

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.12.2018

CORAM

THE HON'BLE MR.JUSTICE N.SESHASAYEE

S.A.NOS.211 & 212 OF 2008

AND

M.P.NO.1 OF 2008

Arumuga Reddy

...Appellant in both Appeals/
Plaintiff

Vs.

Mahalinga Reddy

...Respondent in both Appeals/
Defendant

Prayer:-

Second Appeals filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 07.03.2007 passed in A.S.Nos.49 and 50 of 2006 on the file of Sub-Court, Ranipet, confirming the judgment and decree dated 28.01.2004 passed in O.S. No.212 of 1995 and O.S.No.424 of 1996 on the file of District Munsiff, Arakkonam.

For Appellant in both Appeal :Mr.Parthasarathy
Senior Counsel
assisted by
Mr.V.G.Suresh Kumar

For Respondent in both Appeal : Mr.L.G.Sahadevan

COMMON JUDGMENT

Both the Appeals arise out of a common judgment of the first Appellate Court in A.S.Nos.49 and 50 of 2006.

2. Both the appellant as well as his brother, the respondent herein have filed separate suits for injunction. Appellant's suit was dismissed, whereas the respondent's suit was decreed. Challenging the same, the appellant herein had filed two appeals, both of which, as already indicated above, have been dismissed.

3. For the sake of narrative convenience, the appellant would be referred to hereinafter as 'plaintiff' and the respondent would be as 'defendant'. It may be added herein that both the suits were jointly tried and evidence was recorded in the suit filed by the appellant.

4. The suit property in the plaintiff's suit for injunction is described as 'B' schedule property. 'A' Schedule property is stated to have a dimension by 150 x 53 feet, measuring a total extent of 7,950 sq.ft. in S.F.No.760. The 'B' and 'C' Schedules of properties were part of 'A' Schedule property. Out of the total extent of 7,950 sq.ft., the plaintiff claims title in respect of 6,150 sq.ft and his plot measures 150 x 41 feet. The 'C' Schedule has an extent of 1,800 sq.ft and it has a demension of 150 x 12 feet. According to the plaintiff, the 'C' Schedule property belongs to the defendant.

5. The suit property is stated to be an ancestral property and this is not in dispute. According to the plaintiff, both the parties herein along with their father were jointly entitled to 1/3th share in the suit property. Whiles, the father of the parties were stated to have executed a Holograph Will dated 17.02.1974 (marked Ex.A1 in the suit) bequeathing his share in the property entirely to the plaintiff. This Will is attested by P.W.2.

6. The case of the plaintiff is that there is a residential house in 'B' schedule property and that he has let his brother, the defendant herein to occupy the same, and since the defendant is attempting to change the physical feature of the said house property, he had laid a suit for injunction.

7. The contention of the defendant is that long after execution of the Will, the plaintiff had sold a plot, measuring 150 x 12 feet to him under Ex.B.2 sale deed, dated 23.11.1989, which makes no reference to Ex.A.1 Will, and that the property dealt with thereunder is seen described as sandwiched between the plaintiff's property and the defendant's property, and would submit further that the father of the parties had not executed any Will, that after the demise of the father, the property was orally partitioned between the brothers, and out of the share allotted to the plaintiff, he had sold the plot measuring 150x12 feet under Ex.B.2. As the defendant apprehended that the plaintiff might interfere with his peaceful possession, he came up with the suit in O.S.No.424 of 1996, for bare injunction seeking to restrain the plaintiff from interfering with his possession.

8. As indicated above, both the suits were jointly tried and evidence was recorded in O.S. 212 of 1995. The Trial Court has

held that Ex.A.1-Will was not proved, since the plaintiff has not made available any documents containing the handwriting of the father of the parties herein. In this regard, the Trial Court did not consider the evidence of P.W.2, the attesting witness to Ex.A.1-Will as satisfactory. In addition, the Trial Court also relied on Ex.B.2-sale deed more for the purpose of omitting to mention Ex.A.1-Will, and also for finding some material to support about oral partition that the defendant has alleged. The defeated plaintiff had preferred twin appeals before the first Appellate Court, which found no reason to interfere with the decree passed by the Trial Court, and accordingly, dismissed both the appeals. Challenging the aforesaid decrees of the first Appellate Court, the present Appeals have been filed. These appeals are yet to be admitted.

9. Learned Senior Counsel appearing for the appellant strongly contended that, it is a case of Holograph Will, and no one proved the mere signature of the testator, and therefore, the burden is equally on the defendant to produce such document containing the hand writing of the testator. After all, he is also the plaintiff in the cross suit in O.S.No.424 of 1996 and the obligations are mutual. Turning to Ex.B.2, the sale deed, the learned counsel would submit that mere omission to refer to the recitals of Ex.A.1-Will, may not be material, for, what Ex.B2 sale deed purpose to convey is that portion which substantially represents the father's share. Referring to the schedules of property, while describing the boundaries of the property conveyed under Ex.B.2, reference to plaintiffs share does not imply that there was oral partition between the parties, since in a plot, measuring a dimension of 150 x53 feet, even if father's share taken along with plaintiff's share will still have only two shares, viz., plaintiff's share and defendant's share and it does not say anywhere about any alleged oral partition.

10. Per contra, the learned counsel appearing for the defendant would submit that proving the Will is a finding of fact and both the Courts below have rendered a finding on a specific fact and since the plaintiff has not been able to show any misleading or perversity in the appreciation of this evidence in entering a finding on the proof of the Will, this Court may not be interfere with the same. If the Will goes, argued the learned counsel, necessarily, the oral partition as pleaded by the defendant, has a greater probability to succeed, and that gets reflected in Ex.B.2.

11. Both the suits are for injunction and what is seen omitted here, is yet an another fact about which, P.W.2 speaks. According to him, the property originally belonged to one Chellapa Reddy, the alleged testator in Ex.A.1-Will and he had

two sons and two daughters, and while one of the sons, the plaintiff herein wants to deny father's share to the defendant, the defendant by claiming oral partition wants to have a equal share in the property. What both the parties plead and deny as the case may be, are about the existence of the Will and also the oral partition, but what both the parties have concealed is that they have two sisters, their rights. The pleading as to the existence of a Will by Chellappa Reddy or the oral partition can be considered only in the presence of the daughters, and inasmuch as the same has not been done, any finding on title will be meaningless. However, inasmuch as, the suits are only for injunction and since there is a concurrent finding of the Courts below denying the plaintiff's exclusive right to the property covered under 'A' schedule, the same may not matter much. So far as the defendant is concerned, even his claim is that the plaintiff shall not disturb his possession. Ultimately, in the absence of daughters, both the parties have preserved the property to maintain the existing status quo and it will only augur well for the parties(daughters), who are not before the Court.

12.1 Under these circumstances, this Court does not find any merit in both the Appeals and both the parties are required to agitate their right/title in a separate suit in the presence of the daughters of Chellappa Reddy, if they are so desirous.

12.2 In the result, both the Second Appeals stand dismissed, confirming the judgment and decree passed by both the courts below. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

sd/mrn

To

1. The Subordinate Judge, Ranipet,
2. The District Munsif Judge, Arakkonam

+2cc to Mr.V.G.Suresh Kumar, Advocate, S.R.No.83167 & 83168
+1cc to Mr.L.G.Sahadevan, Advocate, S.R.No.82730

S.A.Nos.211 & 212 of 2008

KK (CO)
CS/27/03/2019