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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.08.2020

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THE HONOURABLE MR.JUSTICE T.RAJA

C.M.A.No.2925 of 2019

N.Chinnavellai

..Appellant/Petitioner

-vs-

1. K.Naria Ramasamy

2. S.C.Dhana Singh

..Respondents/Respondents

Memorandum of Grounds of Civil Miscellaneous Appeal filed under Order XLIII, Rule 1 of the Civil Procedure Code, against the fair and decretal order dated 30.07.2018 made in E.A.No.4 of 2013 in E.P.No.29 of 2008 in O.S.No.9 of 2007 on the file of the III Additional District cum Sessions Court, Thirupathur.

For Appellant :: Mr.K.Sivasubramanian

For Respondents :: Mr.V.Raghavachari for R2

JUDGMENT

Heard learned counsel for the parties through video conferencing due to the Covid-19 pandemic.

2. This civil miscellaneous appeal has been directed against the impugned decretal order dated 30.7.2018 passed in E.A.No.4 of 2013 in E.P.No.29 of 2008 in O.S.No.9 of 2007 by the III Additional District cum Sessions Court, Thirupathur.

3. Learned counsel appearing for the appellant/third party pleaded that the property in question, covered in Survey No.183/2 & 3, originally belonged to the father of the appellant, namely, Nariakali as well as three other sons including the first respondent. After a partition took place amongst the four sons of Mr.Naria Kali, the property covered in Survey No.183/2 & 3, behind the back of the appellant, without his knowledge, was knocked away by the first respondent. Subsequently, an agreement of sale was also executed on 21.12.2006 by the first respondent in favour of the second respondent. Based on the said agreement of sale, a suit in O.S.No.9 of 2007 praying for a decree of specific performance of



the agreement of sale was filed on 29.3.2007 and that was also decreed on 2.4.2008. But it was not contested and it was only an ex parte decree. When the appellant was dealt with unfairly by his younger brother misappropriating the property covered in Survey No.183/2 & 3, a claim petition in E.A.No.9 of 2010 was filed by the daughter of the first respondent on 20.12.2010. But, unfortunately, that could not be prosecuted and it was allowed to be dismissed on 23.2.2012. Therefore, rightly the claim petition in E.A.No.4 of 2013 was filed on 30.1.2013 before the learned III Additional District cum Sessions Court, Thirupathur alleging that the property in question belongs to the appellant, as it has fallen in his favour by virtue of an oral partition that took place amongst the sons of Mr.Nariakali. The executing Court, accepting the counter claim made by the second respondent dated 8.3.2013, erroneously and with mistaken understanding, passed the impugned decretal order dated 30.7.2018 holding against the appellant with various findings, which were not called for. One such finding shows that the appellant has taken repeated somersault, when he pleaded before the executing Court that the partition in respect of the suit property had taken place during the life time of his father late Nariakali and in the cross examination, he has taken a contra stand that the partition has taken place after his death. That may not be a necessary finding. The reason being that when the appellant was able to establish that the first respondent and the other two sons of Mr.Nariakali have partitioned their share and a detailed explanation setting out the survey numbers have been given, there is no need for the executing Court to non-suit the appellant. When the first respondent has misappropriated a portion of the property allotted in favour of the appellant-Mr.N.Chinnavellai, when there was no sufficient or acceptable evidence put forth by the first respondent before the executing Court, the claim petition in E.A.No.4 of 2013 ought to have been allowed. Now the appellant has been deprived of the ancestral property. On the other hand, the first respondent has got unjust enrichment, since the executing Court has miserably failed to consider a simple fact, as a result grave prejudice has been caused to the appellant. Hence, the impugned decretal order is liable to be set aside.

4. Mr.V.Raghavachari, learned counsel appearing for the second respondent pleaded that when there was an agreement of sale dated 21.12.2006 entered into between the respondents 1 & 2, the first respondent mischievously went back from the written sale agreement, that necessitated the filing of the civil suit in O.S.No.9 of 2007 on 29.3.2007 praying for a decree for specific performance of the agreement of sale. When the said suit for specific performance was pending, the first respondent has engaged his counsel. But conveniently, for the reasons best known to him, he did not contest the case. After engaging a



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counsel to take care of his interest, it is an admitted case that the first respondent has given up his contest, for the reasons best known to him, that he had no case legally to fight out against the second respondent. Therefore, the trial Court has decreed the suit on 2.4.2008. This was known to the entire family, namely, the appellant and his family. Hence, after realising that there was an ex parte decree passed on 2.4.2008 and a sale deed was also executed by the Court on 30.4.2009, the first respondent herein, in collusion with his daughter, has set up the claim petition in E.A.No.9 of 2010. Again both the first respondent and his daughter, knowing pretty well that they were unable to prosecute in view of want of evidence, allowed the claim to be dismissed by the order dated 23.2.2012. Being not satisfied, they again came to this Court with C.M.A.No.1852 of 2012, but the said appeal was also dismissed on 18.7.2012. After the dismissal of the first claim petition in E.A.No.9 of 2010 by a detailed order dated 23.2.2012, the matter was brought to this Court by way of C.M.A.No.1852 of 2012 and after a heavy contest, this Court also, finding no merits whatsoever, dismissed the appeal in its order dated 18.7.2012. Thus, the matter became final and concluded and thereafter, neither the first respondent nor anyone pursued the matter. Therefore, when the issue became once and for all settled and concluded, again and again the appellant, in collusion with the first respondent, has engineered the present litigation and again the present claim petition in E.A.No.4 of 2013 has been filed on 30.1.2013. The executing Court, once again went into the facts and circumstances of the case and found that the appellant, in collusion with the first respondent, has spoken a blatant lie before the executing Court stating firstly that the alleged oral partition had taken place during the lifetime of his father late Nariakali and in the cross examination, has taken a contra stand that the oral partition had taken place after his death. When his father late Nariakali died ten years ago, there was no specific date of partition mentioned. Moreover, in the E.A., not even the year, month in which the so called oral partition had taken place amongst the family members, was placed before the trial Court. Therefore, the executing Court, after clearly understanding the controversy brought before it, came to the conclusion that the appellant has miserably failed to establish that there was an oral partition and in the said oral partition, the property covered in Survey No.183/2 & 3 was allotted in favour of the appellant. Secondly, the finding that the first claim petition, was allowed to be dismissed by an order dated 23.2.2012 and without even pursuing the case, the second claim petition in E.A.No.4 of 2013 has been again filed, ignoring the fact that this Court had already considered the very same claim in C.M.A.No.1852 of 2012 in its order dated 18.7.2012.

5. I also find much force on the submissions made by the



learned counsel appearing for the second respondent. The reason being that the daughter of the first respondent had filed the first claim in E.A.No.9 of 2010, that was dismissed by a speaking order dated 23.2.2012. Aggrieved thereby, C.M.A.No.1852 of 2012 was filed before this Court and this Court also, having considered the very same issue between the parties, finding no merits whatsoever, dismissed the same by its order dated 18.7.2012 and that order became final and concluded. Therefore, when the order dated 18.7.2012 passed by this Court in C.M.A.No.1852 of 2012 became final and concluded that would bind the parties, agitating the very same issue repeatedly, firstly in the suit that was decreed on 2.4.2008 in O.S.No.9 of 2007 by the Additional District cum Sessions Court, Thirupathur, secondly, when the claim petition in E.A.No.9 of 2010 filed by the daughter of the first respondent was dismissed by its order dated 23.2.2012, thirdly, when the matter was also brought to this Court in C.M.A.No.1852 of 2012 and the same was also dismissed by the order dated 18.7.2012, it is not open to the appellant to again and again relitigate the litigation one after the other. Therefore, this Court, finding fault with the conduct of the appellant that he has repeatedly, in ignorance of the earlier order dated 18.7.2012 passed in C.M.A.No.1852 of 2012, has again filed the second claim petition in E.A.No.4 of 2013 unsuccessfully, is not inclined to interfere with the impugned decretal order. Accordingly, the civil miscellaneous appeal fails and it is dismissed. Consequently, C.M.P.No.15528 of 2019 is also dismissed. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To
The III Additional District cum Sessions Judge
Thirupathur.

+1cc to Mr.V.Raghavachari, Advocate, Sr.No.27117
+1cc to Mr.T.M.Hariharan, Advocate, Sr.No.26935

C.M.A.No.2925 of 2019

svi (co)
rr ii (18/11/2020)