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S.A.No.477 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :13.10.2023

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THE HONOURABLE MR. JUSTICE S.SOUNTHAR

S.A.No. 477 of 2017
and C.M.P.No.11676 of 2017

Chakravarthy

...Appellant

Vs.

1.Ramalingam

2.Gajendiran

3.Lakshmi

4.State Bank of India

Represented by its Branch Manager,
Cuddalore O.T.

5.Indian Bank

Represented by its Branch Manager,
Kurinjipadi

6.The Post Master,
Head Post Office,
Kurinjipadi.

...Respondents

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, praying to set aside the judgment and decree dated 28.10.2014 passed in A.S.No.23 of 2008 on the file of the Principal District Court, Cuddalore, confirming the judgment and decree dated 12.12.2003 passed in O.S.No.293 of 2002 on the file of the Subordinate Court, Cuddalore.



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For Appellant : Mr.S.T.Bharath Gowtham
for M/s.P.Veena Suresh

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J U D G M E N T

The suit was filed by the appellant/plaintiff seeking partition of B schedule movable properties and item 2 & 3 of A schedule movable properties. The plaintiff also sought for direction to the respondents 1 to 3 to pay a sum of Rs.7050/- with interest. The appellant has also sought for reduction of account against the defendants 1 & 2 in respect of item 1 of A schedule property lying in bank deposit with the 4th respondent. The Trial Court dismissed the suit in respect of relief of partition. However, the respondents 1 & 2/defendants 1 & 2 are directed to pay a sum of Rs.28,000/- with 6% interest to the plaintiff. Aggrieved by the said judgment, the plaintiff filed the appeal and the same was dismissed by confirming the judgement of the trial Court. Aggrieved by the same, the appellant is before this Court.

2.According to the appellant/plaintiff, he is a son of Palani Pathar and the defendants 1 to 3 are his brother Subramanian's children. The appellant's brother Subramanian pre-deceased his father Palani Pathar. After death of



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Palani Pather, the appellant filed a suit for partition in O.S.No.550 of 1974 on the file of Subordinate Court, Cuddalore. The said suit was resisted by the respondents 1 to 3, on the ground that Palani Pather executed a Will on 17.02.1972, bequeathing the suit properties therein in their favour. The Trial Court granted a decree for partition in favour of the appellant and the same was challenged by the respondents 1 to 3 before this Court in A.S.No.609 of 1978. The said appeal was allowed by reversing the findings of the Trial Court. The Will relied on by the respondents 1 to 3 was upheld. Accordingly, the suit for partition filed by the appellant was dismissed. Now, the appellant has filed the partition suit in respect of certain movable properties allegedly not dealt with by Palani Pather, under the said Will. The appellant also sought for recovery of money based on the directions given by Palani Pather in the above said Will.

3.The respondents 1 to 3 filed the written statement and resisted the suit on the ground that the appellant was not entitled to maintain the second partition suit, after dismissal of his earlier partition suit by the Appellate Court in A.S. No.609 of 1978. The respondents 1 to 3 specifically raised a plea that the present suit was barred by res judicata and principles of Order II Rule 2 of



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Civil Procedure Code. As far as B schedule properties are concerned, the respondents 1 to 3 raised a contention that the B schedule movable properties were not at all available for partition.

4. The 4th respondent filed the written statement that there was a deposit in the name of Palani Pather for a sum of Rs. 25,000/- and the maturity amount of Rs.71,130/- was sent to the Principal Sub Court, Cuddalore, as per directions of the Court below. A portion of said amount appeared to have been withdrawn by one Palanivel and another in E.A.No.61 of 1998 and E.A.No.62 of 1998 in O.S.No.424 of 1994 and the balance amount of Rs.23,710/- was available in the Court deposit.

5. The 5th respondent filed the written statement stating that as per their records the fixed deposit referred to as item 2 of A schedule properties was not available.

6. Before the Trial Court, the appellant/plaintiff was examined as P.W.1. On behalf of the appellant, 6 documents were marked as Ex.A1 to Ex.A6. The 1st respondent was examined as D.W.1 and on his behalf, 4 documents were



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marked as Ex.B1 to Ex.B4.

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7. The Trial Court, on appreciation of oral and documentary evidence available on record, came to the conclusion that the appellant having failed to include the movable properties mentioned in B schedule in the earlier suit for partition, is not entitled to maintain the 2nd suit for partition. The Trial Court in the judgment also recorded that the learned counsel for the appellant did not press for relief in respect of B schedule properties. The Court below rendered the findings that B schedule properties are not the properties of Palani Pather and there was no evidence available on record to show that the B schedule properties were properties of Palani Pather.

8. Accordingly, the suit was dismissed in respect of relief of partition. However, the Trial Court granted a decree for recovery of money by directing the respondents 1 & 2 to pay a sum of Rs.28,000/- to the appellant with interest at 6 %. Aggrieved by the same, the appellant filed the appeal in A.S.No.23 of 2008. The Appellate Court concurred with the findings of the Court below and dismissed the appeal. Aggrieved by the same, the appellant is before this Court.



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9.The learned counsel appearing for the appellant submits that the movable properties included in B schedule properties were not subject matter of the suit in the earlier partition suit. Therefore, the Court below ought not to have dismissed the suit on the ground that the earlier partition suit filed by the appellant was dismissed by the Court by upholding the Will executed by Palani Pather. The learned Counsel further submitted that the availability of movable properties for partition was not at all discussed in the earlier suit and hence, the appellant is entitled to maintain the present suit for partition.

10.A perusal of materials available on record would suggest that the appellant/plaintiff was aware of the availability of movable properties, even during the pendency of the earlier suit for partition. The deposition of Saroja Ammal, wife of Subramanian has been marked as Ex.A4 by the appellant. A perusal of the same would suggest that the said Saroja Ammal deposed about the availability of movable properties even in the earlier suit. In such circumstances, the relief of partition in respect of movable properties was very much available to the appellant, even when he filed the earlier suit in O.S.No.550 of 1974. Having failed to include the movable properties



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mentioned in the B schedule properties in the earlier suit for partition, the plaintiff is not entitled to file another suit for partition in respect of suit properties. The relief of partition claimed by the appellant in respect of B schedule properties is clearly barred by Order II Rule 2 of Civil Procedure Code. Further, the finding is rendered that the B schedule properties are not the properties of Palani Pather. In such circumstances, the dismissal of the suit in respect of partition need not be interfered with. A perusal of Trial Court judgment would suggest that the relief of partition in respect of B schedule properties was not pressed by the learned counsel for the appellant before the Court below. It has been clearly recorded by the Trial Court in Paragraph No.16 of its judgment. In such circumstances, the appellant is not entitled to file an appeal. If recording of the Trial Court is not correct, it is for the appellant to file appropriate application before the concerned Court and seek clarification of the same when the matter is afresh in the mind of the concerned Court. The appellant is not entitled to dispute the correctness of the recording made by the Trial Court in an Appeal. Once the Trial Court recorded learned counsel for the plaintiff did not press relief of partition in respect of 'B' schedule properties, Appeal against dismissal of suit in respect of 'B' schedule cannot be entertained.



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S.SOUNTHAR, J.

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11. Accordingly, the substantial questions of law framed at the time of admission are answered against the appellant and the second appeal stands dismissed;

a) by confirming the judgment and decree dated 28.10.2014 passed by the learned Principal District Court, Cuddalore in A.S.No.23 of 2008 confirming the judgment and decree dated 12.12.2023 passed by the learned Subordinate Court, Cuddalore in O.S.No.293 of 2002; and

b) In the above facts and circumstances of the case, there will be no order as to costs.

13.10.2023

Index : Yes/No
Internet : Yes/No
Neutral Citation Case : Yes/No
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To

1. The learned Principal District Judge, Cuddalore.
2. The learned Principal Subordinate Judge, Cuddalore.



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