

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 02.12.2019

CORAM:

THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM

S.A.No.192 of 2014  
and M.P.Nos.1 & 2 of 2014

1. Nandagopal Naidu

2. Ramamurthy Naidu

.. Appellants/Petitioners

Versus

1. Narayanan

2. Krishnamurthy

.. Respondents/Respondents

Second Appeal is filed under Section 100 of Civil Procedure Code to set aside the fair and decreetal order made in A.S.No.21 of 2011 in the Subordinate Court at Gingee dated 09.11.2012 reversing the order in E.A.No.457 of 2009 in E.P.No.27 of 2006 in O.S.No.42 of 2001 on the file of the District Munsif Court, Gingee dated 24.01.2011 and allow the appeal.

For Appellants : Mr.D.Prabu Mukunth Arunkumar

For Respondents : Mr.T.Dhanasekaran, for R1  
No Appearance, for R2

JUDGMENT

This appeal is preferred against the judgment and decree of the Subordinate Court, Gingee dated 09.11.2012 in A.S.No.21 of 2011 reversing the order and decree passed in E.A.No.457 of 2009.

2. The facts in nutshell are as follows:-

The first respondent herein as plaintiff instituted a suit in O.S.No.42 of 2001 before the Sub Court, Tindivanam for recovery of money based on a promissory note. The suit came to be decreed ex-parte on 03.01.2003, directing the defendant / 2nd respondent herein to pay a sum of Rs.56,000/- along with interest at 9% per annum. It appears that the decree passed in O.S.No.42 of 2001 has become final. In execution of the decree, the properties in S.Nos.2641/1, 264/2 and 307/1 in Melsevoor

Village, Gingee Taluk were attached and when the properties were brought for sale, a petition was filed by the appellants under Order 21 Rule 58 CPC.

3. It is the case of the appellants that the properties in dispute were owned by their father Chiti Babu Naidu. After his demise, in a oral partition, the properties fell to the share of the appellants, hence, the attachment order has to be raised. The application was contested by the respondents disputing the claim made by the appellants.

4. Though the applicant succeeded before the Execution Court, but when the matter was taken up to the Appellate Court, a contention was raised by the appellants stating that the appeal preferred under Order 41 Rules 1 & 2 along with Section 96 of IPC is not maintainable and the proper remedy is to file Civil Miscellaneous Appeal. However, the Appellate Judge placing reliance on the decision of the Andhra Pradesh High Court held that the appeal is maintainable and allowed the appeal stating that the oral partition pleaded by the appellants was not proved.

5. The learned counsel for the appellants would submit that the decree passed in O.S.No.42 of 2001 is ex-parte decree and the properties under the attachment belongs to the appellants and hence, the decree cannot be executed. The learned counsel further submitted that the appeal preferred under Order 41 Rules 1 & 2 CPC is not maintainable.

6. I am not able to agree with the contentions raised by the learned counsel for the appellants. The perusal of the records reveal that the first respondent had filed a suit for recovery of Rs.25,000/- on the basis of promissory note against the second respondent herein and the suit was decreed ex-parte on 03.01.2013. Indisputably he has not realised the decree amount even after a lapse of 16 years.

7. It is further evident that the appellants are residing at Chennai and they have executed the Power of Attorney in favour of the second respondent to sell the properties and on the basis of the Power of Attorney, some of the properties were sold as Power Agent of the properties and also individually. It is also seen that the patta in respect of the properties in dispute stands in the name of the appellants' father / Chiti Babu Naidu and no evidence has been produced by the appellants to establish the alleged oral partition. Even according to the appellants, the second respondent was in possession of the property on the date of attachment.

8. In the light of the above facts, I find no merit in this appeal. In that view, the appeal fails and the same is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

-s/d-

Assistant Registrar(CS-I)

True Copy

Sub-Assistant Registrar

pvs

To

1. The Subordinate Court, Gingee

2. The Sub Court, Tindivanam

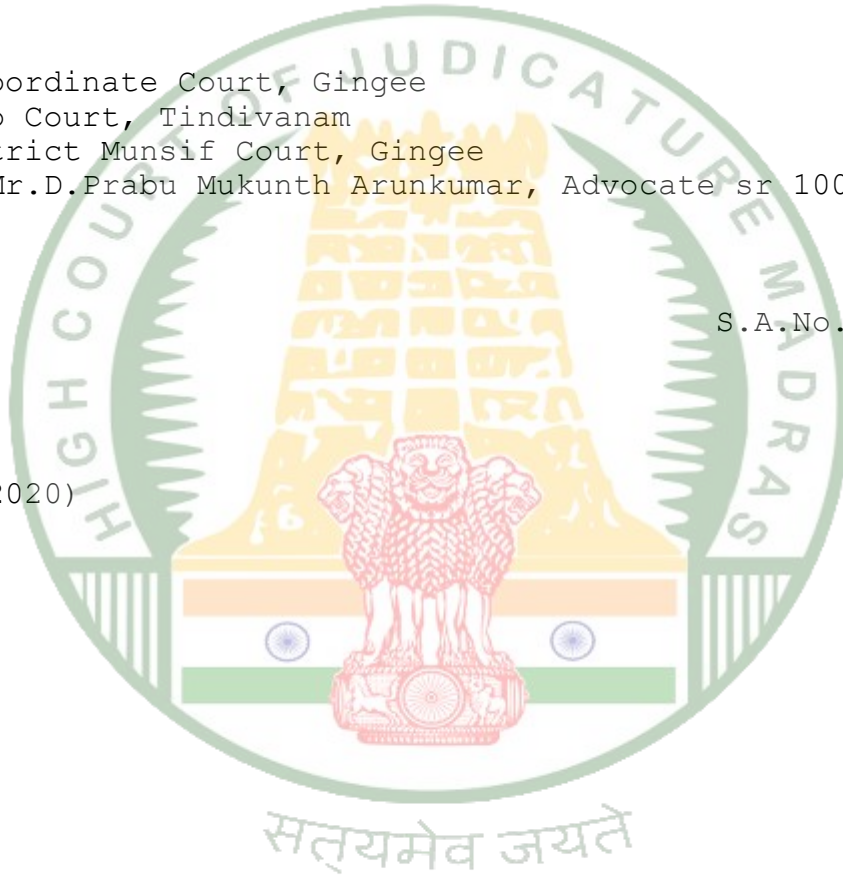
3. The District Munsif Court, Gingee

+1 CC to Mr.D.Prabu Mukunth Arunkumar, Advocate sr 100214.

S.A.No.192 of 2014

CP(CO)

SP(05/03/2020)



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