

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.12.2018

CORAM : THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.1166 of 2010

and

A.S.No.419 of 2013 &

MP.No.1 of 2013 in A.S.No.419 of 2013

MP.Nos.2 & 3 of 2014 in A.S.No.419 of 2013

MP.No.1 & 2 of 2015 in A.S.No.419 of 2013

and CMP.No.22322 of 2018 in AS.No.419 of 2013

S.A.No.1166 of 2010 :

1.A.Suseela

2.A.Senthilkumar

3.A.Maheswari

4.A.Usha

...Appellants / Respondents / Plaintiffs

Vs

1.R.Kamatchi

2.V.Santhi

3.P.Lakshmi

4.S.Gowri

5.R.Vijaya

... Respondents/Appellants/Defendants

A.S.No.419 of 2013 :

Marimuthammal (Died)

1.Chinnaponnu @ Kamatchi

2.V.Shanthi

3.P.Lakshmi

4.S.Gowri

L.Vijaya (died)

... Appellants/Defendants 2 to 5

Vs

1.A.Suseela

2.A.Senthilkumar

3.A.Maheswari

4.A.Usha

... Respondents/Plaintiffs

Prayer in S.A.No.1166 of 2010 : Second Appeal filed under Section 100 of CPC, to set aside the judgment and decree of the

Additional District Judge, Fast Track Court No.IV, Chennai in A.S.No.486 of 2008 dated 19.01.2010 filed by the respondents herein and uphold the judgment and decree of the trial Court [VIII Assistant City Civil Court, Chennai] in O.S.No.7549 of 2005 dated 25.07.2007 with costs.

Prayer in A.S.No.419 of 2013 : First Appeal filed under Section 96 of CPC against the judgment and decree dated 11.10.2012 on the file of the learned IV Additional Judge, City Civil Court, Chennai, passed in O.S.No.4908 of 2000.

In.S.A.No.1166 of 2010 :

For Appellants : Ms.Karthikaa Ashok
For Respondents : Mr.A.Chidambaram [R2 to R4]
R1 - No Appearance

In.A.S. No.419 of 2013 :

For Appellants : Mr.A.Chidambaram
For Respondents : Ms.Karthikaa Ashok

COMMON JUDGMENT

Right at the outset, it may have to be stated that A.S.No.419 of 2013 is the lead case and the suit from which S.A.No.1166 of 2010 has arisen is more of a consequence. However, both the suits were tried separately. For convenience, they are now dealt with together since the larger issue to be decided in S.A.No.1166 of 2010, has to be decided in A.S.No.419 of 2013.

2. A.S.No.419 of 2013 arises out of a suit for partition in O.S.No.4908 of 2000 on the file of IV Assistant, City Civil Court, Chennai. The suit was laid by the respondents herein. The property involved is a house and a shop along with a site measuring 3,057 sq.ft. at Door No.4, Bungalow Street, Ekkattuthangal, Chennai-97, comprised in T.S.No.65, Block No.4 of Mambalam-Guindy Taluk. The admitted facts are that :

- This plot of property was purchased by a certain Munusamy Naicker under sale deed dated 07.4.1920. Munusamy Naicker had two sons viz., Rangasamy Naicker and Munusamy Naicker alias Chinnakannu Naicker. The second mentioned Munusamy Naicker alias Chinnakannu Naicker would be referred to as 'Munusamy Junior'. On 04.9.1957, a partition had taken place between Rangasamy and Munusamy Junior. Munusamy Junior was married to Marimuthammal and they had two daughters and a son. Their son was Arumugam, who was born in 1952 and died in 1981. Arumugam's father, Munusamy Junior died on 01.9.1973. The two daughters of Munusamy Junior and Marimuthammal are one Bommiammal, who was

unmarried and she died in the year 1986; and the other daughter is Chinnaponnu @ Kamatchi, who got married to one Ramamoorthy.

- The present suit involved in both the appeals is between Arumugam's widow and children on one side, and Arumugam's mother Marimuthammal and his sister Chinnaponnu alias Kamatchi on the other side. Arumugam's widow and children had preferred the suit for partition in O.S.No.4908/2000, contending that the property allotted to Munusamy Junior under Ext.A1, partition deed dated 04.9.1957 was an ancestral property in which Arumugam had obtained $\frac{1}{2}$ share by birth, and sought for partition of their half share in the suit property.
- Another set of facts now needs to be introduced here. As indicated, Bommiammal had died in 1986, and when she died, she was survived by her only mother to succeed to whatever share Bommiammal had in the suit property as per Section 15 of the Hindu Succession Act. Secondly, the second defendant/first appellant herein viz., Chinnaponnu alias Kamatchi had released her share in the suit property in favour of Arumugam's widow (first plaintiff) on 08.7.1991 under Ext.A2, Release Deed. Thirdly, Marimuthammal had executed a settlement deed dated 06.05.2004 (Ext.B6), settling what she plea as her $\frac{1}{2}$ share in the suit property in favour of her sole surviving daughter Chinnaponnu alias Kamatchi.

3.1 On 23.07.2001, the trial Court decreed the suit and passed a preliminary decree for $\frac{1}{2}$ share in favour of the plaintiffs and other $\frac{1}{2}$ share to the first defendant with costs.

3.2. Since the plaintiffs were allotted only half share and not any share in Arumugam's father's (Munusamy Junior's) share, the plaintiffs had preferred A.S.No.419 of 2002 before this Court for that fractional share. On 30.03.2012, the suit was remanded by the first Appellate Court with a direction to the trial Court to enter a finding whether the suit property indeed was an ancestral property in the hands of Munusamy Junior, in order Arumugam could obtain $\frac{1}{2}$ share as a coparcener.

3.3 After remand, on 11.10.2012, the trial Court had delivered its judgment, wherein it has held that the suit property was an ancestral property. For arriving at its finding, the trial Court appeared to have been guided by the testimony of Arumugam's mother Marimuthammal, wherein she had deposed that the property was an ancestral property, and proceeded to observe that the defendants/appellants in A.S.No.419 of 2013 have not produced any documents to tilt the probability in their favour.

4. Turning to the second appeal, after the demise of Marimuthammal, Arumugam's widow and children, the plaintiffs in O.S.No.4908 of 2000 had filed another suit in O.S.No.7549 of 2005 before the learned VIII Assistant Judge, City Civil Court, Chennai, for declaration, to declare that the settlement deed dated 06.05.2004 executed by Marimuthammal in favour of her daughter Chinnaponnu alias Kamatchi, is null and void. This suit was originally decreed by the trial Court, but in an appeal preferred by the defendants, Kamatchi and others in A.S.No.486 of 2008 on the file of Additional District Court (Fast Track Court No.IV), Chennai, the same was reversed. Therefore, the plaintiffs (Arumugam's widow and children) have preferred the present second appeal (S.A.No.1166 of 2010).

5. The core issue to be decided, as indicated above, is the one in A.S.No.419 of 2013: It is framed as below:

Whether the suit property is an ancestral property in the hands of Munusamy Junior".

6. The learned counsel for the appellants/defendants in O.S.No.4908/2000 would submit that while it is true that Munusamy Naicker (Munusamy Naicker Senior) had purchased the suit property under Ext.A-9, sale deed dated 07.4.1920, the fact remains that the family did not retain the property continuously and in between, the property had moved out of Munusamy Naicker, and has been re-purchased by his sons Ramasamy Naicker and Munusamy Junior. The reference to the same can be gathered from the recital in Ext.A-1, partition deed dated 11.09.1957, under which Rangasamy Naicker and Munusamy Naicker Junior had partitioned the property. The recital states that neither Rangasamy Naicker nor Munusamy Junior had any ancestral property themselves, that they had purchased the property sometime in 1944 from one Pattabirama Reddiar. Therefore, unless the property is an ancestral property in the hands of Munusamy Naicker Junior, his son Arumugam could not have obtained the right in the same as coparcenar, when he was born in 1952. Admittedly, Munusamy Naicker Junior had died only in 1973 and Arumugam had died a few years later in 1981. Submitting thus, he produced the very same sale deed dated 21.08.1944 recited under Ext.A1, partition deed, and required to be received in evidence Order 41 R.27 r/w.Sec.151 of CPC in CMP.No.22332 of 2013 in A.S.No.419 of 2013.

7. Per contra, the learned counsel for the respondents/plaintiffs would argue that notwithstanding the recital in Ext.A-1, as has been held by the trial Court, the defendants/appellants have not produced any documents to show

that the property was actually purchased by Rangasamy Naicker and Munusamy Junior. It has to be presumed that the property continued with the family, and given the set of other admitted facts namely the birth of Arumugam in 1952 and subsequent demise of Munusamy Naicker Junior in 1973, Arumugam would automatically be entitled to half share in the suit property, and another 1/4th share in the share of his father Munusamy Naicker Junior and the plaintiffs herein would also be entitled to another ¼ share under Ext.A2, Release Deed dated 08.07.1991, executed by Chinnaponnu alias Kamatchi in favour of Arumugam's widow, the first plaintiff. In all, the heirs of Arumugam, the plaintiffs in the suit, would be entitled to ¾ share in the suit property.

8.1 This Court finds preponderating merit in the submissions of the learned counsel for the appellants. Both sides rely on the partition of the year 1957, which in unequivocal terms recites the parties thereto viz., Ramasamy Naicker and Munusamy Junior had purchased the property involved from Pattabirama Reddiar. The other highlight of this document is that they also recite that it did not have any ancestral property. This recital operates as an admission and it binds all those who claim under the same, unless it is proved by material evidence to indicate that what is recited was factually incorrect. If the recital were to be taken as the basic premise, then the suit property purchased was the self-acquisition of Ramasamy Naicker and Munusamy Junior, and during the life time of Munusamy Junior, irrespective of when his son Arumugam was born, he could not have obtained any right whatsoever in the property.

8.2 Here the oral testimony of Marimuthammal, the mother of Arumugam, who at the best of times can be stated as someone illiterate to semi-literate that the property was an ancestral property is of no significance. Whether a property is an ancestral property is borne of the legal incidence attached to the said property, and on which the opinion of the parties would be of little value, when the origin of the title could be traced. Now, it is no more the recital in Ext.A-1 matters, but the very sale deed under which parties to Ext.A-1 had purchased the suit property has come before the Court Vide CMP.No.33223 of 2018. This is a sale deed dated 21.08.1944, under which Pattabirama Reddiar had sold the suit property to Ramasamy Naicker and Munusamy Junior. Even if some doubt were to be remotely entertained, this document nails the plaintiffs down to the finding that this Court has now entered that the suit property is only a self-acquired property in the hands of Munusamy Junior. Since this sale deed document only goes to prove a recital in Ext.A-1, it is more of a clarificatory nature, no oral evidence is required to be adduced. This Court admits it in evidence the document marked on the other side

of the defendants/appellants as Ext.B-1. Accordingly, this CMP is allowed.

9. If the property is a self-acquired property of Munusamy Junior, then on his death, Arumugam would be entitled to $\frac{1}{4}$ share, and take that share along with the share obtained by the plaintiffs under Ext.A-2, release deed, executed by Kamatchi in favour of the first plaintiff. The plaintiffs would be entitled to $\frac{1}{2}$ share in the suit property.

10. This takes this Court now to the issue involved in S.A.No.1166 of 2010. In this appeal, Arumugam's heirs seek a declaration that the settlement deed executed by Marimuthammal in favour of Kamatchi, which is marked as Ext.A2 in A.S.419 of 2013 is null and void. In O.S.No.7549 of 2005, the same settlement deed was marked as Ext.A-1.

11. On admission, this Court has raised the following substantial questions of law :

- 1) Whether the finding of the lower Appellate Court holding that the settlement deed in Document No.3077/2004 is correct?
- 2) Whether the finding of the lower Appellate Court that the deceased settlor was entitled to settle the property is justifiable?
- 3) Whether the property settled lis pendens is against the principle laid down under Section 52 of the Transfer of Property Act?
- 4) Why the settlement pendente lite should not be declared as null and void?

12. The learned counsel for the appellants herein would argue that Marimuthammal had no right to execute the settlement deed in favour of Chinnaponnu @ Kamatchi, till her own rights are crystallised and secondly, inasmuch as the settlement deed was executed during the pendency of O.S.No.4908 of 2000, it is also hit by lis pendense.

13. This Court finds the submission of the counsel for the appellants in the second appeal less impressive. Firstly, doctrine of lis pendens is no bar to convey the property, but it only subjects the title of the transferee pendente lite to the outcome of the litigation. Inasmuch as O.S.No.4908 of 2000, this Court has found that Marimuthammal had her own $\frac{1}{4}$ share in her husband's property and having succeeded to another $\frac{1}{4}$ share of her deceased daughter Bommiammal, she is entitled to $\frac{1}{2}$ share in the suit property. Secondly, the settlement deed cannot be unsettled because Kamatchi would still obtain title as a transferee of a transfer by an ostensible owner. Whichever

way one looks at the second appeal, this Court does not find any substantial questions to be decided.

14.1 The learned counsel for the appellants/defendants in A.S.419 of 2013 submitted that the rentals are collected by the plaintiffs and defendants be given their share of income. To this, the learned counsel for the respondents/plaintiffs submitted that the plaintiffs have filed an application in CMP.No.1798 of 2003 in A.S.No.419 of 2002, to appoint a party-receiver. This Court has appointed the second plaintiff as a party-receiver while the case was pending in A.S.No.419 of 2002, before the suit was remanded. Since the plaintiffs are party receiver they are duty bound to render accounts. The counsel for the plaintiffs would submit that they have some difficulty in depositing the amount before the High Court. The counsel for the appellants/defendants submitted that their share in the amount to be deposited may be permitted to be withdrawn.

14.2 Inasmuch as the second plaintiff/second respondent in A.S.419 of 2013 is the party receiver, he is under a legal obligation to account for the income collected and parties are directed to approach the trial Court both for depositing the amount to be deposited or to withdraw it, as the case may be, and the trial Court shall take care of the accounts and then distribute the income so deposited by the party receiver and then discharge the party receiver, as per law. The Trial Court is required to complete the proceeding within a period of three months.

15. In conclusion, the appeal in A.S.No.419 of 2013 is allowed and the plaintiffs are declared to have $\frac{1}{2}$ share in the suit property, and the judgement and decree in O.S.No.4908 of 2000 is modified to that extent.

S.A.No.1166 of 2010 is dismissed. Given the nature of the relationship between the parties, this Court does not impose any costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS I)
//True Copy//

Sub Assistant Registrar

ds

To:

- 1.The Additional District Judge, Fast Track Court No.IV, Chennai
- 2.The VIII Assistant City Civil Court, Chennai
- 3.The IV Additional Judge, City Civil Court, Chennai.
- 4.The Section Officer, VR Section, High Court, Madras.

+4 cc's to M/s.J.Ashok, Advocate Sr.Nos.84964,85228,85227,84965
+2 cc's to Mr.A.Chidambaram, Advocate Sr.No.84874, 84875

S.A.No.1166 of 2010
and A.S.No.419 of 2013

KJ(CO)
CSL/12.04.2019



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