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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.12.2020

CORAM :

THE HONOURABLE MR. JUSTICE S.S. SUNDAR

A.S.No.958 of 2020

C.M.P.No.13490 of 2020

J.Jayanthi ... petitioner/3rd defendant
Vs.
1.B.Sridhar ... 1st Respondent/Plaintiff
2.M.Ramani
3.Mrs.Kala
4.B.Raja ... Respondents 2 - 4/ Defendant 1,2 & 4

Appeal Suit filed under Section 41 Rule 1 of CPC r/w Section 96 of C.P.C., praying to call for the lower Court records and set aside the decree and judgment passed on 04.10.2018 in O.S.No.2952 of 2016, on the file of the IV Additional Judge, City Civil Court, Chennai.

For Appellant : Mr.T.Sundaranathan

For Respondents : Mr.V.Suryanarayana Reddy

J U D G M E N T

This appeal is preferred by the third defendant in O.S.No.2952 of 2016, on the file of the IV Additional Judge, City Civil Court, Chennai.

2. The brief facts are as follows:

The first respondent in this appeal is the plaintiff and filed the suit in O.S.No.2952 of 2016 for partition of his 1/5th share in the suit property, which is an extent of about 4,720 sq.ft in Anna Nagar West Extension. The relationship between the parties is not in dispute. The plaintiff and 4th respondent herein are the brothers of defendants 1 to 3. The plaintiff and the defendants are the sons and daughters of late Balakrishnan and his wife by name Tmt.S.Pachaiammal. It is also not in dispute that the suit property belonged to mother of plaintiff and the appellant. The fact that the plaintiff's



father Balakrishnan died long back and that the mother of the appellant got allotment of the property and entered into a lease cum sale agreement with Tamil Nadu State Housing Board and put up a home. Subsequently, on 12.12.1994 a sale deed was registered. Stating that the plaintiff as a son of late Balakrishnan and Pachaiaammal is entitled to equal share, the suit came to be filed. Except the appellant, the other defendants did not contest the suit. It is specifically admitted in the written statement filed by the 3rd defendant/appellant that the suit property belonged to Tmt.Pachaiaammal, that her father passed away on 27.12.1989 and that her mother died on 17.01.2012.

3. It is the specific case of the appellant that the plaintiff is not entitled to 1/5th share of the property on the ground that Tmt.Pachaiaammal and all the parties to the suit have sold an extent of 950 sq.ft. out of the total extent of the suit property to the appellant's husband viz., one Jagan Mohan Rao, for a sum of Rs.6,00,000/- . The appellant pleaded oral sale stating that the mother of plaintiff by name Pachaiaammal and others received substantial payment out of the oral sale, in respect of an extent of 950 sq.ft of land, it was contended that the suit of partition is maintainable only to an extent of 3770 sq.ft.

4. It is to be noted that the appellant did not claim any independent right except stating that a portion of the suit property had been orally sold in favour of her husband and that her husband has built a house in the said property. In other words, in the present suit for partition, the 3rd defendant has not pleaded an independent right but set up title in her husband, in respect of a portion of the suit property and contend that the suit for partition can be devided except a portion namely an extent of 950 sq.ft. This is the crux of defence.

5. Before the trial Court, it is seen that the 3rd defendant tried to protract the proceedings by filing petitions. Despite PW.1 was present on several occasions, the learned counsel for the 3rd defendant was absent even for cross examining the plaintiff's only witness, namely, PW.1. Therefore, the evidence on the side of plaintiff was closed. The 3rd defendant is set exparte. Hence, he filed a petition in I.A.No.8263 of 2018 to set aside the exparte order.



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6. Despite several opportunities were given to the defendants no witness was produced and therefore the evidence on the defendants' side was closed on 03.07.2018. When the matter was posted for arguments, an application was filed in I.A.No.8263 of 2018. The petition was allowed on condition directing the petitioner, namely, the 3rd defendant to pay cost of Rs.1,000/- to the plaintiff.

7. Even after the petition in I.A.No.8263 of 2018 was allowed and arguments were heard, no petition was filed on behalf of D3 for reopening the case, so as to lead any further evidence. From the extract of Diary produced by the appellant, this Court is unable to find any attempt either to co-operate with the trial or to re-open the case to let in evidence. It is seen that the third defendant/appellant tried to drag on the proceedings probably to instigate her husband to file an independent suit. The appellant is not claiming any independent title in respect of any portion of suit property in the partition suit. The proceedings before the lower Court only indicate that the appellant made an attempt to drag on the proceedings to facilitate her husband to put some obstruction. The appellant's husband should be aware of the proceedings and he has not taken any steps to implead himself as a party to prove his exclusive right in respect of such portion.

8. In these circumstances, the Trial Court after finding that no evidence was let in on the side of third defendant and other defendants, set them *exparte*. Based on the evidence available, the Trial Court decreed the suit.

9. It is admitted by the appellant herself that the property belonged to her mother by virtue of registered lease cum sale agreement and the sale obtained from Tamil Nadu State Housing Board in the year 1994.

10. It is the plea of appellant that there was a oral sale in favour of her husband. But her husband did not try to implead himself as a party during the proceedings. No attempt was made by the appellant herself to implead him on the ground that the suit without him is liable to be dismissed. When the appellant did not make any attempt to prove the oral sale for the purpose of impleading her husband as a party to the suit, the judgment and decree of the lower Court cannot be challenged



by her as she is not having any exclusive right in the property to maintain her appeal showing a cause of action. In other words, the appellant has no locus standi as on date to file the appeal based on the claim that her husband acquired a portion of property by oral sale.

11. From the documents that are filed this Court is fully convinced that sufficient opportunity was given by the lower Court and the appellant did not avail that opportunity to lead evidence in furtherance of oral sale at least to establish that the suit without impleading her husband is bad for non-joinder of necessary parties.

12. When the plaintiff's right to claim 1/5th share in the suit property is held to be valid, this Court has no reason to interfere with the judgment and decree of the lower Court granting 1/5th share. Even assuming that the plaintiff's husband has a claim on the basis of the oral sale in respect of the small portion of the property, it is not proper for this Court to keep the matter pending or to remit the matter to the lower Court to decide the matter afresh on the basis of a claim by her husband, based on the oral sale without any proof or evidence to accept the claim. The plea of oral sale cannot be accepted as transfer by sale can be effected only by a registered instrument. There is no plea of adverse possession to sustain the defence.

13. The learned counsel for the appellant submitted that an opportunity can be given to the appellant to prove the oral sale. The submission is to the effect that in order to prove the independent right of her husband on the basis of the oral sale, in adherence to the principles of natural justice, the matter should be remitted for giving opportunity to the 3rd defendant to establish the oral sale. The appellant's husband is alive and he has not come forward to implead himself as a party

14. In these circumstances, having regard to the admitted facts and the evidence let in by parties, this Court is of the view that the appeal is liable to be dismissed for want of merits.



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15. Accordingly, this Appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar (CCC)

// True Copy //

Sub Assistant Registrar

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To

The IV Additional Judge, City Civil Court,
Chennai.

Copy to

The Section Officer, VR Section, High Court, Madras.

+1CC to Mr.V.Suryanarayana Reddy, Advocate, SR.No. 40816

+1CC to Mr.T.Sundaranathan, Advocate, SR.No. 40663

A.S.No.958 of 2020

CNR(CO)

B.VC (21/09/2021)