

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 26.07.2019

DATED : 07.08.2019

CORAM :

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

S.A.NOS.48 & 49 OF 2015

AND

CROS.OBJ.NO.83 OF 2016

S.A.No.48 of 2015

Marappan ... Appellant/Respondent/Defendant

Vs.

1.Santhosam

2.Sivagami

.. Respondents/Appellants/Plaintiffs

PRAYER:

This Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and Decree dated 31.07.2014 made in A.S.No. 37 of 2012 on the file of the Principal District Court, Namakkal, reversal of the Judgment and Decree dated 28.09.2012 made in O.S.No.68 of 2012 on the file of the learned Sub Court, Namakkal.

S.A.No.49 of 2015

Marappan

.. Appellant/Appellant/Defendant

Vs.

1.Santhosam

2.Sivagami

.. Respondents/Respondents/Plaintiffs

PRAYER:

This Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and Decree dated 31.07.2014 made in A.S.No. 16 of 2013 on the file of the Principal District Court, Namakkal, confirming the Judgment and Decree dated 28.09.2012 made in O.S.No. 68 of 2012 on the file of the learned Sub Court, Namakkal.

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CROS.OBJ.NO.83 OF 2016:-

1.Santhosham
2.Sivagami

.. Petitioners/Cross Objectors

vs

Marappan

.. Respondent

Prayer:-

Cross Objection filed under order XLI Rule 22 of Civil Procedure Code against the Judgment and Decree dated 31.07.2014 made in A.S.No.37 of 2012 on the file of the Principal District Court, Namakkal, reversal of the Judgment and Decree dated 28.09.2012 made in O.S.No.68 of 2012 on the file of the Sub Court, Namakkal.

For Appellant in both
S.As. : Mr.M.Manokaran
and Respondents in
Cross Objection

For Respondents in
both S.As. : Mr.T.Dhanyakumar
and for Cross Objector
in Cross Objection

COMMON JUDGMENT

The defendant in O.S.No.68 of 2012 is the appellant in both the Second Appeals. He had filed S.A.No.48 of 2015 aggrieved by the Judgment in A.S.No.37 of 2012 on the file of the Principal District Court, Namakkal. He had filed S.A.No.49 of 2015 aggrieved by the Judgment in A.S.No.16 of 2012 on the file of the Principal District Court, Namakkal. The plaintiff in O.S.No.68 of 2012 had filed Cross Objection No.83 of 2016.

2. The Second Appeals had been admitted on the following substantial questions of law:-

"1. Whether the Courts below were right in holding that Ex.B-5 has not been proved in accordance with law?;

2. Whether the Release Deed said to have been executed by Mrs.Nallammal and two other sisters of the plaintiffs in favour of the defendant under Ex.A-1 is genuine and whether the same could have been acted upon without Mrs.Nallammal and two other sisters

of the plaintiffs as parties to the suit?;

3. Whether the First Appellate Court was right in relying on the old text of Hindu Law ignoring the statutory provisions of the Hindu Succession Act?."

3. O.S.No.68 of 2012 had been filed by two sisters Santhosam and Sivagami against their brother Marappan. There were two other sisters, Rajeswari and Arukkani, who were not parties to the suit. It had been stated in the plaint that the father Rasappa Gounder of the plaintiff and defendant possessed immovable properties. They were his self acquired properties. He died on 10.12.2002. He left behind his wife Nallammal, his four daughters and one son as legal heirs. The plaintiffs claimed that all the legal heirs had an equal 1/6th undivided share in the properties. Subsequent to the death of Rasappa Gounder, a portion of the property was sold to one Nirmala. The portion left unsold was the schedule property. The mother Nallammal and other two daughters Rajeswari and Arukkani executed a registered released deed, releasing their share in the schedule properties in favour of the defendant by a deed dated 06.07.2007. The plaintiffs demanded the defendant to divide the suit properties. They issued a notice on 25.08.2007 seeking partition and separate possession. The defendant did not reply to the notice. It was also alternately averred that though the plaintiffs claimed that the suit properties were self acquired properties, subsequently it had been accepted by the parties that they were ancestral properties. It was therefore claimed that the release made by the mother and two sisters was also a release in favour of the plaintiffs. The plaintiffs therefore claimed an undivided 1/3rd share each in the suit property and on that basis filed the suit seeking partition and separate possession.

4. In the written statement, the defendant admitted to the relationship among the parties. It was stated that the mother and two sisters had however released the share by document dated 06.07.2007. It was stated that the properties belonged to the grandfather Palani Gounder and were inherited by the father Rasappa Gounder. It was stated that therefore the properties were the ancestral properties of Rasappa Gounder. It was further stated that Rasappa Gounder had executed a Will on 03.07.2000 bequeathing his share of the properties to the three daughters of the defendant, by name Saranya, Suganya and Subashini.

5. According to the Will, the properties would be kept in Trust by the mother and thereafter, when the beneficiaries attained the age of 18 years, they would acquire the right to enjoy the properties. It was stated that the plaintiffs knew

about the Will. It was therefore stated that the suit is bad for non joinder of beneficiaries under the Will, who also had a caveatable interest in the property. It was stated that the suit should be dismissed.

6. The plaintiffs filed a reply statement denying execution of the Will dated 03.07.2000. They claimed that the suit should be decreed.

7. On the basis of the above pleadings, the learned Sub Judge, Namakkal, framed necessary issues including whether the Will dated 03.07.2000 was valid and true. During trial, the second plaintiff Sivagami was examined as PW-1 and the defendant Marappan was examined as DW-1. Three other witnesses, Chandiran, Kandhasamy and Palanisamy were examined as DW-2, Dw-3 and DW-4. On the side of the plaintiffs, Ex.A-1 release deed; Ex.A-2 sale deed in favour of Nirmala were marked. On the side of the defendant, among other documents, the Original Will dated 30.07.2000 was marked as Ex.B-5.

8. The learned Sub Judge while answering the issue related to the genuineness of the Will gave a specific finding on the basis of the evidence of the attesting witnesses, DW-2 and DW-3 that it was a genuine Will. However, he wondered why the Will was not mentioned in the release deed dated 06.07.2007 executed by the mother and two sisters, and also questioned the rationale for execution of the sale deed in favour of Nirmala. He therefore held that the Will was not a genuine one and had not been proved by the defendant. He finally it was held that the plaintiffs were entitled to an undivided 2/12th share in the suit properties.

9. Challenging that Judgement, the plaintiffs filed A.S.No. 37 of 2012 and the defendant filed A.S.No.16 of 2013 in the Court of the Principal District Judge, Namakkal.

10. The learned Principal District Judge, in the course of the Judgment dated 31.07.2015 observed that the Will Ex.B-5 had been executed in favour of three grand children with respect to one half share in the suit properties. The learned Principal District Judge also came to the same conclusion that the execution of the Will was not properly proved by the defendant and therefore rejected any claim under the Will. However, the share of the plaintiffs was modified and it was held that the plaintiffs were entitled to an undivided 1/6th share each and accordingly, a preliminary decree was passed.

11. As against that Judgment, quite apart from filing S.A.Nos. 48 and 49 of 2015 by the defendant, the plaintiffs also filed Cross Objection No. 83 of 2016. They have questioned the

modification of the share by the First Appellate Court.

12. As stated above, the Second Appeals had been admitted on the following substantial questions of law:-

"1. Whether the Courts below were right in holding that Ex.B-5 has not been proved in accordance with law?;

2. Whether the Release Deed said to have been executed by Mrs.Nallammal and two other sisters of the plaintiffs in favour of the defendant under Ex.A-1 is genuine and whether the same could have been acted upon without Mrs.Nallammal and two other sisters of the plaintiffs as parties to the suit?;

3. Whether the First Appellate Court was right in relying on the old text of Hindu Law ignoring the statutory provisions of the Hindu Succession Act?."

13. During the course of arguments, it had been admitted by both the learned counsels that the beneficiaries of the Will were necessary parties to the suit. The attesting witnesses had been examined and it is the contention of the learned counsel for the appellant that the Will though had been categorised as a genuine Will, had been rejected only on surmises. There has not been a finding regarding the admissibility or otherwise of the evidence of the attesting witnesses. There has not been any finding that the testator was or was not of sound mind while executing the Will. By rejecting the Will in the absence of the beneficiaries to the Will as a parties to the suit, has rendered the entire proceedings non est. Both the learned counsels for the appellant and the respondents were in agreement with respect to the propositions of law that any decree passed in the absence of the beneficiaries would certainly be assailed by them when they attained the rights which flowed from the Will. I therefore hold that it would only be in the interest of all the parties that the three beneficiaries are made party/defendants and are permitted to join in the civil suit for proper adjudication of the rights of the respective parties over the suit property. I hold that they are necessary parties. Non joinder of necessary parties is fatal. I also hold that it would be highly inappropriate on the part of this court to examine the questions of law framed and also give a finding in the absence of necessary parties to the suit, namely, the beneficiaries to the Will. They have not been properly represented in the legal proceedings. Consequently, without rendering any finding on the questions of law, the matter is

remanded back to the Trial Court granting opportunity to the plaintiffs to implead the three beneficiaries namely, the three daughters of the defendant Marappan by name Saranya, Suganya and Subashini under the Will. Naturally this would mean that the Judgment of the trial Court and the First Appellate Court would have to be set aside and the parties will have to start the litigation all over again, since there has been non joinder of necessary parties, any Judgment or decree passed would always be considered as non est in their eyes and not binding on them.

14. For the reasons stated, without rendering any finding on facts, since that would have a direct bearing on the Trial Court, the Judgments and Decree of both the Trial Court and the First Appellate Court are set aside and the entire matter is remanded back to the Sub Court, Namakkal for fresh trial. The plaintiffs are directed to implead the three beneficiaries. The learned trial Judge is directed to grant opportunity to file additional pleadings and record further evidence if sought, and thereafter give a finding on all issues raised and contested.

15. Consequently, S.A.Nos. 48 and 49 of 2015 are allowed and the Judgment and Decree in A.S.No. 37 of 2012 and A.S.No. 16 of 2013 are set aside and the matter is remanded back to the trial Court for fresh trial as observed above. Cross Objection No. 83 of 2016 is dismissed. No costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

vsg

To

1. The Principal District Judge, Namakkal.
2. The Subordinate Judge, Namakkal.
3. The Section Officer, VR Section, High Court, Madras.

+1cc to M/s.M.Manokaran, Advocate, S.R.No.67826
+1cc to M/s.T.Dhanyakumar, Advocate, S.R.No.67775

S.A.Nos.48 & 49 of 2015
And
Cros.Obj.No.83 of 2016

SSV(CO)
CS/09/06/2020