

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 18.09.2019

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBBIAH
AND
THE HONOURABLE MRS.JUSTICE T.KRISHNAVALLI

A.S.No.253 of 2018
and
C.M.P.No.5120 of 2018

1. Usharani
2. Deepa ... Appellants/Defendants 4 & 5
Vs.
1. Seethalakshmi
2. G.Narayanasamy
3. G.Senthilkumar ... Respondents 1 to 3/Plaintiffs
4. Krishnakumar
5. Vijayalakshmi
6. Jayalakshmi
7. Kavitha
8. Vilashini ... Respondents 4 to 8/
Defendants

Appeal Suit (First Appeal) filed under Section 96 read with Order 41 Rule 1 CPC against the judgment and decree dated 18.07.2017 made in O.S.No.36 of 2010 on the file of the IV Additional District Court, Coimbatore.

For appellant : Mr.GK.Muthukumar
For respondents : Mr.L.Murali for RR-1 to 3
Notice served and no appearance
for RR-4 to 8

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JUDGMENT

(The Judgment of the Court was delivered by R.Subbiah, J)

This First Appeal had been filed by the defendants 4 and 5 challenging the preliminary judgment and decree dated 18.07.2017 made in the suit n O.S.No.36 of 2010 filed by the respondents 1 to 3 herein (plaintiffs), for partition of the suit properties as against respondents 4 to 8 herein/defendants 1,2,3,6 and 7 therein and also the appellants/defendants 4 and 5.

2. The case of the plaintiffs/respondents 1 to 3 herein, is as follows:

(a) The suit properties were purchased by one Narayana Asari, who died on 29.10.1992 leaving behind his two sons, Subramaniam and Govindarajan and one daughter Vilasini (seventh defendant). The said Narayana Asari's wife Ammani Ammal pre-deceased Narayana Asari. One of the sons of the said Narayana Asari, namely Govindarajan, died on 08.05.2005 leaving behind his wife, who is the first plaintiff (Seethalakshmi) and two sons, being the plaintiffs 2 and 3 (G.Narayanaswamy and G.Senthilkumar) and one daughter, namely Heenambika @ Hemambika. Another son of Narayana Asari, i.e. Subramaniam, died leaving behind the defendants 1 to 6 (first defendant being son and defendants 2 to 6 being daughters).

(b) The said Narayana Asari purchased the first item of the suit properties on 07.07.1976 by virtue of Document No.2701 of 1975. He also purchased the second item of the suit properties on 06.11.1978 as per Document No.3528 of 1978 and the third item of the suit properties was purchased on the same day under Document No.3951 of 1978. All the said properties are Narayana Asari's self-acquired properties.

(c) The said Narayana Asari, even during his lifetime, constructed the building in the suit property(ies) and made it as a Lodge. The first item of the suit properties, comprise of small houses, which had been leased out to about 30 tenants. The second and third item of the suit properties were previously occupied as a Lodge and they were leased out for residential purpose to various persons and there are about 50 tenants in those properties.

(d) Since the said Narayana Asari died intestate on 29.10.1992, the branches of two sons and one daughter became entitled to one share each. On 01.08.2005, as per Document No.1439 of 2005, the daughter of Govindarajan who is one of the sons of Narayana Asari, i.e. Heenambika @ Hemambika released her share in the properties in favour of the plaintiffs, who happened to be her mother and brothers, and as such, the plaintiffs became entitled to 1/3 share in the said properties.

(e) The daughter of the said Narayana Asari, namely Vilasini (seventh defendant), executed a Release Deed on 30.11.2009 in favour of the plaintiffs by releasing her one-third share as per Document No.5416 of 2009, registered before the District Registrar's Office, Coimbatore. Resultantly, the plaintiffs are entitled to 2/3 share in the suit properties and the defendants are entitled to the remaining 1/3 share in the suit properties.

(f) The plaintiffs and the defendants are in joint possession and common enjoyment of the suit properties with their respective shares in the same. Out of 50 tenants in the second and third items of the suit properties, the plaintiffs have been receiving rent from 15 tenants and the defendants have been receiving the rent from the remaining tenants.

(g) It was decided between the plaintiffs and defendants that the rent being received from all the three items of the suit properties, is to be accounted and shared by them according to their respective shares. Though, initially the defendants agreed for the said arrangement of share of rent, but the defendants were denying plaintiffs' 2/3 share in the suit properties, and therefore, difference of opinion cropped up between the plaintiffs and defendants. Hence, the plaintiffs sought for amicable partition of the suit properties and separate allotment of their 2/3 share in the suit properties. As the defendants have not come forward for amicable partition and separate possession of the suit properties, the plaintiffs have filed the present suit.

3. It is the claim of the defendants that the said Narayana Asari did not die intestate and he had bequeathed the suit properties to the defendants by a Will, dated 30.03.1991 and there is nothing to be partitioned, as the entire suit properties belong to the defendants. Further, the said Govindarajan being the husband of the first plaintiff and who is also the father of the second and third plaintiffs, was aware of the said Will, as he himself was a beneficiary under another Will, dated 21.04.1989 executed by the said Narayana Asari, who settled the properties among his two sons, namely Subramaniam and Govindarajan, by way of the said two Wills, which is not disputed by the said Govindarajan during his lifetime. The Release Deed said to have been executed by the seventh defendant in favour of the plaintiffs, is a document executed in collusion and she has no right to execute the said Release Deed in respect of the suit properties, which had already been bequeathed to the other defendants. Hence, the defendants prayed for dismissal of the suit.

4. On a consideration of the above pleadings and based on the documents filed along with the plaint, the trial Court framed necessary issues. Since the defendants failed to commence trial, they were set ex-parte on 16.04.2015. Thereafter, on 28.04.2015, the defendants filed an application to set aside the ex-parte order, which was allowed on 04.09.2015, subsequent to which, the matter was adjourned for trial for very many hearings. At this stage, the defendants filed an application in I.A.No.97 of 2016 to include one other property in the suit

schedule, which was dismissed on 12.01.2017. The suit was again posted for trial. Despite several opportunities given till 25.04.2017, the trial was not commenced by the defendants. Again on 29.04.2017, I.A.No.303 of 2017 was filed by the defendants contending that the suit is not properly valued, which was also dismissed on 13.06.2017. Once again the matter was posted for trial and finally adjourned to 18.07.2017 directing the defendants to commence the trial. Since the trial had not commenced, the trial Court, based on the oral and documentary evidence, passed ex-parte preliminary decree of partition, against which the present First Appeal is filed before this Court by defendants 4 and 5.

5. The only submission made by the learned counsel for the appellants/D4 and D5 is that the first defendant being incapacitated, was unable to let in evidence. During the evidence on the side of defendants, when the second defendant was not ready, the trial Court ought to have given opportunity to the other defendants who are represented by separate counsel, but the trial Court erroneously closed the evidence of all the defendants and passed the impugned preliminary decree. Hence, the learned counsel for the appellants/D4 and D5 submitted that the defendants 4 and 5 were unable to let in evidence and establish their case that Narayana Asari did not die intestate, but testate, as he has left two Wills in favour of his sons and daughter who are parties in the present suit and that the husband and father of the first plaintiff and the plaintiffs 2 and 3 respectively themselves are the beneficiaries under one Will executed by the said Narayana Asari in his favour. Hence, when there is denial of opportunities to the appellants/D4 and D5 to let in evidence, they could not establish their case based on evidence. Therefore, the present First Appeal had been filed by the defendants 4 and 5 challenging the preliminary decree of the trial Court and the learned counsel for the appellants/D4 and D5 therefore prayed for setting aside the impugned preliminary decree of the trial Court and remit the matter back to the trial Court.

6. The learned counsel for the respondents 1 to 3/plaintiffs vehemently opposed for remitting the matter back to the trial Court as sufficient opportunity(ies) have been provided to the defendants to tender the evidence on their side and they were only interested in prolonging the matter and filed various I.As. as discussed supra. Only under such circumstances, the trial Court set the defendants ex-parte and ultimately passed the preliminary ex-parte decree.

7. In spite of notice having been served on the respondents 4 to 8 herein, who are the defendants 1, 2, 3, 6 and 7, there is no representation for them before this Court.

8. Be that as it may. It is no doubt true that several opportunities have been given to the defendants. But however, in the interest of justice and for better appreciation of evidence, we are of the opinion that the judgment and decree of the trial Court needs to be set aside. Accordingly, without going into the merits or de-merits of the matter and also without going into the claim of the respective parties, this Court sets aside the impugned judgment and decree of the trial Court and consequently, this Court remands the suit back to the trial Court. The trial Court is directed to give sufficient opportunities to both parties to contest the suit on merits by adducing oral and documentary evidence and establish their case. Thereafter, the trial Court is directed to dispose of the suit in O.S.No.36 of 2010, on merits and in accordance with law, within a period of six months from the date of receipt of a copy of the records from this Court or on receipt of a copy of this judgment by the trial Court, whichever is earlier.

9. Accordingly, the First Appeal (Appeal Suit) is allowed, setting aside the impugned judgment and decree of the trial Court and the matter is remanded back to the trial Court for fresh consideration of the suit in O.S.No.36 of 2010, with the above directions. No costs. Consequently, C.M.P. is closed.

Sd/-
Asst.Registrar (CS I)

/true copy/

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Sub Asst. Registrar

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To

1. The IV Additional District Judge,
Coimbatore.

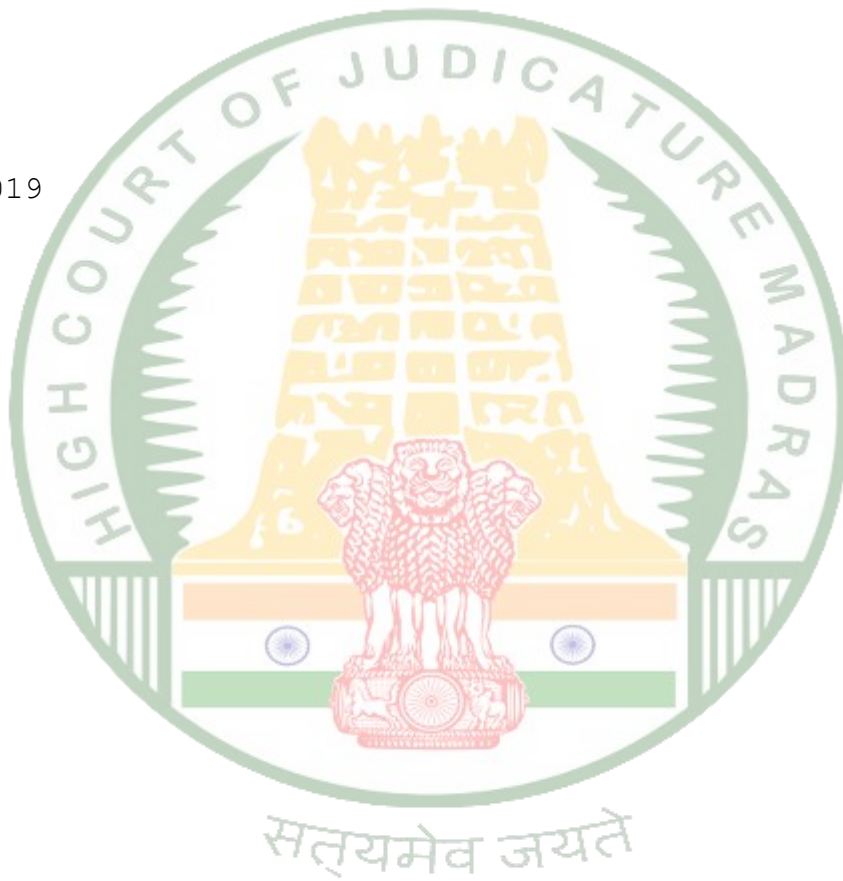
5/6

2. The Section Officer,
V.R. Section,
High Court, Madras.

+1 cc to M/s.K.Mouli Advocate sr80652
+1 cc to M/s.G.K.Muthukumar Advocate sr80113

A.S.No.253 of 2018

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