

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.07.2019

CORAM:

THE HONOURABLE MR.JUSTICE N.SESHASAYEE

S.A.NO.1466 OF 2004

AND

CMP.NO.11409 OF 2004

Jayavel ... Appellant/Respondent/Plaintiff

vs

1.Saratha
2.Vasantha

... Respondents/Appellants/Defendants

Prayer :-

Second Appeal filed under Section 100 of the Civil Procedure Code, preferred against the judgment and decree dated 20.06.2003 made in A.S.No.7 of 2001 on the file of the Court of Sub Judge, Dharmapuri, reversing the judgment and decree dated 28.08.2000 made in O.S.No.55/98 on the file of the Court of District Munsif, Harur.

For Appellant : Ms.Ambika

For Respondents : Mr.J.Nandagopal

JUDGMENT

The plaintiff who was successful in having his suit for declaration of title decreed by the trial Court, but suffered decree reversing it by the first appellate Court, has come before this Court with this second appeal. Parties would be referred to by their rank before the trial Court.

2. The case of the plaintiff is that the suit property was an ancestral property in the hands of his father Vaiyapuri, that Vaiyapuri was married to the first defendant, that the couple had two sons and two daughters, of whom, the plaintiff is one of their sons, that the other son Kumaresan had done a vanishing act and that his whereabouts are not known, that of the two daughters, Vasantha, the second defendant is one, and Sumathi is

the other. According to him, on the demise of Vaiyapuri, the plaintiff has been in enjoyment of the entire suit property, and seeks a declaration based on that.

3. According to the first defendant, the mother of the plaintiff, the family properties were partitioned even in 1988, that on 06.02.1993, her husband Vaiyapuri had executed a registered Will, bequeathing the entire suit property in her favour. Subsequently, she had mutated the revenue records in her name Vide Ext.B7, proceedings of the Tahsildar dated 09.8.1994 and thereafter, had executed a gift dated 12.01.1998 (Ext.B9) in favour of her daughters. She also makes a statement in her pleadings that as regards the property allotted to the plaintiff and Kumaresan in the family partition are concerned, Kumaresan had sold his share in favour of the plaintiff's wife.

4. The matter went to trial and as already indicated, the trial Court has decreed the suit. There are two facts before the trial Court, one is whether the suit property is an ancestral property, and the other, whether Ext.B4, Will dated 06.2.1993 is true. To prove the Will, the defendants have examined D.W.3, one of the attestors to the Will, and the trial Court also finds that in the sale deed in favour of plaintiff's wife by Kumaresan, the property sold is recited as an ancestral property. D.W.3, the attesor to Ext.B4 Will also has deposed that the property is an ancestral property. This decree of the trial Court was reversed by the first appellate Court in an appeal preferred by the defendants 1 and 2. The first appellate Court inter alia has held that the other daughter Sumathy is a necessary party to the proceedings, and ought to have been made a party to the suit, and also that the suit itself is barred by limitation.

5. This case is admitted on the following substantial questions of law :

- (1) Is the relief prayed for in the suit barred by limitation?
- (2) Whether the finding of the lower appellate Court is correct in law that the suit is bad for non-joinder of necessary party?
- (3) In the absence of legal proof that the property forming the subject matter of the Will is the self-acquired property of the testator, is the judgment of the lower appellate Court holding that it is the self-acquired property of the testator is in accordance with law?
- (4) In the absence of legal proof regarding oral

partition in the year 1988, can the testator legally transfer any property said to have been allotted in the partition under the "Will" in question?

6. The learned counsel for the appellant submitted that the suit is filed for declaration of title, and the cause of action arose only when he faced an obstruction to his title. Neither the date of the Will, nor the date of settlement has any relevance. The moment plaintiff was obstructed while he was cultivating the land and his title to the property was challenged, the suit was laid. Turning to the other point, when only the first defendant has challenged the title of the plaintiff, it is not necessary for the plaintiff to implead Sumathi, the other sister of the plaintiff, more so because, the suit is not for partition.

7. Per contra, the learned counsel for the respondents would argue that the suit property was purchased by Vaiyapuri on 28.05.1975 under Ext.B3 sale deed, and there is no case that the sale consideration was from and out of any ancestral property. Therefore, the suit property for all practical purposes, has to be construed as his self-acquisition. After the institution of the suit and during its pendency before the trial Court, the plaintiff and his brother Kumaresan had sold their interest in the property in Survey No.14/2 in favour of plaintiff's wife Meena under Ext.B1. The recital in the said sale deed states that the property conveyed therein is an ancestral piece of property. This recital is post suit. So far as the plaintiff's share is concerned, he was selling his share to his own wife under Ext.B1, and therefore, hence the recital in Exts.B1 (which is marked separately, rather, unnecessarily as Ext.B2) would be self-serving. So far as Kumaresan's share is concerned, he is not even a party to the suit. Hence a unilateral statement made by the plaintiff and Kumaresan, cannot operate as a binding statement on the first defendant.

8. This Court carefully evaluated the merit of rival submissions on the foundation of evidence available on record. Here the plaintiff too first makes a statement that his brother Kumaresan is not residing in his viilage, and his whereabouts are not known. The suit is laid on 02.03.1998, and four months later on 16.07.1998, the same Kumaresan had executed a sale deed in favour of plaintiff's wife, Meena. This implies the lost Kumaresan has now re-surfaced. If Kumaresan is available, even going by the plaintiff's case, he would be entitled to a share in the suit property, but then, he has not been impleaded in the suit.

9.1 In a suit for declaration of title of a property known to be held in co-ownership by an assertion made in the plaint, then all those who are likely to be excluded by the decree sought, ought to be parties to the suit, and it is only when someone could not be impleaded for want of information about one's existence, the doctrine of substantial representation could be pressed into service. This apart, according to the first defendant, on the strength of Ext.B4 Will, she had executed a settlement deed to both her daughter Vasanthi, the second defendant, and Sumathi. Therefore, ultimately Vasanthi and Sumathi have to defend their title, but Sumathi was not made a party to the suit. This Court, therefore, is in agreement with the finding of the Court below that the suit is bad in non-joinder of Sumathi.

9.2 Turning to the second part as to whether the suit property is an ancestral property or not, there is no case for the plaintiff that he had purchased the property out of his independent income, and that the property sold to his wife under Ext.B1 is a joint acquisition with his brother Kumaresan. If he cannot account for the acquisition of the property covered in Survey No.41/2, which is the subject matter of Ext.B1 sale deed, then it ought to be presumed that this property was a part of the property that Vaiyapuri had held. If this is a part of joint family property and if the plaintiff and Kumaresan were allowed to deal with this property after the demise of Vaiyapuri, their father, then one needs to presume that there might have been an oral partition. The first defendant has had only indicated that in 1988, an oral partition had taken place, but when the available documents are cogently placed and are correlated to the pleadings, they only lead to an inference that there should have been an oral partition. If it were to be otherwise, then how Jayavel, the plaintiff, and Kumaresan alone were allowed to deal with the property covered under Ext.B3, would become a puzzling fact.

9.3 And the last of the questions to be investigated is whether Ext.B4 Will is genuine. While the defendants attempted to prove it by examining D.W.3, the plaintiff had made easy their exercises by opting not to post a single question during the cross examination of the second defendant on the factum of execution of the Will. The only question/suggestion he has asked was if the suit property was purchased out of joint efforts of Vaiyapuri, himself and Kumaresan. This indicates that there are two facts that this Court considers relevant are :

- (1) that the suggestion made to D.W.3 is not the case of the plaintiff as disclosed in the plaint.

(2)that the plaintiff, at the end of the day, has resigned to the fact that the Will is genuine and the worst case scenario is that he could defend only 1/3 share in the suit property.

However, as already stated, Ext.B3 and other attending evidenciary circumstances indicate that the suit property could well be the self-acquisition of Vaiyapuri and consequently, he had absolute right of disposition over the same through the testamentary instrument.

10. In conclusion, this Court does not find any merit in the same and the appeal is dismissed, and this Court considers it is not necessary to decide the substantial questions of law, which are against the appellant. No costs. The judgment and decree dated 20.06.2003 made in A.S.No.7 of 2001 on the file of the Court of Sub Judge, Dharmapuri, is hereby confirmed. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To:

1. The Sub Judge, Dharmapuri.
2. The District Munsif Court, Harur
3. The Section Officer,
VR Section, High Court, Madras.

+1cc to Ms.Ambika, Advocate, S.R.No.60077

S.A.No.1466 of 2004

RR(CO)
CS/16/03/2020

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