

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.03.2019
PRONOUNCED ON: 21.03.2019

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No. 1405 of 2005

Shanmugam

... Appellant/D-2/D-2

Vs.

1.Raman @ Ramamoorthy ...1st Respondent/Respondent/Plaintiff

2.Krishnamurthy ...2nd Respondent/Appellant/D-1

3.Vijayalakshmi ...3rd Respondent/3rd Respondent/3rd Respondent

Prayer: Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree of the Court of the 1st Additional Subordinate Judge, Villupuram in A.S.No.107 of 2004 dated 28.03.2005 in modifying the judgment and decree of the Court of the Principal District Munsif, Thirukoilur, in O.S.No.376 of 2002 dated 30.09.2003.

For Appellant : M/s.V.Srimathi

For Respondents: M/s.Nilapher
for M/s. R.Meenal

J U D G M E N T

Challenge in this second appeal is made to the judgment and decree dated 28.03.2005 passed in A.S.No.107 of 2004 on the file of the First Additional Subordinate Court, Villupuram modifying the judgment and decree dated 30.09.2003 passed in O.S.No.376 of 2002 on the file of the District Munsif Court, Thirukoyilur.

2. The second appeal has been admitted on the following substantial question of law:

Whether the lower appellate court was justified in entertaining the appeal at the instance of the 1st defendant inasmuch as

he is not an aggrieved person as per Sec.96 of the CPC?

3. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

4. For the sake of convenience, the parties are referred to as per the rankings in the trial court.

5. The suit has been laid by the plaintiff for partition and permanent injunction.

6. The relationship between the parties is not in dispute. The plaintiff, the defendants 1 and 2 are the sons and the third defendant is the daughter of Venu Gopal. It is found that the parties effected partition in respect of their properties by way of a registered partition deed on 07.03.1970, which document has been marked as Ex.A1/B1 and by way of the abovesaid partition deed, it is found that other than the suit properties, the other properties belonging to the joint family have come to be divided amongst themselves. Thus, the suit properties are left undivided by way of Ex.A1/B1 partition deed.

7. Materials placed on record to go to show that the father Venu Gopal had acquired certain properties after the abovesaid partition and in respect of the said acquired properties, it is seen that he had executed a registered settlement deed in favour of his son namely the first defendant under the settlement deed dated 18.02.1998, the copy of which has been marked as Ex.B5. Inasmuch as the property comprised in Ex.B5 had been acquired by Venu Gopal, after the execution Ex.A1/B1 partition, the same being his self acquired property, it is found that he is entitled to settle the same in favour of his son namely the first defendant. Materials placed on record also go to show that in respect of the properties allotted to him under Ex.A1/B1 partition deed Venu Gopal had executed two registered settlement deeds in favour of his daughter namely the third defendant, the copies of the abovesaid settlement deeds had been marked as Exs.B2 and B3. With reference to the abovesaid facts, there is no dispute between the parties.

8. Though, it is putforth by the second defendant that the property comprised in Ex.B5 settlement deed also partake the character of the joint family property, however, inasmuch as the same had come to be acquired by Venu Gopal after the partition between the family members under Ex.A1/B1, the same can only be his self acquired property and accordingly it is found that he is entitled to settle the same by way of Ex.B5 deed in favour of his son namely the first defendant. Therefore, the contention that the property comprised in Ex.B5

also should be considered as the joint family property belonging to the parties, as such, cannot be accepted.

9. The only point in issue between the parties is the alleged Will dated 27.09.2000 said to have been executed by Venu Gopal in respect of the suit properties in favour of his sons namely the plaintiff and the second defendant. According to the second defendant in particular, Venu Gopal had executed the abovesaid Will bequeathing the property comprised in A schedule of the Will to the plaintiff, the property comprised in B schedule to the second defendant and also directed that the property comprised in C schedule should be enjoyed by the plaintiff and the second defendant in common. Ex.B6 Will is executed with reference to the suit properties, and accordingly, the plaintiff has also projected the case based on Ex.B6 Will, hence according to the plaintiff Venu Gopal and his three sons are each entitled to $\frac{1}{4}$ share in the suit properties and on that footing, contending that inasmuch Venu Gopal had bequeathed his share in the suit properties in his favour and in favour of the second defendant by way of Ex.B6 Will, on that premise, contended that he in toto would be entitled to obtain $\frac{3}{8}$ th share, the second defendant would be entitled to $\frac{3}{8}$ th share and the first defendant would be entitled to $\frac{2}{8}$ th share in the suit properties and on that footing, laid the suit against the defendants for partition.

10. The first defendant in particular, resisted the plaintiff's suit contending that the Will projected by the second defendant and also putforth by the plaintiff for claiming $\frac{3}{8}$ th share in the suit property dated 27.09.2000 said to have been executed by Venu Gopal is not true and valid. Accordingly, further contending that the suit properties being the joint family properties of the plaintiff and the defendants 1 and 2 as well as their father Venu Gopal, the abovesaid persons would be entitled to each $\frac{1}{4}$ share and accordingly, it is his case that on the demise of Venu Gopal, the $\frac{1}{4}$ share of Venu Gopal in the suit properties would devolve upon his legal heirs namely the plaintiff and the defendants 1 to 3 and the plaintiff and the defendants 1 and 2 each would be entitled to $\frac{5}{16}$ share in the suit properties whereas the third defendant would be entitled to $\frac{1}{16}$ share in the suit properties.

11. As above noted, it is only the second defendant, who had mainly projected Ex.B6 Will and accordingly contended that the is entitled to half share in the suit properties by virtue of the abovesaid Will and accordingly prayed for appropriate orders.

12. Based on the materials placed on record, the trial court was pleased to declare that the plaintiff and the second

defendant are each entitled to half share in the suit properties based on the Will marked as Ex.B6 holding that Ex.B6 Will has not been at issue between the plaintiff and the second defendant as such and the plaintiff having admitted that he is entitled to derive benefit under the Will cannot be allowed to challenge the same on the doctrine of estoppel and election and on that reasonings, disposed of the suit declaring half share to the plaintiff in the suit properties and the other half share to the second defendant in the suit properties. Impugning the judgment and decree of the trial court, the first defendant has preferred the first appeal. It is also noted that the second defendant has also preferred cross appeal. The first appellate court, on an appreciation of the materials placed on record, upholding the truth and validity of the Will marked as Ex.B6, modified the judgment and decree of the trial court by declaring that the plaintiff is entitled to 3/8 share, the second defendant is entitled to 3/8 share and the first defendant is entitled to 2/8 share and on that determination, accordingly, allowed the appeal of the first defendant and dismissed the cross appeal preferred by the second defendant. Impugning the judgment and decree of the first appellate court, the second defendant has preferred the present second appeal.

13. It is mainly contended by the second defendant's counsel that inasmuch as the first defendant has not tendered evidence in the trial court with reference to his case, he is not entitled to challenge the judgment and decree of the trial court as he is not an aggrieved party and accordingly contended that the first appellate court erred in modifying the judgment and decree of the trial court without properly appreciating the terms of the Will marked as Ex.B6 executed by Venu Gopal and accordingly sought for interference in the judgment and decree of the first appellate court.

14. In the light of the abovesaid factors, inasmuch as Ex.B6 Will is projected by the parties concerned for determining the shares to which they are entitled to in the suit properties, when in particular, the abovesaid Will has been challenged by the first defendant as not a true and valid document, at the foremost, before considering further issues for determining the shares of the parties in respect of the suit properties on the basis of the said Will, we will have to decide whether the Will Ex.B6 is a true and valid one as the first defendant has challenged the truth and validity of the same. It is for the second defendant or as the case may be, the plaintiff, who also relies upon the said Will, to establish the truth and validity of the same. However, for establishing the truth and validity of the Will as required by law none of the attestors to the said Will has been examined either by the second defendant or by the plaintiff. On the other hand, it is only the scribe of the Will Subramaniam, who has been examined

as D.W.2. As to why the attestors of the Will had not been examined, absolutely, there is no reason adduced by the second defendant in particular, and through the scribe of the Will has claimed that Ex.B6 Will has been executed by Venu Gopal, however when the attestors of the abovesaid Will has not been examined to establish the validity of the Will as per law, in such view of the matter, the truth and validity of Ex.B6 Will cannot be upheld and accordingly, it is found that on the basis of Ex.B6 Will, we cannot determine the shares of the parties to which they are entitled to in favour of the suit properties. Based on the evidence of scribe alone, we cannot uphold safely that Venu Gopal had indeed executed Ex.B6 Will in favour of the plaintiff and the second defendant in respect of the suit properties. Therefore, as rightly contended by the first defendant before the Courts below, no credence could be attached to Ex.B6 Will for determining the issues involved between the parties.

15. Equally, the approach of the Courts below that inasmuch as Ex.B6 Will has not been disputed by the plaintiff, during the course of his evidence, on that premise, the truth and validity of Ex.B6 Will could be accepted as such, does not merit appreciation in the eyes of law. When one of the contesting parties namely the first defendant has challenged the truth and validity of Ex.B6 Will, it is for the second defendant in particular, who propounds the Will to establish the truth and validity of the same. Neither the second defendant nor the plaintiff had endeavored to establish the truth and validity of Ex.B6 Will in the manner known to law and therefore the same cannot be the basis for considering the issues involved between the parties one way or the other.

16. Resultantly, the position being that Ex.B6 Will could not be taken into consideration in any manner, particularly the truth and validity of the same, not having been established as per law. When the suit properties are admittedly the joint family properties belonging to Venu Gopal Pillai and his three sons namely the plaintiff and the defendants 1 and 2, as per the notional partition at the time of the demise of Venu Gopal, the suit properties would devolve upon the above said four persons and thereby each would be entitled to obtain $\frac{1}{4}$ share. The $\frac{1}{4}$ share belonging to Venu Gopal Gounder, on his demise, would devolve upon his legal representatives namely the plaintiff and the defendants 1 to 3, accordingly, it is found the plaintiff and the defendants 1 and 2, each would be entitled to obtain $\frac{5}{16}$ share in the suit properties and the third defendant would be entitled to obtain $\frac{1}{16}$ share in the suit properties. The shares to which the parties are entitled to in respect of the suit properties being as above, the determination of the trial court as well as the first appellate court declaring the shares of the parties, on the basis of Ex.B6 Will cannot be accepted, particularly, when the truth and validity

of Ex.B6 Will has not been established as per law.

17. Merely because, the first defendant has not let in any evidence in the trial court, they would not in any manner deprive him to obtain his lawful share in the suit properties and accordingly when the suit properties admitted to be the joint family properties belonging to the parties, in such view of the matter, it is found that the first defendant also would be entitled to his due share in the suit properties namely 5/16 share as above pointed out. The trial court as well as the first appellate court is found to have based their decision on the doctrine of estoppel and election by invoking the same against the plaintiff, particularly forgetting for a moment, that the same would not apply to the first defendant, when he has not accepted the truth and validity of the Will in question. The admission of the plaintiff accepting the truth and validity of Ex.B6 Will, during the course of his evidence, would not in any manner bind the first defendant as such and therefore the contention that the first defendant cannot held to be not an aggrieved party and not entitled to prefer the appeal against the judgment and decree of the trial court, as such, cannot be countenanced. When he is also one of the sharers, whether he had paid the court fees towards his share or not, that would in any manner deprive him in obtaining his lawful share, particularly when it is found that he would be entitled to seek for his due share after paying the necessary court fee with reference to the same as provided under law.

18. In the light of the abovesaid discussions, the substantial question of law formulated in the second appeal is accordingly answered against the second defendant.

19. For the reasons aforesaid, the judgment and decree dated 28.03.2005 passed in A.S.No.107 of 2004 on the file of the First Additional Subordinate Court, Villupuram as well as the judgment and decree dated 30.09.2003 passed in O.S.No.376 of 2002 on the file of the District Munsif Court, Thirukoyilur are modified and the plaintiff and the defendants 1 and 2 are each entitled to obtain 5/16 share and the third defendant is entitled to obtain 1/16 share in the suit properties and accordingly there shall be a preliminary decree in the suit in favour of the plaintiff. Accordingly, the second appeal is disposed of. No costs. Consequently, connected miscellaneous petition, if any is closed.

-s/d-

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

To

1. The 1st Additional Subordinate Judge,
1st Additional Subordinate Court,
Villupuram.
2. The Principal District Munsif,
Principal District Munsif Court,
Thirukoilur.

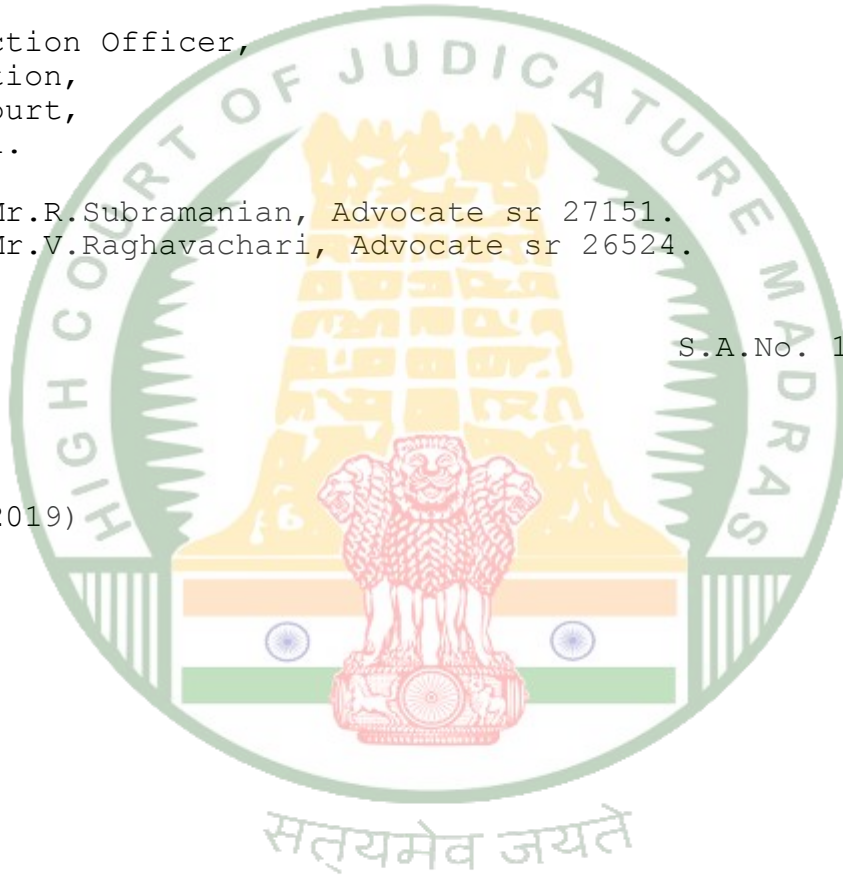
Copy to

The Section Officer,
VR Section,
High Court,
Chennai.

- +1 CC to Mr.R.Subramanian, Advocate sr 27151.
+1 CC to Mr.V.Raghavachari, Advocate sr 26524.

S.A.No. 1405 of 2005

SAI (CO)
SP (15/05/2019)



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