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CMA.No. 731 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.04.2023

CORAM:

THE HONOURABLE MRS. JUSTICE N.MALA

C.M.A.No. 731 of 2023

and

CMP.Nos. 6416, 6418 & 6427 of 2023

Prabhakar Rajan

...Appellant

Versus

1.Ganesan

2.Bakkiyalakshmi

3.Arumugam

Respondents

Civil Miscellaneous Appeal is filed under Order XLIII (i) (r) of the Code of Civil Procedure, prays to set aside the fair and decretal order dated 08.12.2022 passed in I.A.No.2 of 2022 in O.S.No. 128 of 2022 on the file of Additional District Court, Namakkal.

For Appellant : Mr.N. Sivaprakash

For Respondents : No Appearance



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JUDGMENT

This Civil Miscellaneous Appeal is filed seeking to set aside the fair and decretal order dated 08.12.2022 passed in I.A.No.2 of 2022 in O.S.No. 128 of 2022 on the file of Additional District Court, Namakkal.

2. The appellant herein is the plaintiff and the respondents herein are the defendants in the original suit.

3. Though the respondents were served notice and their names are also printed in the cause list, none appears on behalf of the respondent.

4. According to the plaintiff, the property in Survey No. 83/2 and 83/6 Kalappannayakkanpatti Village, measuring a total extent of 3.69 acres, originally belonged to his grandfather late. Karuppa Gounder. Karuppa Gounder died on 03.02.1955 leaving behind him his wife Perumayee and the defendants 1 to 3. Perumayee died on 18.03.2013. According to the plaintiff, the 2nd defendant married some 45 years back and she was given her share by way of Sridhana. The defendants 1 & 3



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entered into an oral partition and the 3rd defendant, the father of the plaintiff was allotted the properties totally measuring 1.83 acres in S.No. 83/2 (1.32 Acres) and in S.No. 83/6 (57 cents). So also the 1st defendant was allotted 1.86 Acres in S.No.83/2 and S.No. 83/6. Ever since the oral partition the plaintiff's father was in exclusive possession and enjoyment of the property allotted to him.

5. While so, on 02.07.1987, the third defendant, the father of the plaintiff, executed a settlement deed on 13.07.2017 settling the property allotted to him in the said oral partition, that is, 1.32 acres in Survey No.83/2 and 51 cents in Survey No.83/6 totally 1.83 acres. According to the plaintiff, in pursuance of the settlement deed in his favour, by the 3rd defendant the plaintiff has been in exclusive possession and enjoyment of the suit properties. The plaintiff further stated that the 1st defendant filed O.S.No.342 of 2019 for partition suppressing the settlement deed in his favour and obtained preliminary decree for partition on 02.03.2021 and that too, without impleading the plaintiff as a party. According to the plaintiff taking advantage of the preliminary decree in favour of the defendants, the defendants tried to interfere with his peaceful possession



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and therefore, the plaintiff was constrained to file the present suit for declaration, injunction and other reliefs.

6. The 1st defendant alone filed the written statement disputing the settlement deed. He further submitted that in pursuance of the preliminary decree passed in O.S.No. 342 of 2019, he had filed IA for passing of final decree and the same was pending. According to the 1st defendant, the third defendant had filed an appeal against judgment and decree in O.S.No.342 of 2019 in A.S.No. 20 of 2021 which was pending before this Court. The 3rd defendant further submitted that the 3rd defendant had no right to settle 1/3 share in favour of the plaintiff, when the properties were still undivided. The 1st defendant therefore submitted that the settlement deed was invalid and not binding on the defendant. Pending the suit, the plaintiff filed the present IA for injunction. Before the Court below in the IA, the plaintiff marked as Ex.P1 to Ex.P13 to prove his possession. The Court below, on an appreciation of the entire materials, rejected the injunction application holding that the plaintiff had not made out a *prima facie* case and also that the balance of convenience was not in favour of the plaintiff.

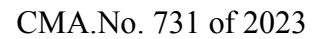


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7. The trial Court dismissed the IA on the sole ground that the injunction petition was filed for 3.69 Acres though the plaintiff was settled only 1.83 Acres in S.No. 83/2 and 83/6 under the settlement deed. The learned counsel for the appellant therefore submitted that he would be satisfied if the injunction is granted to the extent of lands covered under the settlement deed.

8. The learned counsel for the plaintiff/appellant further submitted that the trial Court ought to have given him an opportunity to amend the petition instead of dismissing the application straightaway. In the light of the submission of the learned counsel for the appellant, I am of the view that the plaintiff/appellant should be given an opportunity to amend the petition and prove his possession to the extent covered by the settlement deed. Therefore, the judgment and decree of the Court below in I.A.No. 2 of 2022 is set aside with a direction to the Court below to give an opportunity to the appellant/plaintiff to amend the schedule of the property and thereafter to decide the application on merits and in accordance with law.



21.04.2023

To

1. The Additional District Judge, Namakkal.
2. The Section Officer, V.R. Section,
High Court of Madras, Chennai-600 104.



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N. MALA, J

msm

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