

Antony Chelliah Vs. Mariyal and ors.

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SooperKanoon Citation : sooperkanoon.com/828332

Court : Chennai

Decided On : Oct-31-1996

Reported in : (1997)2MLJ140

Appellant : Antony Chelliah

Respondent : Mariyal and ors.

Judgement :

ORDER

Raju, J.

1. The first defendant in O.S. No. 36 of 1977 on the file of the District Munsif s Court, Kovilpatti, is the appellant in the above second appeal. The suit was filed for partition and separate possession of one-third share of the plaintiffs respondents in the suit properties.

2. The case of the plaintiff before the trial court was that the suit properties belonged to the joint family of the plaintiff's husband, plaintiff and defendants 1 to 3, the same having been purchased with the ancestral funds and no one else has got any exclusive right over the same. It was stated that they were in joint enjoyment of the properties and subsequently in the year 1967, some misunderstandings arose between the members of the family and since the plaintiff has become old, defendants 2 and 3 executed a settlement deed in respect of their two-third share in the suit items 1 and 3 in favour of the plaintiff,

that there was a family arrangement between the plaintiff and the first defendant in pursuance of a mediation and it was decided that the first defendant should manage the family properties and pay two-third share of the income from the same to the plaintiff which arrangement was accepted by the plaintiff and defendants 1 and 3. The first defendant was said to have been paying two-third share of the income from the properties to the plaintiff upto January, 1975 and subsequently refused to do so, driving the plaintiff to the necessity of filing the suit for the reliefs as referred to supra. In was the case of the plaintiff that she was entitled to one-third share, while each of the defendants is entitled to 2/9th share.

3. The first defendant filed a written statement contending that the parties are Christians and therefore, there is no joint family among them and the plaint schedule properties are not ancestral properties, as claimed by the plaintiff. The plaint schedule properties were said to have originally belonged to one Maria Anthoni, the father of the first defendant and the same were said to have been in his exclusive possession. Maria Anthoni, father of the first defendant, appears to have left for Singapore in 1938 and sent monies upto 1955 and the monies were handed over to the plaintiff with a request to purchase properties and to deliver them when he returns from Singapore. The plaintiff had purchased properties under three sale deeds and had also obtained certain usufructuary mortgages on behalf of Maria Anthoni. Maria Anthoni returned to India on 1.5.1958 permanently and has been under the care and protection of the first defendant and on 24.1.1967 he executed a Will voluntarily bequeathing the suit items 1 and 3 in favour of the first defendants. Maria Anthoni died on 29.1.1968 and in view of the Will, the first defendant claims rights under the Will as also by adverse possession in respect of suit items 2 and 4 on the ground that they have been in the enjoyment of the first defendant for more than 25 years. The Panchayat or mediation alleged by the plaintiff was denied.

4. On the above claims and counter-claims, the suit came to be tried and both parties adduced oral and documentary evidence. On a consideration of the materials on record, the learned trial judge by his judgment and decree dated 27.7.1978 held that the family arrangement pleaded by the plaintiff was not proved, that the Will projected by the first defendant was true and valid and

therefore, the plaintiff was entitled to 1/4th share in the suit items 2 and 4 and that the first defendant was entitled to suit items 1 and 3. A decree for partition and separate possession of the plaintiff's 1/4th share in respect of plaint schedule items 2 and 4 alone was passed and in other respects, the suit was dismissed. Aggrieved, the plaintiff filed an appeal in A.S. No. 182 of 1979 before the Sub Court, Tuticorin. The learned principal Subordinate Judge by his judgment and decree dated 25.8.1981 allowed the appeal by modifying the judgment of the learned trial judge and passed a preliminary decree for partition and separate possession of the plaintiff's 1/3rd share in all the suit items as prayed for, while relegating the claim for mesne profits to separate proceedings under Order 20, Rules 12 and 18 of the Code of Civil Procedure. The learned first Appellate Judge was of the view that in the absence of probate of the Will, no rights can be claimed or countenanced on the basis of unprobated Will and consequently, the rights of parties must be decided on the basis that Maria Anthoni died intestate and the shares have to be worked out in terms of the Indian Succession Act, 1925. Aggrieved, the first defendant has filed the above appeal.

5. Mr. Vijayakumar, learned Counsel appearing for the appellant, while elaborating the substantial question of law formulated at the time of admission of the second appeal, contended that the first appellate court committed an error in rejecting the claim of the first defendant appellant based on the Will and that, therefore, the judgment and decree of the learned first appellate Judge negating the claim of the appellant based on the Will executed by Maria Anthoni in respect of suit items 1 and 3 are liable to be set aside and the judgment and decree of the learned trial judge required to be restored.

6. I have carefully considered the submissions of the learned Counsel for the appellant. Section 215 of the Indian Succession Act mandates that no right as executor or legatee can be established in any Court of Justice, unless a court of competent jurisdiction in India has granted probate of the Will under which the right is claimed, or has granted Letters of administration with the Will or with a copy or an authenticated copy of the Will annexed. There is no controversy that this provision applied to the parties in this case. A Full Bench of this Court in *Ganshamdas v. Gulabbi* I.L.R. 50 Mad. 927, held that the plaintiff being a heir

under the intestacy, which must be presumed until a Will is proved, is entitled to succeed to the property, unless it can be shown that his title has been displaced and the mere existence of the Will does not necessarily displace the plaintiff's title. It was also held therein that it is necessary for the defendant to go further and to prove that some one other than the plaintiff has title under the Will and this he cannot do by virtue of the provisions of Section 187 of the old Act, presently Section 215 and the defendant is also not entitled for that purpose to use an unprobated Will even as a defence.

7. In view of the aforesaid well settled proposition of law, the judgment and decree of the learned first Appellate Judge cannot be said to suffer from any infirmity warranting interference of this Court. As a matter of fact, the learned trial Judge has committed a grave error in ignoring this vital aspect of law. In view of the above, it is but necessary that the Courts had to apply Section 33 of the Indian Succession Act and determine the shares accordingly. The exercise undertaken by the learned first Appellate Judge cannot be said to be vitiated in any manner. Consequently, I see no merit in the second appeal. The second appeal, therefore fails and shall stand dismissed. There will be no order as to costs.