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A.S.No.9 of 2



THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.04.2024

CORAM:

THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR. JUSTICE R.SAKTHIVEL

A.S.No.9 of 2017
and
C.M.P.No.206 of 2017

N.Muthu Chennia Maniagar

... Appellant

Vs.

1.N.Doraisamy Maniagar

2.N.Kannappan

3.Negendran

[R3 impleaded vide order of Court dated
11.10.2023 made in CMP.Nos.17969 and
17972 of 2023]

... Respondents

Prayer: Appeal Suit filed under Section Section 96 of the Code of Civil Procedure read with Order XLI Rule 1 of the Code of Civil Procedure, praying to set aside the decree and judgment dated 21.07.2016 passed by the Principal District Judge, Krishnagiri in O.S.No.20 of 2014.



For Appellant : Mr.P.Satheesh Kumar
for Ms.G.Pramila
For Respondent No.1 : Mr.G.Santhanu
for Mr.T.L.Thirumalaisamy
For Respondent Nos.2 & 3 : Mr.Mukund R.Pandiyan

J U D G M E N T

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

Aggrieved by the dismissal of the suit for partition in O.S.No.20 of 2014 by the learned Additional District Judge, Krishnagiri, the plaintiff is on appeal.

2. The plaintiff sued for partition contending that the suit properties are ancestral properties belonging to his family and on the death of his father Nataraja Maniagar on 19.11.1996 and mother on 24.03.2011, the plaintiff and the defendants being the sons of the said Nataraja Maniagar are each entitled to 1/3rd share each.



3. While the 1st defendant sailed with the plaintiff, the 2nd defendant filed a written statement contending that the said Nataraja Maniagar and his wife had executed a registered Will on 27.09.1996 making certain arrangements for distribution of their properties amongst the legal representatives. While the suit 'A', 'B' and 'C' Schedule properties were allotted to the three sons. The 'D' Schedule property was allotted to one Negendran son of the 2nd defendant Kannappan. The 2nd defendant also claimed that the said Negendran being a legatee of certain properties under the Will is a necessary party to the suit. Despite such plea, the plaintiff did not take any steps to implead the said Negendran, who is a legatee.

4. The Will itself was produced and marked as Ex.B2 and the attestor to the Will was examined as DW3.

5. The learned trial Judge dismissed the suit mainly on the ground that neither the plaintiff nor the 1st defendant had sought for setting aside the Will and that the son of the 2nd defendant Negendran, the legatee under the Will, who is a necessary party has not been impleaded. There are certain passing observations made by the learned District Judge regarding the



nature of the property also. On the said findings the learned Additional District Judge dismissed the suit.

6. The 3rd respondent viz., Negendran, legatee under the Will has been impleaded as the 3rd respondent in this appeal.

7. We have heard Mr.P.Sathish Kumar, learned counsel appearing for the appellant and Mr.G.Santhanu, learned counsel representing Mr.T.L.Thirumalisamy, learned counsel for the 1st respondent and Mr.Mukund R.Pandiyan, learned counsel appearing for the respondents 2 and 3.

8. Mr.P.Sathish Kumar, learned counsel appearing for the appellant would vehemently contend that the learned trial Judge was not right in concluding that the suit properties are not ancestral properties ignoring, the very recital in the Will, which is sought to be relied upon by the 2nd defendant. Drawing our attention to the recitals of the Will which reads as follows:- “எங்களில் 1 நபருக்கு பிதுரார்ஜிதமாய் பாத்தியப்பட்டு”, the learned counsel would contend that the testator did not have the right to dispose of the entirety of the property by way of Will. According to him, the properties



being ancestral properties, the sons of the testator viz., Nataraja Maniagar would acquire a right by birth over the properties and therefore Nataraja Maniagar was entitled to dispose of only his 1/4th share under the Will under Section 30 of the Hindu Succession Act.

9. The learned counsel would also fault the learned Additional District Judge for having concluded that the suit is liable to be dismissed for want of prayer for setting aside the Will and for non-impleading the legatee under the Will. He would also point out that the defect of non-impleading has been cured by impleading the legatee in this appeal.

10. Contending contra Mr.G.Santhanu, learned counsel appearing for the 1st respondent would contend that once the written statement had been filed by the 2nd defendant disclosing the fact that there is a Will it was incumbent upon the plaintiff to implead the legatee under the Will. While conceding that the learned Additional District Judge may not be right in her conclusion regarding the prayer for setting aside the Will, the learned counsel would however submit that the learned Additional District Judge was right in dismissing the suit on the ground of non-impleading of the



legatee under the Will.

11. We have considered the rival submissions.

12. We have to necessarily agree with the contention of the learned counsel for the appellant, insofar as the relief of setting aside the Will is concerned. Whenever a Will is projected in defence in the suit for either declaration or partition, there need not be a prayer for setting aside the Will. If the Will is proved in terms of Sections 68, 69 or 71 of the Evidence Act, the property will devolve as per the Will and if the Court concludes that the Will is not proved, the natural course of succession under the Hindu Succession Act or Indian Succession Act as the case may be would follow.

13. Therefore, dismissal of the suit on the ground that there is no prayer for setting aside the Will is unknown to law. This is so because a Will does not result in immediate transfer of immovable property. It takes effect only on the death of the testator and it is also subject to proof when a litigation results in respect of the property. Therefore, the reasonings of the learned Additional District Judge that the suit for partition cannot be



maintained without a prayer for setting aside the Will cannot be sustained.

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14. As regards the character of the property also, the learned trial Judge has not adverted to the evidence in full. She has only referred to the fact that the patta for the property stands in the name of all the three sons and therefore it is not an ancestral property. We are unable to sustain the said conclusion also. At the same time, we do not want to pronounce conclusively on the nature of the property, inasmuch as the 3rd respondent legatee under the Will was not heard by the trial Court. Since the 3rd respondent has been impleaded only before this Court, we deem it fit he should be given an opportunity to file written statement and contest the suit.

15. We therefore **allow** the appeal setting aside the judgment and decree of the trial Court including all the findings rendered by the trial Court and the suit is **remitted to the trial Court for *denovo* trial.** The 3rd respondent who has been impleaded in the appeal is also impleaded in the suit as 3rd defendant and he would be entitled to file a written statement projecting whatever defence that is open to him and also let in evidence. We direct *denovo* trial because the entire evidence has been recorded in the



absence of the 3rd defendant, who is newly impleaded. Considering the relationship between the parties, the parties are directed to bear their own costs in the appeal. Consequently, the connected miscellaneous petition is closed.

16. The Registry is directed to send back the records to the trial Court forthwith and the parties are required to appear before the trial Court on 8th July 2024.

(R.S.M., J.) (R.S.V., J.)
30.04.2024

dsa
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Neutral Citation : No
Speaking order



To

The Principal District Judge,
Krishnagiri.

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R.SUBRAMANIAN, J.
and
R.SAKTHIVEL, J.

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