

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 02.12.2016

Judgment pronounced on : 16.12.2016

CORAM:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

C.M.P.No.15705 of 2016

in

S.A.No.71 of 2006

Hamsa Bai (deceased)

1. N.Jayagopal
2. J.Murali
3. Nirmala
4. J.Prakasam alias Seshachalam
5. Selvam alias Narasimhalu Petitioners

Versus

1. D.Dharani Bai alias Prema
2. Tharagaraman Respondents

Prayer: Civil Miscellaneous Petition filed under Section 151 of the Civil Procedure Code to pass a fresh preliminary decree by recalling the preliminary decree passed in the above Second Appeal No.71 of 2006 dated 23.03.2011 wherein it was prayed that this Hon'ble Court may be pleased to set aside the Judgment and Decree of the XVII Assistant City Civil Judge at Chennai dated 07.09.2001 made in O.S.No.7792 of 1997 as confirmed in A.S.No.48 of 2003 on the file of the VII Additional City Civil Court at Chennai dated 22.01.2004.

For Appellants : Mr.A.Muthukumar

For Respondents : Mr.A.S.Narasimhan for R1
Mr. R.Rajesh for R2

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ORDER

This petition is filed to pass a fresh preliminary decree by recalling the preliminary decree passed in the above Second Appeal No.71 of 2006 dated 23.03.2011.

2. This petition is taken out by the legal representatives of the deceased second respondent in the second appeal for

recalling the preliminary decree passed by this Court on 23.03.2011 and to pass a fresh Preliminary Decree in view of the alleged suppression of fact regarding the sale deed executed by the second respondent and his mother Pushpavathi on 21.04.1986, in favour of Hamsa Bai, the second defendant in the suit. The said suppression of fact amounts to fraud played on the Court and therefore it is liable to be set at naught at any point of time in any proceedings as laid down by the Hon'ble Supreme Court in the case of Kuldip Singh and P.B.Sawant, JJ. in S.P.Chengalvaraya Naidu Vs.Jagannath (AIR 1994 Supreme Court 853).

3. The subject matter of the suit is the property purchased by one Govindasamy Naidu, vide sale deed dated 16.04.1964. The total extent of the property is one ground and 2200 sq.ft. The said Govindasamy Naidu died on 01.10.1964 leaving behind his wife Pushpavathi and son Tharanga Raman and two daughters by name Hamsa Bai and Dharani Bai. Pushpavathi died on 11.09.1994 and one of her daughter Dharani Bai filed suit in O.S.No. 7792 of 1997 for partition claiming 1/3rd share in the above mentioned property. Her brother Tharanga Raman and her sister Hamsa Bai were arrayed as defendants 1 & 2 respectively. From the judgment of the trial Court, it appears that the first defendant Tharanga Raman has filed the written statement contending that the partition suit has to be dismissed on two grounds. i) the plaintiff and the second defendant had relinquished their right over the property by release deed dated 17.02.1977 and ii) the first defendant is in possession of the property and enjoyment of it absolutely adverse to the plaintiff.

4. The trial Court dismissed the suit accepting the plea of the first defendant that, the plaintiff and the second defendant had released their right over the property in favour of the first defendant Tharanga Raman. Aggrieved by that, the plaintiff Dharani Bai has preferred appeal before the VII Additional Judge, City Civil Court, Chennai in A.S.No. 48 of 2002 wherein the first appellate Court, relying upon Ex.B1 & Ex.B2, dismissed the appeal and confirmed the judgment and decree of the trial Court.

5. In the second appeal stage, the first respondent has introduced a new fact pleading that his mother Pushpavathi executed a Will dated 14.01.1994 in his favour in respect of the property and she died on 11.09.1994. This Court, pointing out that this Will was not produced before the Courts below and not been probated. While considering the plea of the counsel for the first defendant to give an opportunity and liberty to prove the Will and to get it probated, this Court has observed as under.

" 7. While admitting the non-production of the Will or probating the same, the learned senior counsel

for the first defendant would point out that if liberty is given to the parties concerned to get the Will probated and prove it, the same would be carried out, and for that course, he seeks for remanding the matter to the lower court, for which the learned senior counsel for the plaintiff would submit that since much water has flown under the bridge, it is too late in the day on the part of the first defendant to make such a prayer and thereby try to set the clock back.

10. The factum of not getting the Will probated and also producing the same to prove it in accordance with Section 68 and 69 of the Indian Evidence Act is fatal to the case of the first defendant, because the first defendant cannot contend that as per the Will, he became the absolute owner of the entire extent of the suit property after his mother relinquished her half share in the suit property. No more elaboration in this regard is required.

11. In the litigative process, once a party fails to take appropriate steps at the appropriate stage, then the question of giving one more opportunity so as to capitalise the defaulting parties own lapses would not arise. There is no rhyme or reason on the part of the first defendant in getting the Will probated and producing it before the Court to prove it as per Section 68 and 69 of the Indian Evidence Act. In this context, I recall the legal maxim *Affirmanti non neganti incumbit probatio*. The burden of proof lies upon him who asserts and not upon him who denies".

6. Hence, a preliminary decree was passed to the effect that the plaintiff will be entitled for 1/6th share in the suit property. The second defendant who died pending the second appeal and legal representatives were not brought on record, in view of giving up by the appellant they are entitled for 1/6th share and the first defendant is entitled to 4/6th share. When the question was raised by the counsel for the first defendant on the share of the second defendant who died pending the second appeal but not been represented by her legal representatives, this Court has made the following observations .

"13. The learned senior counsel for the first defendant would raise a legal question as to what would happen to the share of the second defendant, who had given up her share before this Court because she was set *exparte* before the trial Court. I would like to

observe and hold that this is a suit for partition. As revealed from the representation of both sides, the second defendant died leaving behind her legal heirs. Since the second defendant did not choose to contest the matter, whatever be her share in the property, her legal heirs would be entitled to the same on the death of the second defendant. During the final decree proceedings, the same would be allotted to them by metes and bounds. Therefore, it is open to the plaintiff to implead the legal heirs of the second defendant in the final decree proceedings and it is for the court to allot the share of the second defendant in favour of her legal heirs and they have no independent right to contest the suit because partition suit is entirely on a different footing. Accordingly the final decree proceedings should follow".

7. Accordingly, in pursuant to the preliminary decree passed by this Court, the plaintiff who is the decree holder, has moved the Court below for passing final decree. The said application is numbered as IA 17283 of 2011. In this application, the legal representatives of the second defendant are also arrayed as respondents.

8. Pending final decree applications, the petition is filed by the legal representatives of deceased second defendant Hamsa Bai. Their main contention in this application is that after release of their rights by their mother Hamsa Bai and the plaintiff Dharani Bai in favour of Pushpavathi and Tharangaraman in the year 1997, the property was in possession and enjoyment of Pushpavathi and Tharanga Raman and during her life time, Tharanga Raman and Pushpavathi jointly sold 3206 sq.ft of the suit property to their mother Hamsa Bai vide, sale deed dated 21.04.1986. This fact was suppressed by the plaintiff and the first defendant and a fraudulent decree had been obtained by suppression of the above fact, leading to miscarriage of justice.

9. In support of the above submissions, the petitioners have filed a detailed typed set of papers containing the earlier proceedings and deposition of the parties in the present suit and the subsequent applications taken out by the petitioners as well as the first defendant in the final decree proceedings.

10. The petitioners who are legal representatives of the deceased second defendant can have no better pleadings than the second defendant pleaded or failed to plead in the suit. The petitioners have conveniently and without any compunction allege against the plaintiff and the first defendant for suppression and fraud. This Court fails to understand when their mother

Hamsa Bai was arrayed as second defendant and was served notice in the suit, why she did not submitted this fact before the Court?. If she was really interested in contesting the suit and if the so called sale deed dated 21.04.1986 was genuine and truly executed in her favour by her mother Pushpavathi and brother Tharanga Raman, she should have been the first person to bring that fact to the notice of the Court. The person who had personal knowledge of the sale deed had conveniently remained ex-parte all throughout, till her life time. Whereas her legal representatives who are not parties to the transactions have filed this application on 20.08.2014 made waiting till the disposal of the second appeal.

11. This application is filed alleging fraud against the plaintiff. This Court could not see any reason or justification in the said allegation. The first defendant and the second defendant as well as their deceased mother Pushpavathi alone were parties to the alleged sale deed dated 21.04.1986. The plaintiff was not at all party to the document. It is not stated as to how plaintiff came to know about the sale transaction, when she was not put to notice about this transaction even after she issued a pre-suit notice to both the defendants on 18.08.1987 and 16.09.1997 and when the mother of the petitioner's conveniently remained absent without filing written statement and participating in the trial, the legal representatives of second defendant cannot plead and allege fraud against the plaintiff who is not a party to the sale deed.

12. The petitioners counsel referring a portion of the reply notice issued by the first defendant, contented that the plaintiff was aware of the sale in favour of the second defendant. In the said reply notice, dated 26.08.1997 which is marked as Ex.A.5, the first defendant has stated as under

"Thereafter my clients mother and my client sold a portion of the said property for clearing the loans incurred for the marriage of your client."

13. The above portion extracted does not carry any particulars regarding the date or details about the purchaser or the extent sold by the first defendant.

14. The petitioner without any basis alleges against the plaintiff suppression of sale deed which is neither disclosed in their pre suit notice nor in the pleadings or during the oral evidence of the first defendant. A party cannot be litigating a partition suit by suppressing materials facts touching upon the share on right division and put the plaintiff on shock and surprise at every level of litigation.

15. The first defendant and the second defendant has not whispered anything about the alienation of 2306 sq.ft of land to the second defendant. Similarly, the second defendant has not come before this Court to produce the said sale deed and plead that out of 4600 sq.ft of land, which is subject matter of the suit, she had purchased 2306 sq.ft of land from her mother and brother, vide sale deed dated 21.04.1986. If at all, the petitioners have any grievance of fraud or suppression, they should only blame their own mother and the first defendant for whom they are now making hue and cry to deprive the plaintiff from enjoying her share of property left by her deceased father.

16. The Plaintiff's prime allegation against the defendants who are her brother and sister, is that they both in collusion trying to deprive her share in the property. The first defendant had contested the suit by filing written statement, giving oral evidence and marking documents. His first contention and theory to dislodge the right of the plaintiff was that the plaintiff and the second defendant had already released their share in favour of their mother Pushpavathi, by a registered release deed dated 17.02.1977. This deed itself was not produced before the Court to test as to whether it is obtained under misrepresentation as alleged by the plaintiff or a genuine one. However, Courts throughout have accepted this document and proceeded further.

17. The second theory placed by the first defendant is that his mother executed a Will to him on 14.01.1994 in respect of her share. This Will was also not produced nor pleaded, except a statement mentioning in the reply notice dated 26.08.1997. The relevant portion is extracted below:-

"My client further states that his mother Pushpavathi had under a Will dated 14.01.1994 bequeathed her share in the said property to my client. My client's mother Pushpavathi died on 11.09.1994".

18. This Will, till date, has not seen the light of the day and that is the reason why this Court, while disposing of the second appeal, has made the observations which is extracted at para 4 of this order.

19. The third theory brought out by the first defendant through legal representatives of the second defendant, is that he and his mother sold away substantial portion of the suit land to the second defendant as early as on 21.04.1986.

20. It is pertinent to note that based on this so called sale deed, the first defendant and legal representatives of the second defendant have already filed their counter before trial Court in the final decree proceedings. The copy of it was also

furnished by the petitioner. These counters carry the theory of so called sale deed dated 21.04.1986 burged so long by the petitioners mother and the first defendant. After filing the counter before trial Court in 2013, with the very same theory. The petitioners have preferred this application on 20.08.2014, that is nearly one and a half years later, alleging fraud and to set aside the preliminary decree. The false hood in the petition can be placed under three heads. The petitioner's mother died on 18.11.2008 pending second appeal. She has not chosen to claim right over the suit property based on the sale deed executed in her favour as early as in 1986. The petitioners cannot plead ignorance of the suit till they were impleaded as respondents in the final decree application. They are only legal representatives of the deceased second defendant. It is the second defendant who is the alleged title holder of the portion of the property under a sale deed is a right person whom ought to have brought to the notice of the Court about her title over the portion of the suit property. By remaining absent, she has extinguished her right.

21. This Court's is of the view that if at all there is any fraud to be attributed, it is primarily on the first defendant for deliberately suppressing documents and vital facts and equally the deceased second defendant who had actively connived with first defendant, by remaining ex-parte. The defendants have failed to place the factum of the so called sale deed for judicial scrutiny. The said sale deed was within their knowledge and when they were given an opportunity to place it before the Court, the first defendant has not furnished details about the sale transaction. More particularly, the purchaser being the second defendant and her own sister, is it not the duty of the defendants, who are the purchaser and the buyer of the portion of the disputed property to inform the plaintiff through their pleadings before the Court. The second defendant and the first defendant are now suffering for their own fault of suppression of fact. Neither the first defendant nor the petitioners who are the legal representatives of the second defendant can try to take advantage of their own fault. No indulgence can be shown by this Court, that too on recklessness allegation of the fraud against the plaintiff.

22. It is evident by the conduct of the petitioners and the first defendant in the suit that they are trying to stall the final decree proceedings based on a document, which was deliberately suppressed by them all along. The omission on the part of the second defendant to plead and prove the alleged sale deed renders her right based on the alleged sale deed otiose by acquiescence and extinguish of right, if any. The legal representatives cannot rely on this deed when the parties to the document consciously omitted to place before the Court at the

earliest point of time. In a partition suit, where all the parties are to be treated as plaintiff, omission on the part of one of the party cannot be filled up by their legal heirs. More so, when the petitioner in the final decree application, had already filed their counter in February 2013 and contesting the very same point. This Court cannot decide the same issue simultaneously. It is the law as well as prudent that the lowest Court to decide any matter in dispute at the first instance.

23. Therefore, if the plea of the petitioners is entertained at this stage by this Court, it will amount to granting concession to a party who has withheld the document within his knowledge and possession. Suppressing facts within their knowledge, despite notice, allowing the Court to proceed with available materials placed before it and thereafter filing petition to reopen and re agitate the case based on the facts and materials knowingly withheld is totally impermissible.

24. What Hamsa Bai failed or omitted to plead cannot be done by the petitioners belatedly as legal representative of Hamsa Bai. Unless they could prove that the fact sought to be introduced was not known to Hamsa Bai or she was for reasons prevented from placing it before the Court. In this case, Hamsa Bai is the purchaser. While so the petitioner can at no stretch of imagination say their mother was not aware of the sale deed in her favour. For the above said reasons, this Court finds no merit in this application. Therefore this application is dismissed. No costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

dpq

To

1.The VII Additional Judge,
City Civil Court,
Chennai.

2.The XVII Assistant Judge,
City Civil Court,
Chennai.

Copy To

The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.A.Muthukumar, Advocate, S.R.No.73951

C.M.P.No.15705 of 2016
in
S.A.No.71 of 2006

MV(CO)
CA(25/01/2017)



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