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S.A.(MD)No.397 of 2019

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 20.02.2020

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A. (MD)No.397 of 2019

and

C.M.P. (MD)Nos.7896 of 2019

and

361 of 2020

1.R.Ramasubbu

2.R.Ramalingam

... Appellants/appellants /defendants 2 and 3
Vs.

1.K.Narayanan

2.R.Allammal

3.Meera

... 1st respondent / 1st respondent/plaintiff

... Respondents 2 and 3/Respondents 2 and 3 /
Defendants 4 and 5

PRAYER: This Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 07.12.2018 passed in A.S.No.96 of 2017, on the file of the Principal District Court, Tirunelveli, confirming the judgment and decree dated 28.03.2016 passed in O.S.No.150 of 2010 on the file of the Sub Court, Valliyoor.

For Appellants

For R-1 and R-3

: Mr.H.Arumugam

: Mr.J.Bharathan for Mr.S.Kumar

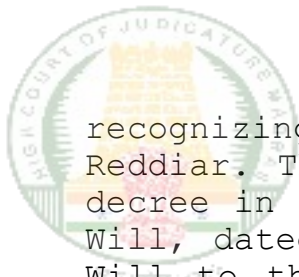
JUDGMENT

The defendants 2 and 3 in O.S.No.150 of 2010, who suffered a decree for partition and separate possession of the plaintiff's 1/2 share in item Nos.1 to 7 of the suit 'A' schedule properties upon the said decree being confirmed by the appellate court in A.S.No.96 of 2017, have come up with this Second Appeal.

2.The case of the plaintiff/first respondent is as follows:-

The suit properties belonged to Narayanasamy Reddiar and his brother Kumarasamy Reddiar. The said Narayanasamy Reddiar died leaving behind his daughter Rengammal. Under a Will, dated 12.09.1983, Narayanasamy Reddiar had bequeathed his share in the suit property along with other properties to his brother Kumarasamy Reddiar granting a life estate to his daughter Rengammal. Subsequently, the said Will dated 12.09.1983 marked as Ex.A.3 was cancelled under a Will dated 02.09.1994 marked as Ex.B1. Under the later Will namely Ex.B.1, Rangammal viz., the daughter of Narayanasamy Reddiar was given an absolute right over the said properties. In a suit in O.S.No.54 of 1999, between Rengammal, the plaintiff, the first defendant and their mother Allammal, the Court upheld the validity of Ex.B.1-Will, dated 02.09.1994, thereby

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recognizing the title of Rengammal to the properties of Narayanasamy Reddiar. There was no further appeal against the said Judgment and decree in O.S.No.54 of 1999. Subsequently, Rengammal had executed a Will, dated 09.10.2006 bequeathing the properties covered by Ex.B.3 Will to the defendants 2 and 3 in this suit viz., the appellants herein. The Will of Rengammal, dated 09.10.2006 is not in dispute. The other owner namely Kumarasamy Reddiar had four daughters and two sons. The elder of the sons, Ramachandran died leaving behind the defendants 2, 3 and 4. Since the claim was made that the property standing in the name of the fifth defendant also belonged to the brothers, she was made as a party. Kumarasamy Reddiar had left a Will dated 10.04.1998 marked as Ex.A.2. Under the said Will, he had bequeathed his properties to both the sons to be taken by them equally. The execution of the said Will by Kumarasamy Reddiar is not disputed. In fact, the prayer for partition itself is based on the said Will. Claiming that the defendants are not agreeing for an amicable partition, the plaintiff laid the suit by including the properties that were bequeathed by Rengammal also as the suit second schedule properties.

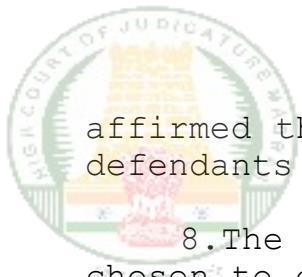
3.The suit was resisted by the defendants contending that as per the Will of Rengammal, the share of Kumarasamy Reddiar would devolve on the defendants 2 and 3. Therefore, the plaintiff would not be entitled to a 1/2 share in all the items of properties in the first schedule.

4.As regards the second schedule, it was the contention of the defendants 2 and 3 that those properties belonged to Rengammal and the same had devolved upon them as per the Will of Rengammal, dated 09.10.2006, therefore, the plaintiff cannot claim share in item Nos.8 and 9 of the first schedule and the second schedule properties.

5.At trial, the plaintiff was examined as P.W.1 and Exs.A.1 to A.13 were marked. The first defendant was examined as D.W.1. Exs.B.1 to B.10 were marked.

6.The trial Court upon a consideration of the evidence on record, upheld the Will of Rengammal. In view of the same, the trial Court concluded that the plaintiff is not entitled to any share in item Nos.8 and 9 of the suit first schedule and the second schedule of the properties. As regards the item Nos.1 to 7 of the suit first schedule properties, the trial Court granted a decree declaring the plaintiff's 1/2 share in the said properties. Aggrieved by the preliminary decree passed by the trial Court granting 1/2 share in the suit properties to the plaintiff, the defendants 2 and 3 preferred an appeal in A.S.No.96 of 2017. A Cross Objection was filed by the plaintiff challenging the dismissal of the suit in respect of item No.9 of the first schedule alone.

7.The lower appellate Court upon a consideration of the evidence on record, concurred the findings of the trial Court and



affirmed the Judgment and decree of the trial Court. Aggrieved, the defendants 2 and 3 have come up with this second appeal.

8.The plaintiff, who is the first respondent herein, has not chosen to challenge the dismissal of his Cross Objection. Therefore, the dismissal of the suit in respect of Item Nos.8 and 9 of the suit first schedule and the second schedule of the suit properties has now become final and this appeal is confined only to the preliminary decree granted declaring the 1/2 share of the plaintiff in item Nos.1 to 7 of the suit first schedule properties.

9.The following substantial questions of law have been framed in this appeal, at the time of admission:-

"(a).Whether the lower appellate court is right in finding that Ex.A.1 Rough plan is not disputed by the defendants and thus decreeing the suit, ignoring the specific denial made in the written statement as per "Order 8, Rule 5" of CPC?

(b).When under Ex.A-2,Will the undivided 1/2 right over item Nos.4 and 5 of the suit properties alone bequeathed whether the Courts below are right in granting decree for partition for entire extent of properties, without considering the Ex.A2 in proper and perspective manner?

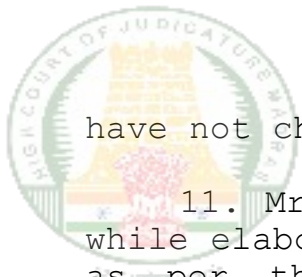
(c).Whether the Courts below have committed wrong in considering the Exs.A2, A8, Exs.B1 and B3 and erroneously decreed the suit as prayed for in respect of item Nos.1 to 7 of the first schedule properties, ignoring the extent of ownership?

(d).Whether the Courts below are right in coming to a conclusion that the suit is bad for partial partition, when admittedly the entire extent of properties shown in the Will in Ex.A2 regarding item No.6 is not included in the suit?

(e).Whether the finding of the trial Court that the defendants did not dispute the extent of 2nd item of suit property, while admitting the Will is perverse for non-considering of specific pleadings in the written statement?

(f).When the lower appellate Court has categorically found the discrepancy regarding the extent of properties between Will and plaint is it right in dismissing the appeal?"

10. I have heard Mr.H.Arumugam, learned counsel appearing for the appellants and Mr.J.Bharathan, learned counsel appearing for the first and third respondents. The other respondents, though served,

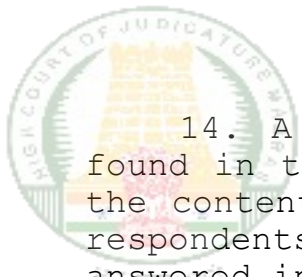


have not chosen to appear either in person or through counsel.

11. Mr.H.Arumugam, learned counsel appearing for the appellants while elaborating on the questions of law framed, would contend that as per the Will of Kumarasamy Reddiar marked as Ex.A.2, the plaintiff would be entitled to a 1/2 share in the properties of Kumarasamy Reddiar. Drawing my attention to the schedule of properties in Ex.A.2-Will, he would contend that in respect of item Nos.3, 4 and 6 of the schedule of properties in the Will, Kumarasamy Reddiar himself had only an undivided 1/2 share. Therefore, the plaintiff would be entitled to only 1/2 of that undivided 1/2 share that is 1/4 share. Therefore, according to him, the Courts below were not right in granting a 1/2 share in the entire extent of properties. Item Nos.3, 4 and 6 in the Will are item Nos.4, 5 and 2 respectively of the plaint schedule.

12. A perusal of the schedule of properties in the Will shows that Kumarasamy Reddiar had only bequeathed his undivided 1/2 share in these properties to his two sons to be taken by them equally. The other 1/2 share apparently belonged to Narayanasamy Reddiar, which had now devolved on the defendants 2 and 3 by virtue of the Will of Rengammal marked as Ex.B.3. Therefore, the learned counsel would submit that the Courts below should have granted only a 1/4 share in these three items of properties.

13. Mr.J.Bharathan, learned counsel appearing for the respondents 1 and 3 would concede the position that the plaintiff would be entitled to only 1/2 of the 1/2 share of Kumarasamy Reddiar in these three items of properties. He would further point out that in respect of item No.2 of the plaint schedule properties (item No.6 in the Will), the property described as Item No.2 itself is only the 1/2 share of Kumarasamy Reddiar. He would point out that while item No.6 in the Will measures 11.45 cents, item No.2 of the suit properties measures only 4.55 cents. Drawing my attention to the rough sketch filed along with the plaint, Mr.J.Bharathan, learned counsel for the respondents 1 and 3 would contend that while item No.6 in the Will included the backyard of both the houses bearing Door Nos.1 and 2. Item No.1 of the suit schedule property, door No.2 which has been bequeathed to the defendants 2 and 3 under the Will of Rengammal. He would also point out that in the very description of the property, the western boundary has been shown as the backyard of Door No.2. Relying upon the above description, Mr.J.Bharathan, learned counsel, would submit that the entire item No.2 constitutes only 1/2 share of item No.6 of the Will. As regards the other two items viz., items 4 and 5 of the plaint first schedule properties, he would fairly concede that the entire property viz., item Nos.3 and 4 in the Will have been shown in the plaint schedule and therefore, the Courts below were not right in granting a preliminary decree for a 1/2 share infavour of the plaintiff.



14. A comparative reading of the description of the property found in the Will as well as in the plaint schedule, would justify the contention of Mr.J.Bharathan, learned counsel appearing for the respondents 1 and 3. Therefore, the questions of law B and C are answered in favour of the appellants.

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15. Though the trial Court and lower Appellate Court appeared to have gone by the rough sketch, the decree itself is not completely based on the rough sketch. The description of property in the plaint as well as the Will are very clear and the properties can be identified even without the aid of the rough sketch. Therefore, I do not think that the Courts below could be faulted for relying on the rough sketch. Hence, the question of law 'A' is answered against the appellants.

16. As regards the claim of partial partition, it is now found that item No.6 in the Will-Ex.A.2 is actually item No.2 of the first schedule, though only a portion of it has been shown as item No.2. The plaintiff has rightly omitted the backyard of the house No.2, which belongs to the defendants 2 and 3 as per the Will of Rengammal. The said backyard which is situated immediately on the North of house No.2, has been bequeathed to defendants 2 and 3 under the Will of Rengammal. Therefore, I do not think that the suit could be held to be bad for partial partition for non-inclusion of the entire property shown as item No.6 in the Will (item No.2 in the suit schedule property). Therefore, question of law 'D' is answered against the appellants.

17. For the same reasons stated above, question of law 'E' which relates to the extent of suit second item of property is also answered against the appellants.

18. Mr.H.Arumugam, learned counsel appearing for the appellants would point out that there are certain discrepancies in the extent of property mentioned in the Will and the suit property. The discrepancy in the extent is very negligible and the same can always be set right at the final decree proceedings by directing the Commissioner to divide whatever the land is available within the boundaries mentioned in the documents.

19. In view of the answers to the questions of law as above, the Judgment and decree of the lower appellate Court are required to be modified and they are modified as follows:-

There will be a preliminary decree declaring the 1/2 share of the plaintiff in suit items 1, 2, 3, 6 and 7 and the plaintiff's 1/4 share in the suit items Nos.4 and 5. In other respects, the Judgment and decree of the Courts below will stand confirmed. The claim regarding difference in extent, which is very negligible could be worked out at the time of passing of final decree.



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20. The Second Appeal is disposed of accordingly. There shall be no order as to costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

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To

1.The Principal District Judge, Tirunelveli.

2.The Subordinate Judge, Valliyoor.

Copy to:

The Section Officer, V.R.Section (2 copies)
Madurai Bench of Madras High Court, Madurai.

+1 CC to M/s.H.ARUMUGAM, Advocate (SR-7464[F] dated 21/02/2020)

+2 CC to M/s.S.KUMAR, Advocate (SR-7499[F] dated 21/02/2020)

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