

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 31.01.2019

CORAM
THE HONOURABLE MR. JUSTICE N.SESHASAYEE

S.A.No.1409 of 2011

1.Seerangammal
2.P.Madeshwaran
3.Ammasai

... Appellants/Defendants

versus

1. Chinnammal
2. Mariammal
3. Lakshmi

... Respondents/Petitioners

Prayer: Second Appeal is filed under Section 100 of code of Civil Procedure against the Judgment and Decree dated 23.11.2010 made in A.S.No.25 of 2008 on the file of the Sub-Court, Bhavani, Erode District in reversing the Judgment and Decree dated 30.11.2007 made in I.A.No.143 of 2006 in O.S.No.23 of 2003 on the file of the II Additional District Munsif Court, Bhavani, Erode District.

For Appellants : Mr.Ma.P.Thangavel

For Respondents : Mr.P.Rathinavel

JUDGMENT

1.1 The plaintiffs request for passing a final decree before the trial court came to be dismissed on a technical ground. At the relevant time, the plaintiff had died and their three daughters also took a share in the properties. Since the plaintiff who was dead when the impugned decree came to be passed, and since the legal heirs of the plaintiff had not been brought on record, and since the trial court itself had come to know of these developments, trial court itself could have directed the parties to implead the legal representatives. But, the trial court has not adopted the same. Challenging the said decree, the legal representatives of the deceased plaintiff had moved the First Appellate Court.

1.2 Interestingly, no Commissioner was appointed either by the trial court or by the First Appellate Court to measure the property or to value the property and to suggest the mode of

division as between the rival parties. Yet the final decree has come to be passed. Challenging the same, the defendants have come before this Court.

2.1 The brief facts involved in this case are that there are two items of properties which originally belonged to a certain Periyasamy. He passed away. Periyasamy's wife and children are the defendants in the suit for partition, and the suit was laid by Periyasamy's mother. Other than Periyasamy, the plaintiff in the suit had three daughters. In fact, these three daughters who claim right through their mother are the plaintiffs.

2.2 In this case a final decree has been passed and this present appeal is preferred by the defendants, challenging the final decree.

3. This appeal is admitted on the following substantial questions of law:

- '1. Whether the lower appellate court is right in reversing the well considered judgment rendered by the trial court without giving plausible reason?
2. Are the respondents legally entitled to file the final decree application based upon the alleged Will executed by Rangammal in their favour?
3. Are the respondents legally entitled to get the 1/12th share of Rangammal through the Will dated 26.05.2003 which was executed by Rangammal in their favour?
4. Is the second appellant is entitled to get the 1/12th share of Rangammal through the Will dated 18.08.2004 which was executed by Rangammal in her favour?
5. Are the respondents entitled to attain the final decree as prayed by them?
6. Are there any defects or lacunae found in the decree and judgment of the trial court?''

4. Opening the arguments for the appellants, their counsel would submit that in item No.1, Periyasamy during his life time had already sold 0.51 cents, and in item No.2, he has sold 1.33 cents to a temple. In effect, the entire suit items of properties which are now described are not available, and such of the alienees of Periyasamy were also not impleaded as parties to the original suit. The learned counsel fairly stated that these aspects touching the alienation by respondents were not pleaded nor were brought to the notice of the Courts below at any point of time and surfaced only now.

5. He would also produced the copies of those two sale deeds. As suggested by this Court, the learned counsel for the appellants circulated copies of the sale deeds to the learned counsel for

the respondents for him to take a fair stance in the on going litigation. On perusing the said sale deed, the learned counsel for the respondents submitted on the instruction of his clients that they are satisfied with the statement made by the learned counsel for the appellants as regards alienation made by Periyasamy himself, and he also fairly submitted that his clients (plaintiffs) will be satisfied if they are granted their share within the remaining properties now available. He also submitted that the plaint also has to be suitably amended.

6. In view of the statement made, this Court does not consider it necessary to decide any of the substantial questions earlier framed as chosen to remand the matter back to the trial court for the following purpose:

- (a) This Court directs the plaintiffs to file suitable application before the trial court for amending the plaint with regard to the extent available in both the items of suit properties, within a period of two weeks from the date of receipt of a copy of this Order.
- (b) The trial court is directed to invite the parties for an amicable settlement to identify their respective shares within a period of next two weeks.
- (c) If both fails, the Court is directed to appoint a Commissioner to measure the property and suggest the mode of division.
- (d) At any rate, the entire process and passing final decree must be completed on or before 31.07.2019.

7. In conclusion, this appeal is allowed and the judgment and decree of the First Appellate Court are set aside and the matter is remanded back to the trial court to comply with the conditions referred to above in paragraph No.6. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

ssn

To

1. The Subordinate Judge,
Bhavani,
Erode District.
2. The II Additional District Munsif,
Bhavani,
Erode District.

WEB COPY

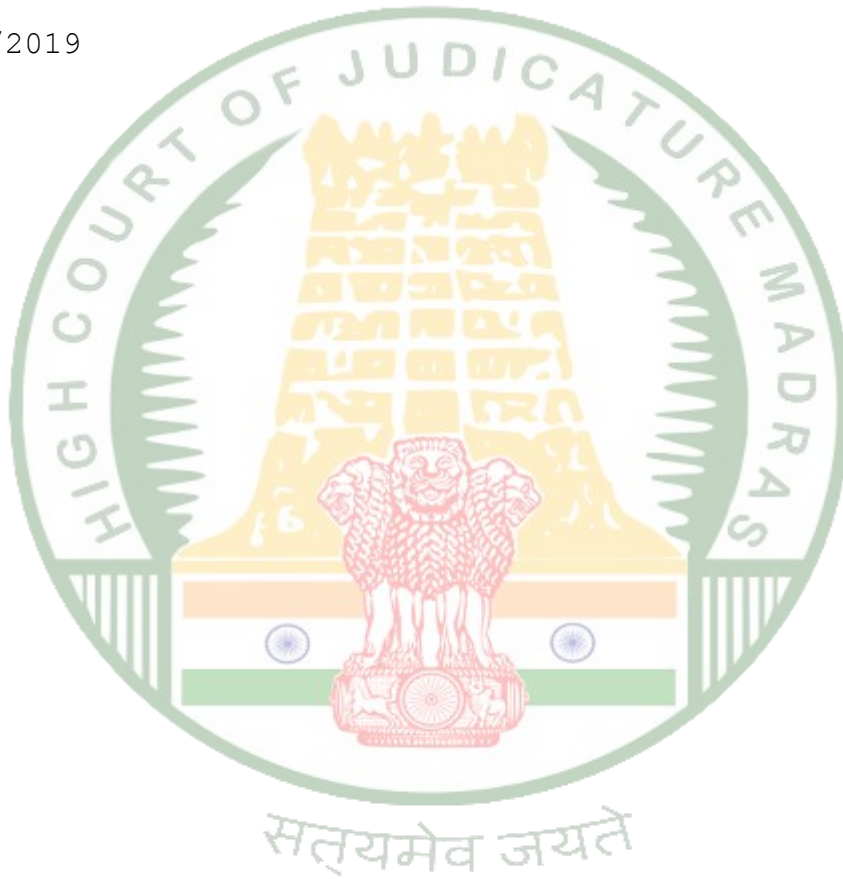
3. The Section Officer,
V.R.Section,
High Court, Madras. (2 copies)

+1cc to Mr. Ma.P.Thangavel, Advocate, S.R.No.8947
+1cc to Mr.P.Rathinavel, Advocate, S.R.No.7912

S.A.No.1409 of 2011

KK(CO)

rrs 12/02/2019



WEB COPY