

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.11.2017

CORAM

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

C.S.No.1169 of 2009

1.V.Parvathy

2.C.Maheshwari

3.A.Ravi

4.N.Jayalakshmi

5.A.Manikandan

6.J.Usha

7.N.Chitra

... Plaintiffs

Versus

A.Elumalai

... Defendant

Plaint filed under Order VII Rule 1 & 2 of Civil Procedure Code and Order IV Rule 1 of Original Side Rules r/w. XXIV Rule 1 of Original Side Rule praying to pass a judgment and decree for:-

a) Partition and separate possession to the 1st and 2nd plaintiff each being entitled to 1/4th share and plaintiffs 3 to 7 herein are jointly entitled to ¼ share in the plaint schedule mentioned property by effected and divided and allotted to the parties hereto or in the alternative the said

properties to be sold and after deducting the cost of the suit, the residue be divided among the parties of which 1/4th share each to be given to the 1st and 2nd plaintiff herein and another 1/4th share to the plaintiffs 3 to 7 herein;

b) that a Commissioner be appointed to divide the immovable property in the schedule hereunder by metes and bounds or in the alternative if it cannot be divided or allotted as the shares of the parties are entitled to sell the same;

c) that the costs of the parties hereto may be paid out of the assets of the family and for that the defendant may be ordered to pay the same.

For Plaintiffs : Mrs.Jayashree

For Defendant : Mr.N.Poovanalingam

JUDGMENT

The suit is filed for partition of 3/4th share of the plaintiffs in the suit property and for separate possession.

2. According to the plaintiffs, a large extent of property including the suit property was purchased by one Appavu and Govindhan, who were brothers, under a Sale deed, dated 26.03.1958. On 07.12.1963, the brothers viz., Appavu and Govindhan entered into a partition, by way of registered instrument, under which, the suit property was allotted to Appavu. The said Appavu died on 03.03.1997, leaving behind four daughters and one son. His wife Kannammal had pre-deceased him on 07.09.1978. It is also stated that,

one of the daughters of Appavu viz., Shanthi died issueless and another daughter by name Kuppammal died subsequently, her children are the plaintiffs 3 to 7 and the only son of Appavu viz., Elumalai is the first defendant. Claiming that Appavu died intestate, the plaintiffs have sought for partition and separate possession of $\frac{3}{4}$ th share.

3. According to the plaintiffs, the first and the second plaintiffs are entitled to $\frac{1}{4}$ th share each and Kuppammal would be entitled to $\frac{1}{4}$ th share. A pre-suit notice was issued on 30.07.2008, demanding partition of the schedule property. Though, the defendant received the same on 04.08.2008 he has not sent any reply. Hence, they have come forward with the above suit.

4. The sole defendant, had filed a written statement, contending that the plaintiffs have released their right over the suit property orally. It is also contended by the defendant that the plaintiffs 1 and 2 and Kuppammal were married off by spending huge amounts. The father, Appavu, mortgaged the property in favour of The Nungambakkam Sasvatha Dhana Rakshaka Nidhi Ltd., and the same was repaid and the property was redeemed in the year 1980.

5. The defendant would further contend that he was helping the father in his business and his income was also utilized for the discharge of the loans of the father. The defendant would also claim that, it was the intention of the father, Appavu, that the property should go to the son alone. It is also pleaded that the father had over draft facility in Syndicate Bank and he died leaving behind a debit balance of Rs.1,80,000/- in the said over draft account. The said amount was also paid by the defendant.

6. On the above pleadings, the following issues were framed by this Court:

1. Whether the plaintiffs are entitled to partition as prayed for?
2. Whether the oral release as pleaded is valid in law?
3. Whether the oral release is genuine and acted upon by the parties?
4. Whether the defendant alone is entitled to the improvements as claimed and as he had redeemed the property?

5. Whether the plaintiffs are entitled for the relief as prayed for?

6. To what other reliefs the plaintiffs are entitled to?

7. During the trial, the first plaintiff was examined as PW1 and Exs.P1 to P6 were marked on the side of the plaintiffs and the sole defendant examined himself as DW1 and he examined one Madurai as DW2. No documentary evidence was produced on the side of the defendant.

Issue Nos.1 to 3:

8. These issues are taken up together as they are interconnected.

9. The fact that the suit property belonged to Appavu is not in dispute. The relationship between the parties is also not in dispute. The fact that Appavu died on 03.03.1997 intestate is also not in dispute. The fact that his wife Kannammal has pre-deceased him even on 07.09.1978 is admitted. It is seen from the evidence on record that one Shanthi, one of the daughters of Appavu, though got married, died issueless. Therefore, the plaintiffs 1 and 2 will be entitled to 1/4th share as Class I heirs under Section 8 of the Hindu Succession Act. The plaintiffs 3 to 7 being the

children of one of the daughters viz., Kuppammal, who are the Class I heirs will be entitled to the 1/4th share and the sole defendant would be entitled to 1/4th share.

10. The sum and substance of the defence is that the plaintiffs have orally released their share in the property. The pleading in respect of oral release is very vague, there is no date mentioned either in the plaint or in the evidence of DW1. All that the defendant would contend is that, since the daughters of Appavu were married off by him by giving them substantial jewelery at the time of marriage, the defendant expected the plaintiffs to release their respective shares.

11. The exact words in the written statement of plaintiffs relating to release are as follows:

“After fulfilling the needs of respondents/ plaintiffs (purchase of land and putting up constitution) by this defendant, this defendant was under the bonafide belief that the respondents would keep up their promise by releasing their respective shares in favour of this defendant. But to the great shock and surprise the respondents started demanding equal share in the schedule property. ”

12. It is also claimed that, at the time of death of Appavu, the schedule property consisted only two floors and it was the defendant, who, with his income, constructed the second floor and three shops in the front of the house. He would also claim that a sum of Rs.1,80,000/- paid by him to Syndicate Bank towards discharge of the over draft facility of Appavu should also be shared between the parties.

13. Unfortunately, for the defendant there is no evidence to prove the improvements effected by him except his own interested and oral testimony and the evidence of DW2 who admits that he is working as mason under the defendant.

14. The defendant, who claims that Appavu had over draft facility with Syndicate Bank and he discharged the same, could have produced, the documentary evidence to establish the same. Similarly, there was no documentary evidence to prove the alleged improvements also. It is well settled position of law that the oral release is not valid. Even on facts, there is no evidence, to support the contention of the defendant that the plaintiffs have agreed to release their right over the property or there was a oral release by the plaintiffs at any point of time.

15. Hence, issue No.1, is answered in favour of the plaintiffs, holding that, they are entitled to partition and issue Nos.2 and 3 are answered against the defendant and in favour of the plaintiffs holding that the oral release pleaded by him is neither proved nor it is valid.

Issue No.4:

16. Though the defendant contends that he effected improvements in the property, as already observed, there is no evidence, from his side, either oral or documentary, except his own interested testimony and the testimony of PW2, who worked for the defendant regarding the alleged improvements made. The burden of proving the same is solely on the defendant and the absence of any documentary evidence to show that the defendant had in fact effected improvements in the property. He cannot claim that he is entitled to costs of improvements.

17. The only other claim of the defendant is that, Appavu, at the time of his death, was having over draft facility with the Syndicate Bank and he discharged the debt of Rs.1,80,000/- out of his own funds. Even to prove this, there is no documentary evidence. In the absence of documentary evidence to prove such discharge, I do not think, the

defendant could claim the value of the improvements and the loan alleged to have been discharged by him.

18. Hence, issue No.4 is answered against the defendant and in favour of the plaintiffs and the suit is decreed as prayed for, granting 1/4th share each to the plaintiffs 1 & 2 and 1/4th share to the plaintiffs 3 to 7 as legal representatives of the deceased daughter. Considering the relationship between the parties, the parties are left to bear their own costs. Since there is no prayer for mesne profits in the suit there shall be no decree for mesne profits and the relief for mesne profits is deemed to be rejected.

30.11.2017

List of the witnesses examined on the side of the plaintiff:

PW1 - V.Parvathy

List of Exhibits marked on the side of the plaintiff:

<i>Sl. No.</i>	<i>Exhibits</i>	<i>Description</i>	<i>Dated</i>
1	Ex.P1	Certified copy of the partition deed	07.12.1963
2	Ex.P2	Xerox copy of the death certificate of Kuppammal	07.03.2006
3	Ex.P3	Copy of legal notice from plaintiff's counsel to the defendant	30.07.2008

Sl. No.	Exhibits	Description	Dated
4	Ex.P4	Postal acknowledgment card	--
5	Ex.P5	Copy of death certificate of Appavu	03.03.1997
6	Ex.P6	Xerox copy of the encumbrance certificate	22.09.2009
7	Ex.P7	Certified copy of the sale deed	26.03.1928

List of the witnesses examined on the side of the defendants:

DW1 - A.Elumalai

DW2 - V.Madurai

List of Exhibits marked on the side of the defendants: Nil

30.11.2017

dsa

Index : Yes/ No

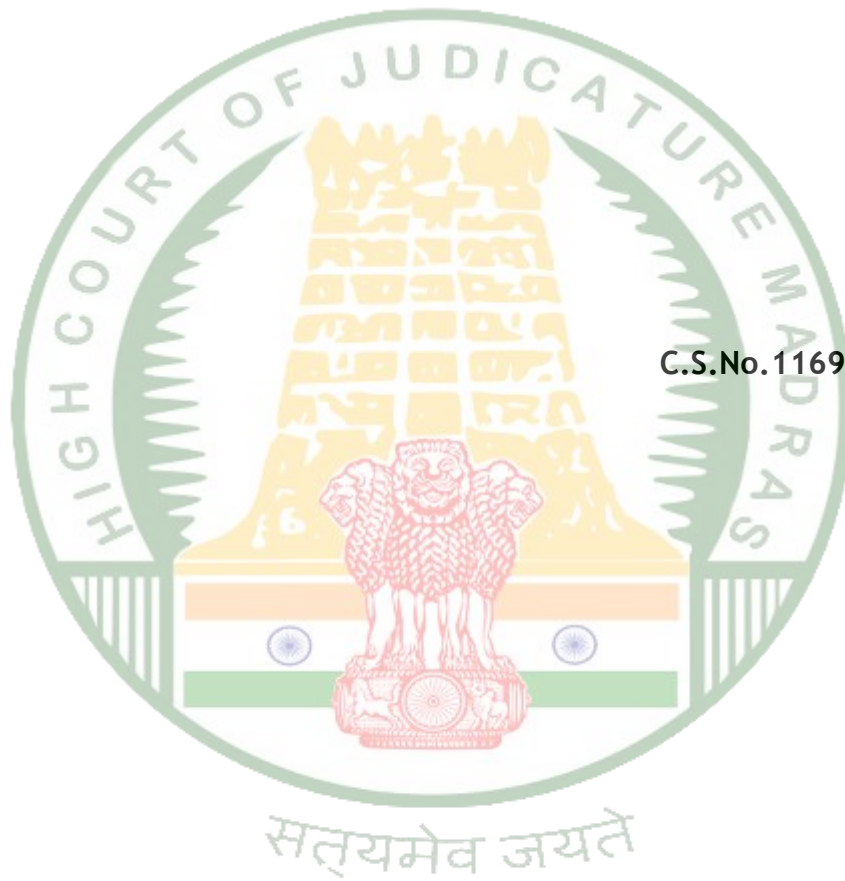
Internet : Yes/ No

Speaking Order/ Non-speaking Order

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C.S.No.1169 of 2009

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