



S.A.No.260 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.02.2024

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.260 of 2021
and
C.M.P.No.5197 of 2021

Mylsami

... Appellant

Vs.

1. Jagannathan
2. Kannammal @ Pavathal
3. Thulasirajan
4. Sulochana
5. Subramanian

... Respondents

PRAYER : Second Appeal filed under Section 100 of C.P.C. to set aside the judgment and decree dated 02.11.2020 in A.S.No.46 of 2019 passed by the learned I Additional Subordinate Judge, Erode, confirming the judgment and decree dated 28.11.2018 in O.S.No.468 of 2005 passed by the learned II Additional District Munsif, Erode.

For appellant : Mr.S.Kaithamalai Kumaran

For R1, R4 & R5 : No appearance

For R2 & R3 : Ms.M.Guruprasad



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S.A.No.260 of 2021

JUDGMENT

The plaintiff is the appellant before this Court.

2. The facts which have resulted in the filing of the above second appeal are set out in hereinbelow with the parties referred to in the same array as before the Trial Court.

FACTS OF THE CASE:

2.1. The plaintiff has filed a suit in O.S.No.468 of 2005 on the file of the II Additional District Munsif Court, Erode, seeking a declaration of his title to the suit property and for permanent injunction restraining the defendants, their men and agents from interfering with his peaceful possession and enjoyment of the suit schedule property.

2.2. It is the case of the plaintiff that the suit property belonged to one Kolandianna Gounder. The said Kolandianna Gounder had three sons, viz., Jagannathan, Palanisamy and Periasamy. Apart from them, Kolandianna Gounder had one daughter viz., Pappayammal. The said



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Kolandianna Gounder had filed a suit in O.S.No.333 of 1981 on the file of the Subordinate Court, Erode, seeking partition of his 1/3rd share in the suit properties therein. The first item of the suit properties in O.S.No.333 of 1981 is the subject matter of the present suit. A preliminary decree came to be passed in O.S.No.333 of 1981 on 15.04.1982 and thereafter, Kolandianna Gounder had filed a petition in I.A.No.736 of 1982 for passing the final decree. The final decree was also passed on 13.02.1984.

2.3. In the final decree, certain portions in the first item were allotted to the share of Kolandianna Gounder. His son Palanisamy, who is since deceased, has filed an appeal in A.S.No. 653 of 1984 on the file of this Court, challenging the final decree alone. This was dismissed for non-prosecution on 10.02.1988. The second item of the suit properties in O.S.No.333 of 1981 was divided east-west into a northern, middle and southern portion. The middle portion was allotted to Kolandianna Gounder. Since all the owners have sold these shares in the second item, this item was not included in the present suit.



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2.4. On 21.08.1982, after the preliminary decree was passed in O.S.No.333 of 1981 and pending the appeal, the plaintiff's paternal grandfather had executed a Will in a sound and disposing state of mind, bequeathing his common 1/3rd share to the plaintiff. This Will is a registered document. Kolandianna Gounder died on 22.09.1987 and the said Will had come to effect since then. The plaintiff would submit that he is in possession of the property since the death of Kolandianna Gounder and patta has been also mutated in his name.

2.5. Of late, the defendants were interfering with the plaintiff's possession and enjoyment of the suit schedule property. Therefore, the plaintiff had come forward with the present suit. In fact, the defendants had attempted to trespass into the suit property on 05.07.2005. Pending the suit, the fourth defendant, Chinnasami Gounder, had died. The said Chinnasami Gounder is none else than the husband of the plaintiff's paternal aunt viz., Pappayammal.

2.6. The third defendant, son of Palanisamy, had filed a written



statement which was adopted by the second defendant, in which, they *inter alia* contend that besides the first defendant and Palanisamy, Kolandianna Gounder had another son Periasamy and one daughter Pappayammal. Periasamy died issueless a bachelor. Therefore, his 1/4th share devolved upon his mother Subbayammal. Subbayammal had also died intestate in the year 1974 and Kolandianna Gounder also died intestate in the year 1987. The defendants had denied the execution of the Will by the said Kolandianna Gounder. They had submitted that the final decree passed in the suit in O.S.No.333 of 1981 would not be binding on them, as they were not parties to the said proceedings. They had also denied that the plaintiff is in possession of the suit property.

2.7. It is also the case of the third defendant that the final decree proceedings is pending in I.A.No.52 of 2005 in O.S.No.273 of 1990 before the Principal District Munsif, Erode, which is the suit filed by mother of the third defendant. Therefore, they sought for the dismissal of the suit in question.



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2.8. The defendants 5 and 6 had filed a written statement which was adopted by the 4th defendant. These defendants are the legal heirs of Pappayammal being her husband and children. They had also submitted that Pappayammal was not a party to the earlier suit in O.S.No.333 of 1981 and she had filed another suit in O.S.No.273 of 1990, on the file of the Principal Sub Court, Erode, against her brothers Jagannathan and Palanisamy. Jagannathan had contested the suit and a preliminary decree for partition and separate possession of the 1/16th share in favour of Pappayammal was passed in the year 1983. Pappayammal died intestate leaving behind the defendants 4 to 6 as her legal heirs.

2.9. The defendants had filed an application for passing a final before the Principal District Munsif, Erode in I.A.No.52 of 2005 and the same is pending. Therefore, the present suit is hit by *res judicata* since the final decree in O.S.No.273 of 1990 is pending. They had denied the execution of the Will and also stated that the final decree in O.S.No.333 of 1981 is not binding on Pappayammal and the defendants



4 to 6 as they were not parties to the earlier suit. They would, therefore, also state that this suit is hit by the *proviso* to Order II Rule 2 of C.P.C. Therefore, they sought for the dismissal of the suit in question.

TRIAL COURT:

3. The learned II Additional District Munsif, on considering the pleadings, had framed the following issues.

“1. Whether the plaintiff is entitled to the relief of declaration as sought for?

2. Whether the suit is barred by res judicata?

3. Whether the suit is barred under Order II Rule 2 of Civil Procedure Code?

4. Whether the plaintiff is entitled to the relief of permanent injunction as sought for?

5. To what other relief?”

4. The plaintiff had examined himself as P.W.1 and marked Exs.A1 to A14 and one Arumugam was examined as P.W.2 and



Sundaralingam, Circle Additional Inspector, Revenue was examined as P.W.3 and through him, Exs.X1 and X2 were marked. Anbalagan, Village Administrative Officer, Erode was examined as P.W.4 and Ex.X3 was marked through him. R.K.Muthusamy was examined as P.W.5 and one Sivapakkiam and Karunanidhi was examined as P.W.6 and P.W.7.

5. On the side of the defendants, the 3rd defendant has examined himself as D.W.1 and Exs.B1 to B8 were marked and the 6th defendant was examined as D.W.2 and Exs.B9 to B13 were marked.

6. The learned Judge dismissed the suit on the ground that the plaintiff has not proved the Will and also taking note of the fact the preliminary decree in O.S.No.273 of 1990 has been passed and the decree marked as Ex.B12. The learned Judge had taken note of the fact that Arumugam, one of the attesting witnesses who have been examined as P.W.2, has submitted himself for chief-examination, but, was not cross-examined, as he was hard of hearing. The wife of P.W.2



had been examined as P.W.6 and even she has stated that she did not have any direct knowledge about the execution of the Will.

7. The Trial Court has however observed that it is the plaintiff who is in possession of the suit property and the patta also stands in his name and that at no point in time, there was any objection raised by the others. Further, a part of the property in possession of the plaintiff was also acquired by the Tamil Nadu Housing Board.

LOWER APPELLATE COURT:

8. Aggrieved by the said judgement and decree, the plaintiff had filed an appeal in A.S.No.46 of 2019 on the file of the I Additional Sub Court, Erode. The learned Judge also concurred with the judgement and decree of the Trial Court and dismissed the appeal.

9. Aggrieved by the same the plaintiff is before this Court. Notice was ordered to the defendants by this Court on 22.03.2021 in the above matter.



10. Heard the learned counsel appearing on either side and perused the materials available on record.

DISCUSSION:

11. The entire case of the plaintiff rests on the Will which has been taken on file as Ex.A11. This Will has been executed by Kolandianna Gounder bequeathing his 1/3rd share in the suit properties in O.S.No.333 of 1981 in favour of the plaintiff and at that point in time, final decree had not been passed and the properties were not demarcated in favour of the respective sharers. Therefore, it is an undivided share that was bequeathed.

12. It appears that after passing of the final decree in the earlier suit, Pappayammal, daughter of Kolandianna Gounder, has filed a suit for partition in O.S.No.273 of 1990 stating that she is also entitled to a share in the suit schedule properties. Jagannathan, father of the plaintiff herein, who is the first defendant therein, had put across the Will – Ex.A11 as a defense. The attesting witness was also examined as



D.W.2.

WEB COPY



S.A.No.260 of 2021.

13. The Court therein had observed as follows:

“9) பிரதிவாதியானவர் தன் தகப்பனார் ஒரு உயில் பிசா.ஆ.4 எழுதிக்கொடுத்தார் என்றும், அதில் சாட்சி கையெழுத்திட்டவர் பிசா.2 என்றும் கூறுகிறார். இவர் உயில்படி தன் தகப்பனார் தன் மகனுக்கு சொத்துக்களை எழுதி வைத்துள்ளதாக கூறினார். இந்த உயிலை உயர் நீதிமன்றத்தில் தாக்கல் செய்திருப்பதாகவும் கூறினார். ஆனால் இந்த உயிலை நீதிமன்றத்தில் தாக்கல் செய்யப்பட்டது என்பதற்கான நீதிமன்ற முத்திரை எதுவும் இதில் இல்லை. பிசா.1 தன் தகப்பனாருடன் வசித்து வந்துள்ளார். அவருடைய தகப்பனாருக்கு உடல் நலமில்லை என்று அவரது சாட்சியம் உள்ளது. அவ்வாறு இருக்கும் போது அவரது தகப்பனாரால் எப்போது உயில் எழுதினார் என்று தெரியாது என்று பிசா.1 கூறுவது இயற்கையாக இல்லை. இந்த உயிலில் கொளந்தையண்ண கவுண்டரின் வயது 71 என்று உள்ளது. அவ்விதம் தன் வயதைப் பற்றி உயிலில் கொளந்தையண்ண கவுண்டர் கூறவில்லை என்று பிசா.2 கூறுகிறார். இந்த உயிலில் கொளந்தையண்ண கவுண்டர் பாடுபட முடியாத நிலையில் இருப்பதாக கூறப்பட்டுள்ளது. அப்போது கொளந்தையண்ண கவுண்டர் நன்றாக பாடு பட்டார் என்று உயிலில்



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S.A.No.260 of 2021

சாட்சிய கையொப்பமிட்டுள்ள பிசா.2 கூறகிறார். கொளந்தையண்ண கவுண்டருக்கு 3 பையன்கள் ஒரு பெண். ஆனால் இரண்டு பையன்கள் மட்டுமே இருப்பதாக உயிலில் காட்டப்பட்டு இருக்கிறது. இந்த உயிலானது வழக்கு உயர்நீதிமன்றத்தில் இருக்கும் போது எழுதித் தரப்பட்டதாக பிரதிவாதி கூறினார். உயர்நீதிமன்றத்தில் உயில் தாக்கல் செய்யப்பட்டதாக சாட்சியம் இல்லை. தன் பங்கை மோசன் செய்வதற்காக இந்த உயில் தயாரிக்கப்பட்டுள்ளது என்று வாதி கூறினார். இதற்கு தகுந்த காரணம் உண்டு. இந்த வழக்கு தாக்கல் செய்த பிறகு 9.7.92ல் முதல் பிரதிவாதி தன் மக்களுக்காக தாவா சொத்தில் ஒரு பகுதியை விற்றுவிட்டார் என்பதை கிரைய பத்திர நகல் பிசா.ஆ.5 காட்டுகிறது. 2ம் பிரதிவாதியும் 14.7.92ம் தேதி சொத்தின் ஒரு பகுதியை கிரையம் செய்து விட்டார் என்பதை பிசா.ஆ.6 காட்டுகிறது. வேண்டுமென்றே தன் பங்கை மோசம் செய்ய வேண்டும் என்ற எண்ணத்தில் கிரையம் செய்யப்பட்டதாக வாதி கூறினார். இந்த உயில் மற்றும் கிரையங்கள் எழுதுவதற்கு முன்பே தாவா சொத்தில் வாதிக்கு உரிமை சித்திக்கிறது. வாதியின் சகோதரர் 30.7.73ல் இறந்த பிறகு வாதியின் தாயார் 31.8.74ல் இறந்த பிறகு வாதிக்கு தாவா சொத்தில் உரிமை சித்திக்கிறது. வாதிக்கு உரிமை சித்தித்த பிறகு அதைப் பொறுத்து வேறு நபர்களால் எழுதப்பட்ட கிரையப் பத்திரங்கள் வாதியை கட்டுப்படுத்தாது.”



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14. Therefore, the Will was held to be not proved in the earlier suit. The defense based on the Will was not accepted by the Trial Court. In the present suit, once again, the said Arumugam is examined as P.W.2. However, he has submitted himself to chief-examination and not submitted himself to cross-examination, since he was hard of hearing and his wife, who was examined as P.W.6 has not let in any evidence to prove that the signature in the Will of the attesting witness is that of her husband Arumugam. She had also further stated that she does not have any direct knowledge about the Will. Therefore, the plaintiff has failed to prove the Will even in these proceedings.

15. The Courts below have rightly rejected the claim of the plaintiff. It is stated that the plaintiff has been impleaded as a party in the final decree proceedings in I.A.No.52 of 2005. Both the Courts below have held that the plaintiff is in possession of the suit schedule property. It is needless to state that at the time of allotment of shares in the final decree proceedings, the possession of the plaintiff shall be taken into consideration and the allotment shall be made as per equity.



S.A.No.260 of 2021.

Accordingly, the above second appeal stands dismissed for want of substantial question of law. Connected C.M.P. stands closed. No costs.

02.02.2024

Index : Yes/No
Speaking order/non-speaking order
ssa

To

- 1.The I Additional Subordinate Judge, Erode.
- 2.The II Additional District Munsif, Erode.
- 3.The Section Officer, V.R.Section, High Court, Madras.



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S.A.No.260 of 2021

P.T.ASHA, J.,

ssa

S.A.No.260 of 2021

02.02.2024