

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 18.10.2019

CORAM

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A.No.2350 of 2017 and
C.M.P.No.12625 of 2017

1. John Xavier Elango
2. Manazees Rajini
3. Agnes
4. Chirstry Jothy ... Appellants/Appellants/
Plaintiffs 2 to 5

Vs.

D.Irudhayaraj ... Respondent/Respondent/Defendant

Civil Miscellaneous Appeal is filed under Order XLIII Rule 1(u) of Civil Procedure Code to set aside the Judgment and Decree of the learned Additional District Judge [FTC], Vellore, Vellore District dated 14.12.2016 in A.S.No.25 of 2015, reversing the Judgment and Decree of the learned Subordinate Judge, Vellore, Vellore District dated 06.04.2015 in O.S.No.74 of 2006 and to direct the Appellate Court to dispose of the Appeal, allowing amendment of plaint.

For Appellants : Mr.T.M.Hariharan

For Respondent : Mr.G.Dilipkumar

J U D G M E N T

The appellants herein have filed the present Civil Miscellaneous Appeal to set aside the Judgment and Decree of the learned Additional District Judge [FTC], Vellore, Vellore District dated 14.12.2016 in A.S.No.25 of 2015, reversing the Judgment and Decree of the learned Subordinate Judge, Vellore, Vellore District dated 06.04.2015 in O.S.No.74 of 2006 and to direct the Appellate Court to dispose of the Appeal by allowing amendment of plaint.

2. The appellants have raised various grounds in the present appeal, wherein they have stated that the order of remand of the appellate court to lower court is contrary to law and erroneous. When the appellate court has rightly held that

the claim for partition is based on Ex.A.1, Will dated 25.01.1973, the appellate court has completely misdirected itself in remanding the suit and the reasoning of the appellate court that the suit must be remanded back for trial for inclusion of all the properties of Savarappa Naidu referred to in Ex.B2 Will is completely erroneous. Further, the appellate Court has erred in readily accepting the case of the respondent that all the properties referred to by the respondent are available for partition but have been omitted to be included in the partition suit. The appellate Court itself can decide the issue instead of remanding the same, as the remand would cause serious prejudice to the parties and the same is unnecessary, when the suit is of the year 2006.

3. The appellants, who are the plaintiffs in the suit had contended in their suit, viz., O.S.No.74 of 2006 stating that one Savarappa Naidu, was in peaceful enjoyment of the property in question. The said Sourappa Naidu had a son, viz., Duraisamy Naidu and the said Duraisamy Naidu had two sons, viz., D.Joseph, (since Joseph died, the plaintiffs are impleaded through I.A. Before the lower court) and the defendant. The said Duraisamy died on 09.07.1978.

4. The plaint further proceeds stating that during the life time, the said Sourappa Naidu, while in a sound and disposing state of mind, out of his own volition free will, bequeathed all his properties including the plaint schedule property by way of an unregistered Will dated 25.01.1973 giving life interest to his wife, viz., Santhammal and after her death the property is to be equally taken by his two grand children, viz., the plaintiff and the defendant. In the said Will, which is the last one, he cancelled all his previous disposition, specifically mentioning the dates and the particulars. The said Sourappa Naidu died on the same day in the evening and the Will took effect. His widow, the mother of the parties, viz., Santhammal was in enjoyment of the properties covered under the said Will, as the life interest holder, till she died on 07.02.1980. The said Will was accepted and acted upon by all the parties including the defendant herein. After the death of the mother on 07.02.1980, both are entitled for suit properties in equal shares.

5. It is further stated in the suit plaint that subsequently, both the parties, [the plaintiff and the defendant] had given a power of attorney to one S.Raja to form a layout in some of the properties covered under the Will and to sell the plots. They have also received the entire sale consideration from the said Raja, in acceptance of the Will dated 25.01.1973. Since under the Will, both the parties are equally entitled to share in the plaint schedule property,

plaintiff (D. Joseph, died) has been demanding for partition and separate possession of his half share in the plaint schedule properties and the defendant was evading under some pretext or the other and he is also trying to sell the same. Hence, the plaintiff prayed that it will not be proper to continue in the joint possession and hence sent Lawyer's notice on 08.11.2005 demanding for immediate partition and separate possession. As there was no charge or attachment or debts available to third parties, the same should be challenged between two persons plaintiff and the defendant. In the meanwhile, the plaintiff, viz., Joseph died, leaving his wife and other legal representatives and the said plaint prayer was to direct the division of plaint schedule properties into two shares and allot one such share to the plaintiff, if need be by appointing commissioners and to direct the defendant to deliver possession of one share out of two shares of the plaint schedule property to the plaintiff and directing the defendant to pay the cost of the suit.

6. In reply to the aforesaid averments raised by the plaintiffs, the defendant has filed written statement to the suit stating that there are several properties in the name of Savarappa Naidu and only three items of the property have been mentioned in the plaint. There are several properties, which was sold by the plaintiff on the basis of ownership without mentioning the Will into consideration. The unregistered Will dated 25.01.1973 was written in the death bed of Savarappa Naidu, who was in coma condition and never uttered a single word subsequent to 25.12.1972 and the said unregistered Will is created by the plaintiff and the same should not be acted upon. In the absence of other items of the property sold by the plaintiff from 1973 onwards, the present plaint mentioned properties should not be decided upon. The said Savarappa Naidu had executed a Will in the year 1971, when he was in a sound state of mind and executed a registered will vide document No.3 of 1971, in which he has given the right to sell the properties after his death in the name of his wife, Santhammal. The Will was duly acted upon after his death in the name of his wife Santhammal on 25.01.1973 and the settlement deed was effected on 23.06.1979 giving the property in due settlement in favour of Loordhmary, wife of Irudayaraj, vide document No.1928/1979. The said Loordhmary is in possession and enjoyment of the property since 23.06.1979. The said Santhammal has executed another settlement deed in favour of Irudhayaraj on the same day 23.06.1979 vide document no.1980/1979. Accordingly, both, viz., Irudhayaraj and his wife, Loordhmary has taken possession and enjoyment of the property and obtained patta in the name of Irudhayaraj. Such being the case, after a lapse of 25 years, the partition suit has been filed by the plaintiffs only to wreck

vengeance and there is no truth in the allegation of execution of the Will dated 25.01.1973 and the attestors also died. As the Will is a fabricated one, the same should not be acted upon and only the Will, which was executed at the time when Sourappa Naidu was in sound state of mind should be acted upon.

7. The defendant in the written statement further submitted that the plaintiff along with his sons have sold the property belonging to the defendant, which was allotted as an ancestral property, wherein in Survey No.92/4, extent 0.58 cents, in Survey No.94/1, 0.33 cents, total 0.91 cents, new Sub division Survey No.94/1B, vide document no.4760/2005 dated 22.08.2005. The sale was in flagrant violation of the trust created among the sharers. As the plaintiffs sold several properties without the knowledge of the defendant, he is constrained to file inter pleader suit to set aside the same, hence the defendant sought for dismissal of the said suit.

8. After taking note of the rival submissions and after analysing the records, the learned Subordinate Judge, Vellore, Vellore District had dismissed the suit in O.S.No.74 of 2006 on 06.04.2015. Against which, the appellants herein have filed appeal suit in A.S.No.25 of 2015. In the said Appellate Suit, the learned Additional District Judge, Fast Track, Vellore has considered the case on hand and had set aside the Judgment and Decree of the trial court and has remitted the matter back to the trial court for fresh disposal stating that when the lower court has come to the conclusion that the properties, which are found in Ex.B.2 not been included in this case, the lower court ought to have given a chance to the plaintiff to include those properties and should have directed the plaintiffs to include the properties also in the suit. Aggrieved against the order passed by the lower appellate court, the appellants /plaintiffs have filed this appeal.

9. Heard the learned counsel on either side and perused the documents placed on record.

10. From the Appellate Court's order it is seen that the trial court has framed several issues and during the trial, on the side of the plaintiffs, P.Ws. 1 and 2 were examined and documents Exs.A.1 to A.7 were marked and on the defendant side also, D.Ws.1 and 2 were examined and Exs.B1 to B.7 were marked. After considering the issues, the trial court has dismissed the suit and as against the same, the appellants have filed an appeal. The trial court ought to have considered the witnesses and decided the issues thereon, but has taken only the evidences, which will be apt for dismissing the suit.

11. Further, the lower court without any basis has imported its knowledge regarding the proof of Will and the lower court has not considered certain aspects filed by the appellants / plaintiffs and it closed the evidence and posted the case to 30.03.2015 for Judgment and directed the parties to advance their arguments before 30th March, 2015. Since both the parties did not argue the case, the case was adjourned to 06.04.2015 for Judgment. The appellants have advanced their arguments and also filed written arguments on 06.04.2015. The advocate for the respondent took time and never advanced any argument on 06.04.2015. The lower court has not taken the respondent's arguments, but on 06.04.2015, the case is posted for Judgment and Judgment was pronounced, thereby gross injustice has been done to the appellants. Further, it is the admitted case of the respondent that the unregistered Will dated 25.01.1973 is the last Will of Savarappa Naidu and that none of the attesting witnesses are alive and on the basis of the Will, a power of Attorney was given to one Raja, who has also paid a sum of Rs.15,00,000/- as part of the sale consideration of the property covered under the Will dated 25.1.1973 and that the Will was acted upon.

12. The lower court has lost sight of the fact that the defendant has also relied on a Will, Settlement Deeds to prove his case, but the lower court had not examined any one of the witnesses connected with those documents. When that being the case, the lower court has not framed any additional issue based on the said documents. When the Will is not registered, then, the attesting witnesses have to be examined. Even as per the defendant's statement, the Will was executed by the said Sourappa Naidu in the year 1973, on the date of his death and through that Will only life enjoyment was granted to the wife of Savarappa Naidu. The trial court has not considered the admission of the defendant and has dismissed the suit, which is an error committed by the trial court and there was no partition took place between the parties after the demise of Santhammal. Further, life interest was given to his mother, Santhammal and on 13.02.1980, she died and the properties have been devolved on both the parties. Also, it has been clearly established through the admission in the cross examination of D.W.1, that there was a Will executed by the said Savarappa Naidu in the year 1973. So through clear admission, which is deemed to be a judicial admission, the execution of Will on 25.07.1973 has been clearly established. Therefore, non examination of attestors who are all not alive will not definitely affect the case of plaintiffs and has dismissed their case.

13. The defendant relying upon the registered Will dated 11.01.1971 submitted that even two months before the death of

Sourappa Naidu, he was in the stage of coma and he was admitted in the hospital and was in the custody of the defendant and his wife at the time of death. When the said Sourappa Naidu was under treatment till his death at C.M.C. Hospital, there is no possibility of executing a Will on 25.01.1973, as alleged by the plaintiffs.

14. Apart from the above, it is seen that by deleting the properties involved in Ex.A.1, the suit has been filed only to an extent of three survey numbers in Ex.B3. If a person executes a Will, the probability is that he will show all the properties, which are belonging to him and allot share as per his whims and fancies, as he feels so. But, in this case, according to Ex.B.3, some of the properties have not been shown. When D.W.1 has admitted that there was a Will executed on the date of death of his grant father in year 1973 granting life interest to his grand mother Santhammal till her life time and thereafter, it will be devolved on the plaintiff and defendant, the defendant has not taken any steps regarding the said Will and in the year 2005, both the defendant and the plaintiffs executed power of attorney to one Raja to sell the properties, which are all described in the schedule of properties of Ex.B.4. When there is a clear admission by D.W.1, with regard to the Will in the year 1973 on the date of the death of his grand father Sourappa Naidu as well as the admission with regard to the life estate that was granted to Santhammal till her life time and further admission that after the demise of Santhammal, it is clear that the plaintiff and defendant are having full interest over the property.

15. When the lower court has come to the conclusion that the properties, which are found in Ex.B.2 not been included in this case, it ought to have given a chance to the plaintiffs to include those properties and should direct the plaintiffs to include the properties also in the suit, but the same has not been done. By stating the said reasons, the lower appellate court, has remanded back the matter to the trial court to give a chance to the plaintiff to include those properties also in the schedule of property and to contest the case on merits in order to give a fair chance to both parties to conduct fresh trial before the trial court, which does not warrant any interference at the hands of this Court.

16. At this stage, the learned counsel for the appellants submitted that instead of amending the plaint by itself, the appellate court has remanded the matter for the said purpose, which is unnecessary and it will take long time to decide the issue.

17. In reply, the learned counsel for the respondent submitted that if the matter is taken by the trial court, he will lose one appeal remedy. Since the suit is of the year 2006, the respondent submits that he is ready and willing to co-operate with the proceedings and fairly submitted that if the case is remanded back, he has no hesitation to conduct the case.

18. When the lower appellate court has stated that the properties in total has to be decided, which was executed in the suit and has rightly remanded the matter to the lower court to decide the issue regarding the properties in Ex.B.2, this Court is in full agreement with the views taken by the lower appellate court because of the reason that non-impleading of the properties would cause serious prejudice to both the parties.

19. Considering the fact that the suit is of the year 2006, the trial court, viz., the Learned Subordinate Judge, Vellore District, Vellore is directed to amend the plaint within a period of one month after receiving the bundles from the lower appellate Court and decide the issue afresh without being influenced by any of the observations made by this Court as well as lower appellate court within a period of six months thereafter.

With the above observations and directions, this Civil Miscellaneous Appeal is disposed of. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-V)

//True copy//

Sub Assistant Registrar

ssd

To

1. The Additional District Judge [FTC],
Vellore, Vellore District
2. The Subordinate Judge,
Vellore, Vellore District
3. The Section Officer,
VR Section, Madras High Court, Chennai

+1cc to Mr.T.M.Hariharan, Advocate SR.No.87621

+1cc to Mr.A.Prabhakaran, Advocate SR.No.87592

C.M.A.No.2350 of 2017 and
C.M.P.No.12625 of 2017

KJ(CO)

GMV(11/06/2020)