

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.07.2018

CORAM :

THE HONOURABLE MR.JUSTICE N. SESHASAYEE

CMA.No.1032 of 2018

and

CMP.No.8347 of 2018

R. Thiyagarajan ... Appellant/Petitioner

Vs.

1. B. Senthilraja

2. B. Rajesh ... Respondents/defendant 3 & 4

Prayer : Civil Miscellaneous Appeal filed under Order 43 Rule 1 (r) of CPC against the fair and decreetal order dated 08.03.2018 passed in I.A. No.705 of 2017 in O.S. No. 205 of 2017 on the file of the I Additional District Judge, Erode.

For Appellant : Mr. S.V. Jayaraman, Sr. Counsel
Assisted by Mr.C.E. Pratap

For Respondents : Mr. S. Parthasarathy, Sr.Counsel
Assisted by Mr.T.Nirmaleswar

JUDGMENT

The plaintiff in the suit for partition has lost his Interlocutory Application seeking an order of interim injunction, to restrain the defendants/respondents herein, from alienating the property, has come forward with this appeal.

2.1 The facts are: Certain Periyanna Gounder had two sons Shanmugham and Rajappa. Rajappa, again had two sons and a daughter. Of the two sons, plaintiff is one. The other son Balasubramanian and his only daughter Rajamani had died. Defendants 1 to 4 represent Balasubramanian branch, while the defendants 6 & 7 represent Rajamani. Their collateral are defendants 8 to 14, who claim right under Rajappa's brother Shanmugham.

2.2 There are four items of property of which two are included in the 'A' Schedule to the plaint, and the other two are respectively described in 'B' schedule and 'C' schedule thereto.

Be that as it may, on 25.03.1972, there took place a partition between Rajappa and his two sons Balasubramanian and Thiagarajan, the plaintiff. In that partition, Balasubramanian was allotted 'B' schedule property and this is said to be described in the 'C' schedule of the plaint. The 'B' schedule property is said to be jointly purchased by one Mohammed Sultan Sahib and Ponnappa Chettiyar in 1927. Periyanna Gounder, the father of both Rajappa and Shanmugham, had purchased $\frac{1}{2}$ share of Mohammed Sultan Sahib in 1944. In this $\frac{1}{2}$ share, both Rajappa and Shanmugham have $\frac{1}{2}$ share each. As regards the other $\frac{1}{2}$ share in the 'B' schedule property, it devolved on the heirs of Ponnappa Chettiyar. They filed a suit for partition in O.S. No. 360 of 1983 and had their share separated and this is not the subject matter in issue, any longer. So far as item 1 & 2 in 'A' schedule to plaint is concerned, there is no dispute regarding the extent of shares that the plaintiff and defendants 1 to 7 are entitled to, though the defendant's 1 to 4 plead ouster as regards item 1 of the 'A' schedule.

2.3 The critical issue, however, is with regard to 'C' schedule property in the plaint, which as stated earlier was described as 'B' schedule property in the partition deed dated 25.03.1972. As said earlier, this property was allotted to the share of Balasubramanian. The defendants would contend in their written statement that before his demise, Balasubramanian had executed two Wills. The first Will is dated on 24.12.1999, and it is a registered one, and this is modified by his second Will dated 31.12.1999. In this Will the testator had excluded his mother, and bequeathed his entire properties to the other heirs.

2.4 So far as 'A' schedule property is concerned, as regards 'A' schedule item 2 and 'B' schedule property, there is no dispute. As regards 'C' Schedule property, plaintiff impugnes the two Wills of Balasubramanian, and his strategy for so doing appears to be that, in the absence of those two Wills, his mother would become entitled to one share in 'C' schedule, which, on her demise would devolve on him.

3. The defendants 2 and 3 do not object for partitioning 'B' schedule property as well as 'A' schedule item 2. This would necessarily imply that only 'A' schedule item 1, and the two Wills of Balasubramanian referred to above that deal with 'C' schedule property, should go for trial. So far as the property described in 'A' schedule, item 1 is concerned, defendants 3 and 4 plead ouster.

4. The learned counsel for the respondents 1 and 2 (defendants 3 and 4) submitted that his clients would not alienate 'A' schedule item 1 in its entirety. His statement is recorded. So far as 'C' schedule is concerned, it proceeds on an admitted

fact that the property was originally allotted to Balasubramanian. The genuineness of the Will, necessarily have to be decided only in the trial, and this Court for the present may not presume the Wills to be suspicious till it is proved to be so in the trial. In these circumstances, this Court is not inclined to grant injunction with regard to 'C' schedule property.

5. This Court is informed that the pleadings in the suit are settled and issues have been framed, it is only appropriate for the parties to go for trial. Both sides evinced interest to commence the trial and conclude it as expeditiously as possible.

6. In view of the same, this Court partially allows this appeal and this limited to the undertaking given by the respondents' counsel as indicated in paragraph 4 above. The trial court is now directed to complete the trial within a period of three months from the date of receipt of a copy of this order. Since the contesting defendant did not offer any resistance for passing a preliminary decree, with regard to properties described in 'A' schedule, item 2 and 'B' schedule to the plaint, the trial court may pass appropriate preliminary decrees, based on the said admission. This will also help the trial court to narrow down the scope of the trial. Consequently, the connected Miscellaneous Petition is closed. No costs.

Sd/-

Assistant Registrar (CS-vii)

//True Copy//

Sub Assistant Registrar

avr

To:

The I Additional District Judge,
Erode.

+1cc to Mr.T.NIRMALESWAR, Advocate, S.R.No.47005
+1cc to Mr.C.E.PRATAP, Advocate, S.R.No. 46027

CMA.No.1032 of 2018
and

CMP.No.8347 of 2018

RJ (CO)
TR(24/07/2018)