

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 15.03.2017

CORAM

THE HONOURABLE MR. JUSTICE M.SATHYNARAYANAN

SA.No.203/2017 & CMP.No.4765/2017

Kokila

..

Appellant / Plaintiff

Versus

1.L.Velumani

2.L.Govindaraj

3.L.Selvaraj

4.L.Mani

5.L.Shenbagavalli

.. Respondents / Defendants

Prayer: Second Appeal filed under section 100 of the Code of Civil Procedure against the judgment and decree dated 02.01.2014 made in AS.No.94/2012 passed by the learned Principal Subordinate Judge, Coimbatore confirming the Judgment and Decree dated 29.07.2011 made in OS.No.4458/2004 passed by the learned III Additional District Munsif, Coimbatore.

For Appellant : M.E.J.Ayyappan

For Respondents : Mr.N.Manoharan for Caveator/R3

JUDGMENT

The plaintiff, who lost before the Courts below, is the appellant herein and challenging the dismissal of the suit in OS.No.4458/2004 on the file of the Court of District Munsif, Coimbatore, for partition and other consequential reliefs, as confirmed by the Lower Appellate Court, viz., the Principal Subordinate Judge, Coimbatore, in AS.No.94/2012, the present Second Appeal is filed.

2 The facts leading to the filing of this Second Appeal, briefly narrated, are as follows:-

[a] The appellant/plaintiff would aver that she and defendants 4 and 5 are daughters of one Lakshmana Naidu and the defendants 1 to 3 are the sons of the said Lakshmana Naidu. The father of the plaintiff along with his elder brother viz., Rangula Naidu, were in joint possession and enjoyment of the suit A and B Schedule Properties after the death of their father Ellappanaidu and subsequently, divided the properties by way of an oral partition, in and by which, [late] Lakshmana Naidu was allotted suit "A" Schedule Property and his brother Rangula

Naidu was allotted with suit "B" Schedule Property. The plaintiff would aver that defendants 4 and 5 got married in the years 1975 and 1982 respectively and as such, they are not co-parceners of the suit "A" Schedule Property and whereas, the plaintiff got married on 14.06.1990 and as such, she becomes coparcener of suit "A" schedule property along with her father Lakshmana Naidu and the defendants 1 to 3 and hence, she is entitled to $1/5^{\text{th}}$ share in the suit "A" schedule property. The appellant/plaintiff would further aver that her father Lakshmana Naidu is the absolute owner of the suit "B" schedule property as per the registered Sale Deed dated 26.10.1942 [Ex.A.7] and Lakshmana Naidu died intestate on 06.08.2003 and therefore, the plaintiff and the defendants are having $1/6^{\text{th}}$ share each in suit "B" schedule property and in spite of the requests and demands made to partition the A and B Schedule Properties and give her separate possession, the defendants failed to do so and therefore, the plaintiff came forward to file the suit for partition.

[b] The 1st defendant filed a written statement contending among other things that the suit "A" schedule property is an ancestral property and Lakshmana Naidu never executed any Will in favour of anybody and so also the Settlement Deed and all the legal heirs are in

possession of the said properties and as such, they are entitled to the share as prayed for by the plaintiff. The 2nd defendant filed a written statement which was adopted by the defendants 3 to 5 and they refuted the averments made in the plaint and contended that the suit "B" schedule property was purchased by Lakshmana Naidu under Ex.A7 dated 26.10.1942 out of his own earning and as such, it is a self-acquired property. The defendants 2 to 5 denied about the existence of suit "A" schedule property and accordance to them, only suit "B" schedule property alone is available and Lakshmana Naidu had executed a Will dated 11.06.1997 [Ex.A16] in favour of the plaintiff with regard to suit "B" schedule property and thereafter, the plaintiff and her husband tried to grab the property and therefore, Lakshmana Naidu had filed OS.No.607/2003 [Ex.A8] and subsequently, cancelled the Will under Ex.A16 executed in favour of the plaintiff and thereafter, executed a Settlement Deed in favour of the 4th defendant in respect of a part of suit "B" schedule property [Ex.A16] in which the husband of the plaintiff had signed as a witness. The defendants would further contend that the Will dated 07.02.2003 executed by Lakshmana Naidu in favour of Selvaraj [Ex.B13] also came into force after his demise and as per the terms of the Will the 2nd respondent and after his life time, the 3rd defendant is entitled

to the remaining part of the suit "B" schedule property and therefore, prayed for dismissal of the suit.

[c] The Trial Court, on a consideration of the pleadings, has framed the following issues:-

- [a] Whether the plaintiff is entitled to 7/30th share in the suit "A" schedule property? ;
- [b] Whether the plaintiff is entitled to 1/6th share in the suit "B" schedule property? ;
- [c] Whether the plaintiff is entitled to decree for partition? And
- [d] To what other reliefs the plaintiff is entitled to?

[d] The plaintiff examined her self as P.W.1 and marked Exs.A1 to 17. On behalf of the defendants, D.Ws.1 to 3 were examined and Exs.B1 to 15 were marked.

[e] The Trial Court, on a consideration of pleadings and appreciation of oral and documentary evidences, has dismissed the suit vide judgment and decree dated 29.07.2011 and challenging the legality of the same, the plaintiff filed an Appeal in AS.No.94/2012 on the file of the

Court of Principal Subordinate Judge, Coimbatore. The Lower Appellate Court, on a consideration of materials placed before it, had formulated the following points for consideration:-

- [a] Whether the plaintiff is entitled to 7/30th share in suit "A" schedule property?
- [b] Whether the plaintiff is entitled to 1/6th share in the suit "B" schedule property? ;
- [c] Whether the judgment and decree of the Trial Court is correct? ; and
- [d] To what other reliefs the plaintiff is entitled to?

[f] The Lower Appellate Court on appreciation of the oral and documentary evidences and findings rendered by the Trial Court, recorded the findings that admittedly, the plaintiff did not produce any documentary evidence or revenue records to prove about the existence of the suit "A" schedule property and in Exs.A7 and B15, it has been mentioned that the property belongs to Rangula Naidu ancestrally and in Ex.A16, Lakshmana Naidu, father of the plaintiff, has also clearly mentioned that the property belong to him ancestrally.

[g] The Lower Appellate Court has taken into consideration the Pre-suit Notice issued by the plaintiff under Ex.A1 and found that the contents of the notice did not disclose anything about the claim made by the appellant/plaintiff in respect of the suit "A" schedule property and whereas, it mentions only about the suit "B" schedule property and nothing has been stated with regard to Exs.A7 and A15. The Lower Appellate Court has also taken note of the fact that the father of the plaintiff while he was alive, filed OS.No.607/2003 against the plaintiff for permanent injunction wherein, he has clearly stated that the suit "B" schedule property belong to him absolutely and it is a self-acquired property.

[h] The Lower Appellate Court also recorded the fact that merely there is a word in Ex.A7, about the ancestral nature of the property, will not lead to the inference that the property is ancestral in nature and in the absence of any evidence as to the existence of suit "A" schedule property, the plaintiff is not entitled to any relief. Insofar as the suit "B" schedule property is concerned, the Lower Appellate Court has taken note of the fact that in Ex.A16, Lakshmana Naidu executed a Will and subsequently, it was cancelled under Ex.B4, registered Cancellation

Will dated 19.04.2000 and subsequently, he executed a Settlement Deed under Ex.B14 dated 11.06.1997 in respect of a portion of the property in favour of the 4th defendant in which the husband of the plaintiff has also subscribed his signature as a witness. Lakshmana Naidu had also executed a registered Will under Ex.B13 dated 07.02.2003 in respect of the remaining portion of the suit "B" schedule property and after his demise, the Will came into force and the defendants 2 and 3 alone are entitled to the property. The Lower Appellate Court also recorded the finding that the suit "B" schedule property is a self-acquired property of Lakshmana Naidu and after cancelling the Will under Ex.A16, he executed the Settlement Deeds and therefore, the plaintiff is not entitled to any share in suit "B" schedule property also. In respect of Ex.B13-Will dated 07.02.2003, one of the attesting witnesses, viz., Devaraj, was also examined and thus, the Lower Appellate Court, has taken into consideration the above facts and circumstances and found that there are no infirmity in the findings rendered by the Trial Court and therefore, dismissed the appeal filed by the appellant/plaintiff vide impugned Judgment and Decree dated 02.01.2014. Aggrieved by the same, the plaintiff has filed the Second Appeal.

3 In the Memorandum Grounds of Second Appeal, the following Substantial Questions of law are raised:-

- [a] Whether the Lower Appellate Court is right in confirming the decree made by the Trial Court when of the main property described in the suit schedule? ;
- [b] Whether the Lower Appellate Court is right in giving a finding that the plaintiff is not entitled to any share of the suit property that belonged to her father late Lakshmana Naidu who died intestate?
- [c] Whether the Court below is right in holding that the Appellant's father, did not have ancestral property?
- [d] Whether the Lower Court is right in holding that the Appellant has not proved that?
- [e] Whether the Lower Appellate Court is right in relying on Exhibits B13 and B14?
- [f] Whether the Lower Appellate Court is right in holding that Ex.A1 and A2 are ancient documents are genuine when the schedule in those documents differ from the schedule of the suit main property?
- [g] Whether the Lower Appellate Court has taken into consideration the pleadings, oral evidence and documents and other material facts notwithstanding the defendant relying on the evidence and pleadings of the Plaintiffs for the defendant's case?

4 Mr.E.J.Ayyappan, learned counsel for the appellant/plaintiff has drawn the attention of this Court to the Judgments rendered by the Courts below and would submit that in the light of the fact that in Ex.A7, a recital appear as to the ancestral nature of the property coupled with the fact that S.No.450/B admeasuring to an extent of 1 acre has been given, there cannot be any contra evidence to the said registered document and the said material aspect has been completely overlooked by the Courts below. It is the further submission of the learned counsel for the appellant/plaintiff that admittedly, the plaintiff got married on 14.06.1990 and as such, she became a coparcener and therefore, she is entitled to a share claimed by her in the suit mentioned properties and through overwhelming oral and documentary evidence, the plaintiff had probablised the case and therefore, prays for setting aside the judgment and decree passed by the Lower Appellate Court, confirming the judgment and decree passed by the Trial Court.

5 Per contra, Mr.N.Manoharan, learned counsel appearing for the Caveator/3rd respondent has drawn the attention of this Court to the judgment rendered by the Courts below and would contend that the findings rendered by the Courts below are concurrent in nature based

upon proper appreciation of oral and documentary evidences and whatever substantial questions of law raised in this Second Appeal, have been answered by the Courts below and further pointed out that as to the existence of the "A" schedule property, the appellant / plaintiff has miserably failed to prove even its existence and insofar as "B" schedule property is concerned, it is a self-acquired property of Lakshmana Naidu and by means of Settlement Deeds, he settled the property in favour of the defendants and they are also in possession and enjoyment of the same. It is the further submission of the learned counsel that admittedly, while Lakshmana Naidu was alive, he filed a suit in OS.No.607/2003 against his daughter, viz., the appellant/plaintiff wherein he took a stand that the suit "B" schedule property is a self-acquired property and therefore, while even Lakshmana Naidu was alive, the plaintiff was enmical towards him and as such, after his demise, she came forward to file the present suit which is nothing but a abuse of process of law and therefore, prays for dismissal of the second appeal.

6 This Court paid its best attention to the rival submissions and also perused the materials placed before it.

7 As rightly pointed out by the learned counsel for the 3rd respondent / Caveator and also by the Courts below, there are absolutely no materials produced to prove the existence of suit "A" schedule property. Merely a recital in Ex.A7 would not lead to the conclusion or presumption about the existence of suit "A" schedule property and if really such a property is in existence, the relevant revenue records ought to have been produced by the appellant/plaintiff ; but unfortunately, she has failed to do so. Insofar as suit "B" schedule property is concerned, under Ex.A8, the father of the plaintiff, viz., Lakshmana Naidu, has filed a suit in OS.No.607/2003 against the plaintiff for permanent injunction wherein he took a stand that the suit "B" schedule property is a self-acquired property. Though Lakshmana Naidu executed a Will under Ex.A7, subsequently it was cancelled under Ex.B4 dated 19.04.2000 and thereafter, he executed a Settlement Deed under Ex.B14 in respect of a portion of the property in favour of the 4th defendant in which, the husband of the plaintiff has also signed as one of the witnesses and subsequently, executed a registered Will under Ex.B13 in respect of the remaining portion of the "B" schedule property in favour of the defendants 2 and 3 and after his demise, the Will has also come into force and as on today, he is in possession of the property and to prove the Will,

one of the attesting witness to Ex.B13, Devaraj, was also examined as DW2 and nothing useful or contra was elicited in his cross-examination.

8 Subsequently, in respect of suit "B" Schedule Property, mutation of records also took place. It is very pertinent to point out at this juncture that Ex.A1 – Legal Notice say only about "B" Schedule property and nothing has been mentioned about the "A" Schedule property. It is a well settled position of law that a plaintiff in order to probablise is/her case, has to stand on his / her own legs and substantiate the same and unfortunately, the appellant/plaintiff has miserably failed to do so. In the considered opinion of this Court, the findings rendered by the Courts below are based upon proper appreciation of oral and documentary evidences and correct application of law.

9 This Court, on an independent application of mind and on perusal of the entire materials is of the view that there is no perversity attached in the findings rendered by the Courts below.

10 There is no questions of law, not even leave alone the substantial questions of law arise for consideration in this second appeal.

Accordingly, the Second Appeal is dismissed confirming the judgment and decree passed by the learned Principal Subordinate Judge, Coimbatore in AS.No.94/2012 dated 02.01.2014. However, there shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.

15.03.2017

Speaking Order

Index : No

Internet : Yes

AP

To

1.The Principal Subordinate Judge,
Coimbatore .

2.The III Additional District Munsif
Coimbatore.

Copy to:

The Section Officer
VR Section, High Court,
Madras.

M.SATHYNARAYANAN, J.,

AP

SA.No.203/2017

15.03.2017

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