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S.A.No.564 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 18.03.2024

Coram:

THE HONOURABLE Mr. JUSTICE P.B.BALAJI

S.A.No.564 of 2018

Ramasamy

... Appellant

/versus/

1. Varudhappan

2. Sellammal.

.... Respondent

R2 is impleaded vide Court order dated 27.02.2024 made in C.M.P.No.4536 of 2024 in S.A.No.564 of 2018 (PBBJ)

Prayer: Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree dated 22.02.2018 made in A.S.No.35 of 2016, on the file of the Principal District Judge, Namakkal reversing the Judgment and decree dated 08.12.2015 made in O.S.No.244 of 2007 on the file of the Sub Court, Namakkal.

For Appellant : Mr.T.Dhanya Kumar

For R1 : Mr.S.N.Subramani

For R2 : Mr.S.Senthil



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JUDGMENT

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The plaintiff filed a suit for partition seeking $\frac{1}{2}$ share in the suit properties on the ground that the properties were undivided and had been purchased by the father.

2. The said suit was resisted by the brother/defendant against whom the claim was made, claiming that there was an oral partition in the year 1978 and therefore, the plaintiff was not entitled to any right. The trial Court after assessing the pleadings, oral and documentary evidence, dismissed the suit, upholding the oral partition.

3. However, on appeal preferred by the plaintiff, the First Appellate Court allowed the appeal and the suit was decreed by the First Appellate Court in view of the admission of the defendant that there was no document to prove the oral partition in the year 1978.

4. Aggrieved by the same, the present Second Appeal has been preferred by the defendant. Pending the Second Appeal, the sister of the plaintiff and the defendant has sought to implead herself, claiming equal share



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in the suit properties, whether they are self acquired properties or ancestral properties of the father, being one of legal heirs and especially in view of the defence set up by the defendant that they are joint and undivided properties, the daughter also would become entitled to an equal share along with the brothers i.e., sons. The said impleading application was allowed by this Court.

5. The above Second Appeal was admitted on 19.11.2018 and the following substantial question of law was framed:

“Whether the decision of the Lower Appellate Court is vitiated in as much as it failed to consider the findings rendered by the Trial Court regarding oral partition and further without setting aside the findings of the Trial Court?”

6. I have heard Mr.T.Dhanya Kumar, Learned Counsel for the appellant, Mr.S.N.Subramani, Learned Counsel for the 1st respondent and Mr.S.Senthil, Learned Counsel for the 2nd respondent.



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7. It is also brought to my notice that the sister has also filed a suit in O.S.No.65 of 2018 on the file of Subordinate Court, Namakkal, seeking partition of her 1/3rd share.

8. I find from the judgment and decree of the Courts below that even though the defendant had set up a plea of oral partition in the year 1978, he has not been able to successfully establish the said factum of oral partition. That apart while being cross examined, he has specifically admitted that there is no document to evidence the alleged oral partition in the year 1978. In such view of matter, there can be no dispute amongst the parties that the property is joint and undivided and the brothers as well as sister are entitled to an equal 1/3rd share in the suit properties. In view of the present legal position being settled by the Hon'ble Supreme Court in *Vineeta Sharma -vs- Rakesh Sharma* reported in **2020 (9) SCC 1**, the sister is also entitled to an equal share along with her two brothers. Regarding the manner of division of the same, it has to be left open to each of the parties to be agitated during the final decree proceedings.



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9. Accordingly, the judgment of the First Appellate Court is modified in view of the impleadment of the sister pending the Second Appeal and the appellant and the 2nd respondent shall have an equal 1/3rd share in the suit properties and the parties shall be at liberty to work out their rights for separate possession by initiating final decree proceedings. It is also brought to my notice that the sister has also paid Court fees for her share to be declared and therefore, a preliminary decree is passed declaring the plaintiff's 1/3rd share in the suit properties as well as the 2nd respondent's 1/3rd share in the suit properties. The submission of the Counsel for the 2nd respondent/sister that the suit in O.S.No.65 of 2018 will be withdrawn is recorded.

10. In fine, the substantial question of law is answered in favour of the appellant and the Second Appeal is Partly Allowed, granting a preliminary decree of 1/3rd share each to the plaintiff and 2nd respondent. No costs.

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P.B.BALAJI, J.

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2. The Sub Court, Namakkal.

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