

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.07.2018

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

A.S.No.969 of 2004
and CMP.No.14803 of 2004
and CMP.No.1848 of 2016

Hamsavalli

.. Appellant/1st Defendant

Vs.

1.S.Jayanthi
2.R.Suryalatha
3.G.Thilagavathi

Rep. by her Power of Attorney Holder R.Ramanujam
[Power of Attorney Holder permitted to R3 Vide order of this
Court dated 19.01.2018 made in CMP.No.1848 of 2016
in A.S.No.969 of 2004]

4.R.Hemalatha ... Respondents 1 - 4/Plaintiff 1-4
5.Ramakrishnan ... 5th Respondent/2nd Defendant
6.Krishnamurthy ... 6th Respondent/3rd Plaintiff
7.A.Thiruvembalam ... 7th Respondent/4th Defendant
8.J.Krishnaswamy ... 8th Respondent/5th Defendant
9.Dorai Raj ... 9th Respondent/6th Defendant

[Respondents 5 to 8 were set ex parte before the trial Court
and hence notices are dispensed with]

Prayer : First Appeal filed under Section 96 of CPC, against the
judgment and decree dated 10.12.2003 in O.S.No.5 of 2003 on the
file of the Additional District Judge/Fast Track Court No.II,
Cuddalore.

For Appellant : Mr.R.Muralidharan

For Respondents : Mr.A.R.Nixon [R1 to R4]
Respondents 5 to 8 [Given up]
Respondent 9 [No appearance]

JUDGMENT

Challenging the preliminary decree for partition passed in O.S.No.5 of 2003 on the file of Additional District Judge, Cuddalore (originally the suit in O.S.No.156 of 1998 on the file of Sub Court, Cuddalore), the first defendant therein has come forward with this appeal.

2. The brief facts which are necessary for the disposal of this case may be stated as below :

- The suit deals with two schedules of property. The immovable properties are described in the A-schedule property and in the B-schedule to the plaint, the movables are listed.
- He was first married to Andal, who pre-deceased him on 04.07.1979. Through Andal, Sethuraman had four daughters, who are the plaintiffs in the suit. After the demise of Andal, Sethuraman married Hamsavalli, the first defendant.
- All the properties, except Item No.4 of the A-schedule property belonged to a certain Sethuraman. Item No.4 was jointly purchased in the name of Sethuraman and his third daughter Thilagavathy (3rd plaintiff) on 13.08.1997 under Ext.A-4, sale deed. Of these four items, there is no contest with regard to Item Nos.1 and 2 of the A-schedule property.

3. So far as Item No.3 of A-schedule is concerned, the first defendant has contended in her written statement that Item No.3 was bequeathed by Andal to her husband Sethuraman Vide registered Will dated 17.05.1979. This Will was marked as Ext.B-1. On 12.02.1997, Sethuraman died, upon which the Will took effect. So far as Item No.4 of A-schedule is concerned, the first defendant would allege that notwithstanding the fact that the property was purchased jointly in the name of Sethuraman and Thilagavathy, the third plaintiff, Sethuraman had half share in the said item and therefore, she was entitled to 1/5 share in all the suit properties.

4. The trial Court granted a preliminary decree for 1/5th share in Item Nos.1,2. The property in Item No.3 of A-schedule originally belonged to Sethuraman's first wife Andal, and the trial court rejected the contention of the first defendant that Andal had executed a Will in favour of her husband, and has held that on Sethuraman's death she would become entitled to 1/5 share, since the Will was not proved as required under Sec.68 of the Evidence Act. Consequently, the trial Court held that in

item 3, Sethuraman himself had obtained only 1/5 share and when divided, Hamsavalli, the appellant/first defendant was allotted only 1/25th share and rest were allotted to the plaintiffs. So far as Item No.4 of A-schedule is concerned, as trial Court found that Thilagavathy was entitled to half share, and divided the remaining half share of Sethuraman equally among all the five sharers, and granted 1/10 share to the plaintiffs 1,2,4 and the first defendant, and 6/10 share to the third defendant. The suit was dismissed as regards B-schedule property.

5. Points for consideration :

1. Whether Ext.B-1 is proved?
2. Whether the property covered under Ext.A-4 absolutely belonged to Sethuraman.

6. The learned counsel for the appellant fairly submitted that the attester of Ext.B-1 was not examined before the Court. So far as Item No.4 is concerned, the learned counsel would submit that Thilakavathy was examined before the trial Court as P.W.2 and in the course of her examination, she has deposed that the property was available for all.

7. The learned counsel for the respondents 1 to 4/plaintiffs argued along the lines of the reasoning of the trial Court.

8.1 So far as Item No.3 of A-schedule property is concerned, the only ground on which the appellant seeks to exclude other sharers of Sethuraman was on the basis of Ext.B-1, Will. It is a rudimentary requirement of law that for proving the Will at least one of the attestors must be examined in the manner known to law. It is unfortunate that the first defendant had chosen not even to examine any. Necessarily, the appeal has to fail so far as item 3 of the A-schedule goes.

8.2. So far as Item No.4 of A-schedule is concerned, admittedly, the property was jointly purchased in the names of the third plaintiff and her father Sethuraman. On the face of it, it is inconceivable that Sethuraman would be entitled to anything more than ½ share in the property. So far as the submission of the counsel of the appellant that Thilakavathy herself has testified that the property belonged to all is concerned, it appears more as a stray sentence and this apart, right to immovable property cannot be conferred on admission. To state it differently, an admission of a party cannot divest one of the right in an immovable property. Therefore, even with regard to Item No.4 of A-schedule property, this Court is not satisfied with the submissions of the learned counsel.

9. In conclusion, this Court does not find any merit in the appeal and the same is dismissed. No costs. Consequently,

connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS-VII)

//True copy//

Sub Assistant Registrar

ds

To:

1. The Additional District Judge
Fast Track Court No.II,
Cuddalore.

+1cc to Mr.R.Muralidharan, Advocate SR.No.49295

+1cc to Mr.A.R.Nixon, Advocate SR.No.49187

GMV (04/10/2018)

A.S.No.969 of 2004



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