

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated:-31-12-2004

Coram:-

The Hon'ble Mr. Justice P. SATHASIVAM  
and  
The Hon'ble Mr. Justice AR. RAMALINGAM

Civil Misc., Appeal No. 198 of 1997

1. V. Munusamy (deceased)

2. M. Navaneetham,

3. M. Geetha,

4. M. Latha.

5. A.M. Bhalaji.  
(Appellants 2 to 5 brought on record  
as Legal Representatives of the  
deceased sole appellant as per order  
of Court dated 1-12-2004 in  
CMP.13259/04)).

..Appellant/  
Defendant.

Vs.

M. Suguna.

.. Respondent/  
Plaintiff.

Civil Misc., Appeal is filed under Order 43, Rule  
10 of Code of Civil Procedure against judgment and decree in  
A.S.No. 393/89 dated 30-4-1992 on the file of II Additional  
Judge, City Civil Court at Madras.

For appellants:- Mr. T.R. Mani, Senior counsel  
for Mr. S. Senthilnathan.

For Respondent:- Mr. G. Ravishankar.

## JUDGEMENT

(Judgement of the Court was delivered by P. Sathasivam,J.)

The above Civil Miscellaneous Appeal has been directed against the order of the II Additional Judge, City Civil Court, Madras dated 30-4-1992 made in A.S.No.393/89 wherein the learned Judge remanded the suit to the trial Court (III Assistant Judge, City Civil Court, Madras) for fresh disposal in conformity with Section 4 (1) of the Partition Act. First defendant in I.A.No.9105/81 on the file of 3rd Assistant Judge, City Civil Court, Madras is the appellant in the above appeal. The respondent herein/plaintiff filed the said suit for partition. The suit property is a building bearing Door No. 70/1, New No.13 in Sundaraja Perumal Koil street, Peravellore, Madras-82, originally belonged to one Athiammal. She executed a settlement deed on 19-2-1951 in respect of the said property in favour of defendants 1 and 2 who are brothers. They were residing in a portion of the suit building and had let out the remaining portions to defendants 3 to 9. The first defendant has not amenable to give due share to the 2<sup>nd</sup> defendant in the suit property; accordingly, the 2<sup>nd</sup> defendant went out of the same and to live in his wife's house. The second defendant offered to sell his half share in the suit property to the plaintiff, who agreed to purchase the same. Accordingly, the share of the 2<sup>nd</sup> defendant was conveyed by him on 22-5-81 in favour of the plaintiff for a consideration of Rs.20,000/-. After purchase, the plaintiff issued lawyer's notice to the first defendant calling upon him to effect partition of the suit property in to two half shares. Since the same was not acceded to, the plaintiff filed the said suit.

2. The suit was resisted by the first defendant by filing written statement. Ultimately, by judgement and decree dated 25-3-83, a preliminary decree was passed for partition and separate possession of half share in the property in favour of the plaintiff. सत्यमेव जयते

3. After the preliminary decree, the first defendant filed I.A.No.7745/87 under Section 4 (1) of the Partition Act before the 6<sup>th</sup> Assistant Judge, City Civil Court, Madras to ascertain the value of the share of the plaintiff in respect of the dwelling house of the petitioner therein/1st dwefendant situated at No.13, Sundararaja Perumal Koil street which is the subject matter of the partition suit in O.S.No. 9105 of 81. The said application was contested by the respondent therein/plaintiff by filing counter statement. Learned III Assistant Judge, City Civil Court, Madras, after considering the rival contentions, ultimately allowed the application filed under Section 4 (1) of the Partition Act.

Questioning the same, the respondent therein/plaintiff filed an appeal in A.S.No. 393/89 before the II Additional Judge, City Civil Court, Madras. The appellate Judge allowed the appeal, set aside the decree and judgement of the trial Court and remitted the matter back to the trial Court for fresh disposal according to law and in conformity with Section 4 (1) of the Partition Act. Questioning the said order of remand, the first defendant/appellant herein has preferred the present appeal. Pending disposal of the appeal, the sole appellant died and in his place his legal heirs, namely, appellants 2 to 5 were brought on record as per the order dated 1-12-2004 made in C.M.P.No. 13259 of 2004.

4. Heard Mr. T.R. Mani, learned senior counsel for the appellants and Mr. G. Ravishankar, learned counsel for the respondent.

5. The only point for consideration in this appeal is, whether the appellate Court is justified in remanding the matter to the trial Court for fresh disposal?

6. There is no dispute that the preliminary decree dated 25-3-83, granting half share in the suit house in favour of the plaintiff and the first defendant has become final, since no appeal has been filed against the same. Inasmuch as the plaintiff being a third party who purchased the share of the second defendant who is none-else than the brother of the first defendant, the other sharer, namely, first defendant filed a petition under Section 4 (1) of the Partition Act, 1893 (in short "the Act"). The said provision reads as under:-

"Section 4. Partition suit by transferee of share in dwelling-house.- (1) Where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf.

Section 4 (1) of the Partition Act involves the following aspects:

- i) The property shall be a dwelling house;
- ii) It shall remain as an undivided family property;
- iii) The member of such undivided family should have sold his share of the dwelling house to a transferee such a transferee should be a third party;

v) There shall be an undertaking by the other shareholder to undertake to buy the share purchased by such a transferee in terms of Section 4(1) of the Partition Act;

vi) Thereupon the Court shall direct the sale of such share by the transferee to such a shareholder.

7. Based on the averment in the affidavit filed in support of I.A.No.7745/87, filed under Section 4 (1) of the Act, the trial Court, after satisfying itself, gave a finding that the petitioner therein/appellant herein is entitled to purchase the suit property. Such finding satisfies one of the conditions prescribed under Section 4 (1) of the Act. No doubt, the trial Court has not arrived the value of the share purchased by the transferee i.e., plaintiff. However, as rightly pointed out by the learned senior counsel for the appellant, on this ground the lower appellate court set aside the order of the trial Court, including the finding of the entitlement of the appellant to purchase undivided share alienated by the family member to stranger alienee. As rightly argued, the principles underlying the exercise of the power of remand by the appellate court has not been properly applied or exercised by the lower appellate court. Courts have held that only in exceptional cases where the judgement of the trial court is wholly unintelligible or incomprehensible the appellate court can remand the matter for fresh disposal. Order 41, Rule 23 give ample power to the lower appellate court to decide all issues, including appointment of a commission for local inspection, secure finding from the trial Court. Even if certain mistakes crept in in the order of the trial court, the same can be rectified by the appellate court itself, unless there are very compelling circumstances to make an order of remand. An order of remand should not be taken to be matter of course and the power of remand should be sparingly exercised. There should be always endeavour to dispose of the case by the appellate court itself, when the commissions and omissions made by the first Court could be corrected by the appellate Court. In the case on hand, even if there is omission by the trial Court regarding determination of the value of the share purchased by the plaintiff, in the light of the above discussion coupled with the mandate provided under Order 41, Rule 23 and 27, the appellate court itself can ascertain the value either by appointment of a Commissioner or by getting a report from the trial Court. As said earlier, Section 4 (1) of the Act gives option to any member of the family who is a co-sharer in respect of a dwelling house, a portion whereof has been transferred to a person who is not a member of such family, to purchase the share of such transferee if a suit for partition is filed by that transferee. On such



option being exercised, the valuation of such share has to be determined. The crucial date for the purpose of fixing the valuation of the share of such transferee is the date when option to purchase in accordance with Section 4 of the Act is exercised by the defendant-co-sharer.

8. In the light of our discussion, we are of the view that the lower Appellate Court committed an error in remanding the matter to the trial Court; accordingly we set aside the judgement dated 30-4-1992 in A.S.No. 393 of 1989 and restore the appeal on its file. The II Additional Judge, City Civil Court, Madras is directed to dispose of the appeal on merits as indicated above, after affording opportunity to both parties. Since the I.A. under Section 4 (1) of the Act is pending from 1987, the lower Appellate Court is directed to dispose of the matter within a period of four months from the date of receipt of a copy of this order. Civil Miscellaneous Appeal is allowed. No costs.

This Appeal having been posted on this day [i.e] 04.3.2005 for "Being Mentioned" in pursuance to the order of this court dated 31.12.2004 and made in CMA.No.198 of 1997 in the presence of the aforesaid Advocates the court made the following Order:

At the instance of the learned counsel for the respondent, the above appeal is posted today for "Being Mentioned".

2. After hearing the learned counsel on either side, we are of the view that no further clarification is required, more particularly with reference to the observation made in para 7 of our order, in view of the fact that we have already said in para 8 that it is for the court below to dispose of the appeal on merits.

Sd/  
Asst.Registrar

/true copy/

Sub Asst.Registrar

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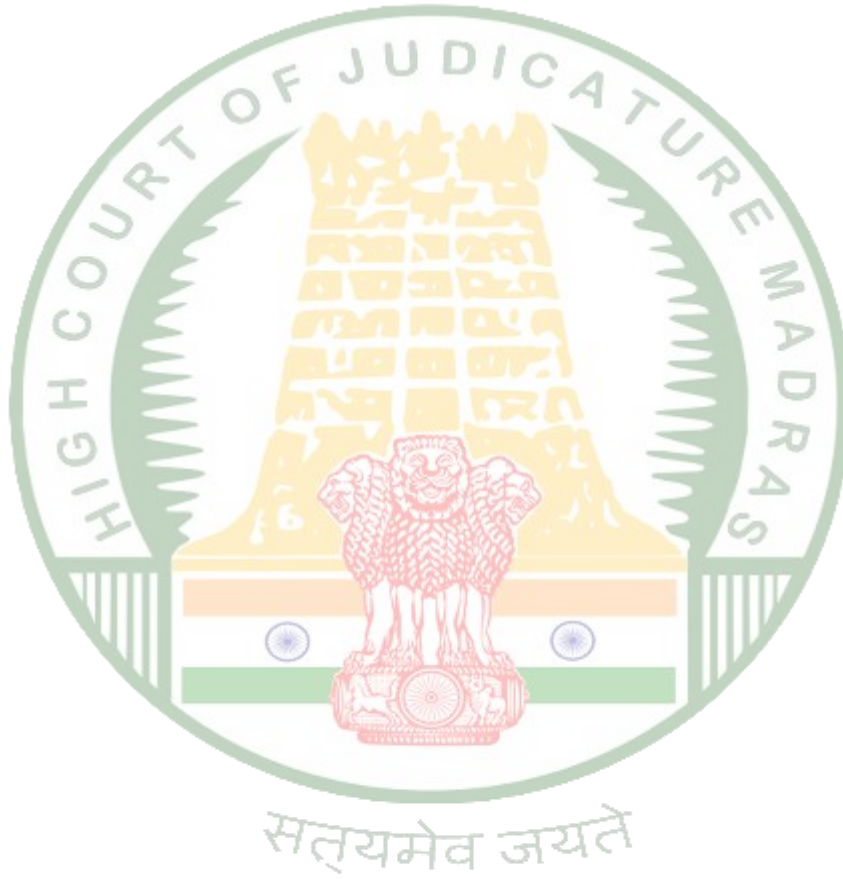
1. The Registrar,  
City Civil Court, Madras

DATED: 31.12.2004 / 04.3.2005

CMA.No.198 of 1997

PV [co]

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