

IN THE HIGH COURT OF JUDICATURE AT MADRAS
Dated : 05.10.2018
CORAM
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBORAYAN
C.M.A.No.1710 of 2011

1.R.Chandrasekaran	...1 st Appellant/Plaintiff
2.Angammal	...2 nd Appellant/5 th Defendant
3.Sankari	...3 rd Appellants/6 th Defendant

Versus

1.R.Thirunavukarasu	
2.R.Ramamurthy	
3.Ellammal	... Respondents/1,2,4 Defendants

Civil Miscellaneous Appeal is filed under Order 43, Rule 1 (v) of Civil Procedure Code, to against the order and decree dated 29.11.2010 made in A.S.No.6 of 2008 on the file of the Court of the Subordinate Judge, Gingee, remaining back the matter to the trial court by reversing the judgment and decree dated 27.04.2007 made in I.A.No.395 of 2001 in O.S.No.461 of 1981 on the file of the Court of the Principal District Munsif, Gingee.

For Appellants : Mr.T.Dhanasekaran

For Respondents : Mr.K.S.Vaithanathan
for Mr.K.Chandrasekaran

J U D G M E N T

This appeal has been filed to against the order and decree dated 29.11.2010 made in A.S.No.6 of 2008 on the file of the Court of the Subordinate Judge, Gingee, remanding the matter back to the trial court, by reversing the judgment and decree dated 27.04.2007 made in I.A.No.395 of 2001 in O.S.No.461 of 1981 on the file of the Court of the Principal District Munsif, Gingee.

2. The first appellant in this appeal, as sole plaintiff, filed the suit in O.S. No. 461 of 1981 for partition and separate possession of 1/4 share in the suit items and for rendering true and proper account of the profits yielded from the suit property from 17.05.1976 till the suit property is divided by metes and bounds and to appoint a receiver to divide the same and allot 1/4 share thereof.

3. The plaint averments are to the effect that the first defendant is the father of the plaintiff and defendants 2 and 3. The plaintiff is the son of the first defendant born through his second wife Angammal. The defendants 2 and 3 are the sons born

to the first defendant through his first wife Saradambal. It is the case of the first appellant/plaintiff that his father, the first defendant, his father's brother Manikasamy and their father Venkatachala Udayar were members of the joint family properties in which the property described in A Schedule of the plaint was allotted to the plaintiff's father viz., first defendant. From and out of the income derived from A Schedule property, the B Schedule property was purchased by the plaintiff and defendants 2 and 3 in the name of the first defendant, father. Thus, A and B Schedule properties are the joint family properties in which the plaintiff, defendants 1 to 3 are entitled to equal share. However, when the plaintiff demanded for a share in the A and B Schedule properties, the first defendant evaded and avoided to partition the property, hence, the plaintiff sent a notice dated 17.06.1976 to effect division of all the family properties, for which a reply dated 07.06.1976 falsely claiming tht the joint family properties are sufficient to maintain the joint family and that the first defendant purchased the B Schedule property by borrowing funds from third parties. It was also stated that the plaintiff's mother namely Angammal is not the legally wedded wife of the first defendant and that she is a concubine. Further, the plaintiff and his sister Sankari are illegitimate children of the first deffendant. Even as illegitimate children, the plaintiff is entitled to a share in the suit property and therefore, he filed the suit.

4. The first defendant viz., Rajavelu Udayar, filed a written statement denying that he married the mother of the plaintiff and that the plaintiff and his sister Sankari were not born to him. The suit properties are enjoyed by him in his individual right and that the plaintiff has no right for a share in the suit property. The first defendant also contended that some properties were purchased in the name of the mother of the plaintiff, who is his concubine, as a bename and that the plaintiff's mother has no financial capacity to purchase those properties. The properties so acquired in the name of mother of plaintiff were not included in the B Schedule property wantonly. The first defendant also filed O.S. No. 196 of 1976 before the District Munsif, Tindivanam for bare injunction against the plaintiff and his mother Angammal from interfering with his peaceful possession and enjoyment of the property. When the plaintiff's mother is not the legally wedded wife of the first defendant and that she married one Madhava Mudaliar and lived with him till his death, she cannot claims herself to be the legally wedded wife of the first defendant. After the death of Madhava Mudaliar, the mother of the plaintiff developed intimacy with the first defendant in the year 1947 as a result of which the plaintiff and his sister Sankari have born. Even otherwise, the first defendant has already purchased 35 cents of land and given it to the mother of the plaintiff for her livelihood besides incurred the educational expenses of the plaintiff and

his sister. While so, the plaintiff is not entitled to any share in the properties of the first defendant. The defendants 2 and 3 alone are entitled to succeed to the estate of the first defendant as they are the lawful sons born to him. The suit has been filed at the instance of Angammal to enrich herself and the suit is liable only to be dismissed.

5. The trial Court, after considering the oral and documentary evidence adduced by both sides, decreed the suit for partition by passing a preliminary decree. After the preliminary decree passed in the suit, the first defendant, father of the plaintiff and defendant 2 and 3, died. Subsequently, based on the preliminary decree, the plaintiff filed I.A. No. 395 of 2001 in O.S. No.461 of 1981 for passing a final decree by appointing an advocate commissioner to divide the suit properties by metes and bounds and to allot his share.

6. The defendants 2 and 3 contested the final decree application by contending that the first defendant executed a Will in their favour bequeathing all the properties covered in the suit in their favour. Therefore, they prayed for dismissal of the final decree application.

7. The trial Court, by order dated 31.03.2005 allowed the application in I.A. No. 395 of 2001 in O.S. No. 461 of 1981 by pointing out that even though the defendants 2 and 3 have contended that the first defendant had executed a Will in their favour, they did not prove the Will, Ex.B3 in a manner known to law. The defendants 2 and 3 did not examine any witness on their side to prove the Will in a manner known to law. Furthermore, the plaintiff has disputed the genuineness of the Will inasmuch as it was not pleaded during the course of trial in the suit. Therefore, the trial Court, while disbelieving the Will said to have been executed by the first defendant, allowed the final decree application and appointed an advocate commissioner.

8. Aggrieved by the order dated 31.03.2005 made in I.A. No. 395 of 2001 in O.S. No. 461 of 1981, the defendants in the suit have filed A.S. No. 6 of 2008 before the Subordinate Judge, Gingee allowed the appeal, remanded the matter back to the trial Court by finding that though the appellants have not proved the Will, Ex.B3, in a manner known to law and the finding rendered by the trial Court is just, still the final decree is remanded to the trial Court to consider Ex.B3 and to render a finding thereon. Aggrieved by the order of remand passed by the First appellate Court, the present Civil Miscellaneous Appeal is filed.

9. The learned counsel for the appellant would contend that the trial Court specifically recorded a finding that inspite of opportunities given to the defendants, they have merely marked Ex.B3, Will but they did not examine the attesting Witnesses to

the Will or any one acquainted with the execution of the Will. Therefore, the trial Court specifically pointed out that the Will said to have been executed by the deceased first defendant in favour of the defendants 2 and 3 cannot be a bar for passing final decree in terms of the preliminary decree. In fact, the trial Court also recorded a finding that the suit was filed in the year 1976 and it was re-numbered as O.S. No. 461 of 1981 and that the first defendant contested the suit. While so, the first defendant had executed the Will only to ensure that the plaintiff could not get a decree in his favour. Even though the First Appellate Court has held that the defendants did not prove the execution of the Will, Ex.B3 in a manner known to law, yet, for re-consideration of the Will, the matter was remanded back to the trial Court. The Order passed by the First appellate Court is laconic and without assigning any reasons. The order passed by the trial court on merits was set aside by the Appellate Court without assigning any reasons and therefore, the learned counsel prayed for allowing this appeal.

10. The learned counsel for the defendants/respondents state that the Will, Ex.B3 was a registered Will and it was also marked as a document before the trial Court. While so, the trial Court ought to have considered the effect of the Will executed by the deceased first defendant for determining the issues involved in the suit. The First appellate court therefore held that non-consideration of the Will, Ex.B3 warrants remanding the matter back to the trial Court. Such a finding rendered by the first appellate Court is valid and it does not call for any interference by this Court.

11. Heard the learned counsel appearing for the appellants as well as the learned counsel appearing for the respondents and perused the materials available on record.

12. The defendants 2 and 3 claimed that the deceased first defendant late. Rajavelu Udaiyar has executed a Registered Will in their favour and that the Will would have the effect in executing the decree passed in the suit. The defendants 2 and 3 also filed the Will as a document under Ex.B3. The trial Court rendered a specific finding that the defendants 2 and 3 have only marked the Will, Ex.B3 but they did not examine any witness on their side even after giving ample opportunity to them. Further, the defendants 2 and 3 were not ready to prove the Will as per law. Further, merely because the Will is registered, it cannot be said that it is a genuine and bonafide one unless it is proved in a manner known to law. Thus, the trial Court has considered the claim made by the defendants 2 and 3 on the basis of the Will, Ex.B3. However, the first appellate Court merely remanded the matter back to the trial Court without assigning any reasons. In fact, the Appellate Court has stated that though the appellants/defendants have marked the Will, Ex.B3, they have

not proved the Will and the findings rendered by the trial Court is just and proper. At the same time, the first Appellate Court merely stated that still, the final decree is remanded back to the trial Court to consider the effect of the Will, Ex.B3 and to give a finding on the same. Such a conclusion arrived at by the First Appellate Court is not proper. By the impugned order, the First Appellate Court had set aside the final decree passed by the trial Court on merits without assigning any reasons. The first appellate Court, instead of remanding the matter back to the trial court, could have taken up the process of considering the effect of the Will, Ex.B3 by itself. This Civil Miscellaneous Appeal was filed in the year 2011 and the appeal is being taken up for disposal now. Hence it will be appropriate that the matter has to be remanded back to the Lower Appellate Court itself, to decide the issues within a period of two months from the date of receipt of a copy of this Judgment, after giving opportunity to the parties concerned to adduce evidence and to decide the issue with regard to the genuineness of Ex.B3, Will in accordance with law. The parties to the appeal are directed to co-operate with Court proceedings for disposal of the appeal within the time granted by this Court.

13. With these observations and directions, this Civil miscellaneous Appeal is disposed of. No costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

klr

To

1.The Subordinate Judge,
Gingee.

2.The Principal District Munsif,
Gingee.

+lcc to Mr.T.Dhanasekaran, Advocate, S.R.No.69253
+lcc to Mr.K.Chandrasekaran, Advocate, S.R.No.69214

CMA.No.1710 of 2011

CA(CO)

rrs 27/03/2019