

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.07.2019

CORAM:

THE HON'BLE MR.JUSTICE N.SESHASAYEE

S.A.NO.30 OF 2005

AND

C.M.P.NO.403 OF 2013

AND

C.M.P.NO.472 OF 2005

- 1.Nagaraja Ayer(died)
- 2.Vasuki
- 3.N.Paramasivam
- 4.N.Balamurugan
- 5.N.Yuvaraj
- 6.Banurani
- 7.Miss Hemalatha

...Appellants/2 to 7 Appellants LRS

[Appellants 2 to 7 brought on record as LRS of the deceased sole Appellant Vide order of Court dated 20/06/2019 made in CMP.No.11081/2018 in SA.NO.30/2005]

Vs.

- 1.Kalyanasundaram
- 2.Gangaiyar
- 3.Rathina Chettiar
- 4.Sakarai Iyer
- 5.Natesa Iyer
- 6.Lakshmi Ammal
- 7.Geetha Ammal

.. 1st Respondent/6th Defendant

.. 2 to 7 Respondents/
5,8,13,14,15 Defendants

- 8.Minor Senthil
- 9.Minor Jayanthi

.. 8th & 9th Respondents/
16th & 17th Defendants

- 10.Krishnaveni Ammal(died)
- 11.Gnanambal
- 12.Thirupuram
- 13.Balaiar

.. 11 to 13 Respondents

[RR11 to 13 are recorded as LRS of the deceased R10 viz., Krishnaveni Ammal Vide Order of Court dated 20/06/2019 made in SA.No.30/2005 as per memo dated 20/07/2015 in USR.No.5478/2015 are recorded]

Prayer:-

Second Appeals filed under Section 100 of Civil Procedure Code against the Judgment and Decree made in A.S.No.96 of 1993 dated 27-2-2004 on the file of the Court of Sub-ordinate Judge, Kancheepuram in partly allowing the judgment and decree made in O.S.No.276 of 1989 dated 30-8-1993 on the file of the Court of Additional District Munsif, Kancheepuram.

For Appellants : Mr.A.Muthukumar

For 1st & 11th Respondents : No appearance

For R6 to R9, R2 to R4 : Notice Dispensed with

For R5, R10, R12 : Died

JUDGMENT

The plaintiff who was successful before the Trial Court in his suit for partition, but suffered a decree dismissing the suit by the first Appellate Court, with regard to item 1 of the B schedule, has come forward with the second appeal. The suit was originally laid by the plaintiff as an indigent person in 1974, and after certain inexplicable delay and transfer of suit from the Court of Subordinate Judge, Kancheepuram to the Court of Additional District Munsif, Kancheepuram, where it was taken on file as O.S.No.276/1989. Parties would be referred to by their rank before the trial Court.

2.The plaintiff had laid a suit for partition as an indigent person sometime in the year 1974, and died without enjoying the property with regard to which he had laid the suit. On his death, his son was impleaded in the first appeal and during the pendency of this appeal, he too died. Now the third generation from the original owner is awaiting for some relief from this Court in this appeal. It is not that they have entirely lost the case, but then the preliminary decree has not become final yet for them to proceed with the final decree proceedings.

3. As stated above, the suit is laid for partition. There are two schedules to the plaint, of which, A schedule of the plaint deals with the movables, whereas the B schedule deals with 3 items of immovable properties. While the trial Court decreed the suit, the first appellate Court concurred with the findings of the trial Court as regards properties described in items 2 and 3 of the B schedule, but dismissed the suit as regards item 1 of the B schedule therein. Therefore, the entire controversy in this appeal is limited to item 1 in B schedule.

4.The B schedule property is described as a residential property in Sy.No.259. The boundary description reads: To the east of Veeraiyer house.

5. According to the plaintiff, this property originally belonged to his maternal grandmother Thayammal, that Thayammal died sometime in 1935, and left behind her two daughters Aburupammal and Rajammal to succeed to her properties as per the law that then prevailed. Therefore, in this property both Aburupammal and Rajammal had half share each, and following Aburupammal's death, the property devolved equally on the plaintiff and his two brothers, and that his two brothers relinquished their right in the property Vide Ext.A.10. Accordingly, the plaintiff has absolute title to half share in item 1 of the suit property. The other half belongs to Aburupammal's sister Rajammal's branch.

6. The suit was resisted by the 6th defendant, the son of Rajammal. He alleged that the property originally belonged to Bassavayyar alias Chakkaraiyar, that the property came to be sold in a Court-auction in which, one Neelakandaiyar purchased the property, that the auction purchaser had sold the property to Manickaiyar, the maternal uncle of the 6th defendant, that Manickayyar executed a Will in favour of one Sambandhaiyar, the first defendant in the suit, and subsequently, Sambandhaiyar sold the property to the sixth defendant. Therefore, the plaintiff has no title to the property. Further, in the sale deed executed in favour of the 6th defendant, the first defendant traced his title to the Will executed by Manickaiyar and as well as a settlement deed executed by Rajammal in his favour.

7.1 The dispute went for trial, and before the trial Court, both sides have adduced both oral and documentary evidence and acting on them the trial court decreed the suit.

7.2 The dispute went to the first appellate court. Turning to the documentary evidence, there are certain critical documents, but, in the context of the judgment of the trial Court Ext.B.1, Ext.B.2 and Ext.B.5 alone are significant. Ext.B.1 is a lease deed executed by Rajammal and the first defendant in favour of a third party, by which, they have leased the entire suit property and the property to its west. In this document, the plaintiff herein is the second attester. This was followed by Ext.B.2 and Ext.B.5, both of which are copies of property tax assessment registers. Acting on them, the first appellate Court has held that Ext.B.1, lease deed, leads to an inference that there had been an oral relinquishment by plaintiff's mother Aburupammal of her half share in the suit property in favour of Rajammal.

8.This appeal is admitted on the following substantial questions of law;

(a)Whether the lower Appellate Court erred in law in holding that the plaintiff lost his title to the first item of B-Schedule property on the ground that he had attested Ex.B1, lease deed against the settled law that mere attestation of a document will not divest his title?

(b)Whether the Lower Appellate Court erred in law in holding that mere mutation of records viz house tax assessment and payment of of house tax under Ex.B2 and Ex.B5 had divested the title of the plaintiff and his mother?

(c)In the absence of any release deed executed by the plaintiff's mother in favour of her sister Rajammal, whether the lower appellate Court erred in law in holding that the Plaintiff's mother released her half share in favour of her sister?

9.The learned counsel for the appellants argued;

- A) Thayammal had purchased item 1 of the suit property under Ext.A.1, dated 17.05.1888. The property to its immediate west was owned by Thayammal's husband Chakkaraiyar. Besides Aburupammal and Rajammal, the two daughters of Thayammal referred to above, the couple had three sons, namely, Natesan, Neelakanta Ayyar and Manikaiyar. While so, Thayammal died in 1935 as could be ascertained from Ext.A.8, death certificate.
- B) Secondly, a Small Causes Suit came to be laid against Neelakanta Ayyar in Small Cause Suit No.1412 of 1936. In this suit, the property covered under Ext.A.1 and the entire property belonging to Chakkaraiyar were brought to sale. Immediately, Aburupammal Ammal and Rajammal filed E.A.No.2097 of 1936 under Order 29 Rule 58 of the Civil Procedure Code, staking a claim over the suit property. Under Ext.A.7, order dated 27.01.1937, their claim was upheld. In other words, item 1 in the B schedule here in this suit came to be exempted from sale in the aforesaid small causes case.
- C) In the meantime, as regards the western portion, Nateson's son Sadasiva Ayyar filed E.A.No.2136 of 1936 claiming 7/12

share in the suit property. The claimant is none other than the Judgment debtor Neelakanta Ayyar's brother Nateson's son. He claimed 7/12 share in the western portion and that too came to be allowed. The remaining 5/12 share in the western portion alone was brought for sale. One Neelakanta Ayyar (he is different from the Judgment Debtor in the small cause suit No.1412 of 1936) purchased this 5/12 share. Ext.B.4, is the sale certificate in his favour which shows that the property sold to Neelakanta Ayyar was to the east of the 7/12 share of Sadasiva Ayyar, and to west of item 1 of the suit property.

- D) Subsequently, the auction purchaser Neelakanta Ayyar sold the property he purchased to one Manickaiyar under Ext.B.6, dated 11.11.1944. Manickaiyar, as already stated is yet another son of Thayammal. On 14.11.1962, under Ext.B.11, Manickaiyar executed a Will in favour of first defendant. In the meantime, Rajammal too executed a settlement deed under Ext.B.10, dated 17.06.1967 in favour of Sambandhaiyar. On the strength of Ext.B.10 and Ext.B.11, the first defendant executed a sale deed in favour of the 6th defendant.
- E) The above flow of title would indicate that as regards item 1 in B schedule, the sixth defendant can claim title only on the basis of Ext.10, settlement deed which Rajammal had executed in favour of the first defendant. However, Rajammal had only half share in item 1, and therefore, Ext.B.10, settlement deed cannot convey anything more than the half share of Rajammal in item 1. So far as the title obtained by the 6th defendant under Ext.B.11 is concerned, the same is traceable immediately to Ext.B.11, Will and Ext.B.11, will depends for its title to Ext.B.4, sale certificate, and Ext.B.6, sale deed executed in favour of Manickaiyar, the testator in Ext.B.11, will.

10. The respondents are represented by a counsel but, no appearance is made on both the days when the case was heard by this Court. However, this Court did not dispense the counsel for the appellants from establishing his case on the basis of evidence available on record. This Court has also perused the entire materials to satisfy itself that the statement made by the counsel for the appellants is found correct and supported by the documents available on record. Hence, this Court proceeds to decide this case on its merits.

11.1 The first appellate Court, argued the learned counsel for the appellants, has held that there had been an oral relinquishment by plaintiff's mother Aburupammal of her half share in the suit property in favour of Rajammal based on the

lease deed in Ext.B.1. This document was jointly executed by Rajammal and the first defendant, who as already indicated has confirmed his title to 7/12 share based on the order in claim petition in E.A.No.2136 of 1936. The plaintiff is only an attester in Ext.B.1, lease deed.

11.2 On the face of it, the document does not recite anything about the alleged relinquishment of half share by Aburupammal. However, the participation of the plaintiff as an attester in Ext.B.1 can only lead to the conclusion that the plaintiff had authorized one of the co-sharers of the property, namely, Rajammal to execute a sale deed and this would in no where convey an idea that he had parted his share in favour of Rajammal. Right of management of property held in co-sharership by one of the co-sharers does not imply that other sharers have given up their share in the suit property. So far as Ext.B.2 and Ext.B.3 are concerned, they are copies of property tax registers and law has never recognized property tax assessment registers as documents of title but, had treated them only as an incident to ownership. Therefore, assessing the property held in co-ownership in the name of one of the co-sharer can never be equated to relinquishment of the shares by other co-sharers.

13. This Court finds substantial merit in the submissions of the learned counsel for the appellants. First there is no pleading in the written statement that plaintiff's mother Aburupammal had relinquished her right in favour of Rajammal. The nearest document which may come to the rescue of the sixth defendant is Ext.B.10, the settlement deed executed by Rajammal in favour of the first defendant, on whose strength he had executed Ext.A.11 = Ext.B.9, sale deed in favour of the 6th defendant. As rightly argued, even Ext.B.10, settlement deed does not indicate, nor does it recite that Aburupammal had relinquished her half share in favour of Rajammal. Going by Ext.A.7, the Order passed in claim petition in E.A.No.1412 of 1936, Aburupammal's right has been recognized as she was a party/petitioner to that proceedings. However, there is nothing on record to indicate that between 27.01.1937, the date on which Ext.A.7 Order came to be pronounced, and till execution of Ex.B.1, lease deed in 1964, Aburupammal had relinquished her half share in favour of her sister Rajammal.

14. In this scenario, if Ext.B.1, lease deed is considered, it can well be considered as a document executed by a co-sharer, exercising her power of management in administering the property held in co-ownership, and the fact another co-sharer had signed as an attester does not automatically imply that the right of the attesting co-sharer is given up. After all, the law does not presume anything more than animus attestandi of the

attester in all such cases unless specific knowledge of the attester to the content of the document is shown to have been established. That precisely is not the case here, nor is there any evidence supporting the case of the defendant.

15. In this setting, if Ext.B.2 and Ext.B.5 are considered, they are mere property tax assessment registers, which does not defend the case on title. The only possible plea that the defendant could have taken is ouster but, it was not pleaded.

16. Therefore, if viewed from every conceivable angle, this Court considers that materials on record support a finding on the substantial questions of law in favour of the appellants.

17. In the result, the second appeal is allowed and the Judgment and Decree made in A.S.No.96 of 1993 dated 27.02.2004 on the file of the Sub-ordinate Court, Kancheepuram in partly allowing the judgment and decree made in O.S.No.276 of 1989 dated 30-8-1993 on the file of the Additional District Munsif Court, Kancheepuram is set aside. No costs. Consequently, the connected civil miscellaneous petitions are closed.

Sd/-

Assistant Registrar(Insp.Cell)

//True Copy//

Sub Assistant Registrar

tsg

To:

1. The Sub Judge,
The Sub-ordinate Court, Kancheepuram.
2. The Distict Munsif,
The Additional District Munsif Court, Kancheepuram.
3. The Section Officer
VR Section, High Court, Madras.

+1cc to Mr.A.Muthukumar, Advocate, S.R.No.58812

S.A.No.30 of 2005
and C.M.P.No.403 of 2013
and C.M.P.No.472 of 2005

VGI (CO)
CS/05/01/2021