

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.03.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

C.M.A.NO.2356 OF 2013
AND MP NO.1 OF 2013

1.Indirani
2.Kannan
3.Sasikala
4.Navaneetha Varadan
5.Chitra ... Appellants/Defendants

Vs.

Jayaprakash ... Respondent/Plaintiff

PRAYER: Civil Miscellaneous Appeal filed under Order 43 Rule 1 (u) of the Civil Procedure Code against the judgment and decree of A.S.No.23 of 2012 on the file of Principal District Judge, Tiruvallur, dated 16.04.2013, in remanding the appeal suit, while confirming the judgment and decree in O.S.No.172 of 2008 dated 28.07.2011 on the file of the Subordinate Judge, Thiruvallur.

For Appellants : Mr.V.Raghavachari
For Respondents : No appearance

J U D G M E N T

This Civil Miscellaneous Appeal is directed against the order of remand made by the Lower Appellate Court by partly setting aside the judgment and decree and partly allowing it.

2. The case of the plaintiff / respondent is that the suit properties belong to joint family of one Deenadayalan Naidu. He purchased the second item of the suit schedule property from and out of the sale proceeds of the lands allotted to Deenadayalan, who is none other than his father. Deenadayalan died intestate on 19.12.1997 and his wife on 19.10.2003. Thereafter, the joint family properties devolved on six children and the plaintiff / respondent, being one of the son is entitled to 1/6th share. Hence, the suit for partition came to be filed. The defendants / appellants have denied the contention that the properties are joint family properties and would contend that the first item of the suit schedule property was allotted to the plaintiff by way

of registered settlement deed dated 29.08.1994 and the second item was given to defendants 2 and 4 for life and absolute right of their children through a registered will dated 17.09.1992. Therefore, the suit properties were not liable for partition. The Trial Court, after framing appropriate issues, had decided that the plaintiff is entitled to partition in respect of item no.1 of the suit schedule property and dismissed the suit in respect of item no.2 of the suit schedule property as the WILL has been admitted and proved by evidence.

3. Aggrieved over the same, the plaintiff / respondent has filed A.S.No.23 of 2012 and the defendants / appellants have filed A.S.No.24 of 2012. During the pendency of the suit, the plaintiff / respondent filed an interlocutory application in I.A.No.1 of 2013 for marking additional documents, under order 41 Rule 27 of the Code of Civil Procedure. The Trial Court decided to receive the additional documents and confirmed the judgment in respect of item no.1 of the suit schedule property and remanded the matter in respect of item no.2 of the suit schedule property to decide as to whether the second item of the suit schedule property is a self acquired property of Deenadayalan Naidu or ancestral and joint family property of the parties.

4. Aggrieved over the decision to remand the matter to the Trial Court to decide as to whether the property is a self acquired property or ancestral / joint family property of Deenadayalan Naidu, the respondents in the suit have preferred the present Civil Miscellaneous Appeal.

5. Heard the submissions made by the learned counsel for the appellants. None appeared for the respondent.

6. From the perusal of the material on record, it is seen that the appellants / defendants have produced the WILL as well as the family arrangement made between the plaintiff and the defendants dated 30.08.2003. The defendants, being the propounder of the WILL have examined the attester and the Trial Court has found that WILL has been proved. The plaintiff himself admits the signature of his father namely, Deenadayalan Naidu, who executed the WILL. In so far as the family arrangement is concerned, it was admitted by the plaintiff that it was executed one, while he was not well. There is no whisper about the settlement deed registered in favour of the plaintiff. Besides all these things, the Lower Appellate Court has allowed the application for marking additional documents and marked a partition deed dated 14.07.1965 as additional document No.1. On the basis of the additional documents received and in order to examine the parties to let in evidence, to decide whether the

properties are ancestral property or joint family property, the matter was remitted back to the Trial Court.

7. As contended by the learned counsel for the appellants, there is no plea by the plaintiff that the properties were ancestral properties. It is a clear case that they are the joint family properties of Deenadayalan Naidu and in the absence of any pleading, the Trial Court cannot substitute a non-existing issue to be decided. Secondly, when the Trial Court has categorically found that the WILL has been proved, and a decision has been taken that it is a self acquired property of the said Deenadayalan Naidu, father of the plaintiff, the First Appellate Court is empowered to take additional evidence and decide the matter by itself, rather than remitting it back to the Trial Court. This will lead filling up the lacuna.

8. Therefore, the order passed by the Lower Appellate Court in A.S.Nos.23 and 24 of 2012 dated 16.04.2013 is set aside and a direction is issued to the Lower Appellate Court to decide the matter on merits, if required, by marking the documents, subject to proof and relevancy and to record evidence in accordance with law, within a period of two months from the date of receipt of a copy of this order.

9. The Civil Miscellaneous Appeal is ordered in the above terms. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

TK
To

1. The Principal District Judge
Tiruvallur.

2. The Subordinate Judge
Tiruvallur.

+1 cc to M/s.V.Raghavachari Advocate sr 23501

copy to
The Record Keeper
VR Section
High Court, Madras

C.M.A.NO.2356 OF 2013

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