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S.A.No.431 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.08.2024

Coram:

THE HONOURABLE MR. JUSTICE R.SAKTHIVEL

S.A.No.431 of 2019

R.Ramesh

... Appellant

Vs.

Raj

... Respondent

Prayer: This Second Appeal is filed under Section 100 of Code of Civil Procedure, 1908 praying to set aside the Judgment and Decree dated 29.04.2017 passed in A.S.No.48 of 2015 by the Sub Court, Tambaram confirming the Judgment and Decree dated 27.10.2015 passed in O.S.No.17 of 2014 on the file of the District Munsif Court at Tambaram, by allowing this Second Appeal.

For Appellant : Mr.G.Thangavel
Mr.G.Raja
Ms.A.Saranya

For Respondent : Mr.V.Ramamoorthy
for M/s.V.Venkatesan
R.Sekaran
P.Natarajan

J U D G M E N T



Feeling aggrieved with the judgment and decree dated April 29, 2017 passed by the 'Sub Court, Tambaram' ['First Appellate Court' for short] in A.S.No.48 of 2015, the appellant therein has filed this Second Appeal.

2.The appellant herein is the plaintiff and the respondent herein is the defendant in O.S.No.17 of 2014 on the file of 'District Munsif Court, Tambaram' ['Trial Court' for short].

Plaintiff's case:

3.The case of the plaintiff is that the plaintiff's parents, Rajaram and Palammal, had 2 sons – plaintiff and defendant as well as 4 daughters namely, S.Rani, Kala, Neela and Indira. The plaintiff's father-Rajaram owned an extent of 2,632 Sq.ft. in S.No.145/B2 and an extent of 500 Sq.ft. in S.No.333/A1, of Selaiyur Village, East Tambaram. According to the plaintiff, father-Rajaram executed a Will dated May 26, 1998 whereby, he bequeathed the suit property to the plaintiff subject to the life interest created in favour of his wife-Palammal. On the same day, he executed another Will whereby, he bequeathed the property behind the suit property to the defendant. The plaintiff's father-Rajaram passed away on



January 31, 2012 and his mother-Palammal passed away in May 2007.

Hence, the Wills dated May 26, 1998 came into effect and both the plaintiff and the defendant have been in possession and enjoyment of their respective property allotted under the said Wills.

3.1.Since the defendant tried to interfere with the plaintiff's peaceful possession and enjoyment, the plaintiff filed a suit in O.S.No.76 of 2010 seeking the relief of permanent injunction against the defendant and after full trial, the suit was dismissed on March 28, 2012.

3.2.Aggrieved with the same, the plaintiff filed A.S.No.31 of 2012 before the Sub Court, Tambaram. The said appeal was dismissed vide judgment and decree dated March 26, 2013 with liberty to file fresh suit with the same cause of action. Consequently, the plaintiff filed the present Original Suit in O.S.No.17 of 2014 on the file of the District Munsif Court, Tambaram.

4.The defendant filed written statement denying the averments made in the plaint. The defendant denied that his father-Rajaram partitioned the property through Wills. The defendant contended that the suit is bad for non-joinder of necessary parties. He further contended that only the plaintiff and the defendant are in occupation of the suit property, while their sisters are residing along with their respective



husbands elsewhere from the suit property. He denied that the suit Will dated May 26, 1998 (Doc. No.77/1998) is false. Further, he denied the division of property as stated in the plaint. Accordingly, he prayed to dismiss the suit as not maintainable.

5. Based on these pleadings, the following issues were framed by the Trial Court:

“(i) Whether the plaintiff is entitled to vacate the defendant from the suit Property?

(ii) Whether the plaintiff is entitled for mandatory injunction as per the terms of Will dated 26.05.1998?

(iii) Whether the plaintiff is entitled for permanent injunction?

(iv) To what other reliefs?”

6. At trial, on the side of the plaintiff, the plaintiff was examined as P.W.1 and Kumar – Attestor of the Will was examined as P.W.2. Ex-A.1 to Ex-A.21 were marked. On the side of the defendant, defendant was examined as D.W.1 and no documents were marked.

7. Upon hearing either side and perusing the records, the Trial Court held that injunction against co-owner cannot be granted; that the Suit is bad for non-joinder of the necessary parties viz., the 4 daughters of the testator – Rajaram; that there is no prayer for declaration of title despite the observation made in A.S.No.31 of 2012. Upon these findings, the Trial



Court dismissed the Suit. On appeal by the aggrieved plaintiff, the First Appellate Court concurred with the findings of the Trial Court and dismissed the Suit. Aggrieved with the same, the plaintiff has filed this Second Appeal.

Arguments:

8.The learned counsel for the appellant/plaintiff argues that the Will dated May 26, 1998 (Ex-A.16) has been duly proved as per law by examining P.W.2-Kumar, one of the attesor of the Will. The original of Ex.A16-Will was produced in the earlier proceedings in O.S.No.76 of 2010. Since the Will is a registered one, only formal proof is required. In such scenario, the Trial Court and the First Appellate Court ought to have allowed the suit as prayed for. Further submits that the testator bequeathed the property equally in favour of the plaintiff and defendant and there are no suspicious circumstances surrounding either of the Wills. Moreover, the testator bequeathed another property to his daughters (Ex-A.1) and till date, the daughters have neither denied the Will nor sought for partition in the suit property. The defendant, in his evidence admitted the execution of Ex-A.16-Will. The Trial Court as well as the First Appellate Court have miserably failed to appreciate the facts in the right perspective. Accordingly, the learned counsel prays to allow this appeal.



9.Per contra, the learned counsel appearing for the respondent/ defendant argues that the suit has not been framed as directed in A.S.No.31 of 2012. The plaintiff ought to have filed a suit for declaration of title. The Trial Court as well as the First Appellate Court, concurrently held that without the prayer for declaration of title, the suit is not maintainable and there is no need to interfere with these findings. Further, the learned counsel submits that no substantial question of law is involved in this Second Appeal. Accordingly, he prays to dismiss this appeal.

Discussion:

10.This Court has considered both sides' submissions and perused the materials available on record.

11.On perusal of records, it is seen that an extent of 500 *Sq.ft.* in S.No.333/A1 and an extent of 2632 *Sq.ft.* in S.No.145/B2 were owned by Rajaram as his self-acquired properties. The case of the plaintiff is that his father-Rajaram executed three Wills. Through Ex-A.1-Registered Will dated March 27, 1996 (Doc.No.40/1996, S.R.O., Tambaram), Rajaram bequeathed a house property consisting of 500 *Sq.ft.* in favour of his 4 daughters and through Ex-A.16 – Registered Will dated May 26, 1998, he bequeathed the suit property to the plaintiff. On the same date, through



another Will, he bequeathed the property behind the suit property comprising of an extent of 1154 *Sq.ft.* along with 6*ft.* width exclusive pathway, to the defendant. Ex-A.1 and Ex-A.16 were subject to the life interest created on his wife Palammal. In short, Rajaram partitioned his self-acquired properties among his children through the aforesaid three Wills. After the demise of the testator and the life interest holder, the Wills came into effect and as per Ex-A.16 - Will, the plaintiff has been in enjoyment and possession of the suit property since then. On the other hand, the defendant denies the Will dated May 26, 1998 (Ex-A.16) and the alleged manner of division of the properties. Notably, he has not denied the Registered Will dated May 26, 1998 (Doc.No.76/1998) executed in his favour nor has he denied his possession and enjoyment of the property covered under the said Will.

12.In these circumstances, the plaintiff ought to have proved the Will relied upon by him as per law, in the presence of the legal heirs of the testator i.e., the four daughters.

13.It is settled law that in a suit for declaration or partition, all the sharers are necessary parties. It is apposite to cite the decision of this Court in ***T.Panchapakesan (died) and others Vs. Peria Thambi Naicker***



(died) and others reported in AIR 1973 Madras 133, wherein, this Court while referring to the case of **Subbaraya Sastri V. Seetha Ramaswami** reported in **65 M.L.J. 290**, has held as follows:

"In Subbaraya Sastri V.Seetha Ramaswami, a learned Single Judge of this Court had to deal with a case of the non-joinder of a Municipality in a suit in which the Municipality was interested. On an elaborate review of the case law and after referring to certain passages Bullen and Leake's Precedents of Pleadings' the learned Judge found that notwithstanding Order I, R.9, C.P.C., the Court will be justified in dismissing a suit if the necessary party is not impleaded.

The same principle applies to this case also having regard to the reliefs prayed for by the plaintiffs. The question as to whether there was a partition, as contended by the plaintiffs, is one in which all the sharers are interested. Even with regard to the plea of injunction which the plaintiffs have asked for, all the persons interested should be made parties. Even with regard to the limited rights of joint possession, all the persons interested should be made parties, for it may be open to those who are not made parties to show that the plaintiffs have no subsisting title."

14.Further, this Court in the case of **A.Ramachandra Pillai V. Valliammal (died)** reported in **(1987) 100 L.W. 486**, while referring to the Hon'ble Supreme Court's judgment in **Kanakarathanammal V. Loganatha**, reported in **A.I.R. 1965 S.C. 271**, has held as follows:



"7. Though 0.1, R.9 of the Code of Civil Procedure provides that no suit shall be defeated by reason of mis-joinder or non-joinder of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of parties actually before it, there is a proviso which says that nothing in that rule will apply to non-joinder of necessary parties. In a suit for general partition, there could be no doubt that all the sharers are necessary parties as mentioned above. Apart from this, the main part of R.9 is only an enabling provision and the Court shall deal with each case with reference to the particular facts in that case. It is in that' context, the decision of the Supreme Court in *Kanakarathnammal v. Loganatha*, is relevant. In that case, also, the plaintiff filed a suit for declaration and possession on the ground that the properties belonged to her mother and on her death she, as the sole heir, was entitled to the entirety of the properties. The suit was filed against two defendants who claimed that the father of the plaintiff had executed a will under which the first defendant had been appointed as executor and that as such executor he obtained probate of the said will got possession of the properties and handed over possession to the second defendant therein as directed in the will. Thus the defendants set up a title in respect of the suit properties in the appellant's father. Alternatively they also added that if the properties belonged to the plaintiff's mother, she would not be entitled to claim exclusive title to the same, because by succession, the suit properties would devolve upon the appellant and her two brothers and the appellant's failure to join her brothers made the suit incompetent for non-joinder of necessary parties. The trial Court held that the



mother was the owner of the properties. However, it held that the suit is bad for non-joinder of necessary parties and on that ground the suit was dismissed. On appeal however, the High Court held that the properties belonged to the father. The appeal was dismissed on this ground and therefore there was no necessity to go into the question whether the suit was maintainable or not. On a further appeal, the Supreme Court accepted the contention of the plaintiff that the properties belonged to the mother. However, the Supreme Court held that since she was one of the three heirs of her mother and since she had not impleaded her two brothers to her suit, the suit was liable to be dismissed. The Supreme Court further observed:

*"It is true that under Order I, Rule 9 of the Code of Civil Procedure no suit shall be defeated by reason of the mis-joinder or non-joinder of the parties, but there can be no doubt that if the parties who are not joined are not only proper but also necessary parties to it, the infirmity in the suit is bound to be fatal. Even in such cases, the Court can under Order 1, Rule 10, sub-rule (2) direct the necessary parties to be joined, but all this can and should be done at the stage of trial and that too without prejudice to the said parties plea of limitation. Once it is held that the appellant's two brothers are co- heirs with her in respect of the properties left intestate by their mother, the present suit filed by the appellant **partakes** of the character of a suit for partition and in such a suit clearly the appellant alone would not be entitled to claim any relief against the respondents."*

This decision is thus an authority for the position that in a suit for partition, all the sharers are necessary parties and also for the position that the suit is liable to be dismissed



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for non joinder of any one of the parties. In (T. Panchapakesan and others v. Peria Thambi Naicker and others) also, a Division Bench of this Court has taken a similar view by judgment dated 18-7-1972."

15.Hence, it is settled law that in a suit for declaration or partition, all the sharers are necessary parties. Hence, in this case, the four daughters namely Rani, Kala, Neela and Indira who are the competent persons to deny the suit Will, ought to have been impleaded as necessary parties. In the absence of necessary parties, the Will cannot be considered as proved.

16.On perusal of the records, it is seen that the defendant has not specifically denied the Will; he has made evasive denial in his written statement. It is relevant to extract the evidence of D.W.1 hereunder:

"... சொத்துக்கள் குறித்து பிரச்சனை ஏற்படக்கூடாது என்று என் தந்தை எழுதி வைத்த உயில் பற்றி எனக்கு எப்போழுது தெரிய வந்தது என்றால் தாயார் இறந்த பிறகு தான் தெரிய வந்தது. என் தந்தை என் சகோதரிகளுக்கு 27.3.1996ல் எழுதி வைத்த உயில் பற்றி தெரியுமா என்றால் தெரியாது. என் தந்தை எனக்கும், என் சகோதரருக்கும் தனித்தனியாக ஆவணம் பதிவு செய்தது குறித்து எப்போழுது தெரிய வந்தது என்றால் என் தாயார் 2007 ல் இறந்தார் அப்போழுது தான் தெரிய வந்தது. தாயா சொத்தில் எப்போழுது குடி வந்தேன் என்றால் என் தந்தை இறந்த பிறகு குடியேறினேன். அதற்கு முன்பு எங்கு குடியிருந்தேன் என்றால் சிவஞான தெரு, கிழக்கு தாம்பரத்தில் வாடகைக்கு



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குடியிருந்தேன். என தந்தை இறப்பதற்கு முன்பு தாவா
சொத்தில் யார் இருந்தார்கள் என்றால் என தந்தையும்,
தாயாரும் தான் இருந்தார்கள்..."

17.It is true that one of the attesting witnesses namely Kumar (P.W.2) was examined by the plaintiff to prove the suit Will. On perusal of the records, it is seen that the plaintiff has marked Ex.A16, the registered copy of the Will. Since the suit is for declaration that Ex-A.16 – Will is valid and for injunction, the plaintiff ought to have marked the original Will as evidence in this case. But, the plaintiff miserably failed to do so. The Trial Court and the First Appellate Court, upon considering the oral and documentary evidence, concurrently held that the four sisters are necessary parties to the suit and that the suit is bad for non-joinder of necessary parties. This Court is of the considered view that there is no need to interfere with the said findings. As rightly submitted by the learned Counsel appearing for the respondent, there is no substantial question of law involved in this Second Appeal.

18.Assuming the moment that the plaintiff is not able to prove Ex-A.16 - Will, he is still entitled for share in the suit property and the other properties left by his father-Rajaram subject to law and other testament(s). Right to property is a constitutional right under Article 300A



of the Constitution of India and it cannot be deprived merely on technical grounds. In other words, right to property cannot be deprived merely because of non-joinder of necessary parties.

19.As far as the Contention of the learned counsel appearing for the respondent/defendant that the plaintiff ought to have filed a suit for declaration of title is concerned, this Court is of the considered view that since the plaintiff is the *dominant litus*, the Court cannot direct the plaintiff to seek a specific prayer. This Court does not find any infirmity in the present form of the suit except for non-joinder of necessary parties. If Ex-A.16-Will is proved as per law, the defendant has no right to interfere with the plaintiff's peaceful possession and enjoyment of the suit property. This Court believes that the process of adjudication involves not only adjudication of laws, but also adjudication of justice. Hence, in view of the above narrative and in the interest of justice, this Court is of the view that the plaintiff shall be given liberty to file a fresh suit after impleading the daughters of Rajaram, making appropriate plea with necessary documents and adding the other properties left by Rajaram as well, if so desired and/or advised.

20.Resultantly, the Second Appeal is dismissed with liberty to file fresh suit as indicated above. No costs.



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Index : Yes

Speaking Order : Yes

Neutral Citation Case : Yes



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- 1.The Sub Court, Tambaram
2. The District Munsif Court, Tambaram
- 3.The Section Officer
VR Section
High Court of Madras



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