



A.S.No.687 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.09.2024

CORAM

**THE HONOURABLE MRS. JUSTICE J.NISHA BANU
AND
THE HONOURABLE MRS. JUSTICE R.KALAIMATHI**

**A.S.No.687 of 2017
and
C.M.P.No.21923 of 2017
and
C.M.P.Nos.18988 & 18991 of 2018**

Mahalingam,
S/o Rethinavelu

..Appellant

Vs.

1. Jayalakshmi,
D/o Rethinavelu

2. Kamalambal,
W/o Rethinavelu

3. Rajendran,
S/o Rethinavelu

4. Rajakumari,
D/o Rethinavelu

5. Valarmathi,
D/o Rethinavelu

6. Chozharajan,
S/o Rathinavelu

..Respondents



A.S.No.687 of 2017

Prayer: Appeal filed under Section 96 r/w Order 41 Rule 1 of CPC against the judgment and decree of the District Court, Nagapattinam, dated 28.07.2017 made in O.S.No.25 of 2013.

For Appellant : Mr.Arun Babu

For Respondents : Ms.A.Devagi
for R1
R2-No appearance
Mr.M.Arun for R3 to R6

J U D G M E N T

(The order of the Court was made by Mrs.J.Nisha Banu,J.)

The above appeal has been filed challenging the judgment and decree dated 28.07.2017 made in O.S.No.25 of 2013 passed by the learned District Court, Nagapattinam, decreeing the suit for 1/7th share in respect of schedule 'A' property and dismissing the suit with regard to the properties in schedule 'B' and schedule 'C'.

2. The suit has been filed by the 1st respondent herein for partition against her mother, brothers and sisters. The appellant herein is the 2nd defendant in the suit.

3. The averments in the plaint is that the husband of the 1st defendant, Rethinavelu who is the father of the plaintiff and defendants



A.S.No.687 of 2017

WEB COPY

2 to 6, died on 27.08.1988. Some items of the suit properties are joint family properties and the rest are self acquired properties of Rethinavelu, which were purchased by utilizing the income from the joint family properties. The schedule 'A' properties were obtained by Rethinavelu by way of Partition Deed dated 14.10.1961 that took place between Rethinavelu and his brother and out of the income from the said properties and from own earnings, Rethinavelu purchased other items of schedule 'A' from third parties by way of two sale deeds dated 24.11.1965 and 17.03.1983. The items of the schedule 'A' properties are the self acquired properties by Rethinavelu. The items in Schedule 'C' properties belong to Santhammal Trust, a charity trust run by the family members. The items in Schedule 'B' properties are poramboke lands. In the said B schedule properties, the appellant/2nd defendant had constructed a multi storeyed complex and is running a photo studio. In the said properties also, the plaintiff is entitled to 1/7th share. There was an old house in New Survey No.77/5 of an extent of 21 cents in the schedule 'B' properties which was demolished and a complex was constructed. All the properties are under the control of the appellant/ 2nd defendant and he is enjoying the same on his free will though the



A.S.No.687 of 2017

plaintiff requested him to give her share. The 2nd defendant was evading partition stating some reason or the other and was not taking any steps for partition. Hence, the suit.

4. The 2nd defendant has filed a written statement denying the averments stated in the plaint. He would state that the items in Schedule 'C' properties belong to Santhammal Trust, a charity trust run by the family members and no one can claim share in the same. In the 'B' schedule property, the 2nd defendant had constructed the building from his own earnings and enjoying the same. The averment made in the plaint that father had constructed the building and enjoying the income out of the same is not correct. After the death of their father, the 4th and 5th defendants got married and the same was arranged by the 2nd defendant only. As per the Family Arrangement Deed dated 05.06.1986, their father Rethinavelu had given shares to all the family members and all the family members were enjoying the same. The plaintiff cannot claim the property which is in possession and enjoyment of the 2nd defendant which was given to him by way of Family Arrangement Deed dated dated 05.06.1986. Hence, prayed for dismissal of the suit.



A.S.No.687 of 2017

5. The trial court framed the following issues.

i) Whether the plaintiff is entitled for preliminary decree of 1/7th share in the suit schedule properties?

ii) Whether the suit properties were partitioned as per the Family Arrangement Deed dated 05.06.1986?

iii) Whether 'B' schedule property is a separate property of the 2nd defendant?

iv) Whether 'C' schedule property is the property belongs to the trust and not for partition?

v) To what other relief the plaintiff is entitled to?

6. Before the Trial Court, the plaintiff/1st respondent herein examined two witnesses viz., P.W.1 and P.W.2 and marked nineteen documents viz., Exs.P1 to P19. The 2nd defendant examined himself as RW1 and marked five documents viz., Exs.R1 to R5.

7. The trial Court, on examination of the pleadings and documents on record, passed a preliminary decree for 1/7th share in respect of schedule 'A' properties and dismissed the suit with regard to the properties in schedules 'B' and 'C'. Aggrieved over the same, the appellant has preferred the above appeal.



A.S.No.687 of 2017

WEB COPY

8. Heard the learned counsel for the appellant and the learned counsel appearing for 1st, 3rd to 6th respondents.

9. When the appeal is taken up for hearing, the learned counsel for the appellant would state that the appellant has filed the appeal only with regard to 'A' Schedule properties and now, the appellant agreed to give share in respect of item Nos.1 to 7 in 'A' Schedule properties and claimed the entire property in item No.8 of 'A' schedule property alone.

10. It is also brought to the notice of this court that the mother 2nd respondent herein/1st defendant died on 29.05.2021 pending the appeal. A copy of the death certificate of Kamalabal, 1st defendant is also produced by the 1st respondent.

11. It is an admitted fact that the 'A' Schedule properties were obtained by father, Rethinavel by way of Partition Deed that took place on 14.10.1961 between him and his brother. The trial Court has also given a finding in respect of issue No.1 that though the 2nd defendant/appellant herein has categorically stated that their father



A.S.No.687 of 2017

Rethinavelu had made Family Arrangement Deed dated 05.06.1986 and as per the said Family Arrangement deed, the 1st respondent herein/plaintiff cannot claim the property which is in possession and enjoyment of the appellant/2nd defendant, in an earlier suit in O.S.No.158/2003 in respect of the same properties, the appellant had stated that there was no partition of the schedule properties. Thus, the trial court had come to the conclusion that as there was contradictory statement made by the appellant/2nd defendant, the contention of the appellant/2nd defendant that there was Family Arrangement Deed dated 05.06.1986 and only based on the family arrangement, he is in possession and enjoyment of 'A' schedule properties, cannot be countenanced.

12. Further, the appellant has not let in any evidence with regard to the document, Family Arrangement Deed dated 05.06.1986. Merely based on the statement made by the appellant, the said document cannot be accepted unless it is substantially proved by proper evidence. Further, the 1st respondent/plaintiff has also denied the said document. Therefore, the burden of proof lies on the part of the appellant and the same has not



A.S.No.687 of 2017

been done by him. No independent witness was examined to prove the said document. Therefore, we are not inclined to interfere with the judgment and decree passed by the Trial Court as we do not find any illegality or infirmity in the judgment of the Trial Court.

13. In the result, the Appeal is dismissed. Since the 2nd respondent/ 1st defendant died during the pendency of the appeal, the judgment and decree dated 28.07.2017 passed by the District Judge, Nagapattinam, shall be modified to the extent that the 1st respondent/plaintiff is entitled to 1/6th share instead of 1/7th share in 'A' Schedule properties. Except the said modification, the judgment and decree dated 28.07.2017 passed by the Trial Court is confirmed. No costs. Consequently, connected miscellaneous petitions are closed.

(J.N.B,J.) (R.K.M., J.)
06.09.2024

Index : Yes / No
Internet : Yes
vsi

To

The District Court,
Nagapattinam.



WEB COPY



A.S.No.687 of 2017

J. NISHA BANU, J.
and
R.KALAIMATHI, J.

vsi

A.S.No.687 of 2017

06.09.2024