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S.A.No.354 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 28.02.2024

CORAM:

THE HONOURABLE MRS. JUSTICE T.V. THAMILSELVI

Second Appeal No. 354 of 2019
and
CMP No. 5168 of 2019

Aswini

.. Appellant

Versus

1.Avaniraj (Died)
2.G.Vimalachini
3.Jayaraj
4.A.Cherom Milan

(R1 died and R4 wasbrought on record as LR
of deceased R1 vide Court order dated
14.07.2023 made in CMP.No.12657 of
2022 in S.A.No.354 of 2019 by TVTSJ.)

.. Respondents

Second Appeal is filed under Section 100 of the Code of Civil Procedure, prayed to set aside the Judgement and Decree dated 03.07.2018 passed in A.S.No.295 of 2016, on the file of the III Additional City Civil Court, Chennai, partly allowing the appeal and by modifying the judgment and decree dated 31.03.2016 made in O.S. No. 13852 of 2010 on the file of the XVI Assistant Judge, City Civil Court, Chennai.

For Appellant	:	Mr.R.Muruga Bharathi
For R1	:	Died
For R2	:	Mr.M.Manohar
For R3	:	Mrs. V. Srimathi
For R4	:	Mr. D. Rajarajan



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J U D G M E N T

WEB COPY This appeal has been filed to set aside the Judgement and Decree dated 03.07.2018 passed in A.S. No. 295 of 2016, on the file of the III Additional City Civil Court, Chennai, partly allowing the appeal and by modifying the judgment and decree dated 31.03.2016 made in O.S. No. 13852 of 2010 on the file of the XVI Assistant Judge, City Civil Court, Chennai.

2. The appellant herein is the plaintiff, who has filed the suit in O.S. No. 13852 of 2010 against her brother and sister for the relief of partition claiming 1/4th share in A-Schedule property. Subsequently by way of amendment B-Schedule property was included in which also she claimed 1/4th share. According to the appellant, both the properties belongs to his father. After the A-schedule property was purchased by her father in the year 1997 from Tamil Nadu Housing Board. Further, she would submit that B-Schedule property belongs to her father by way of partition in which also she is entitled 1/5th share. It is stated that the father of the appellant died on 26.05.2007 leaving behind her mother, son and daughters (plaintiffs and defendant). Subsequently, her mother also died in the year 2010 leaving behind the plaintiff and defendants to succeed to their estate. In A-Schedule property the



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plaintiff and defendants are entitled to equal share, but the defendants joined together and did not allow the plaintiff to enjoy the property. The defendants are collecting the rent from the 1st floor of the suit property till the date of filling of the suit, after filling of the suit, they have not received the rent of Rs.10,000/-, therefore in the rent arrears she is entitled 1/4th share.

3. The defendants contested the case by filling their written statement, admitted the relationship but denied the plaintiff's claim for 1/4th share in the A-Schedule property. According to the 3rd defendant, he took care of his mother till her demise and out of love and affection she gave him 1/5th undivided share in A-Schedule property and accordingly he is entitled to 2/5th share in A-schedule property. In B-schedule property the third defendant claimed that he is having 1/4th share. Further he would submit that he is maintaining the entire property by receiving rent and therefore, he denied the claim of the plaintiff for division of properties.

4. On considering both side submissions, the learned trial Judge concluded that the plaintiff is entitled for 1/5th share in A-schedule property. It is also held that the settlement deed executed by the mother in favour of



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third defendant has not been acted upon for the reason that as per the evidence of D3/D.W.1 his mother collected rent till her demise, thereby it was held that settlement deed was not acted upon. Accordingly the plaintiff was allotted 1/4th share in A-schedule property. In B-schedule also the trial court allotted 1/4th share..

5. Aggrieved by the same, the 3rd defendant has preferred an appeal in A.S.No.295 of 2006, wherein the First Appellate Judge, after analysing the oral and documentary evidence held that as per the terms of settlement deed / Ex.B1, mother collected rent till her life time and gave absolute right to the third defendant, therefore till her life time she collected the rent, after her demise the third defendant become absolute owner of the property. Accordingly 2/5 share was given to the third defendant in A-Schedule property and 1/4 share in B-schedule property, thereby the appeal was allowed. In respect of the shares in the rent claimed by the plaintiff, it was not accepted by both the Court belows stating that, in respect of mesne profit of Rs.2,500/- received as rent it is equivalent to 1/4th share and accordingly, both the Courts below directed the plaintiff to work out the remedy by initiating separate proceedings to recover the mesne profits. Aggrieved by the



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Judgment and Decree of the First appellate Court in A.S. No. 598 of 2016, the

plaintiff/appellant has preferred this appeal.

6. At the time of admission of this appeal, the following questions of Law have been framed for consideration and they are as follows:

“1. Whether the first appellate Court erred in law in reducing the partition share of the appellant from 1/4th to 2/5th based on Ex.B1. ?

2. Whether Ex.B1 Settlement deed is acted upon and a valid document ?

3. Whether the findings of the first appellate Court are perverse ?

4. Whether the first appellate Court erred in law in reducing the share of the property of the appellant herein from 1/4th share to 2/5th share ?

5. Whether the plaintiff is entitled to the mesne profits of the rental and lease amount in the suit property ?”

7. On considering both side submissions, it is evident that both the parties admit their relationship. They also admit that the property originally belongs to Kuppusmy, father of the appellant-plaintiff. It is also admitted that A.-schedule property was purchased by father of the plaintiff/appellant out of



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his self earned funds. Therefore, on the death of the father of the plaintiff, the plaintiff, the defendants and the wife of Late. Kuppusamy (widow) are each entitled 1/3 share in the property. According to the third defendant, during the life time of his mother, she executed a settlement deed/Ex.D1, but according to the plaintiff, the so called settlement deed has not been acted upon. So the genuineness of the settlement deed was not totally denied by the appellant-plaintiff. However, during the evidence of DW3 he has stated that till the life time of his mother in the year 2007, she collected rent and thereafter, he received rent in which the plaintiff is claiming 1/4th share rent of Rs.10,000/- from the 1st floor. However, the the learned trial Judge without considering the said admission, erroneously concluded that the settlement deed was not acted upon but the First Appellate Judge rightly concluded that the settlement deed was acted upon thereby allotted 2/5th share to the 3rd defendant as such it is valid. Accordingly, questions of law 1 to 4 are answered.

8. In respect of the claim for share in the monthly rent from the A-schedule property it is admitted that 1st floor was rented to third party. The rent was collected by the mother till her life time and after her demise from the year 2008, the 3rd defendant is receiving the rent. This fact is not denied



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by the 3rd defendant. However, he contended that by utilizing the said amount he is maintaining the building and providing other amenities. However, there is no proof forthcoming from the 3rd defendant to show that he had carried out maintenance to the property. But he admits that for the 1st floor he is receiving a sum of Rs.10,000/- as monthly rent. In the light of such admission, it has to be held that out of Rs.10,000/- the 1st plaintiff is entitled 1/5th share i.e., Rs.2000/- per month from the year 2008 onwards. But both the Courts below held that in respect of mesne profit the appellant-plaintiff has to initiate separate proceedings. When there is an evidence on the side of the 3rd defendant that he received rent of Rs.10,000/-, the plaintiff is entitled for 1/5th share in the rent received by the third defendant. Hence, there is no necessity for the appellant-plaintiff to initiate separate proceedings because already the third defendant is receiving rent Rs.10,000/- and it is also admitted by him. While so, driving the appellant-plaintiff to initiate separate proceedings to recover the mesne profits is not warranted. Accordingly, the findings of the Court belows in respect of means profit is set aside. Consequently, it is held that the plaintiff is entitled for a sum of Rs.2,000/- from July 2010 onwards as her mother died on 26.06.2010. Accordingly, question of law No.5 is answered.



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WEB COPY 9. In the light of the above, the Judgement and Decree dated 03.07.2018 passed in A.S. No. 295 of 2016, on the file of the III Additional City Civil Court, Chennai is modified and this Second appeal is partly allowed. The plaintiff/appellant is entitled for 1/5th share, the 1st defendant is entitled 1/5th share, 2nd defendant is entitled 1/5th share and the 3rd defendant is entitled 2/5th share in A-schedule property. In B-schedule property the plaintiff and defendants are entitled 1/4th share each. In respect of mesne profit, the plaintiff is entitled for a sum of Rs.2000/- per month from July 2010 till the date of realization which is payable by the third defendant. Consequently the connected Miscellaneous petition is closed. No Costs.

28.02.2024

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Index : Yes/No

Speaking Order: Yes/No

Neutral citation: Yes/No



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WEB COPY To

- 1.The III Additional Judge, City Civil Court, Chennai.
2. The XVI Assistant Judge, City Civil Court, Chennai.
- 3.The Section Officer, VR Section,
High Court of Madras.



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T.V.THAMILSELVI, J.

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