

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 16-11-2016

Pronounced on: 29-11-2016

Coram:

The Hon'ble Mr.Justice A.SELVAM

and

The Hon'ble Mr. Justice P.KALAIYARASAN

O.S.A.No.165 of 2016

Mrs. Mallika Surrender .. Appellant/Defendant

Vs.

Mrs. Renuka Manuel ... Respondent/Plaintiff

Original Side Appeal preferred under Order XXXVI Rule 1 of Original Side Rules against the order of this Court dated 26-04-2016 made in C.S.No.600 of 2014.

For Appellant : Mr. S.A. Rajan
For Respondents : Mr. S.R. Rajagopal

JUDGMENT

(JUDGMENT OF THE COURT WAS DELIVERED BY A.SELVAM, J.)

This Original Side Appeal is directed against the order dated 26-04-2016 made in C.S.No.600 of 2014 by the learned Single Judge of this Court.

2. The respondent herein as plaintiff has filed C.S.No.600 of 2014 on the file of this Court praying to pass a preliminary decree of partition in respect of her half share wherein the present appellant has been shown as sole defendant.

3. The material averments made in the plaint are that both the plaintiff and defendant are daughters of one Helen Dasan. The suit property is the absolute property of the said Helen Dasan and she executed a Will dated 31-07-1983 in favour of both the plaintiff and defendant and she passed away on 24-12-2004 and therefore, the Will dated 31-07-1983 has come into effect. The father of the plaintiff and defendant by name Dr. A.J. Dasan has been appointed as a sole Executor under the said Will. The defendant has represented to the plaintiff that the house situates in the suit property is in a dilapidated condition and

new house has to be constructed. The plaintiff has executed a General Power of Attorney in favour of the defendant for getting necessary permission to put up construction. The plaintiff has been kept in darkness. The plaintiff is residing in United kingdom. Under the said circumstances, the present suit has been instituted for the relief sought therein.

4. In the written statement filed on the side of the defendant, it is averred that the relationship mentioned in the plaint is correct. In the suit property, a dilapidated building has been in existence and it is agreed that a new building has to be constructed by using the amount of Dr. A.J. Dasan, father of both the plaintiff and defendant and the first floor has to be given to the plaintiff and the ground floor has to be given to the defendant. The proposed construction has been valued at Rs.85,00,000/- (Rupees Eighty five lakhs only). The father of both the plaintiff and defendant has sold his properties and mobilised funds and by utilising the same, he put up construction. It is not true that the plaintiff has been kept in darkness. Both the plaintiff and defendant are not owners of the building which situates in the suit property and there is no merit in the suit and the same deserves to be dismissed.

5. On the basis of the rival pleadings raised on either side, the learned Single Judge has framed necessary issues and after pondering both oral and documentary evidence has decreed the suit as prayed for. Against the judgment and decree passed by the learned Single Judge, the present Original Side Appeal has been preferred at the instance of the defendant, as appellant.

6. Before contemplating the rival submissions made on either side, the Court has to perorate the following admitted facts:

It is an admitted fact that both the plaintiff and defendant are sisters and their mother's name is Helen Dasan and she voluntarily executed the Will dated 31-07-1983 in favour of both of them wherein their father, by name Dr. A.J. Dasan has been appointed as an Executor of the Will.

7. The present suit has been instituted for the relief of partition of half share of the plaintiff in the suit property whereas the defence put forth on the side of the defendant is that the house situated in the suit property has become dilapidated and the same has been demolished and by utilising the funds of the said Dr.A.J. Dasan, a new building has been constructed and both the plaintiff and defendants are not the owners of the same and therefore, the plaintiff is not entitled to get the relief of partition.

8. The learned Single Judge after considering the rival

submissions made on either side has decreed the suit as prayed for.

9. The learned counsel appearing for the appellant/defendant has repeatedly contended that the old house situated in the suit property has been demolished and subsequently, by utilising separate funds of father of both the plaintiff and defendant, a new building has been constructed. Under the said circumstances, the father of both the plaintiff and defendant has become absolute owner of the new building and during his life time, he has executed a Will in favour of the appellant/defendant and for the purpose of adducing additional evidence, the judgment and decree passed by the learned Single Judge are to be set aside and the matter is liable to be remitted.

10. In support of the contentions raised on the side of the appellant/defendant, the decision reported in 2016 (4) CTC 533 (Union of India Vs. K.V. Lakshman & Others) is relied upon wherein the Honourable Supreme Court has held that the First Appellate Court is having powers of the Trial Court.

11. Per contra, the learned counsel appearing for the respondent/plaintiff has contended that with regard to contentions raised on the side of the appellant/defendant no pleadings are available in the written statement, and further in the Will executed by Helen Dasan, her husband/father of the defendant and plaintiff has been appointed as Sole Executor and he cannot do anything against law and therefore, the argument put forth on the side of the appellant/ defendant cannot be accepted.

12. The entire argument put forth on the side of the appellant/ defendant is based upon Section 54 of the Easement Act, 1882 and the same reads thus:

"Grant may be express or implied. -- The grant of license may be express or implied from the conduct of the grantor, and an agreement which purports to create an easement, but is ineffectual for that purpose, may operate to create a license."

It is a settled principle of law that grant of licence may be expressed or implied.

13. In the instant case, in the written statement it is averred that the father of both the plaintiff and defendant viz., Dr. A.J. Dasan has utilised his money for constructing a house in the suit property. In the plaint it has been specifically averred to the effect that the plaintiff has given Power of Attorney in favour of the defendant for getting necessary permission to put up new construction.

14. The learned counsel appearing for the respondent/plaintiff has relied upon Section 310 of Indian Succession Act, 1925 and the same reads as follows:

"Purchase by executor or administrator of deceased's property. -- If any executor or administrator purchases, either directly or indirectly, any part of the property of the deceased, the sale is voidable at the instance of any other person interested in the property sold."

15. At this juncture, the Court has to look into the evidence given by the defendant. The defendant has been examined as D.W.1. She has candidly admitted to the effect that she obtained a Power of Attorney from the plaintiff for demolishing the building and also for getting necessary approval for putting up new construction. Further, she has admitted that the application for getting approval has been made in the names of both.

16. The learned counsel appearing for the appellant/defendant has advanced his entire argument on the basis of the Will dated 01-07-2015 alleged to have been executed by Dr. A.J. Dasan in favour of the defendant and with regard to the said Will, C.M.P.No.18236 of 2016 has been filed and C.M.P.No.13019 of 2016 has been filed so as to permit the petitioner/appellant to examine additional witness.

17. As stated earlier, the suit property is the absolute property of Helen Dasan, the mother of both the plaintiff and defendant and she executed a Will wherein her husband/father of both the plaintiff and defendant has been appointed as an Executor. After the demise of Helen Dasan, the Will has come into effect. The only objection raised on the side of the appellant/defendant is that the father of both the plaintiff and defendant, have constructed a house in the suit property and therefore, he has become absolute owner of the same. As rightly pointed out on the side of the respondent/plaintiff, in the written statement it has not been specifically pleaded to the effect that as a licensee, he has put up construction. Further, he passed away after pronouncing judgment by the learned Single Judge.

18. Considering the relationship between the parties and also considering the submissions put forth on the side of the appellant/defendant, this Court is of the view that the suit property should be divided into two halves and the plaintiff is entitled to get one-half whereas the defendant is entitled to get another half. Since the suit property is liable to be divided as noted down earlier, this Court is of the view that C.M.P.Nos.11568, 13019 and 18236 of 2016 are liable to be dismissed.

19. The learned Single Judge after considering the available evidence on record and also after considering the close relationship between the parties, has rightly decreed the suit. In view of the discussions made earlier, this Court has not found any error or illegality in the judgment passed by the learned Single Judge and therefore, the present Original Side Appeal deserves to be dismissed.

In fine, this Original Side Appeal is dismissed without costs. The judgment passed in C.S.No.600 of 2014 dated 26-04-2016 by the learned Single Judge of this Court is confirmed. Consequently, C.M.P.Nos.11568, 13019 and 18236 of 2016 are also dismissed.

Sd/-
Asst.Registrar (CS IV)

/true copy/

Sub Asst. Registrar

To
The Sub Assistant Registrar,
original Side, High Court,
Madras.

+1 cc to M/s.A.Rajan, advocate, sr.69755

+1 cc to M/s.R.Rajagopal, advocate, sr.69749.

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