

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.01.2017

CORAM

THE HONOURABLE MR.JUSTICE R. SUBRAMANIAN

A.S.No.28/2012

Mrs.K.Chokkammal

...Appellant

..Vs..

1.Mrs.M.Neelavathy

2.Mrs.P.Kasthuri

3.Mrs.S.Rajeswari

4.Mr.T.S.Elango

...Respondents

Prayer: Appeal filed under Section 96 of the Civil Procedure Code and under Order 41-A Rules 1 and 2 of the CPC to set aside the Judgment and Decree dated 18.07.2011 passed in O.S.No.13467/2010 by the Learned III Additional Judge of the City Civil Court, Chennai.

For Appellant	: Mr.S.D.S.Philip
For RR1 to 3	: Mr.H.Nazirudeen
For R4	: No Appearance

JUDGMENT

The plaintiff, whose suit for partition and separate possession of 1/4th share in the suit properties, was dismissed by the Trial Court, is the appellant.

2. According to the plaintiff, she is the daughter of one Mr.T.K.Subramaniam and Mrs.S.Rajam, the 1st wife of Mr.T.K.Subramaniam. The fourth defendant is the son of said Mr.T.K.Subramaniam and Mrs.S.Rajam. Since Mrs.S.Rajam died in the year 1948 itself, the said Mr.T.K.Subramaniam married one Punidhammal as his second wife and out of the said wedlock, defendants 1 to 3 were born. The suit property, according to the plaintiff, was purchased by Mr.T.K.Subramaniam in the name of his second wife Mrs.S.Punidhammal. The said Mrs.S.Punidhammal died on 15.06.1998. Mr.T.K.Subramaniam died on 15.08.1995. The plaintiff's case is that the suit properties belong to the joint family and it was agreed between the parties even during the life time of the parents that their son namely the 4th defendant will take the properties that stood in the name of his father Mr.T.K.Subramaniam and that the suit properties standing in the name of Mrs.Punidhammal, will be equally divided among the four daughters namely the plaintiff and the defendants 1 to 3. On the aforesaid pleadings, the plaintiff sought for a preliminary decree for partition of her 1/4th share in the suit properties.

3. The suit was resisted by the defendants 1 to 3 contending that the suit properties belonged to Mrs.S.Punidhammal as her absolute

property. The claim of the plaintiff relating to the purchase by Mr.T.K.Subramaniam in the name of Mrs.Punidhammal as well as the alleged assurance given by the parents was denied. The defendants also set up a Will said to have been executed by Mrs.Punidhammal. In the said Will, it appears that Mrs.Punidhammal had bequeathed a portion of the suit schedule item 1 to the plaintiff. Therefore, the defendants would contend that the plaintiff's suit for partition was not maintainable. Though the plaintiff has taken a plea that the Will is not true and valid and extensive cross examination has been made on the truth and validity of the Will, the trial Court did not go into the said question, since it found that the Will required a probate from this Court and in the absence of the probate, the same cannot be looked into to establish the title of either the plaintiff or the defendants.

4.On the side of the plaintiff, she examined herself as P.W-1 and Exs.A-1 to A-9 were marked. The third defendant S.Rajeswari was examined as D.W-1, and one K.Muniyandi attesor of the Will of Punidhammal was examined as DW-2. The Will was marked as Ex.B-1. On the above pleadings and evidence, the learned IIIrd Additional City Civil Judge framed the following issues in the suit.

1. Whether the plaintiff is entitled to 1/4th share in the suit schedule properties?

2. Whether the plaintiff is entitled to permanent injunction resisting the defendants 1 to 3 from either encumbering the plaintiff 1/4th share in the suit properties?

3. Whether S.Punidharmal had executed the Will 20.10.1997?

4. To what other relief is the plaintiff entitled to?

5. The fourth defendant namely the son of Mr.T.K.Subramaniam remained ex-parte. Upon consideration of the oral and documentary evidence, the learned Trial Judge is disbelieved the claim of the plaintiff that there was an oral assurance by the parents which would entitle the plaintiff to seek 1/4th share in the suit properties. The learned trial Judge did not decide the question relating to the validity of the Will since the properties covered by the Will are within the original jurisdiction of this Court, thereby making the requirement of probate mandatory. The learned Additional District Judge also disbelieved the

theory of the plaintiff that the acquisition of the suit properties was actually by Mr.T.K.Subramaniam and Mrs.Punidhammal was only a benami. On the above findings, the learned Trial Judge dismissed the suit. Aggrieved by the said dismissal, the plaintiff has preferred the above appeal.

6.I have heard Mr.S.D.S.Phillip, learned counsel appearing for the appellant, and Mr.H.Nazirudden, learned counsel appearing for respondents 1 to 3. Though the 4th respondent has been served, he has not entered appearance through counsel nor has he chosen to appear in person.

7.The following points are framed for determination in this appeal:

1.Whether the plaintiff would be entitled to share in the properties of her step mother Mrs.Punidhammal?

2.Whether the plaintiff has established the oral assurance alleged to have been given by her parents?

3.Whether the suit properties were acquired by Mr.T.K.Subramaniam in the name of Mrs.Punidhammal, and the said purchase was not intended for the benefit of the said Mrs.Punidhammal?

POINT.1:

8.It is an admitted case in the appeal that the sale deed for the suit properties is in the name of Mrs.Punidhammal, who is the second wife of Mr.T.K.Subramaniam. The said purchase has been made in the year 1963. Since the Will said to have been executed by Mrs.Punidhammal has not been probated, we have to necessarily presume that Mrs.Punidhammal died intestate. Admittedly, the plaintiff is the daughter of Mr.T.K.Subramaniam through his first wife Mrs.S.Rajam. The suit property is that of female Hindu who died intestate. As per the Section 15 of the Hindu Succession Act 1956, the property of female Hindu shall devolve upon her sons and daughters and and the husband. Mr.T.K.Subramaniam, husband of Punidhammal, pre-deceased her. Therefore, on the date of her death, it is only the defendants 1 to 3 who would be the heirs of Punidhammal. This is as per Rule [1] of Section 16 of the Hindu Succession Act . The plaintiff being the daughter of Mr.T.K.Subramaniam and his 1st wife, cannot claim her share as the heir of Punidhammal. Hence point number 1 is answered against the Plaintiff/Appellant.

POINT.2:

9.The other contention of the plaintiff is that her parents namely Mr.T.K.Subramaniam and Mrs.Punidhammal even during their life time had given an assurance that the son would take the properties that stood in the name of the father and the properties that stood in the name of Punidhammal will be divided equally among the daughters namely, defendants 1 to 3 and plaintiff. In order to establish the said contention, the only evidence available on the side of the plaintiff is her oral evidence which is an interested testimony. Though Mr.S.D.S.Philip, learned counsel appearing for the appellant has drawn the attention of this Court to certain admissions made by the third defendant as DW-1 to the effect that none of the sisters had claimed their share in the property of the father namely, Mr.T.K.Subramaniam and contended that the said admission only strengthens the case of the plaintiff relating to the oral assurance. I am unable to agree with the said contention. The brother of the plaintiff has not supported her case. He is competent to speak about the said oral assurance though he was arrayed as defendant he remained ex-parte. Nothing prevented the plaintiff from having examined him as witness on her side or as an independent witness to speak about the

alleged oral assurance. The admission relied upon by the learned counsel is not sufficient to uphold the theory of oral assurance and by pass the normal rule of Succession provided under the Hindu Succession Act. I am, therefore, constrained to agree with the learned trial Judge who had analysed the entire evidence on record before arriving at the conclusion that the said oral assurance has not been established. Hence point number 2 is also answered against the Plaintiff/Appellant.

POINT.3:-

10.Though the plaintiff claim that the purchase in 1963 was actually by Mr.T.K.Subramaniam in the name of his 2nd wife Mrs.Punidhammal, the plaintiff has failed to prove the said contention. After the enactment of the Benami Transactions (Prohibition) Act in the year 1988, any purchase made by a person in the name of his wife or unmarried daughter is presumed to be for the benefit of the wife or the unmarried daughter as the case may be. Though the said statutory presumption created by Section (3)(2)(a), is rebuttable, very strong and cogent evidence is required to rebutt the said presumption. As already pointed out, except the interested testimony of the plaintiff, there is no other evidence on record to prove the said contention. In the light of the

above, point number 3 is also answered against the Plaintiff/Appellant.

11. In view of the foregoing discussions, I have no other option but to confirm the findings of the trial Court. In the result, the appeal is dismissed, confirming the judgment and decree of the trial Court. Considering the facts and circumstances of the case as well as the relationship between the parties there shall be no order as to cost.

12. Mr. H. Nazirudeen, learned counsel appearing for the respondents would concede that, defendants 1 to 3, even today, are willing to share the properties with the plaintiff as per the Will of Punidhammal. It is for parties to work out their rights over the property of Punidhammal after obtaining proper probate of the said Will.

12.01.2017

KP
Index: No
Internet: No
To
The III Additional Judge,
City Civil Court, Chennai.

R.SUBRAMANIAN.,J.

KP

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