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S.A.No.426 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.06.2023

CORAM

MR.JUSTICE N.SESHASAYEE

S.A.No.426 of 2020
and C.M.P.No.9086 of 2020

C.Devarajan

... Appellant

Vs.

1.Anjalai
2.Sivakumar
3.Rajeswari
4.Vinayagamurthy
5.Ramajayam
6.Kannammal
7.Devasi @ Devasundari
8.Krishnaveni
9.Seetha

10.The Sub Registrar,
Sub Registrar Office,
Thellar,
Vandavasi Taluk,
Tiruvannamalai District.

... Respondents



S.A.No.426 of 2020

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, seeking to set aside the judgement and decree dated 04.01.2020 made in A.S.No.25 of 2017 on the file of the Additional District Court (FTC), Arani (A.S.No.09 of 2015 - District Court, Tiruvannamalai) confirming the judgement and decree dated 04.07.2014 made in O.S.No.30 of 2007 on the file of the Sub Court, Cheyyar.

For Appellant : Mr.N.Manoharan

For Respondents : Mr.S.P.Karthik
Government Advocate
for R10

No Appearance
for R1 to R8

Unclaimed - R9

JUDGMENT

The second defendant in O.S.No.30/2007 on the file of Sub Court, Cheyyar, which was laid for partition of five items of properties, is the appellant. The suit was concurrently decreed by the Courts below.



S.A.No.426 of 2020

2. The brief facts of the case are :

- The subject matter of the suit for partition are five in number, and barring item No.4, others are landed properties. According to the plaintiff, his father Chinnasamy was married twice, first to his mother Ponnammal, and after her demise, he married the first defendant Kannammal, through whom he had four children who are arrayed as defendants 2 to 5. Of them, the second defendant alone is his son and rest are daughters.
- On 04.02.1972, under Ext.A1, Chinnasamy and his brothers had executed a deed of partition whereunder the B-schedule property came to be allotted to the share of Chinnasamy. Chinnasamy had alienated this property and the proceeds of this sale were utilised for the purchase of Item No.5 under Ext.A2, and Items 1 to 3 under Ext.A3, dated 10.08.1974.
- Claiming that the entire properties are ancestral properties, the plaintiff laid a suit for partition of his 7/18 share which is comprised



S.A.No.426 of 2020

WEB COPY

of his own independent 1/3 share plus another fractional share of the share allotted to his father in the notional partition in terms of Section 6 of the Hindu Succession Act, as was then in vogue sometime in 2004 when Chinnasamy died.

3. The suit was resisted essentially by the second defendant, the step-brother of the plaintiff. He preferred the following contentions :

- All the properties are the self-acquired properties of Chinnasamy, and the allegation that they are the ancestral properties in his hands is denied.
- While so, on 02.04.1997, Chinnasamy executed Ext.B1 Will, whereunder he bequeathed Items 1 to 4 to the second defendant, and the fifth item was bequeathed for life to his wife, the first defendant in the suit, and the remainder to the second defendant. This Will was later superseded by a settlement deed (Ext.B2) dated 22.05.2002, whereunder Chinnasamy had settled all the five items of immovable properties to the second defendant.



S.A.No.426 of 2020

WEB COPY

- There are other items of immovable properties which are not included in the suit, and therefore, the suit is bad for seeking partial partition.

4.1 The suit went to trial, and before the trial Court, both sides adduced oral and documentary evidence. During the pendency of the suit, the plaintiff passed away and his heirs were impleaded as additional plaintiffs.

4.2 During trial, the plaintiff's son Shivakumar (P3) was examined as P.W.1. Besides whom, they examined a certain Munusamy as P.W.2, and they produced Exts.A1 to Ext.A4. For the defendants, both D1 and D2 examined themselves respectively as D.W.2 and D.W.1, and they produced Ext.B1 to Ext.B4.

5. Considering the evidence before it, the trial Court decreed the suit and its line of reasoning are :

- (a) Neither Ext.B1 Will nor Ext.B2 settlement deed were duly proved by examining the attesting witnesses.



S.A.No.426 of 2020

(b) Secondly, the suit properties are not self acquired properties.

Challenging the same, the 2nd defendant is before this Court.

6. This Second Appeal is admitted for considering the following Substantial Questions of Law:

i) *"Whether the Courts below were right in rejecting the claim of the defendant based on Ex.B2, settlement deed, dated 22.05.2002 on the ground, the same has not been proved in accordance with law by examining an attesting witness more so, when execution of the said document by Chinnasamy was not specifically denied ?"*

ii) *"Whether the Courts below were right in concluding that the suit properties were purchased out of the surplus income possessed by Chinnasamy and earned by him from and out of the property allotted to him under Ex.A1, partition deed dated 04.02.1972 ?"*



S.A.No.426 of 2020

7.Learned counsel for the appellant / 2nd defendant submitted that when the defendants had pleaded about the settlement deed, in fitness of things the plaintiff ought to have filed his rejoinder under Order VIII Rule 9 C.P.C., and when he was not specifically denied, Order VIII Rule 5 C.P.C., will step in. Hence, the settlement deed must be considered to have been admitted.

7.1 Turning to the second aspect, the learned counsel submitted that the categorical case of the plaintiff is that the property which Chinnasamy had obtained under Ex.A1, partition was sold and the proceeds of the sale was utilized for the purchase of the properties covered under Ex.A2 and Ex.A3. The plaintiff had not produced any documents to show the nexus between the alleged sale of the property by Chinnasamy under Ex.A1 and the properties purchased by him under Ex.A2 and Ex.A3. There is no presumption in law that merely because a Hindu male possesses ancestral property, the property he purchased will also assume the character of ancestral property.



S.A.No.426 of 2020

8. Prima facie there is some merit in the submissions of the learned counsel on both the aspects that he argued. The respondents have been served, but they did not chose to enter appearance.

9. Turning to the proof of the settlement deed, this Court deems it appropriate to grant the appellant an opportunity to prove it. Hence, it chooses to remand the matter back to the First Appellate Court. The appellant is also free to advance the aspect on law as to the character of the property covered under Ex.A2 and Ex.A3.

10.1 In conclusion, this appeal is allowed and the decree of the First Appellate Court in A.S.No.25 of 2017, dated 04.01.2020 is set aside and the matter is remanded back to the First Appellate Court for considering the aspects herein above indicated. Both sides will also have the right to produce such additional evidence as may be relevant. No Costs. Consequently, the connected miscellaneous petition is closed.



S.A.No.426 of 2020

10.2 The First Appellate Court is directed to dispose of the appeal within a period of four (4) months from the date of receipt of a copy of this order.

The parties are required to appear before the First Appellate Court on 05.07.2023. Since the respondents did not appear before this Court today, this Court requires the First Appellate Court to issue Court notice to them and on their counsel, if any available.

08.06.2023

Anu

Index : yes / no

Internet : yes / no

Speaking / Non Speaking order

To.

1.The Additional District Court (FTC), Arani

2.The Sub Court, Cheyyar.

3.The Sub Registrar,
Sub Registrar Office,
Thellar,
Vandavasi Taluk,
Tiruvannamalai District.



WEB COPY



S.A.No.426 of 2020

N.SESHASAYEE, J.

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S.A.No.426 of 2020
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