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S.A.No.458 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 21.12.2022

CORAM

THE HONOURABLE MRS.JUSTICE T.V.THAMILSELVI

S.A.No.458 of 2013
and M.P.No.1 of 2013

V.Karpagam

....Appellant

Vs.

1. V.Chinnadurai
2. Mrs.Ranganayakiammal
3. V.Kannan
4. V.Venugopal
Respondents

...

PRAYER: Second Appeal filed under Section 100 of C.P.C., to set aside the Judgment and decree dated 13.12.2012 passed in A.S.No.333 of 2011 by the learned II Additional Judge, City Civil Court, Chennai, confirming the Judgment and decree dated 30.09.2010 passed in O.S.No.4877 of 2007 by the learned V Asst. Judge, City Civil Court, Chennai by allowing the above appeal.

For Appellant : Mr.Giridhar and Sai

For R1 : Mr.L.Sankar krishnan
For R2 & R3 : Mr.S. Madhusudanan
For R4 : M/s.Narmatha Rani



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JUDGMENT

The appellant herein is the 1st defendant in suit O.S.No.4877 of 2007 on the file of the V Assistant Judge, City Civil Court, Chennai filed by the 1st respondent herein/plaintiff for the relief of partition and separate possession claiming the 1/5 share in the suit property situated at Plot No.20, comprised in R.S.No.8/2, 8/3 and 9/2 Door No.19. Ramiya Naidu Colony, Paper Mills Road, Peravallur, Chennai with an extent of 3110 sq ft against the defendants.

2. The brief of the case are as follows:-

The plaintiff and the 1st defendant are the son and daughter of Vaiyapuri through his first wife and the 2nd defendant is the 2nd wife of Vaiyapuri and the defendants 3 and 4 are the sons of Vaiyapuri through his 2nd wife/2nd defendant. The case of the plaintiff is that the suit property with an extent of 3110 sq ft along with other properties were purchased by his father Vaiyapuri in the year 1969. The other properties were settled by him in his life time except the suit properties. Subsequently, the partition was held, wherein, the plaintiff's father has agreed to settle the suit property in



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favour of the 1st defendant as she is the only daughter of the said Vaiyapuri and that on his refusal, the plaintiff executed the sale deed in favour of his sister/ 1st defendant's husband in the year 1983. Aggrieved by this, the plaintiff's father instituted a suit in O.S.No.7245 of 1985 for declaration and recovery of possession and the said suit was dismissed. Against which, the appeal was preferred by the plaintiff's father in A.S.No.72 of 1990 and the same was allowed and plaintiff's father title was declared. Thereafter, his father settled the portion occupied by the 1st defendant and her husband in document No.1023 of 2003 and left the remaining portion is vacant. Plaintiff's father left the above vacant suit property intestate and expired on 13.06.2003. After the demise of his father, the plaintiff had demanded the share by giving notice, though the 1st defendant gave reply and trying to alienate the suit property. Hence, the suit.

3. The 1st defendant admits that her father executed the sale deed in her favour and she is in possession and enjoyment of the suit property and also contended that having executed the sale deed in her husband favour by the plaintiff, she is not entitled to claim any share.



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4. The defendants 2, 3 and 4 had contended that they are the legal heirs of the second wife of Vaiyapuri, they are entitled to respective shares in the suit property.

5. Before the trial Court framed issues, on the side of the plaintiff P.W.1 was examined and Ex.A1 to A7 were marked. On the defendants side D.W.1 and D.W.2 were examined and Ex.B1 to B5 were marked.

6. Considering the evidence as well as the documents, the trial Court held that the suit property belongs to one Vaiyapuri, his legal heirs are the plaintiff and defendants are each entitled for 1/5 share and also held that the 1st defendant has not proved that the defendants 3 and 4 born to her father Vaiyapuri through second wife/second defendant and also appreciating the earlier suit proceedings concluded that the plaintiff is entitled for 1/5 share in the suit property.



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7. Against which, the appeal was filed by the 1st defendant in A.S.No.333 of 2011 wherein, the Lower Appellate Judge also analysing the evidence and confirming the finding of the trial Judge. Challenging the said concurrent findings of the Court below, the 1st defendant had preferred this second appeal.

8. This Court at the time of admitting the second appeal has formulated the following substantial questions of law:

(i) *Whether the Court below failed to note of the fact that already the plaintiff sold the suit property in favour of the appellant's husband as such as he is not entitled claim 1/5th share in the suit property in view of the provisions of Section 43 of the Transfer of Property Act.*

(ii) *Whether not the Courts below erred in rendering a finding of Legal heir ship in relation to Mr.Vaiyapuri in favour of defendants 2 to 4 in the absence of any evidence.*

(iii) *Whether, the findings rendered by the Court below is liable to be set aside.*

9. Heard the learned counsel for the appellant and the learned counsel for the respondents and perused the material available on record.



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10. The learned counsel for the appellant/ 1st defendant has submitted that the evidence adduced on the side of the 1st defendant, not properly appreciating the provisions as per Section 43 of Transfer of Property Act. The plaintiff is barred from claiming share in the suit property as he already sold his shares to the 1st defendant's husband. thereby findings of the Court below are totally erroneous. He further submitted that both Court below has failed to note that the plaintiff gave insufficient description of property without proper extent, inspite of that the suit was decreed as such as erroneous one and also not appreciating the legal aspects that as per the provisions of Section 43 of Transfer of Property Act, the plaintiff is barred to claim share in the suit property as he already sold and also contended that the defendants 2,3 and 4 are not second wife and sons of his father Vaiyapuri indeed their names were not found in the legal heirs certificate (Ex.A4). Accordingly, the finding of the Court below is liable to be set aside.

11. Per contra, the learned counsel for the plaintiff/1st respondent herein submitted that as per the earlier suit findings, the sale deed executed by the plaintiff in favour of the 1st defendant's husband was automatically



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become cancelled. Therefore, the plaintiff's father became the absolute owner of the suit property, thereby the plaintiff/1st respondent is entitled for 1/5 share in the suit property and the same was rightly appreciated by the Court below. Hence, he prays to dismiss the appeal.

12. The learned counsel for the respondents 2 and 3 have submitted that the 2nd defendant married the said Vaiyapuri, after the death of Manikammal who is first wife of said Vaiyapuri. After the marriage 2nd defendant and Vaiyapuri begotten 2 children who are 3rd and 4th defendants. He further submitted that the defendants have respective shares in the suit property and never objected for the same. He further submitted that the 1st defendant/appellant is trying to dispose the property as mentioned in the plaint. Hence, the suit may be decreed allotting to the respondents 2 and 3 their respective share in the suit property.

13. The learned counsel for the 4th respondent has submitted that the plaintiff has issued notice for amicable partition but it is false to allege that the defendants have not complied with the said notice. In fact, this defendant



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tried to approach the 1st defendant and advised him for peaceful and amicable partition and also demanded his share in the said property. But it is only the 1st defendant who refused for peaceful and amicable settlement of the suit properties. Hence, he entitled to 1/5 share in the suit property as mentioned by the plaintiff.

14. Considering the rival submissions on either side, admittedly, the suit property was purchased by father of the plaintiff's in the year 1969 through the sale deed marked as Ex.A1. In fact, during the life time of said Vaiyapuri, the plaintiff sold the said property in favour of her sister husband through Ex.B5 sale deed in the year 1983. As the plaintiff has no right to sell the suit property, her father filed the suit in [O.S.No.7245](#) of 1985 claiming the declaration of his title and recovery of possession. Though said suit was dismissed but the relief granted in appeal and the same was confirmed the second Appeal in S.A.No.466 of 1991. Thereafter, his father Vaiyapuri settled the portion of the suit property in favour of the 1st defendant which was under their occupation through the settlement deed Ex.A2 in the year 2003. So, as per the settlement deed Ex.A2, the plaintiff father viz., Vaiyapuri



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settled 900 sq ft shown as 'I' scheduled property with house constructed along with four boundaries. Thereafter, the remaining extent of 2200 sq ft is vacant land possessed and enjoyed by plaintiff's father as absolute owner.

15. Admittedly, the plaintiff and the first defendant were born to the said Vaiyapuri through his first wife, after the demise of his mother, his father married the second wife/Ranganayakiammal and the defendants 3 and 4 are the sons of Vaiyapuri through second wife/Ranganayakiammal. The 1st defendant denied claim of the defendants 2 to 4 stating that her father viz Vaiyapuri not married the 2nd defendant and she was wife of one Mangayya and the child not born to his father vaiyapuri. Even in the legal heir certificate was obtained by the plaintiff from the authority, the defendants names was not found in the certificate. Hence, the 1st defendant denied the claim of the defendants 2 to 4.

16. The earlier suit in O.S.No.7245 of 1985 plaint copy as Ex.B1 was produced on the side of the defendants, it reveals that his father Vaiyauri pleaded that he is living with the second wife after the demise of his first wife



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in para 7 of the plaint. It is pertinent to note that the suit was filed by the said Vaiyapuri, decreed his in favour and the same was confirmed in the second appeal. Therefore, the second defendant is the second wife of said Vaiyapuri is proved fact. Further, the 1st defendant has not produced any contrary evidence to establish that the defendants 3 and 4 are not born to his father Vaiyapuri and the second wife of /second defendant. Admittedly, the said Vaiyapuri married the second defendant and no contrary evidence adduced that the defendants 3 and 4 are not the legal heirs of the said Vaiyapuri and the second defendant. Therefore, the objection raised by the 1st defendant with regard to legal heirs of the defendants 2 to 4 as such is not maintainable . Accordingly, question of law C is answered.

17. The another contention of the 1st defendant is that as per the settlement deed executed by his father Vaiyapuri, she is entitled for portion of the suit property that part, already the plaintiff sold his share through sale deed in the year 1983, so after the demise of his father, as per the provisions of Section 43 of the Transfer of Property Act, plaintiff not entitled any share in the property.



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18. As per the Ex.A2/settlement deed, it is clear that Vaiyapuri executed the settlement deed to the 1st defendant with an extent of 900 sq ft along with house with 4 boundaries in Plot No.20. The remaining extent of 2200 sq ft in Plot No.20 is vacant land, which was enjoyed by the Vaiyapuri, as a absolute owner, though, the 1st defendant contended that after the demise of his father the remaining land with an extent of 2200 sq ft is enjoyed by the 1st defendant. But there is no evidence on the side of the 1st defendant that the said Vaiyapuri was maintained by her. Furthermore, in the earlier proceedings in O.S.No.7245 of 1985 filed by the said Vaiyapuri, claiming the title over the suit property was declared and the sale deed executed in the year 1983 was automatically cancelled. Hence, the plaintiff's father become the absolute owner of the suit property, thereafter, he executed the portion of the suit property through Ex.A2/settlement deed in favour of the 1st defendant. Till his father died on 13.06.2003 he was absolute owner of the remaining extent of 2200 sq ft in Plot No.20 Hence, based on the finding rendered by the Court below in O.S.No.7245 of 1985 the provision of Section 43 of Transfer of Property Act not applicable to the facts of this case to that effect, the authority relied by the 1st defendant/appellant Judgment in **(1979 (1) MLJ**



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411, also not support this case wherein it has been held as follows:-

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When a person had no power to transfer title in that property to another, it will attract section 43 of the Transfer of Property Act, if he subsequently acquires any interest in or title to that property. It is no defence to the person estopped to plead that the transferee made no proper enquiry as section 43 does not impose upon the transferee the duty of taking reasonable care

19. Both Court below concluded that the suit property was purchased by the plaintiff's father, thereby the plaintiff is having 1/5 share in the suit property and without appreciating the settlement deed/Ex.A2 executed by the father during his life time in favour of the 1st defendant. As per the Ex.A2/settlement deed 900 sq ft along with house with 4 boundaries settled in favour of the 1st defendant in Plot No.20 and the remaining vacant portion with an extent of 2200 sq ft is alone belongs to the plaintiff's father. In that 2200 sq ft, the plaintiff and the defendants are each entitled 1/5 share. On seeing the description of the property, the total extent of the suit property has not been mentioned by the plaintiff, he simply mentioned only Door No.19, Plot No,20 along with survey Nos.8/2, 8/3, 8/3 and 9/2 Ramiya Naidu Colony, Paper Mills Road, Peravallur, Perambur, Chennai. As discussed above, as per the Ex.A2, 900 sq ft land already settled in favour of the 1st



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defendant. Hence, the remaining extent an 2200 sq ft with 4 boundaries lying vacant is available for partition.

20. Both the Court below failed to take note of the settlement deed/ Ex.A2 and also failed to mention about the entire extent of the suit property. Hence, the findings rendered by the Court below is set aside. Accordingly, the second appeal is partly allowed thereby, the suit is decreed as follows:-

"The entire extent of 3100 sq ft is situated at plot No.20, comprised in R.S.No.8/2, 8/3 and 9/2 Door No.19. Ramiya Naidu Colony, Paper Mills Road, Peravallur, Chennai with 4 boundaries. Excluding 'I' scheduled property with an extent of 900 sq ft with 4 boundaries which was already settled in favour of the 1st defendant/appellant herein and in the remaining extent of 2200 sq ft in Plot No.20, the plaintiff and the defendants are each entitled to 1/5 share equally. Accordingly, the suit is decreed."

Consequently, connected miscellaneous petition is closed. No costs.



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To

1. The II Additional Judge,
City Civil Court, Chennai.
2. The V Asst. Judge,
City Civil Court,
Chennai.
3. The Section Officer,
V.R,Section



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T.V.THAMILSELVI, J.

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