

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04-02-2020

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

A.S.Nos.465 & 671 of 2012

1. Zaibunnissa Begum
 2. Syed Masood Ali
 3. Syed Mir Mohammed Ali
- ..Appellants/Plaintiffs
(in both Appeal Suits)

Appellants 2 and 3 brought on record as Legal Heirs of the deceased sole appellant viz., Zaibunnissa Begum vide court order dated 02.01.2019 made in CMP.No.17274/2018 in AS.No.465/2012

vs.

1. Haseena Begum
 2. Syed Natif Nawaz
 3. Arshiya Afsha
 4. Buhari Beevi
- ... Respondents
(in A.S.No.465/2012)/Defendants

R4 impleaded as party respondent vide order of Court dated 04.09.2013 made in MP.No.1/2013.

1. Haseena Begum
2. Syed Natif Nawaz
3. Arshiya Afsha
4. Indirani
5. M.Sangeetha
6. M/s.Aditya Birla Housing Finance Limited

... Respondents
(in A.S.No.671/2012)/Defendants

(R5 and R6 are impleaded as party respondents vide court order dated 02/01/2019 made in CMP.17271/18 in AS.No.671/2012

Appeal under Section 96 of the Code of Civil Procedure, 1908, read with Order 41, Rule 1 of the Code of Civil Procedure, 1908 against the judgment and decree made in O.S.No.9282 of 2010 and O.S.No.842 of 2011 on the file of the IV Additional Judge i/c, City Civil Court, Chennai, dated 20.03.2012.

For Appellants : Mr.V.V.Sairam (for both AS)

For Respondents : Mr.N.A.Nissar Ahmed R1 to R3
in both AS
Mr.G.Balasubramaniam for
R4 in AS.No.465/12
Mr.C.P.Sivamohan for R4,R5
in AS.No.671/12 No Appearance
of R6 in AS.No.671/2012

COMMON JUDGMENT

The appeal suits are filed against the common judgment and decree dated 20.03.2012, passed in O.S.No.9282 of 2010 and O.S.No.842 of 2011. In both the suits the appellants are the plaintiffs.

2. O.S.No.9282 of 2010 was instituted for partition and separate possession of the plaintiff's 7/112th share in the suit schedule property directing the defendants to pay a sum of Rs.56,250/- towards past mesne profits and also to pay future mesne profits per month from the date of filing of the suit till the date of delivery of possession and for costs.

3. O.S.No.842 of 2011 was filed by the first appellant as well as the appellants 2 and 3 for preliminary decree for partition and separate possession of the plaintiff's half share in the suit schedule properties by metes and bounds, directing the defendants to pay a sum of Rs.1,20,000/- towards past mesne profits and also to pay future mesne profits per month from the date of filing of the suit till the date of delivery of possession and for costs.

4. The facts in brief set out in the plaint in O.S.No.9282 of 2010 are as under:-

a) The plaintiff is the second wife of late Syed Yacoob Ali. The defendant is the first wife of late Syed Yacoob Ali while the 2nd and 3rd defendants are her son and daughters through the above said late Syed Yacoob Ali. The plaintiffs husband died on 11.01.2003 leaving behind herself and her two sons and the

defendants as his legal heirs.

b) Out of his self acquired funds her husband late Syed Yacoob Ali purchased number of properties and was in possession and enjoyment of the same till his death. After the death of the said Syed Yacoob Ali, the plaintiff and her sons were demanding the defendants to effect partition and to allot their due share in the property behind by late Syed Yacoob Ali and after much demand, the defendants met the sons of the plaintiff namely Syed Masood Ali and Syed Mir Mohammed Ali to release their share in the suit property. Accordingly the sons of the plaintiff released their share under Registered Release Deed dated 6.03.2003 for a consideration of Rs.6,00,000/-.

c) The contention of the defendants that the plaintiff is a divorced wife of the late Syed Yacoob Ali is not correct. On the contrary the plea of divorce has been set up by the defendants only to avoid in giving due share to the plaintiff.

d) The Chief Kazi, Government of Tamilnadu has given a clear certificate that there was no Talaq (divorce) between the plaintiff and late Syed Yacoob Ali at any point of time. Subsequent to the death of late Syed Yacoob Ali the 1st defendant projecting herself as the sole wife of late Syed Yacoob Ali misrepresented to the Government and was getting full family pension in her name from the Department of Land Administration, Government of Tamil Nadu in which late Syed Yacoob Ali was working. However, the plaintiff approached the Principal Accountant General, Chennai, to clarify the matter by demonstrating that she is the second wife of late Syed Yacoob Ali and that there did not take place any divorce between herself and late Syed Yacoob Ali.

e) In this context the plaintiff also produced documents and ultimately her plea was accepted and pension was granted recognizing her status as a second wife. Her status as second wife was confirmed by the District Collector and the Chief Kazi, Government of Tamilnadu during the enquiry conducted by them.

f) Thus it can be seen that the plaintiff is the second wife of late Syed Yacoob Ali and that she is entitled to 7/112th share each in the suit properties as per Mohammedan Law. The defendants are not agreeing to give her share of the suit schedule property and hence the plaintiff filed the suit for partition. However, the 1st defendant provisionally allowed the plaintiff to occupy the 1st floor of Schedule B property.

g) A suit for partition In O.S.6444/2003 on the file of Additional District Judge, Fast Track Court-V, Chennai, claiming their share in some other properties apart from the properties mentioned in the Release Deed. The said suit was decreed and ultimately when the matter was taken up by way of appeal by the defendants, a compromise was arrived at and the sons of the plaintiff were given a property in lieu of their share in the properties mentioned in the above suit. The reasons for the plaintiff approaching the Court belatedly is due to the reason that she has to establish her status as second wife of late Syed Yacoob Ali.

h) The suit schedule properties are being occupied by number of tenants and the total rental Income will be more than Rs.25,000/- per month. The 1st defendant is enjoying all the rents ever since the date of death of late Syed Yacoob Ali i.e. from 11.01.2003 and the plaintiff is entitled to a sum of Rs.56,250/- as her share in which the 1st defendant is liable to pay being the share of arrears of rent to the plaintiff, immediately before three years from the date of suit i.e. from 21.08.2007 to 20.08.2010. Hence the suit for partition and separate possession of the plaintiff's 7/112th share in the suit schedule properties, directing the defendants to pay a sum of Rs.56,250/- towards past mesne profits and also to pay future mesne profits per month from the date of filing of the suit till the date of delivery of possession and for costs.

5. The defendants in O.S.9282 of 2010 has filed a written statement denying the statement of allegations set out in the plaint and the contents in the written statement are as under:-

a) The plaintiff was the 2nd wife of late Syed Yacoob Ali. Syed Yacoob Ali divorced the plaintiff as per Islamic Shariat on 10.11.1983 and communicated the same to her by the Kazi owing to her illicit relationship with one Das. In fact the plaintiff before her divorce had left Syed Yacoob Ali with all her belongings and Jewels.

b) The plaintiff lodged false police complaint in which Syed Yacoob Ali issued notices to the police on 18.10.1986, 22.12.1988, narrating the fact of divorce and sending maintenance to the minor child in the custody of the plaintiff. In fact the maintenance case MC 89/89 on the file of Principal Family Court, Chennai, filed by the plaintiff and her minor children against Syed Yacoob Ali was dismissed by order dated 26.9.1989 and even in those proceedings Syed Yacoob Ali had contested that he had divorced the plaintiff.

c) The plaintiff had been receiving the maintenance amounts and had acknowledged receipt of the same. It is for all the reasons that the plaintiff was not arrayed in earlier suit for partition filed by her sons in O.S.6444/2003. Against the Judgment and decree dated 7.4.2006 in O.S.6444/2003 the defendants 1 & 3 herein filed A.S.536/2006 before the Hon'ble High Court, Madras and the plaintiff herein was impleaded as 4th respondent and the disposed of recording the memo of compromise between the parties by and under which it was categorically recorded that the plaintiff herein along with her children are allotted by mutual consent Western portion of the property Old No.21, New No.4, Thaipoon Ali Khan Bahadur Street, and that the plaintiff herein has no manner of right title or interest in the schedule mentioned properties and had been made a formal party to the above appeal as well as to the memo of compromise.

d) The plaintiff obtained certain documents fraudulently without the knowledge of the defendants and after the death of Yacoob Ali and now alleges that she is not divorced wife after the age of 27 years. Having lived as a divorced wife and accepted the same all these years cannot now after the death of Yacoob Ali claim right over his estate. Merely because the plaintiff had played franc and obtained pension that would not vest any right to the plaintiff.

e) The plaintiff is taking the defendants for a ride and has not purposely impleaded her children and as such the suit is hit for non-joinder of parties. The suit is not maintainable and when she herself would state that she had approached the court belatedly in order to establish her status as wife would belie her case. There is no cause of action and the description of the suit properties are wrong and the other paragraphs in the plaint are unworthy of any reply and the suit is liable to be dismissed.

6. With reference to O.S.No.9282 of 2010, the Trial Court framed the issues as follows;

1. Whether the suit is bad for non-joinder for necessary parties?
2. Whether the suit is bad for misjoinder of parties?
3. Whether the plaintiff is entitled for partition as prayed for?
4. Whether the plaintiff is entitled to past mesne profits as prayed for?
5. To what relief if any, the plaintiff is entitled?

7. The plaint in O.S.No.842 of 2011 is filed with the following facts;

a) The 1st plaintiff was the 2rd wife of late Syed Yacoob Ali. Syed Yacoob Ali divorced the plaintiff as per Islamic Shariat on 10.11.1983 and communicated the same to her by the Kazi owing to her illicit relationship with one Das. In fact the 1st plaintiff before her divorce had left Syed Yacoob Ali with all her belongings and jewels.

b) The 1st plaintiff lodged false police complaint to which Syed Yacoob Ali issued notices to the police on 18.10.1986, 22.12.1988 narrating the fact of divorce and sending maintenance to the minor child in the custody of the 1st plaintiff. In fact the maintenance Case MC 89/89 on the file of Principal Family Court, Chennai filed by the plaintiff and her minor children against Syed Yacoob Ali was dismissed by order dated 26.9.1989 and even in those proceedings Syed Yacoob Ali had contested that he had divorced the 1st plaintiff.

c) The 1st plaintiff had been receiving the maintenance amounts and had acknowledged receipt of the same. It is for all the reasons that the plaintiff was not arrayed in earlier suit for partition filed by her sons in O.S.6444/2003. Against the Judgment and decree dated 7.4.2006 in O.S.6444/2003 the defendants 1 & 3 herein filed AS.536/2006 before the Hon'ble High Court, Madras and the plaintiff herein was impleaded as 4th respondent and the disposed of recording the memo of compromise between the parties by and under which it was categorically recorded that the 1st plaintiff herein along with her children are allotted by mutual consent Western portion of the property Old No.21, New No.4, Thaifoon All Than Bahadur Street, and that the plaintiff herein has no manner of right title or interest in the schedule mentioned properties and had been made a formal party to the above appeal as well as to the memo of compromise. Whilesso suppressing all the facts the 1st plaintiff has filed the suit O.S.9282/2010 before the XV Assistant Judge for partition and other reliefs.

d) The 1st plaintiff obtained certain documents fraudulently without the knowledge of the defendants and after the death of Yacoob Ali and now alleges that she is not divorced wife after a lapse of 27 years. Having Lived as a divorced wife and accepted the same all these years cannot now after the death of Yacoob Ali claim right over his estate. Merely because the plaintiff had played fraud and obtained pension that would not vest any

right to the plaintiff.

e) The 1st plaintiff is taking the defendants for a ride and has not purposely impleaded her children and as such the suit is bad for non-joinder of parties. The suit is not maintainable and when she herself would state that she had approached the court belatedly in order to establish her status as wife would belie her case. There is no cause of action and the description of the suit properties are wrong and the other paragraphs in the plaint are unworthy of any reply and the suit is liable to be dismissed. Only to harass the defendants the above suit has been laid as if the plaintiffs have interest over the suit property and have impleaded the 4th defendant so as to give unnecessary trouble to the defendants. The suit is vexatious. The allegation that the 1st defendant had sold A Schedule property and 3 Schedule property to escape from giving the alleged shares to the plaintiffs is a false and imaginary statement.

f) The plaintiffs have no right over the property and therefore just merely filing suit for partition would not cloth them with any right over the suit property and assailing the sale deed and settlement deeds executed by her without a prayer for declaration and they are not entitled any claim in the suit.

g) The defendant denies all the averments made in the plaint except those that are specifically admitted. The suit is not maintainable. The defendant purchased the suit A schedule property for a valuable consideration. The suit A schedule property absolutely belonged to the 1st defendant, she having purchased the same from Asma Beevi and another, out of her own funds for a valuable sale consideration of Rs.4,54,500/- in and by Deed of Sale dated 1.11.2002, registered as Doc.No. 1480/2002 in the SRO., Triplicane.

h) The 1st defendant while selling her property had informed this defendant that she was working as Assistant Inspector of Labour, 1st Circle, Chennai and had voluntarily retired from Government service on 30.11.2000 and purchased the suit a schedule property from and out of her said retirement benefits and other savings under a Deed of Sale dated 1.11.2002 i.e., 2 years subsequent to her voluntary retirement from service. The defendant demolished the then existing old and dilapidated building and raised a new building thereon and as such she has

been enjoying the said property for the past 7 years.

i) Since the 1st defendant had purchased the A schedule property from Asma Beevi and another out of her own funds, there was no legal impediment in selling the property to this defendant and further this defendant is a bonafide purchaser for a valuable consideration. The balance of convenience is in favour of this defendant as the plaintiffs have not made any prima facie case and the needle of justice tilts in favour of this defendant.

j) The suit is nothing but blackmailing in nature and appears to have been filed only to settle scores with the defendants 1 to 3 in O.S.9282/2010 pending on the file of XV Assistant Judge, City Civil Court, Chennai and therefore the present suit deserves to be dismissed with exemplary costs and also dismiss the above suit in respect of the Suit "A" Schedule property with costs as this defendant is the absolute owner of the of the same as placed by 4th defendant.

8. The Trial Court in O.S.No.842 of 2011, framed the issues as follows;

1. Whether the suit is bad for non-joinder for necessary parties?
2. Whether the suit is bad for mis-joinder of parties?
3. Whether the plain tiffs are entitled for partition as prayed for?
4. Whether the plaintiffs are entitled to past mesne profits as prayed for?
5. To what relief if any, the plaintiff are entitled?

9. On the side of the plaintiff in O.S.No.9282 of 2010, the son of the 1st plaintiff was examined as PW1 and proof affidavit was filed. Ex.A1 to A26 were marked. On the side of the defendants, the power agent of the defendants was examined as DW1 and proof affidavit was filed. Ex.B1 to B9 were marked.

10. As far as the O.S.No.842 of 2011 is concerned, the 2nd plaintiff himself was examined as PW1 and proof affidavit was filed. Ex.A1 to 18 were marked. On the side of the defendants, the power agent of the defendants was examined as DW1 and proof affidavit was filed. No documentary was marked.

11. Both the suits in O.S.No.9282 of 2010 and O.S.No.842 of 2011 are concerned, issues were framed separately and O.S.No.842

of 2011 is concerned, the 4th defendant is the third party purchaser who purchased the part of the suit schedule property. Therefore, the Trial Court framed the issues commonly for the purpose of convenience in respect of the both the suits and accordingly the common issues framed in both the suits are that ;

1. Whether the suit is bad for non-joinder for necessary parties?

2. Whether the plaintiffs are entitled for partition as prayed for?

3. Whether the plaintiffs are entitled to past mesne profits as prayed for?

4. Whether the plaintiffs are entitled to past mesne profits as prayed for?

5. Whether the 4th defendant in O.S.No.842 of 2011 is concerned liable to be dismissed as pleaded by him.

As pleaded by him, he purchased the suit "A" schedule property for valuable consideration. As such the suit in O.S.No.842 of 2011 is concerned, liable to be dismissed as treated by the 4th defendant and what other relief.

12. Parties to both the suits are one and the same and accordingly, the Trial Court also inclined to pass a common judgment.

13. With reference to issues 1 to 4, the Trial Court considered the documents as well as evidences placed by the respective parties. The plaintiff in both the suits are Zaibunnissa Begum and she filed a suit in O.S.No.9282 of 2010 for the relief for partition and separate possession of her 7/112th share in the suit property which is described in the schedule as stated in the suit and also prayed for past and future mesne profits and for costs.

14. The same plaintiff preferred a suit for the relief of preliminary decree for partition and separate possession of plaintiff's half share in the properties described in the schedule A and B properties and further prayed for past and future mesne profits in O.S.No.842 of 2011 along with her two sons Syed Masood Ali and Syed Mir Mohammed Ali. In both the suits, the defendants 1 to 3 were one and the same. As far as the suit in O.S.No.842 of 2011 is concerned, the 4th defendant is arrayed as one Indirani. The defendants in both the suits had restricted the ground mainly by stating that the suit is liable to be dismissed on the ground of non-joinder and mis-joinder of parties in the suit. There was no cause of action and the description of properties were wrong and the court fee paid in the suits have not been properly valued and accordingly, the

proper court fee has not been paid by the plaintiff. According to the defendant, admittedly the plaintiffs are not in possession of the suit property and have no right or title over the suit property. Thus the suit cannot be maintained and this Court is not having jurisdiction to entertain the suit as there was no cause of action and the prayer sought for in the suits are liable to be dismissed as not maintainable.

15. The plaintiff in order to prove their case, the sons of plaintiff in O.S.No.9282 of 2010 was examined in both the suits as PW1 and also in order to prove the case of the plaintiff in O.S.No.9282 of 2010, 26 documents have been placed and marked as Ex.A1 to A26 and in O.S.No.842 of 2011, 18 documents have been placed and marked as Ex.A1 to A18. In order to dispute the contention of the plaintiffs, on the side of the defendants one witness had been placed and examined as DW1 in both the suits and in O.S.No.842 of 2011, 8 documents have been placed and marked as Ex.B1 to B9. No documents were marked on the side of the defendants in O.S.No.842 of 2011.

16. The Trial Court considered the judgments placed by the parties, made a finding that, as per the document marked as Ex.A9 dated 19.08.2008, it is a judgment of the High Court in A.S.No.536 of 2006. The High Court clearly and categorically disposed the case as compromised in between the parties. The said point is made available in the plaint also as the party in the said appeal as the respondent No.4. Having made as a party and having admitted the contents as it is found in the compromise having signed in the said document of compromise vide in Ex.A9 which was accepted. The Trial Court arrived a finding that the plaintiffs are estopped from claiming any due share over the suit property as claimed in both the suits. Even though according to the plaintiffs, she was made as a formal party in the said appeal, she admitted the compromise and she signed in the same and also the said signature was proved by marking Ex.A9. Accordingly the Trial Court held that she is not entitled for partition as the same was not claimed or questioned for partial partition as claimed by the defendants.

17. DW1 had been examined on the strength of power of attorney of defendant No.1, Ex.B1. As far as the Triple Talaq is concerned, the Trial Court was convinced only the other aspects of the case and decided in favour of the present defendants. The relevant documents were not proved by an examination of the said witnesses in that record. Accordingly, the Trial Court arrived a conclusion that the first defendant owned the property in respect of the schedule property in O.s.No.842 of 2011 is concerned, therefore she got right to deal with the property and

sold the A schedule property in favour of the 4th defendant. The transaction of sale made to 4th defendant cannot be interfered with as it was found that the 4th defendant was the bonafide purchaser of the said property for a valuable consideration.

18. As far as the B schedule property is concerned, the first defendant is the owner of the property and she had proved that she is the absolute owner of the property in respect of the B schedule and therefore she is entitled to deal with the same. She made two settlements and the said settlements also cannot be interfered with. The Trial Court mainly relied upon the compromise memo as well as the contentions agreed between the parties in the compromise memo and accordingly, dismissed both the Original Suits filed by the plaintiffs.

19. The Appeal Suits are filed and the learned counsel appearing on behalf of the appellants mainly contended that based on the wrong description, the appellants cannot be deprived of their right of property. In the original suit filed in O.S.No.6444 of 2003, the suit schedule property reveals that "Yousuf Labbai Lane, Triplicane, Chennai - 5", however, such a description is an error and the Advocate Commissioner in his report also held that there is no such property made available in Yousuf labbai Lane. The learned counsel for the appellants reiterated that it is only Yousuf labbai Street and not lane. This apart, the said property is not included in the compromise memo and therefore, the plaintiffs are entitled to claim partition in respect of the property which is not included in the compromise memo. Relying on the said ground, the learned counsel for the appellants is of an opinion that the first respondent was not having adequate income so as to purchase the other properties and the said properties were purchased from and out of the income from the husband of the first respondent and those properties are also to be made available to the plaintiffs by way of partition. In other words, it is contended that the first plaintiff was working as an Assistant and her retirement benefit of Rs.3 lakhs and the property was purchased for more than Rs.14 lakhs and therefore there is a probability that she could not have purchase all the properties from and out of her income. When the plaintiffs have set out the facts that she had no sufficient means to purchase the property, then it is the duty of the first defendant to rebut the said contention and before the Trial Court such an effort had not been taken by the first respondent and therefore the Trial Court committed an error in dismissing the suit.

20. The two-fold contentions raised by the appellants are that the suit properties in O.S.No.9282 of 2010 is concerned,

the properties situated in Yousuf labbai Lane, Triplicane was not included in the compromise memo. However, the learned counsel for the appellants agreed that the property in Typhoon Ali Khan Bahadur Street was included in the compromise memo. Therefore, the appellants/plaintiffs are entitled for a share in the suit schedule property situated in Yousuf labbai Street. The second ground is that the first respondent had no enough means to purchase the property for a huge sum and therefore, the said property was also purchased from and out of the income of the husband of the first respondent and those properties are also to be made available to the plaintiffs by way of partition.

21. The said contentions raised on behalf of the appellants were strenuously disputed by the learned counsel appearing on behalf of the first respondent, who is the first wife of Late.Syed Yacoob Ali. The learned counsel for the first respondent reiterated that the suit initially filed in O.S.No.6444 of 2003 which was marked as Ex.A15, reveals that the property both at Typhoon Ali Khan Bahadur Street as well as in Yousuf labbai Street were included and the suit was partly decreed against which the appeal suit was filed in A.S.No.536 of 2006 marked as Ex.A9 and in the said appeal suit, the parties have entered into a compromise and the memo of compromise was recorded and was treated as part and parcel of the decree in A.S.No.536 of 2006 and now the parties cannot institute a fresh suit in violation of the terms and conditions of the compromise agreed between the parties. In order to substantiate the said claim, the learned counsel for the first respondent solicited the attention of this Court, with reference to the decree passed in O.S.No.6444 of 2003. In the said decree two properties, A schedule property includes old Door No.21, New Door No.4, Typhoon Ali Khan Bahadur Street, Triplicane, Chennai 600 005 and B schedule property denotes house and building bearing old No.17, New No.16, Yousuf Labbai Street, Triplicane, Chennai-600 005.

22. The learned counsel for the first respondent made a submission that, undoubtedly, there is a mistake in the description and instead of mentioning the street as Yousuf labbai Street, it is mentioned as Yousuf labbai Lane. However, the property is one and the same. The survey numbers and the extent of the property, metes and bounds are one and the same both in respect of the property mentioned in O.S.No.6444 of 2003 as well as in the present suit in O.S.No.9282 of 2010.

23. This being the factum, by taking undue advantage of the typographical mistake made in the decree in O.S.No.6444 of 2003, now the appellants/plaintiffs are attempting to claim partition

which is otherwise impermissible in view of the compromise memo recorded in A.S.No.536 of 2006.

24. The learned counsel for the appellants by way of reply contended that it is not a typographical mistake and there is no such property as per the Advocate Commissioner's report and it is Yousuf labbai Street and not Yousuf labbai Lane. However, the said suit in O.S.No.6444 of 2003 was instituted by none other than the sons of the first appellant. Therefore, this Court is of the considered opinion that such a contention at this length of time cannot be made available as the door number, survey number, registration district, metes and bounds in respect of the said property are one and the same and except in the name of the street, wherein it is stated as Yousuf labbai Lane in O.S.No.6444 of 2003 and it is stated as Yousuf labbai Street in O.S.No.9282 of 2010 is concerned.

25. Looking into the nature of the compromise, final decree passed in the appeal suit in A.S.No.536 of 2006 filed against the judgment and decree passed in O.S.No.6444 of 2003, it is stated unambiguously that "the parties hereby agree that the respondents 1 and 2 along with their mother (Zaibunnissa begum), 4th respondent in AS are hereby jointly allotted by mutual consent western portion consisting of land and building of the premises at old Door No.21, New Door No.4, Typhoon Ali Khan Bahadur Street, Triplicane, Chennai 600 005, in R.S.No.2938/3, admeasuring about 590 sq.ft. or therabouts more particularly, in the schedule B hereunder and more expressly delienated and marked RED in the plan attached towards their share in plaint schedule first item in the suit O.S.No.6444 of 2003.

26. However, in the present suit filed in O.S.No.9282 of 2010 is concerned, the plaint contains the very same property in schedule B. However, the eastern portion of the said property allotted to the first defendant is now made subject matter of the suit in O.S.No.9282 of 2010. As far as the other terms and conditions of compromise is concerned, it is made very clear in para 6, 7 and 10 of the compromise memo:-

"That the fourth respondent herein who is the mother of respondents 1 and 2 / plaintiffs 1 and 2 herein has no manner of right, title or interest in the schedule mentioned properties. She has been made a formal party to the above appeal as well as to this memo of compromise with a view to bind her with the terms of this compromise.

That the matter has been settled by mutual consent amicably, none of the parties hereto has or have any

claim against the other parties hereto now or in future.

That as the matter be and hereby is settled amicably between the parties hereto the respondents 1 and 2/plaintiffs 1 and 2 herein along with fourth respondent (their mother (Zaibunnissa) herein hereby jointly and severally waive their right to claim mesne profits either past, present or future from the appellants/defendants 1 and 3 and the third respondent/2nd defendant herein.

That the parties hereto do agree that hereafter there shall be no monetary consideration or connection between the parties hereto except blood relationship."

27. Perusal of the compromise memo reveals that the parties in totality agreed to settle the properties and accordingly the respective shares were allotted and the compromise memo was signed by all the appellants and under these circumstances, the institution of the further suit in respect of the said property cannot be entertained.

28. To substantiate the said contention, the learned counsel for the first respondent cited the judgment of the Hon'ble Supreme Court of India in the case of Amarendra Komalam & Another Vs. Usha Sinha & Another, reported in (2005) 11 SCC 251, and the relevant paragraphs 24, 25 and 26 are extracted hereunder:-

"24. In our opinion, the High Court has miserably failed to appreciate that the undertaking of the first respondent in Civil Revision No. 18 of 1999 that she will not raise the issue of interpolation is binding on her in the present suit and as such she was barred by the principles of res judicata, waiver and estoppel from being allowed to raise the same issue again between the very same parties in relation to the same subject-matter. The agreement dated 2-9-1978 is an admitted document. Respondent 1 had sought to raise the issue of its forgery in earlier proceedings, but finally undertook not to do so. This was recorded by the High Court and the civil revision filed by Respondent 1 was disposed of accordingly. Later Respondent 1 sought to resile from her stand and filed an application for review before the High Court, which was also dismissed. The said order was challenged in Special Leave Petition (Civil) No. 16513 of 2001. This Court dismissed the

same after hearing the parties at the stage of final disposal. In that view of the matter, we are of the opinion that the respondent is precluded from raising the same issue of interpolation/forgery in the renewal clause of the said agreement deed again.

25. The undertaking and the acceptance not to raise the issue of interpolation is a matter of record. It is well settled that once an issue of fact has been judicially determined finally between the parties by a court of competent jurisdiction and the same issue comes directly in question in subsequent proceedings between the same parties then the persons cannot be allowed to raise the same question which already stands determined earlier by the competent court. For that the question of interpolation in the renewal clause of the said deed has been finally decided and the same issue has been raised in the present suit when in both the suits the parties are the same and the basic claim of both the parties is the same, as in eviction suit, the plaintiff is claiming eviction by termination of lease and denying the renewal clause whereas in the specific performance suit, the appellants are claiming the renewal of the lease on the basis of the said renewal clause. Hence in both the suits, the main issue is substantially and materially one and the same and both the cases are being tried simultaneously. This apart, the judgment of the High Court and of this Court is a judgment in personam which is binding upon both the parties. It is also seen that the order dated 15-2-1999 in civil revision is a consent order which creates an estoppel by judgment as the judgment dated 15-2-1999 operates as estoppel as records of the findings are essential to ascertain the judgment. By passing of the impugned judgment, the High Court has virtually allowed the suit in favour of Respondent 1. In any view of the matter, the impugned order is bad in law and fact as well and, therefore, the same is liable to be set aside.

26. In our view, Respondent 1 wants to revive the dispute which has finally been set at rest by this Court by challenging the genuineness of the agreement dated 2-9-1978 on the plea that the said order was passed in Title Suit No. 382 of 1993 which has no binding effect in the present case. In our view, Respondent 1 cannot be allowed to challenge the genuineness of the agreement dated 2-9-1978."

29. In the case of Raja Sri Sailendra Narayabhanja Deo Vs. The State of Orissa, reported in CDJ 1956 SC 108, the Hon'ble Supreme Court of India made an observation as follows:-

"The fact that the claim in the earlier suit related only to a part of the land, namely the river beds, whereas the present case is that the entire land held by the plaintiff is not an "estate" makes no difference, for the real issue between the parties in the earlier suit was, as it is in the present suit, only concerning his status and the rights flowing therefrom.. To hold in this suit that the plaintiff is not the holder of an estate subject to payment of land revenue for the discharge of which a separate engagement has been entered into, will be to permit the plaintiff to set up a sovereign status for himself, which he actually did in the earlier case but failed to establish in the trial court and which he, by the compromise, expressly abandoned in the appeal court. In our judgment the compromise decree precludes the plaintiff from re-asserting the title, which had been negatived by the compromise decree although it related only to his claim to a part of the lands, namely the beds of the rivers therein mentioned. The compromise decree is also sought to be pleaded by the State against the plaintiff as estoppel by representation. It is said, that even if the compromise had not the imprimatur of the court, it would, nevertheless, be representation that the plaintiff's predecessor was the Zemindar of a permanently settled estate. The compromise consisted of reciprocal concessions, those made by one party being the consideration for those made by the other."

30. In the case of Byram Pestonji Gariwala Vs. Union of India & others, reported in CDJ 1991 SC 517, the Hon'ble Supreme Court of India, held as follows:-

"...As stated by this Court in Shankar Sitaram Sontakke & Anr. v. Balkrishna Sitaram Sontakke & Ors., AIR 1954 SC 352:- "..... It is well settled that a consent decree is as binding upon the parties thereto as a decree passed by invitum. The compromise having been found not to be vitiated by fraud, misrepresentation, misunderstanding or mistake, the decree passed thereon has the binding force of 'res judicata'."

"Any judgment or order which in other respects answers to the description of a res judicata is nonetheless so because it was made in pursuance of the consent and agreement of the parties Accordingly, judgments, orders, and awards by consent have always been held no less efficacious as estoppels than other judgments, orders or decisions, though doubts have been occasionally expressed whether, strictly, the foundation of the estoppel in such cases is not representation by conduct, rather than res judicata...

The consent decree made on 18.6.1984 remained unchallenged. None questioned it. The appellant never raised any doubt as to its validity or genuineness. He had no case that the decree was vitiated by fraud or misrepresentation or his counsel lacked authority to enter into a compromise on his behalf. Nevertheless, after six years he questioned its validity by means of chamber summons. This was an unsuccessful challenge by reason of delay, estoppel or res judicata, and was rightly so held by the High Court."

31. The Madras High Court in the case of A.Ramachandra Pillai Vs. Valliammal, reported in (1987) 100 L.W.486, held as follows:-

"...It is true that under Order I, Rule 9 of the Code of Civil Procedure no suit shall be defeated by reason of the mis-joinder or non-joinder of the parties, but there can be no doubt that if the parties who are not joined are not only proper but also necessary parties to it, the infirmity in the suit is bound to be fatal. Even in such cases, the Court can under Order 1. Rule 10, sub-rule (2) direct the necessary parties to be joined, but all this can and should be done at the stage of trial and that too without prejudice to the said parties' plea of limitation. Once it is held that the appellant's two brothers are co heirs with her in respect of the properties left intestate by their mother, the present suit filed by the appellant partakes of the character of a suit for partition and in such a suit clearly the appellant alone would not be entitled to claim any relief against the

respondents."

This decision is thus an authority for the position that in a suit for partition, all the sharers are necessary parties and also for the position that the suit is liable to be dismissed for nonjoinder of any one of the parties. In (T. Panchapakesan and others vs. Peria Thambi Naicker and others)¹ also, a Division Bench of this Court has taken a similar view by judgment dated 18-7-1972. We are accordingly of the view that the finding of the learned Subordinate Judge on issue No. 10 holding that the suit is not bad for non-joinder of Nagarathinam's heirs is unsound and liable to be set aside. Accordingly, we hold that the suit is liable to be dismissed for non-joinder of the heirs of Nagarathinam."

32. The very same principle was reiterated by the Madras High Court in the case of L. Suresh & Another Vs. Yasothammal & Ors., reported in CDJ 2014 MHC 624, and the following observations are made:-

"12. As far as the facts of this case are concerned, it is of course true that Muruga Mandiri would represent all legal heirs, but the plaintiff does not challenge the sale deeds Exs.B.2 and B.8. As per her contention, the sale deeds obtained by defendants 1 and 2 are latter point of time when the deed of sale in favour of plaintiff came to existence. She also pleads that the legal heirs of Muruga Mandiri have no right to transfer the property in favour of 1st and 2nd defendants and on the date of sale it was in her favour and they did not have any right. Hence, the competency of legal heirs of Muruga Mandiri is questioned. In view of this Court, they should be impleaded in the suit for partition since all the parties are necessary parties to the suit for partition. They cannot be said to be mere proper parties. They are very much necessary for determining the issue between the parties. In their absence no proper and final adjudication could be made as to the rights of the parties. In case if the plaintiff admits Exs.B-2 and B-8, then there can be a finding that they are not necessary parties. Further, the Courts below could not believe the alleged partition effected by Muruga Mandiri. In view of the above observation, in the light of the provision under Order I Rule 9 C.P.C., and the decision in 100 L.W. 486, it is held that the suit is bad for non-joinder of necessary parties and

the suit has to fail in entirety."

33. The contention of the first respondent is that the suit in O.S.No.9282 of 2010 for partition was instituted without impleading the necessary parties and more specifically, the two sons of the first appellant who were parties in the compromise memo had not been impleaded in the suit purchase. Therefore, the suit is liable to be dismissed for non-joinder and mis-joinder of necessary parties.

34. This Court is of the considered opinion that the compromise memo Ex.A9, made in A.S.No.536 of 2006 is comprehensive. The terms of compromise memo is unambiguous with reference to the intention of the parties and the parties had intended to settle the entire properties which was the subject matter of the suits and accordingly agreed for the allotments made through the said compromise memo dated 19.08.2008. The suit in O.S.No.6444 of 2003, the very same schedule property has been included in the suit schedule property. The mistake committed in naming the street cannot be a ground to institute a further suit by claiming that it is a separate property. Perusal of both the schedules in compromise memo as well as in the plaint filed in O.S.No.9282 of 2010 is concerned, the door number, survey number, measurement, metes and bounds as well as the registration district are one and the same and there is no such difference as claimed by the appellants. Only mistake committed is that instead of stating Yousuf labbai Street, it has been wrongly stated as Yousuf labbai Lane. Therefore, the same would not change the character of the property, nor would give any further cause of action for the purpose of instituting a fresh suit for partition.

35. This being the factum, this Court is of an opinion that, the suit was dismissed on the ground of non-joinder of necessary parties. When the suit for partition is filed, all the necessary parties are to be impleaded and the non-joinder of necessary parties in the partition suit is vital and it is a ground to dismiss the suit itself. Even during the pendency of the suit, the sons of the first appellant had not been impleaded as party. This being the factum, the appellant had not been approached the Trial Court with clean hands and they have not filed a suit with clear facts and by impleading all the necessary parties as the suit itself for partition.

36. This being the facts and circumstances, this Court do not found any perversity or infirmity in respect of the judgment and decree passed commonly both in O.S.No.9282 of 2010 as well

as in O.S.No.842 of 2011. The Trial Court has arrived a conclusion in a right perspective in respect of the documents filed, more specifically, the compromise memo recorded in A.S.No.536 of 2006 Ex.A9 and further considered the vital ground regarding the non-joinder of parties in partition suit and accordingly dismissed the suit.

37. There is no error or infirmity in respect of the findings and this Court is not inclined to accept the grounds of appeal filed in both appeal suits and consequently, the common judgment and decree passed in O.S.No.9282 of 2010 and in O.S.No.842 of 2011, dated 20.03.2012 are confirmed and A.S.Nos.465 and A.S.No.671 of 2012 are dismissed. No Costs.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

pkn
To

1.IV Additional Judge i/c,
City Civil Court, Chennai.

2.The Section Officer
VR Section
High Court Madras

+2 ccs to Mr.V.V.Sairam Advocate sr8657
+1 cc to Mr.C.P.Sivamohan Advocate sr8958
+1 cc to Mr.N.A.Nissar Ahmed Advocate sr9161

सत्यमेव जयते

A.S.Nos.465 & 671 of 2012

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