he marked partition deed (Koorchit Ex.B-9) and as per the above partition, the parties have divided the properties and enjoying the same from the year 1978 itself. That apart, the suit is also bad for non joinder of necessary parties, since other legal heirs of Gnanaprakasam were not impleaded as defendants and both the Courts have not considered the same.

8. On a perusal of the materials available on record, it is seen that both the Courts below have concurrently held that the first item of the suit schedule property is a self acquired property of Gnanaprakasam. Even though the defendants claimed that it is a joint family property and they also contributed for purchase of the first item property, there is no evidence available on record to establish the same and the plea has been rejected by both the Courts. So far as the Ex.B9, Koorchit is concerned, both the Courts relied upon the evidence of DW2, who is one of the sharers, wherein he has stated that he was not aware of any oral partition and Ex.B9. That apart, DW1 has admitted that during partition, the plaintiff is not a party to the Koorchit and no share was allotted to her. As such, the Ex.B9 cannot be relied upon.

9. So far as the next contention of the learned counsel for the appellant that the suit is liable to be dismissed for non-joinder of the necessary parties, the same cannot be countenanced for a simple reason that, no issues have been framed in that regard by the Trial Court and the Lower Appellate Court and it is not open to him to raise such a plea in the Second Appeal.

10. Considering the materials available, both the Courts below on fact concurrently held that the plaintiff is entitled for a share in the 1st item of the suit schedule properties and there is no perversity in the judgments of the

Courts below, and no substantial question of law arises for entertaining the Second Appeal. Hence, the Second Appeal fails and accordingly it is dismissed.

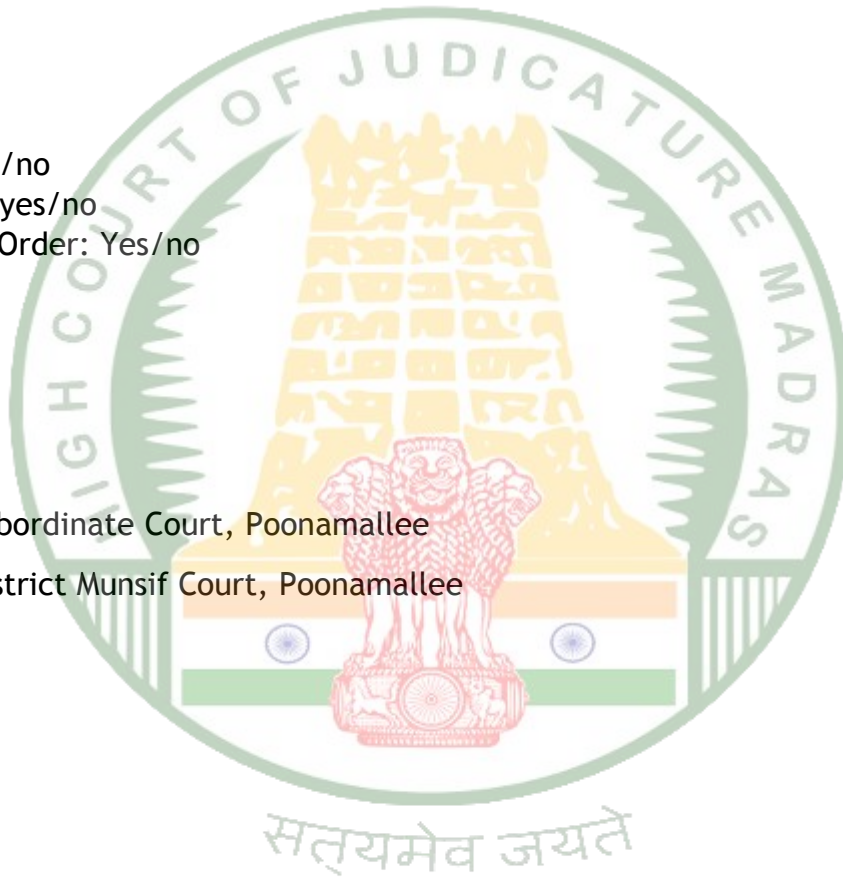
No costs. Consequently, connected miscellaneous petition is closed.

25.03.2019

Index:Yes/no
Internet: yes/no
Speaking Order: Yes/no
pvs

To

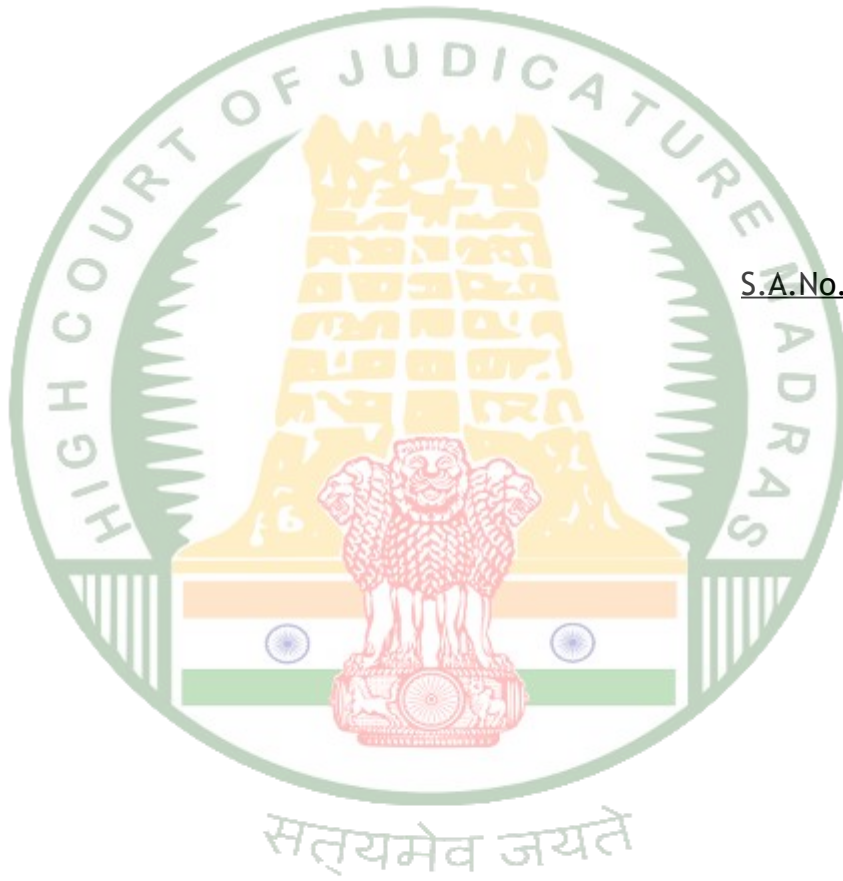
1. The Subordinate Court, Poonamallee
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pvs



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