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AS No.824 of 2005

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.11.2023

CORAM:

THE HONOURABLE MR.JUSTICE **R.SUBRAMANIAN**
and
THE HONOURABLE MR.JUSTICE **N.SENTHILKUMAR**

A.S.No.824 of 2005
and CMP No.14404 of 2005

Mowleeshwaran ... Appellant/2nd Defendant

Vs

1. Shankar ... 1st Respondent/Plaintiff

2. Balavenkatraman Chettiyar (Died)

3. Janarthanan

4. Divakaran

5. Krishnan @ Babu

6. Messrs Sri Vasavi & Co.,
Rajaveedhi,
Coimbatore.

... Respondents 2 to 6/
Defendants 1, 3 to 6

This appeal is filed under Section 96 of the Code of Civil Procedure, to set aside the judgement and decree of the learned Additional District Judge's cum Fast Track Court No.1 at Coimbatore, dated 19.4.2004 in OS.No.6 of 2003.



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For Appellant : Mr.R.Kannan

For Respondents : Mr.M.Sriram, for R5 & R6

R1, R3 & R4 – No appearance
R2- Died

J U D G E M E N T

(Judgment of the Court was delivered by R.SUBRAMANIAN, J.)

The second defendant in OS No.6 of 2003 on the file of the Additional District Court, Coimbatore, is on Appeal, aggrieved by the decree for partition declaring the 1/5th share of the plaintiff and the second defendant in the Suit Item No.1 alone, while dismissing the suit in respect of suit Item Nos.2, 3 and 4.

2. The plaintiff in OS No.6 of 2003 sought for partition and separate possession of his 1/5th share in suit Item No.1, 1/10th share in suit Item Nos.2 and 3 and 1/5th share in suit Item No.4.

3. According to the plaintiff, the suit properties belonged to the joint family consisting of the plaintiff himself, the first defendant his



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father, defendants 2, 3 and 4 his brothers. The fifth defendant was the partner of the first defendant in the business that has been carried on in the name of Messrs Sri Vasavi & Co., shown as the sixth defendant. Claiming that suit Item Nos. 2, 3 and 4 belonged to the joint family and the Suit Item No.1 belonged to his mother, who died on 06.01.2000, the plaintiff laid his claim for partition.

4. The suit was resisted by the first defendant contending that there was no joint family and the family also did not possess any joint properties. It was claimed that the suit properties belonged to the first defendant as his absolute properties. As regards the businesses, the first defendant contended that the businesses were wound up even 15 years prior to the filing of the suit and therefore, the claim of the plaintiff is not acceptable. Even in respect of the suit first item which stood in the name of the mother of the plaintiff, the first defendant would contend that it was purchased by him in the name of his wife and she had by a Will dated 03.11.1998 bequeathed the same in his favour. Hence under the Will the property belongs to him.

5. On the above pleadings, the learned Trial Judge framed the



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following issues.

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1. Whether the plaintiff is entitled to partition as prayed for;

2. Whether the plaintiff is entitled to a share in the first item;

3. To what other relief is the plaintiff is entitled to?

6. The plaintiff was examined as P.W.1 and Exhibits A1 to A4 were marked. The third defendant Janarthanan was examined as D.W.1, while the first defendant was examined as D.W.2. Exhibits B1 to B15 were marked on the side of the defendants.

7. As regards Item Nos.2 and 3, businesses, the learned Trial Judge concluded that the businesses were wound up and they were not in existence on the date of the suit and hence the plaintiff is not entitled to a share. As regards Item No.4 movables, the Trial Court found that the existence of the movables has not been established. However, in respect of the suit Item No.1 which stood in the name of the mother of the plaintiff, the Trial Court granted 1/5th share to the plaintiff. Aggrieved by the said judgment and decree, the second defendant has come up with this Appeal.



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8. We have heard Mr.R.Kannan, the learned counsel appearing for the appellant and Mr.M.Sriram, the learned counsel appearing for respondents 5 and 6. The respondents 1, 3 and 4 are not appearing either in person or through counsel duly instructed. The second respondent is no more. His children who are already on record as appellant and respondents 3 and 4 are recorded as LRs of the deceased second respondent.

9. Mr.R.Kannan, learned counsel appearing for the appellant would submit that the Trial Court was not right in dismissing the suit in respect of Item Nos.2, 3 and 4. He would submit that the plaintiff would be entitled to a share in the proceeds that was received by the first defendant in the said businesses. He would also contend that now that the first defendant has died intestate, the Court can take note of the subsequent events and modify the decree granted by the Trial Court.

10. We find that in the connected Appeal in AS No.373 of 2005 which was dismissed by us for non prosecution the third respondent herein Janarthanan had filed an application to bring himself on record as



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the legal representative under a Will purported to have been executed by the first defendant/second respondent Balavenkatarama Chettiar. On receipt of the said application this Court had directed the Additional District and Sessions Judge, Coimbatore to record evidence on the Will and render a finding on its genuineness. Pursuant to the said direction, the learned Additional District Judge, Coimbatore had returned a finding to the effect that the Will has not been proved in accordance with law. In fact the learned Additional District Judge has found that the Will has not been attested and therefore, it is not valid.

11. We do not see any reason to overturn the findings of the learned Additional District Judge on the genuineness of the Will. In the absence of the Will, the appellant and respondents 1, 3 and 4 would inherit the properties left behind by the second respondent viz. Balavenkataraman Chettiyar in equal moieties. Therefore, the 1/5th share granted to the defendant in the suit first item would now enlarge to 1/4th.

12. Though Mr.Kannan would attempt to launch an attack on the conclusions of the learned Additional District Judge rejecting his claim in respect of Item Nos.2, 3 and 4 also, we do not find any material to



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support his contentions. The learned Trial Judge had upon consideration of the entire evidence on record, particularly the documentary evidence come to the conclusion that the businesses were closed and the first defendant Balavenkatraman Chettiyar had retired from the partnership business even in the year 1995 and therefore, the claim of the plaintiff for a share in the proceeds is not maintainable. Hence we do not see any reason to interfere with those findings.

13. In the light of the above, we only modify the preliminary decree and declare that the plaintiff and the second defendant would be entitled to 1/4th share in the suit Item No.1 in other respects the decree of the Trial Court will stand confirmed. There shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.

(R.SUBRAMANIAN, J.) (N.SENTHILKUMAR, J.)
08.11.2023

jv

Index : No
Internet : Yes
Speaking order
Neutral Citation: No



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To

1. The Additional District Judge's
cum Fast Track Court No.1
Coimbatore.
2. The Section Officer,
V.R.Section,
High Court.



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and
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