

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.11.2021

Coram

The Hon'ble Mr. Justice **PARESH UPADHYAY**
and

The Hon'ble Mr. Justice **SATHI KUMAR SUKUMARA KURUP**

C.M.P.No.18570 of 2021
in
O.S.A.SR.No.100891 of 2021

Sharath Kumar Surendra

..Petitioner

Vs

1.P.S.Usha
2.P.S.Surendra
3.P.S.Subramani
4.P.S.Vijayalakshmi

..Respondents

Petition filed under Order XIV Rule 8 of O.S. Rules and Section
151 C.P.C. to grant leave to the petitioner/appellant to file Original
Side Appeal.

For Petitioner ..

Mr.Sam Jayaraj Houston

JUDGMENT

(Delivered by **PARESH UPADHYAY, J.**)

This petition is seeking leave of this Court to file appeal against the order dated 29 June 2021, recorded on O.A.No.374 of 2021 in C.S.No.207 of 2021.

2. The suit is for partition and permanent injunction. One of the siblings (sister) is the plaintiff and other three siblings are the defendants. The first defendant is the brother of the plaintiff. The prayer clause in the suit is as under:

"(a) pass a preliminary decree for partition dividing Schedule A and B properties into 4 equal shares and allot 1/4th share to the plaintiff.

(b) for permanent injunction restraining the first defendant, their men or agents from dispossessing the plaintiff from the suit property morefully described in Item 1 of B Schedule below."

3. By the impugned order, injunction is granted in favour of the plaintiff, against her dispossession from the suit property.

4. The petitioner is the son of original first defendant (brother).

5. Learned advocate for the petitioner has submitted that the impugned order prejudices the rights of the present petitioner, since according to him, he is the owner of the property. It is submitted that he ought to have been heard before passing the impugned order and therefore, this petition be allowed and appeal be entertained. It is further submitted that in the event the present petitioner is not heard, that will prejudice his case including *qua* his right regarding his own property. Learned advocate has further submitted that the petitioner's father is not well and therefore he (defendant No.1) could not put correct facts before learned single Judge. It is noted that the learned advocate for the petitioner has taken this Court extensively through the paper book. It is prayed by him that this petition be allowed.

6. Having heard the learned advocate for the petitioner and having considered the material on record, this Court finds as under:

6.1. This petition, ostensibly is seeking leave to challenge the order dated 29 June 2021. The said order was passed on O.A No.374 of 2021 in C.S. No.207 of 2021, wherein the averments by the applicant/ plaintiff are to the effect that she and first defendant (her brother) are residing in the same property. She is occupying ground

floor and the first defendant (brother) is on the first floor. The first defendant and his other family members wanted the plaintiff to handover possession of the suit property, that is how the controversy started. It is under these circumstances, along with the plaint for partition, she also moved an application to grant injunction in her favour against her dispossession. It is on the said application, initially the order was passed by the learned single Judge on 29 June 2021 (for which leave to appeal is sought for). Thereafter, on 20 July 2021, following further order was passed :

"It is seen from the records that notice has been served on the respondents.

2. Registry is directed to verify whether any counsel has entered appearance on behalf of the respondents. If no counsel entered appearance, print the name of the respondents in the cause list.

3. Post on 19.08.2021.

4. The interim order already granted by this Court is extended until further orders."

6.2. The matter was considered again on 19 August 2021. After hearing all the parties, including the first defendant (father of the present petitioner), the following order was passed:

" The learned counsel for the parties submitted that they require some time to explore the possibility of

settlement between the parties. Therefore, they requested long adjournment.

2. The learned counsel for the respondents fairly submitted that the respondents have no intention to alienate the property.

3. The above submission of the learned counsel for the respondents is recorded. The interim order already granted by this Court is made absolute.

4. Post the matter on 08.10.2021."

(emphasis supplied)

6.3. It is under the above circumstances, the son of the original first defendant has filed this petition, praying for leave of this Court to file appeal against the order of 29 June 2021 on the ground that he is an aggrieved party. We find that, the first defendant whose concession is recorded in the order dated 19 August 2021 is before this Court, challenging - effectively the same order dated 19 August 2021, under the pretext of challenging the order dated 29 June 2021, with the mask of his son. Such a tactic can not be acknowledged.

6.4. If any party is aggrieved, he is well within his right to approach the higher / appropriate forum. The father is not before this Court. It is his son - who can very well move learned single Judge, is in appeal, that too, by challenging only the order dated 29 June 2021.

If the argument on behalf of the present petitioner is accepted on its face value, it is an ex-parte order and appropriate remedy could have been resorted to.

6.5. Going by any parameter, this Court finds that entertaining this petition would result in prolonging the dispute between the siblings at the hands of the next generation, without his participating in the suit proceedings, if otherwise he is entitled to. This petition therefore needs to be dismissed.

7. There is an additional factor against the present petitioner. During the course of hearing, learned advocate for the petitioner has submitted that the plaintiff (aunt) and the first defendant (father) are staying in the same property but the present petitioner is not staying in that property. Only because of sickness of his father, he has gone there to attend him. This factor also needs to be kept in view. When the dispute is essentially between siblings, colour thereof can not be permitted to be changed at the hands of the next generation of one of the contesting parties.

8. There is additional material on record, which we have considered. Expressing any opinion *qua* that would only further

prejudice the case of present petitioner or the first defendant and therefore we have refrained from doing so. Suffice it to hold that this petition can not be / need not be entertained.

9. In view of the above, the following order is passed:

9.1. This petition seeking leave is rejected.

9.2. O.S.A.SR. No.100891 of 2021 would not survive and stands rejected.

(P.U.J.,) (S.S.K.J.,)
11.11.2021

Index:Yes/No
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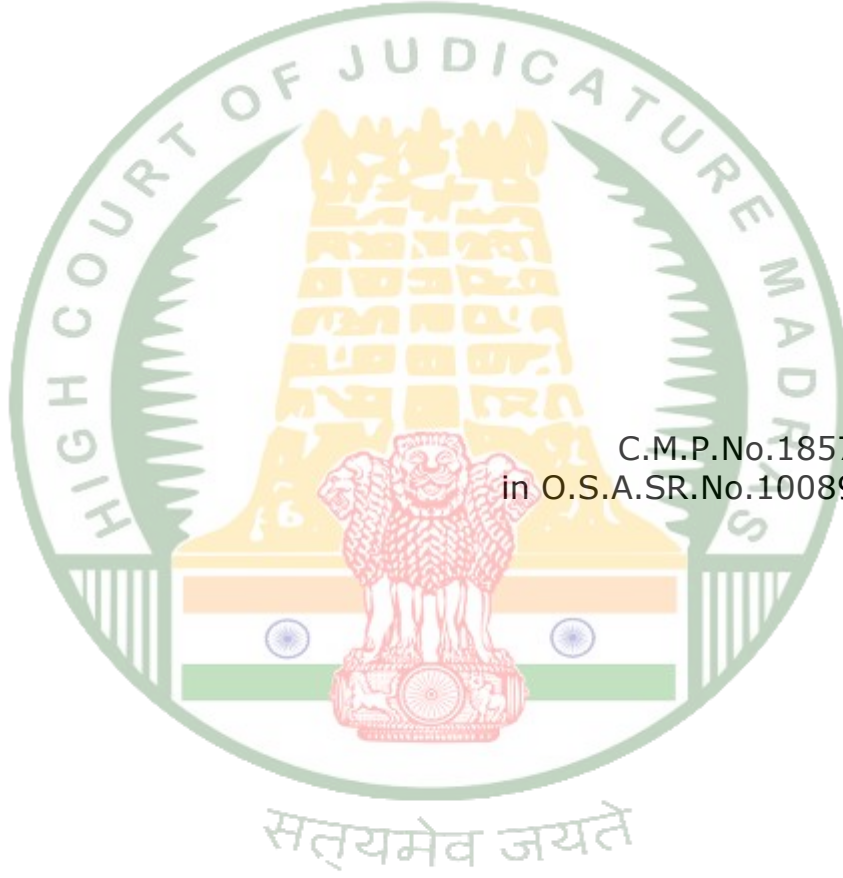
To

The Sub Assistant Registrar,
Original Side, High Court, Madras.

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**PARESH UPADHYAY, J.
and
SATHI KUMAR SUKUMARA KURUP, J.**

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