

IN THE HIGH COURT OF JUDICATURE OF MADRAS

Judgment Reserved on : 01.08.2017

Judgment Pronounced on : 19.04.2018

CORAM:

THE HONOURABLE MR. JUSTICE S.BASKARAN

S.A.No.170 of 2007
and M.P.No.1 of 2007

1.U.Pachiappan
2.Jothiammal

... Appellants/Appellants/defendants

Vs.

Tmt.Pachiammal

... Respondent/Respondent/Plaintiff

This second appeal is filed under Section 100 of CPC, against the judgment and decree dated 08.06.2006 passed by the learned Additional Sub Judge, Thiruvannamalai, in A.S.No.83 of 2005, confirming the Judgment and decree dated 06.09.2005 passed by the learned Principal District Munsif, Chengam in O.S.No.178 of 2004.

For Appellant : Mr.V.Raghavachari

Mr.Mukunth for

For Respondents : M/s.Sarvabhousan Associates

JUDGMENT

The above second appeal arises out of the Judgment and Decree dated 08.06.2006 passed by the learned Sub Judge, Thiruvannamalai, in A.S.No.83 of 2005, confirming the Judgment and decree dated 06.09.2005 passed by the learned Principal District Munsif, Chengam in O.S.No.178 of 2004.

2. Brief facts of the case in brief is as follows:-

According to the plaintiff/respondent the suit A and B schedule properties belonged to her father Uthandi Pillai. The said Uthandi Pillai got two wives. The plaintiff is the son of Uthandi Pillai through his 1st wife Poongavanammal. After her death the said Uthandi Pillai married one Kanniammal as his 2nd wife. The defendants are the children of the said Uthandi

Pillai through the second wife Kanniammal. The said Uthandi Pillai was working as Village Administrative Officer of Se. Agaram village and died on 21.3.98. As the said Uthandi Pillai was a government servant a sum of Rs.44000/- was given to the 1st defendant. When the plaintiff demanded 1/3rd share in the said amount the first defendant evaded and failure to give any amount to the plaintiff. The above said amount is shown as A schedule of this suit. Thus, suit "B" schedule property is an immovable property which originally belonged to the brother of Uthandi Pillai by name Subburoya Pillai who died on 29.11.1981 intestate as bachelor. He purchased the property on 10.03.1980 for a sum of Rs.1000/-. So the only nearest legal heir is the plaintiff and defendants 1 and 2. Hence the plaintiff demanded 1/3 in both A and B schedule properties. Since the defendants evaded for partition the plaintiff issued legal notice on 03.02.2001 and the same was received by the first defendant on 05.02.2001. Even thereafter, the defendant did not come forward to partition the suit property. Hence, the plaintiff has come forward with the suit.

3. On the other hand, the defendants denied the paternity of the plaintiff and stated that "A" schedule property of Rs.44,000/- was received by Uthandi Pillai himself during his life time and the same was spent himself. Thus the "A" schedule property is not in existence. Regarding "B" schedule property, the defendant states that the concerned Subburoya Pillai himself executed Will dated 21.08.1981 in favour of the 1st defendant, who is the only male decedent in the family and the said Will was accepted and acted upon after the death of said Uthandi Pillai. The said property is in possession and occupation of the defendant. Thus, the defendant seeks dismissal of the suit, as no property is available for partition.

4. After contest, the trial Court decreed the suit. Aggrieved upon that the defendants preferred the first appeal before the lower appellate Court and after contest, the lower appellate Court dismissed the first appeal and confirmed the decree and judgment of the trial Court. Now, aggrieved upon that the defendants have come forward with this second appeal.

5. On the side of the appellants, they raised the following substantial question of law.

(a) Whether the Courts below are right in decreeing the suit when the proper and necessary parties had not been impleaded in the suit?

(b) Admittedly when Kaniammal, the mother of the appellants is the step mother of the plaintiff and she is not the class 1 heir under the Hindu Successions Act, whether the plaintiff is entitled

to seek for 1/3rd share in the property?

(c) Whether the courts below are justified in rejecting the Ex.B4 when the same had been established by examining DW1, the scribe?

(d) Whether the lower appellate Court is justified in rejecting the application for additional evidence when the document is relevant for adjudicating and deciding the appeal on merits?

6. The learned counsel for the appellants/defendants submitted that the suit for partition is not maintainable unless and until necessary parties are impleaded. The Courts below failed to consider the fact that Kanniammal is step mother of the plaintiff and the plaintiff will not be her class-I heir. Raniammal, the sister of the appellants/defendants and on her death, the property will devolve upon the mother of the defendants and the defendants would be the heir. As such, the plaintiff will be entitled to seek only 1/5th share as against the claim of 1/3rd share in the property. The learned counsel for the appellants/defendants would further submit that the mother of the defendants, who is also the step mother of plaintiff, as a class I heir is a proper and necessary party to this suit and to prove the same by producing the legal heir certificate, the appellants/defendants filed Order 41 Rule 27 petition in I.A.No.123 of 2005 in the 1st appellate Court, but the same was negatived by the first appellate Court. As such, the suit is bad for non-joinder of necessary party and on that ground alone the suit has to fail and in support of this contention the learned counsel for the appellants/defendants relied on the ruling reported in 2010(4) CTC 640. It is also contended that the only available witness to prove the Ex.B4 Will was examined as D.W.2 and his evidence was not shattered by the respondent and the same will falsify the claim of the plaintiff. In spite of the same, it is contended that the courts below failed to consider the claim of the defendants properly and decreed the suit erroneously, which is not sustainable. Hence, the defendants seek to entertain the appeal.

7. Per contra, the learned counsel for the respondent/plaintiff would submit that both the courts below itself have elaborately discussed in detail the grounds now raised by the appellants in the second appeal and answered against the appellants/defendants with proper reasoning. Hence there is no substance in the contention of the appellants and there is no acceptable substantial question of law raised by the appellants. Thus, the respondent/plaintiff seeks dismissal of the appeal.

7. I have heard the rival submissions and perused the

materials available on record.

8.The first and foremost contention of the defendant is that the plaintiff is not the daughter of Uthandi Pillai and Poongavanam as claimed by her. Thus, the claim of the plaintiff about her paternity is denied by the defendants. However, as rightly pointed out by the Courts below, the first defendant who deposed as D.W.1 clearly admitted in his evidence that the plaintiff is the daughter of Uthandi Pillai by stating that including the plaintiff her father had 3 children. The plaintiff also produce her birth certificate as Ex.A1 and also examined to other witnesses as P.W.2 and P.W.3 and they stated that the plaintiff was born to Uthandi Pillai and his wife Poongavanam Ammal. Thus, in view of the admission of D.W.1 himself, the contention itself is clear that the plaintiff is the daughter of Uthandi Pillai and Poongavanam ammal and the objection by the defendants to the contrary is unsustainable. Thus, the first defence raised by the defendants is to fail.

9.The learned counsel for the the defendants/appellants further contended that the plaintiff is entitled to 1/5th share alone in the property as there are 5 legal heirs and not for 1/3rd share in the suit property. He also contended that the mother of the defendant and another sister by name Rani are also Class-I heirs of Uthandi Pillai, apart from the parties to the suit. Thus, the learned counsel for the appellants/defendants contended that failure to implead the mother and one sister of the defendants namely, Rani is fatal to the plaintiff's case. In support of this arguments the learned counsel for appellants/plaintiffs relied upon the ruling of this Court reported in 2010 (4) CTC 640 in VENKATARAMAN AND OTHERS Vs. N.MUNUSWAMY NAIDU AND OTHERS, wherein it has held as follows:-

"23.The learned Senior Counsel for the respondent has also admitted that specific defence as to the non-joinder of necessary party has not been raised in the Written statement. However, it is open to the defendant to raise the same at any stage of the case as it goes to the root of the matter. To establish his contention, he garnered support from a decision of this Court in shanmugham and others v. Saraswathi and others, air 1997 Mad. 226, wherein it is held as follows:-

"The contention of non-jointer of necessary parties in a suit for partition can be raised at any time as it goes to the root of the matter. It is well settled that a suit for partition is not maintainable in the absence of some of the co-owners".

10. However, refuting the same, the learned counsel for the respondent/plaintiff contended that no such plea was raised in the written statement and therefore the said contention now being raised is unsustainable. In support of the same, the learned counsel for the respondent/plaintiff has relied upon the ruling of this Court reported in 2016-3-L.W. 825 in THOMAS AND ANOTHER Vs. THIYAGARAJAN, wherein it is held as follows:-

"The objection on the ground of non-joinder of necessary parties shall be taken at the earliest possible opportunity. In this case, the plea has not been raised in the written statement. Therefore the contention of the learned counsel for the appellants about the non-joinder of the necessary party is to be brushed aside."

11. The learned counsel appearing for the respondent further relied upon the ruling of this Court reported in 2017 (4) CTC 483 in S.PARTHASARATHY AND OTHERS Vs. THE COIMBATORE PERIYAR DISTRICT, DRAVIDA PANCHALAI THOZHILALAR MUNNETRA SANGAM, wherein it is held as follows:-

"44. In the written statement filed in O.S.No.228 of 2010, the issue relating to nonjoinder of other elected representatives has not been raised. The Trial Court has not framed any issues relating to nonjoinder of necessary parties. Rule 9 Order 1 of CPC prescribes that a suit shall not be defeated on the ground of misjoinder or nonjoinder of necessary parties. Of course, proviso makes an exception. It provides that nothing in Rule 9 would apply to the case of non-joinder of necessary parties. Rule 13 provides that if the objection relating to nonjoinder of necessary party or a proper party is not taken prior to the settlement of issues, the same shall be deemed to have been waived and the Court shall deal with the controversy between the parties who were present before it."

12. In another ruling of this Court reported in 2011(2) 776 in CHANDRAMOHAN Vs. ELEPHANT G.RAJENDRAN AND OTHERS, wherein it is held that even if the requirement under Order 1 Rule 8 are not strictly complied with, once it is shown that the persons, who are likely to be affected by the decree in such a suit, had sufficient notice to the suit, the objection to maintainability cannot be entertained at a later stage. In fact the Division Bench has held that the conduct of the objectors in not choosing to implead themselves in the suit despite their having knowledge

of the suit would amount to waiver. In the light of the above pronouncement, the objections raised by the appellants to the maintainability of the suit also fails.

13. Following the above said rulings, it is clear that if the parties having right or the objectors did not come forward to implead themselves in the suit despite having knowledge of the suit, the same would amount to waiver. It is pointed out that in the case on hand, the mother and sister of the defendants have not chosen to come forward to implead themselves and the same will amount to waiver. In the case on hand also, the appellants/defendants have not raised any objection in the written statement about non impleading of their mother and sister. The defendants relied on only Ex.B4 Will to claim right over the property. During the trial Court proceedings, no steps was taken to implead the mother and sister of the defendants. It was only after the trial Court held against the defendants, they came forward with the application in I.A.No.123 of 2005 under Order 41 Rule 27 seeking to produce legal heir certificate to prove their contention before the first appellate Court. In such circumstances, it is also found by the Courts below that the mother and another sister of the defendants are not existence. In such circumstances, the following above said reulings relied upon by the plaintiff/respondent, the contention of the appellants/defendants that non impleading of necessary parties is fatal to the case cannot be entertained and the same has to fail.

14. The defendants/appellants claims title over the suit property as per Ex.B4 Will said to have been executed by Uthandi Pillai. The same is disputed by the plaintiff. To prove the execution of Will, the defendants examined the scribe of the Will as D.W.2 before the trial Court. Apparently, the settled position of the law regarding proof of Will is that the attesting witness ought to be examined and only then Will stands proved. The scribe of Ex.B4 Will who deposed as D.W.2 is not the attesting witness. Pointing it out, the learned counsel for the plaintiff/respondent contended that execution of Ex.B4 Will is not proved and mere examination of the scribe is of no use to prove the same. In support of his contention, the learned counsel for the plaintiff/respondent relied upon the ruling reported in 2010 (5) MLJ 78(SC) SRINIVASA AND OTHERS Vs. PADMAVATHAMMA, wherein it has held as follows:-

"28. The aforesaid observations are fully applicable in this case. Admittedly, none of the attesting witnesses have been examined. Here signature of the scribe cannot be taken as proof of attestation. Therefore, it becomes evident that the execution of a Will

can be held to have been proved when the statutory requirements for proving the Will are satisfied."

15. It is clear from the above said verdict that Ex.B4 Will is not proved as required under the Evidence Act. Therefore, the conclusion arrived at by the Courts below that Ex.B4 Will is not proved as no infirmity and does not warrant any interference. Further, the lower appellate court held that no case was made out on behalf of the defendants/appellants for interfering with the judgment and decree passed by the trial court. The grievance made on behalf of the appellant is that the judgment of the lower appellate court is vitiated because it failed to discuss the evidence on record in detail and the same is not well founded. However, refuting the same, the learned counsel for the respondent/plaintiff relying upon the observation of the Supreme Court reported in AIR 1967 SC 1124 in GIRIJANANDINI DEVI Vs. BIJENDRA NARAIN CHOUDHARY, contended that the conclusion of the appellant is unsustainable. In the said ruling it is held as follows:-

"It is not the duty of the appellate court when it agrees with the view of the trial court on the evidence either to restate the effect of the evidence or to reiterate the reasons given by the trial court. Expression of general agreement with reasons given by the court decision of which is under appeal ordinarily suffice.

16. Following the above said ruling, it is clear that the contention raised by the appellant cannot be entertained. For the above said reasons, I am of the view that the judgment of the courts below are in accordance with law and not vitiated by on any ground. Thus, in my opinion, no case has been made out for interfering with the judgment and decree passed by the courts below. Thus, the appeal has to fail and the point is answered accordingly.

17. In the result, the second appeal is fails and the same is dismissed. No costs. The Decree and judgment dated 08.06.2006 in A.S.No.83 of 2005 by the learned Additional Sub Judge, Thiruvannamalai is hereby confirmed. Consequently, connected M.P is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

rrg

To

1.The Additional Subordinate Judge,
Thiruvannamalai.

2.The Principal District Munsif Court,
Chengam.

3.The Record Keeper,
VR Section,
High Court, Madras.

+1cc to Mr.Sarvabhauman Associates, Advocate, S.R.No.29345

+1cc to Mr.V.Raghavachari, Advocate, S.R.No.29058

S.A.NO.170 OF 2007

SV(CO)
GSP(09/01/2019)



WEB COPY