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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.03.2022

CORAM

THE HONOURABLE MRS.JUSTICE R.HEMALATHA

S.A.NO.198 OF 2010

AND

M.P.NO.1 OF 2010

Pankajam

... Appellant

.Vs.

Andallammal (deceased)

1. Dhakshna Nadar Sangam,
No.26, Mettu Street,
Ayanavaram,
Chennai - 600 023.

... Respondents

PRAYER:-

Second Appeal filed under Section 100 CPC, 1908 against the decree and judgment dated 20.04.2009 passed in A.S.No.660 of 2007, on the file of the V Additional City Civil Court, Chennai, upholding the decree and judgment dated 31.01.2006 passed in O.S.No.3479 of 1999, on the file of the XII Assistant City Civil Court, Chennai.

For Appellant : Mr.S.N.Narasimhulu

For Respondent : Mr.G.Thangavel

JUDGMENT

The unsuccessful plaintiff before both the courts below has filed the present second appeal.

2. For the sake of convenience, the parties are referred to as per their ranking in the trial court and at appropriate places, their ranking in the present appeal would also be indicated.



3. The plaintiff Pankajam filed a suit for partition of the suit property into two equal shares and to allot one share to her. She further prayed for permanent injunction restraining the first defendant Tmt.Andal Ammal (since deceased) from alienating the suit property to a third party and for costs. The suit property is described in the plaint schedule as a house bearing Door No.166, Mettu Street, Ayanavaram, Chennai 600023.

4. The case of the plaintiff in nutshell is as follows:

The plaintiff is the wife of Late. Subramani who is the son of Late.Indirani Ammal. Indirani Ammal is the daughter of Late.Dhamodara Mudaliar born through his third wife. Damodhara Mudaliar executed a registered Will (Ex.A1) dated 20.10.1939 in favour of his three sons born through his two wives. As per the Will, the suit property should be divided into three equal shares by his three sons. There was also a condition attached to the Will that Indirani Ammal's interest should be protected and she must be paid a sum of Rs.200/- by the sons of Dhamodara Mudaliar. Indirani Ammal was residing in a portion of the suit property. The first defendant forcefully evicted Indirani Ammal and her family from the suit property. They did not pay a sum of Rs.200/- as mentioned in the Will (Ex.A1). The plaintiff, therefore, issued a legal notice dated 13.03.1998 (Ex.A2) to the defendant calling upon the defendant to divide the suit property into two equal shares and to allot one such share to her. Though the said notice was received by the first defendant, as is evidenced by the postal acknowledgment card (Ex.A4), the defendant did not send any reply and did not also come forward to partition the suit property. Hence, the suit.

5. The suit was resisted by the defendants 1 & 2 on the following grounds :

- i. The father-in-law of the first defendant Late.Dhamodara Mudaliar executed a registered Will (Ex.A1) dated 20.10.1939 bequeathing the suit property in favour of his three sons. A sum of Rs.200/- was directed to be paid to Indirani Ammal, daughter of Late.Dhamodara Mudaliar by the beneficiaries of the Will. However, though Indirani Ammal was offered a sum of Rs.200/- she refused to receive the same. Therefore, question of paying the said amount to the legal heirs of Indirani Ammal (plaintiff) would not arise.
- ii.A suit for partition was filed in O.S.No.5832/1976 before the VI Assistant Judge, City Civil Court, Chennai, for partition of the properties of Damodara Mudaliar by the three brothers and the suit property was allotted to the share of Natesa Mudaliar, the husband of the first



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defendant, who executed a settlement deed in favour of his wife Andal Ammal (first defendant). In the settlement deed, it is clearly intimated that Indirani Ammal refused to receive a sum of Rs.200/- mentioned in the Will (Ex.A1).

iii. Since Indirani Ammal did not claim the amount during her life time, the plaintiff cannot seek for partition of the suit property.

6. The trial Court on the basis of the above pleadings framed the following issues :

i. Whether the plaintiff is entitled for a preliminary decree of partition of one 1/2 share in the suit property ?

ii. To what other relief the plaintiff is entitled ?

7. In the trial Court, the plaintiff examined herself and marked Ex.A1 to Ex.A4. One witness was examined on the side of the defendant and Ex.B1 to Ex.B4 were marked.

8. The learned XII Assistant Judge, City Civil Court, Chennai, after full contest, dismissed the suit filed by the plaintiff vide his decree and judgment dated 31.01.2006, on the following grounds :

i. The plaintiff failed to prove that she is in possession of the suit property and that her mother Indirani Ammal was a beneficiary to the Will.

ii. In the settlement deed (EX.B1) dated 03.03.1973, it is clearly mentioned that Indirani Ammal refused to receive Rs.200/- as indicated in the Will (Ex.A1). The husband of the first defendant (one of the beneficiaries of the Will) got his 1/3rd share in the partition suit and took possession of the suit property in the execution proceedings. Therefore, claim of the plaintiff by way of the Will is not maintainable at this stage.

iii. Pending suit, the first defendant executed a sale deed in favour of the second defendant and presently the second defendant is the actual owner of the suit property.

iv. Therefore, the plaintiff cannot maintain the suit for partition. She can only maintain a suit for declaration of her title to the suit property and recovery of possession.



9. Aggrieved over the same, the plaintiff filed an appeal before the V Additional City Civil Court, Chennai, in A.S.No.660 of 2007. The learned V Additional Judge, after analysing the oral/documentary evidence adduced on both sides upheld the findings recorded by the trial Court.

10. Notice of motion was issued to the respondent and after several adjournments, the case was posted today for hearing. Substantial questions of law raised by the learned counsel for the appellant in the grounds of appeal are as follows:

- i. When the suit for partition is pending before the Court, any sale in favour of the second defendant of the suit schedule property is null and void as it is hit by lispendence.
- ii. Though the registered Will was executed by late Damodara Mudaliar dated 20th October 1939 in Document No.20/1939 in favour of his three sons, whether the properties can be divided as per Will when the Will was not probated ?
- iii. Whether the trial court was justified in giving a finding that the plaintiff is not entitled for a permanent injunction as prayed for by her even without framing an issue ?

11. Heard Mr.S.N.Narasimhulu, learned counsel appearing for the appellant and Mr.G.Thangavel, learned counsel appearing for the respondent.

12. It is admitted fact that the suit property originally belonged to one Dhamodara Mudaliar and he executed a registered Will. He had three wives through whom he had three sons namely Natesa Mudaliar, Vedachala Mudaliar and Vajravelu Mudaliar and one daughter Indirani Ammal. He executed a registered Will (Ex.A1) dated 20.10.1939 bequeathing the suit property in favour of his three sons and he specifically mentioned in the Will that his sons should take $1/3^{\text{rd}}$ share of the suit property and that a sum of Rs.200/- should be paid to Indirani Ammal. However, Indirani Ammal did not claim the said amount from her brothers and as per the averments of the written statement, Indirani Ammal refused to receive the same. Therefore, during the life time of Indirani Ammal, she did not claim the said amount either from her brothers or their legal heirs and thus abandoned the claim. The plaintiff is the daughter in law of Indirani Ammal. The suit for partition was filed by three brothers as is seen from Ex.B2 to Ex.B4 and the first defendant's husband Natesa Mudaliar was allotted $1/3^{\text{rd}}$ share in an execution proceedings in O.S.No.5832/1976. Natesa Mudaliar executed a settlement deed dated 03.03.1973 (Ex.B1) in favour of his wife Andal Ammal



(first defendant) in respect of the suit property. Further it is also mentioned in the settlement deed about payment of Rs.200/- to Indirani Ammal. Though she refused to receive the same from her brother, Natesa Mudaliar had directed the settlee (first defendant) to pay a sum of Rs.200/- to Indirani Ammal. This settlement deed was executed on 03.03.1973 and the present suit was filed in the year 1999. No evidence was adduced by the plaintiff to show that Indirani Ammal claimed a sum of Rs.200/- from the first defendant. It is also seen from the records that the first defendant during her life time executed a sale deed in favour of the second defendant in respect of the suit property and therefore both the courts below were right in holding that the plaintiff cannot seek for a partition of the suit property especially when her mother-in-law Indirani Ammal abandoned her claim. The properties of Damodhara Mudaliar were partitioned in a suit and the present suit property fell to the share of the husband of the first defendant. Indirani Ammal did not claim any right in respect of her father's properties during her life time even in the partition suit filed by her brothers and also refused to receive a sum of Rs.200/- from her brothers. Ex.B1 was executed nearly thirty years prior to the filling of the present suit. In the circumstances, I hold that no substantial question of law is involved in the present appeal. Therefore second appeal fails and is dismissed.

13. In the result,

- i. the second appeal is dismissed. No costs. Consequently, the connected miscellaneous petition is closed.
- ii. the decree and judgment dated 20.04.2009 passed in A.S. No.660 of 2007, on the file of the V Additional City Civil Court, Chennai, and
- iii. the decree and judgment dated 31.01.2006 passed in O.S.No.3479 of 1999, on the file of the XII Assistant City Civil Court, Chennai, are upheld.

Sd/-

Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

mtl



To

1. The V Additional Judge,
The City Civil Court,
Chennai.
2. The XII Assistant Judge,
The City Civil Court,
Chennai.
3. The Section Officer,
V.R. Section,
High Court, Madras.

+1cc to Mr.S.N.Narasimhulu, Advocate, S.R.No.19263
+1cc to Mr.G.Thangavel, Advocate, S.R.No.18951

S.A.NO.198 OF 2010 AND
M.P.NO.1 OF 2010

RGN(CO)
PBS/31/05/2022