



S.A.Nos.890 and 892 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.09.2023

CORAM

THE HON'BLE MR. JUSTICE **A.D.JAGADISH CHANDIRA**

S.A.Nos.890 and 892 of 2021
and C.M.P.No.16910 of 2021

S.Arunagiri

... Appellant in
both the petitions

Vs.

1. B.K.Rathinam
- 2.B.K.Abimanyaraj
- 3.A.Devaraj
- 4.A.Parameswaran
- 5.A.Elangovan
- 6.A.Deepa
- 7.Chinthamani

... Respondents in
both the petitions

PRAYER: Second Appeals filed under Section 100 of C.P.C., pleased to set aside the common judgement and decree passed in A.S. No.17 of 2017 and Cross Appeal No.17 of 2017 in A.S.No.17 of 2017 dated 03.12.2020 on the file of III Additional District and Session Judge, Erode at Gobichettipalayam modifying the judgment and decree passed in O.S.No.97 of 2012 dated 13.07.2017 on the file of the Subordinate Judge, Gobichettipalayam and allow the second appeals.



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For Appellant : M/s.V.V.Sathya, Advocate

For Respondents : Mr.K.Govi Ganesan for R1

Mr.G.C.Nelson Britto for
Mr.C.E.Pratap for R2 to R6

Mr.S.Sriram for R7.

COMMON JUDGMENT

Both these Second Appeals have been filed against the common Judgement and Decree passed in A.S. No.17 of 2017 and Cross Appeal No.17 of 2017 in A.S.No.17 of 2017 dated 03.12.2020 on the file of III Additional District and Session Judge, Erode at Gobichettipalayam modifying the judgment and decree passed in O.S.No.97 of 2012 dated 13.07.2017 on the file of the Subordinate Judge, Gobichettipalayam.

2. The 7th defendant is the Appellant herein and defendants 1 to 6 are respondents 2 to 7. The first respondent/plaintiff had filed the Original Suit seeking for partition, separate possession and permanent injunction. The suit was decreed in favour of the plaintiff and the 6th defendant and it was modified by the first Appellate Court, aggrieved over the



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same, the appellant/7th defendant has filed the present Second Appeals.

3. For the sake of convenience, the parties are referred to as they are arrayed in the Original Suit.

4. The case of the plaintiff is that she is a daughter of one late Kopa Naicker and she had filed O.S.No.97 of 2012 against the defendants 1 and 6 who are her siblings and defendants 2 to 5, who are the children of the first defendant and the 7th defendant, one Arunagiri, who is the proposed purchaser of item I of the suit properties vide registered agreement of sale entered into with defendants 1 to 4, which is marked as Ex.A3.

5. The suit was filed in respect of seven items. The plaintiff had claimed partition of item 1 suit property into 3 equal shares and item II to VII suit properties into 4 equal shares and allot one such share to the plaintiff and deliver separate possession of the same to plaintiff.

6. The Trial Court passed the preliminary decree directing defendants 1 to 5 to divide the suit properties by metes and bounds into 4 equal shares



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and allot one such share to the plaintiff and the 6th defendant and deliver separate possession of the same to them. The Trial Court also decreed that the plaintiff is entitled to claim mesne profit for her share by separate proceedings and also granted injunction restraining defendants 1 to 5 from alienating or leasing or mortgaging including the plaintiffs 1/ 4th share in the suit properties to the 7th defendant or to any other third party.

7. Against the said judgment and decree, the plaintiff AS.No.17 of 2017 seeking modification of the judgment and decree rendered by the Trial Court in respect of Item 1 of the suit properties. The seventh defendant filed Cross Appeal No.17 of 2017 on the ground that the 1st item of the suit property is the self acquired property of Kopanaicker and thus he is a person competent to execute the Will dated 28.11.2008 as he likes and thereby, the person, with whom he had entered the agreement, has the right to get the entire property. The first Appellate Court modified the Judgment and decree of the Sub Court, Gobichettipalayam in OS.No.97 of 2012 dated 13.07.2017 directing division of item I of the suit property into 3 equal shares and allotment of one such share to the plaintiff and dismissed the Cross Appeal.



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8. The Second Appeals are now filed by the 7th defendant, who is none other than the agreement holder having entered into an agreement of sale with defendants 1 to 4. M/s.V.V.Sathya, the learned counsel for the appellant in both the appeals, would submit that item 1 is a self acquired property of Kopa Naicker and he has every right to execute the Will and based on the Will, defendants 1 to 4 have entered into the agreement of sale and the Appeals have to be allowed.

9. Per contra, Mr.K.Govi Ganesan, learned counsel for the first respondent would submit that the appellant is only an agreement holder and if at all, he can only step into the shoes of the person with whom he had entered into the agreement and he has no more rights than the person with whom he had entered into the agreement. He would also submit that as per Section 54 of the Transfer of Property Act, a contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties and it does not, of itself, create any interest in or charge on any such property, but in this case, the parties themselves have agreed to abide by the order passed by the Trial Court as



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well as the modified decree made by the Appellate Court. There is no substantial question of law involved in this appeal, as both courts had held that item no.7 of the properties is not the self-acquired property of said Kopa Naicker. Therefore, the appellant cannot claim any rights beyond what is entitled to the person with whom he has entered into the agreement, especially considering that the agreement itself is time-barred and he cannot claim anything more than what is entitled to the person with whom he had entered into the agreement.

10. The learned counsel appearing for defendants 2 to 6 submits that he has not filed any Appeal against the order of the Appellate Court dated 03.12.2020.

11. Heard the learned counsel appearing on both sides and perused the materials available on record.

12. A perusal of the entire materials available on record including the judgments of the courts below would reveal the following aspects:-



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- (a) The suit properties contain 7 items.
- (b) The suit properties belonged to the family of the plaintiff from time immemorial.
- (c) The plaintiff, first defendant and sixth defendant are the children of Kopa Naicker and grandchildren of Massaiya Naicker.
- (d) A dispute arose when an agreement of sale dated 3.7.2012 was entered by defendants 2 to 4 with the 7th defendant, a proposed purchaser in respect of item 1 of the suit properties on the strength of a Will executed by Kopa Naicker under Ex.B1 on 28.11.2008 bequeathing the entire suit properties in favour of his grandchildren viz., defendants 2 to 4 giving life estate to his son, the first defendant.
- (e) Producing revenue records standing in the name of one Massaiya Naicker, the grandfather of the plaintiff, she claimed that the suit properties are ancestral properties and thereby, she claimed 1/3 share in 1st item of suit properties and 1/4 share in items 2 to 7 of the suit properties.
- (f) Though defendants 1 to 5 took a stand as if the suit properties were not ancestral properties and they were self acquired properties of Kopa Naicker and thereby he was entitled execute the Will in respect of the suit properties, they failed in their attempt to prove their case



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before both the courts below.

(g) The plaintiff, though admits execution of the Will, it is her specific case that the suit properties being ancestral properties, Kopa Naicker had no right to execute the Will in respect of entire suit properties and if at all, he could execute the Will in respect of his $\frac{1}{3}$ share alone and excluding such $\frac{1}{3}$ share in respect of items 2 to 7 of the suit properties deemed to have been bequeathed by Kopa Naicker through his Will to his grandchildren, the plaintiff had claimed only $\frac{1}{4}$ share in items 2 to 7 of the suit properties and $\frac{1}{3}$ share in respect of item 1 of the suit properties since the said item of the suit properties was not bequeathed by Kopa Naicker through his Will.

(h) On analysis of the entire oral and documentary evidence, the courts below, appreciating that the plaintiff has produced relevant records to establish that the suit properties are ancestral properties and the defendants have failed to prove that the suit properties are self acquired properties of Kopa Naicker, decreed the suit.

(i) However, while decreeing the suit, the Trial Court has misconstrued with regard to item 1 of the suit properties and inferred that Kopa Naicker had an intention to bequeath item 1 of the suit properties also



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merely on finding that there is a mention in the Will about his possession and enjoyment of lands carrying various Patta Numbers including the one that was assigned to item 1 of the suit properties though the said item of the suit properties has not been shown in the description of property in the Will and thereby, the suit was decreed by the Trial Court granting only 1/4 share to the plaintiff in respect of all the items of the suit properties.

(j) The above discrepancy has been clarified by the first appellate court and the decree of the Trial Court has been modified and thereby 1/3 share in respect of the 1st item of the suit properties was granted to the plaintiff, or in other words, the suit was decreed in entirety and as prayed for.

(k) The 7th defendant, who holds an agreement of sale having been entered with defendants 2 to 4 in respect of 1st item of suit properties, has come up with the Second Appeals, aggrieved by the judgment and decree passed by the first appellate court dismissing the Cross Appeal filed by him and allowing the Appeal Suit filed by the plaintiff.

13. In this regard, it is relevant to note that the appellant herein is only an agreement holder. Section 54 of the Transfer of Property



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Act reads as under:-

“A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on any such property”.

14. The appellant, who is none other than the person, who claims to have entered into an agreement of sale with defendants 1 to 4, is not entitled to any title or right when the alleged vendors have not been conferred with any right or title. The courts below, appreciating the oral and documentary evidence, have rightly held that the suit properties are not self acquired properties of Kopa Naicker and they are the ancestral properties and thereby, the Will executed by him in respect of the shares belonging to other co-parceners is not binding on them. Further, the first appellate court has also clarified with regard to the first item of the suit properties that it has not been included in the description of property in the said Will also.

15. The finding of both the courts below having been rendered after thoroughly analysing the oral and documentary evidence, this court is of the view that it does not warrant any interference and no question



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of law much less substantial question of law arises for consideration in the Second Appeals in the light of the decision of the Hon'ble Apex Court in **Kirpa Ram (D) Tr.Lrs. Vs Surender Deo Gaur (2020 SCC OnLine SC 935)**, wherein it has been categorically held as under:-

“23. Sub-section (1) of Section 100 of the Code contemplates that an appeal shall lie to the High Court if it is satisfied that the case involves a substantial question of law. The substantial question of law is required to be precisely stated in the memorandum of appeal. If the High Court is satisfied that such substantial question of law is involved, it is required to formulate that question. The appeal has to be heard on the question so formulated. However, the Court has the power to hear appeal on any other substantial question of law on satisfaction of the conditions laid down in the proviso of Section 100 of the Code. Therefore, if the substantial question of law framed by the appellants are found to be arising in the case, only then the High Court is required to formulate the same for consideration. If no such question arises, it is not necessary for the High Court to frame any substantial question of law. The formulation of substantial question of law or re-formulation of the same in terms of the proviso arises only if there are some questions of law and not in the absence of any substantial question of law. The High Court is not obliged to



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frame substantial question of law, in case, it finds no error in the findings recorded by the First Appellate Court.”

16. With the above observation, both the Second Appeals stand dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

15.09.2023

drl

Index : Yes / No

Speaking / Non-speaking

Neutral Citation : Yes / No

To

1. The III Additional District and Session Judge, Erode.

2. The Subordinate Judge, Gobichettipalayam

3. The Section Officer,
VR Section, High Court of Madras.

A.D.JAGADISH CHANDIRA.,J.



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