

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.11.2016

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

A.S.No.778 of 2009

1.D.Rani
2.Kasthuri
3.G.S.S.Janakiraman ... Appellant/Plaintiffs

Vs

1.U.Narasimhan
2.Lakshmi
3.S.Nagarani ... Respondents/Defendants

R3 impleaded as party respondent
vide order of the court dated 14.11.16
made in CMP.No.16206/2016 in
A.S.No.778/2009

This appeal is filed under Section 96 of Civil Procedure Code against the judgement and decree dated 02.12.2008 passed in O.S.No.5617 of 2007 on the file of Additional District Judge, Fast Track Court-V, Chennai.

For Appellants : Mr.H.Adaikala Arockiaraj
For Respondents : Mr.Senthilnathan

J U D G E M E N T

The un-successful plaintiff in O.S.No.5617 of 2007 on the file of Additional District Judge, Fast Track Court-V, Chennai is the appellant in the above appeal. The said suit was filed seeking partition of 3/5 share of the three plaintiffs i.e. 1/5 each in the suit properties.

2. It is an admitted case that the suit property belonged to late Umapathy Mudaliar, who died on 8.12.1982 leaving behind five daughters and one son. According to the plaintiffs, plaintiffs 1 and 2 are daughters and the 3rd plaintiff is son of one of the deceased daughter and other children of Umapathy Mudaliar were already given their share, the plaintiffs are entitled to 1/5 share each since Umapathi Mudaliar had died intestate.

3. The suit was resisted by the defendants, who are the son and grand daughter, through another deceased daughter, of Umapathi Mudaliar claiming that the said Umapathy Mudaliar did not die intestate. He left behind a registered will dated 15.4.1982 and upon an application by the first defendant in O.P.No.205 of 1988, this Court has granted probate of the said Will by order dated 21.06.1988.

4. The defendants would further contend that the plaintiffs are not entitled to maintain the suit. They would also contend that the suit is bad for non-joinder of necessary parties, namely two other daughters of Umapathi Mudaliar namely, Lakshmi and Sundari, whose existence is admitted. On the above pleadings, the learned Additional District Judge, Fast Track Court-V, Chennai framed the following issues:

1)Whether the plaintiffs are entitled 1/5th share each in the suit property?

2)Whether they are entitled for a permanent injunction as against the 1st defendant?

3)To what other reliefs the plaintiffs are entitled to?

5. The plaintiffs were examined as PWS1 to 3 and Exs.A1 and A2 were marked. Defendants were examined as DWs.1 and 2 and Exs.B1 to B10 were marked.

6. The learned Additional District Judge, Fast Track Court-V, Chennai, upon consideration of the both oral and documentary evidence came to the conclusion that the plaintiffs are not entitled to any share, in view of the Will executed by Umapathy Mudaliar on 15.04.1982 which was duly probated

7. The learned Additional District Judge, Fast Track Court-V, Chennai also dealt with the other issues and found that the plaintiffs have not established their claim. Upon the aforesaid findings, the learned Trial Court Judge dismissed the suit. Aggrieved by the dismissal of the suit, the plaintiffs have filed the above appeal.

8. I have heard Mr.H.Adaikala Arockiyaraj, learned counsel appearing for the appellants and Mr.S.Senthilnathan, learned counsel appearing for the respondents.

9. It appears that the suit property was sold by the 1st defendant to one Ngarani pending disposal of the suit. Upon an application in CMP.No.16206 of 2016, she was impleaded as 3rd respondent in the appeal. It is now claimed by Mr.H.Adaikala Arockiaraj, learned counsel appearing for the appellants that the application filed by the plaintiffs for revocation of the probate

granted in O.P.No.205 of 1988 dated 21.06.1988, is pending on the file of the Original Side of this Court in application No.4157 of 2008.

10. The learned counsel for the appellants would contend that in view of pendency of the above application for revocation of the Will, share of the plaintiffs should be declared. Per contra, Mr.S.Senthilnathan, learned counsel appearing for the respondents would submit that as of today, there is a Will, which has been probated in accordance with law and the same will be valid and binding on all the legal heirs. Therefore, there is no question of granting a preliminary decree for partition, since the plaintiffs are not legatees under the Will. He would further contend whatever was directed to be paid by Umapathy Mudaliar to the plaintiffs 1 and 2 and mother of the 3rd plaintiff have already been paid and receipts have been obtained from them, which have been marked as Ex.B7, B8 and B9. Mr.S.Senthilnathan, learned counsel for the respondent would also contend that the suit is bad for non-joinder of parties namely the other two daughters of Umapathy Mudaliar namely, lakshmi and Sundari. He would draw my attention to the allegation in the plaint to the effect that other children of Umapathi Mudaliar, namely, Lakshmi and Sundari have been given their shares even during the life-time of Umapathy Mudaliar and would submit that in the absence of any relinquishment they should be impleaded as parties.

11. The following points arise for determination in the appeal:

"1.Whether the suit O.S.No.5617 of 2007 is bad for non-joinder of necessary parties?

2.Whether the plaintiffs are entitled to partition as prayed for?"
Point No.1

12. The defendants claimed that Umapathy Mudaliar had other daughters apart from the the plaintiffs, namely Lakshmi and Sundari and they have to be impleaded as parties to the suit. The plaintiffs have claimed that they have been given their shares even during the life time of Umapathy Mudaliar which is denied by the defendants. There is no documentary evidence other than the interested testimony of the plaintiffs to show such handing over of the shares to those two daughters namely lakshmi and Sundari. That being so, I am unable to agree the contention of the learned counsel for the appellants that they are not necessary parties to the suit. Therefore, I hold that the suit is bad of non-joinder of necessary parties.

Point No.2.

13. While considering the question whether the plaintiffs are entitled to their shares, it should be borne in mind that there is a registered Will which has been duly probated and a copy of the probate has also been produced before the Trial Court. It is also claimed by the defendants that the plaintiffs had given their consent for grant of probate of the will in O.P.No.205 of 1988. In answer to the above, Mr.H.Adaikala Arockiaraj, learned Counsel appearing for the appellants would contend that the plaintiffs have taken out an application in Appln.No.4571 of 2008 for revocation of the probate.

14. The plaintiffs may get their right to seek partition if they succeed in the application for revocation. As on today, I am obliged to hold that the plaintiffs have no right to seek partition.

15. In the light of the above, the appeal is dismissed confirming the judgement and decree dated 02.12.2008 passed in O.S.No.5617 of 2007 on the file of Additional District Judge, Fast Track Court-V, Chennai. However, it will be open to the plaintiffs to seek any relief depending on the result of the application for revocation of the probate. However, there will be no order as to costs.

Sd/-

Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

To
The Additional District Judge,
Fast Track Court-V,
Chennai.

Copy to
The Section Officer,
VR Section, High Court, Madras.

+1cc to Mr.H.Adaikala Arockiaraj, Advocate Sr.66860
+1cc to Mr.S.Senthilnathan, Advocate Sr.67383

A.S.No.778 of 2009

pa[col
srg 28/02/2017