



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 08.01.2020

CORAM:

WEB COPY

THE HONOURABLE MR.JUSTICE **N. SATHISH KUMAR**

AS (MD).No.36 of 2017

M. Vijaya

Appellant / Defendant

Vs.

1. Nagarajan

2. Shanmugam

Respondents / plaintiffs

Prayer: Appeal Suit filed under Section 96 CPC against the Judgment and Decree of the District Judge, Sivagangai in O.S.No. 02 of 2013, dated 30.10.2015.

For appellant : Mr. R. Sundar Srinivasan

For Respondents : Mr. S. Srinivasa Raghavan

JUDGMENT

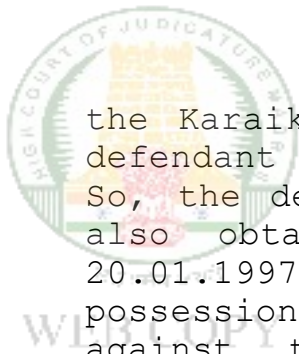
Aggrieved over the Judgment and decree of the trial Court decreeing the suit filed for partition, the present first appeal is filed.

2. For the sake of convenience, the parties are referred to herein as per their ranking before the trial Court.

3. The brief facts leading to the filing of the suit are as follows:

(i) The plaintiffs and the defendant are brothers and sister and they have jointly purchased the suit property. Even since the date of purchase, they enjoyed the property jointly. The plaintiffs are working at Paramakudi. Despite the request for partition, the defendant did not agree. Hence, the suit.

(ii) It is the case of the defendant that the plaintiffs have given up 2/3rd share to the defendant after receiving Rs.20,000/- on 10.09.1998. After giving up their shares, the defendant had been in possession and enjoyment of the property exclusively. The defendant constructed a house in the schedule property in the year 1997. The defendant had obtained a building plan from Karaikudi Municipality and also obtained permission of



the Karaikudi Municipality, by proceedings dated 29.02.1993. The defendant was not able to construct the house within the period. So, the defendant has applied for extension of time and she has also obtained an order from the Karaikudi Municipality on 20.01.1997. When the plaintiffs made an attempt to disturb the possession, the defendant has filed a suit in O.S.No. 139 of 1997 against the plaintiffs before the District Munsif Court, Karaikudi. The plaintiffs, after receiving notice, have not appeared before the trial Court and therefore, ex parte decree was passed on 19.06.1998. But, no appeal was filed against the defendant. Hence, the present suit is not maintainable.

4. On the side of the plaintiffs, PW.1 and PW.2 were examined and Exs.A1 and A2 were marked. On the side of the defendant, DW.1 was examined and Exs.B1 to B20 were marked.

5. Based on the above pleadings, the trial Court has framed the following issues:

1. Whether the release in respect of plaintiffs 2/3rd is true and genuine?
2. Whether the plaintiffs are entitled to 2/3rd share in the schedule mentioned properties?
3. To what other reliefs, the plaintiff is entitled for?

6. The trial Court has decreed the suit stating that the ex parte decree has no bar to the subsequent filing of the suit and granted partition, aggrieved against which, the present appeal came to be filed.

7. The learned counsel appearing for the appellant / defendant submitted that the defendant obtained an ex parte decree in O.S.No.139 of 1997 and Ex.B5 is the certified copy of the Judgment by the District Munsif Court, Karaikudi. The respondents / plaintiffs have not challenged the above and reached finality. The application filed by the respondents / plaintiffs to set aside the ex parte decree was also dismissed. Such being the position, when the right of the appellant is crystallized by Judgment and decree of the Court below, relief of partition cannot be granted ignoring the previous Judgment and decree passed by the Trial Court in O.S.No.139 of 1997. Hence, he prayed for allowing the appeal.

8. Whereas, the learned counsel appearing for the respondents / plaintiffs submitted that though there was an ex parte decree against the respondents / plaintiffs the facts remains that the oral release has not been established. Their contention is that there is no bar for entertaining the subsequent



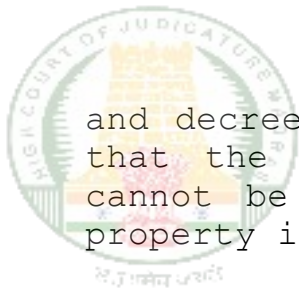
9. In the light of the above submissions, this Court framed the following point for consideration:

" When the right of the party is crystallized by the Judgment and Decree of the trial Court in respect of the property, whether the parties are entitled to seek for partition in respect of the same property?"

10. Admittedly, the relationship between the parties is not disputed. It is admitted by both sides that the property was purchased by the plaintiffs and defendant jointly under Ex.B20 - sale deed. It is the contention of the plaintiffs that the property is joint family property, whereas the case of the defendant is that on 10.09.1998 the plaintiffs relinquished their shares on oral partition for a sum of Rs.20,000/-. From that day onwards the defendant is in exclusive possession of the property and obtained necessary plan for construction of the building and she is in enjoyment of the property. Exs.B7 and B8 to B11, reveal the fact that the defendant is in possession of the property. Be that as it may, it is the specific stand of the defendant that there was an oral release of the property and the plaintiffs have received the consideration and given up their shares to the defendant.

11. The fact reveals that though the defendant obtained a decree of declaration against the plaintiffs in O.S.No. 139 of 1997, wherein he has also pleaded the oral release, Ex.B4 a copy of the plaint in O.S.No. 139 of 1997, when carefully seen, a defence theory set up in the present suit is pleaded. Ex.B5 shows that the petition filed by the respondents / plaintiffs to set aside the ex parte decree was also dismissed and the same clearly indicate that in fact, before the trial Court, the plaintiffs appeared through their power agent by filing a counter and after ex parte Judgment, filed an application to set aside the order of ex parte. Further, after 17 years it cannot be said that the plaintiffs were not aware of the ex parte decree that too, after appearing in the earlier suit. The fact remains that the trial court in the earlier suit in O.S.No.139 of 1997 granted a decree of declaration in favour of the defendant and the decree has reached finality and the same has not been challenged. When the Judgment of the Court declared the right of the party, in respect of the property, the same property cannot be subject matter of partition, even though the decree was an ex parte decree.

12. On perusal of the certified copy of the ex parte decree in O.S.No. 139 of 1997 it is seen that the the trial Court has taken into consideration various averments made by the defendant



and decreed the suit in his favour. Even though it is contended that the ex parte decree was obtained by playing fraud that cannot be gone into as there was a finding in respect of the property in the earlier suit.

13. In view of the above, when the right of the defendant is already crystallized and decree was passed in respect of the very same property, the trial Court ignoring such decree, granted the decree of partition, which is not according to law. Thus, the point is answered in favour of the appellant and the Judgment and Decree of the trial Court is set aside and the suit is dismissed. Considering the relationship between the parties, there is no order as to costs.

14. In the result, the appeal suit is allowed.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

/ /2020

Sub Assistant Registrar (CS)

trp

To

The District Judge, Sivagangai

copy to

The Section Officer-2 copies

VR Section,

Madurai Bench of Madras High Court, Madurai.

+1 CC to Mr.S.SRINIVASA RAGAVAN, Advocate (SR-1113[F] dated 09/01/2020)

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