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S.A.No.414 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.03.2024

CORAM :

THE HONOURABLE MR.JUSTICE V. LAKSHMINARAYANAN

S.A.No.414 of 2013
& M.P.No.1 of 2013

Elumalai

.. Appellant

vs.

1. Mallika

Minor Prabu (died)

2. Babu

3.Sakthi

4.Arul

5. Anbu

6.Ayyappan

7.Lalitha

..Respondents

Second Appeal filed under Section 100 of CPC against decree and judgment dated 12.09.2012 in A.S.No.47 of 2011 on the file of Principal Sub-Court, Tiruvannamalai confirming the decree and judgment dated 26.07.2011 in O.S.No.756 of 2004 on the file of Additional District Munsif, Tiruvannamalai.

For Appellant : Mr.M.Manokaran
for Mr.G.Rajan

For Respondents : Mr.R.P.Rooban Chakravarthy



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JUDGMENT

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The present second appeal arises out of the judgment and decree of the Court of Principal Subordinate Judge at Tiruvannamalai in A.S.No.47 of 2011 dated 12.09.2012 in confirming the judgment and decree of the Additional District Munsif at Tiruvannamalai in O.S.No.756 of 2004 dated 26.07.2011.

2. O.S.No.756 of 2004 is a suit filed for declaration of title and for injunction. The case of the plaintiff is that the property originally belonged to one Ramasamy Reddiar. Ramasamy Reddiar executed a sale deed in favour of one Virudhambal on 12.04.1940. The said Virudhambal had executed a settlement deed in favour of her son Ramasamy Gounder on 19.12.1981. Ramasamy Gounder had disappeared about 10 years ago and therefore, there is a presumption of civil death. The plaintiffs 1 to 3 are the legal heirs of Ramasamy Gounder's first son Pandurangan and other plaintiffs are his children. Ramasamy Gounder had married one Dhanabagyam and begot Pandurangan and other plaintiffs. According to them, the defendant who is the sister's son of Ramasamy Gounder attempted to interfere with the



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peaceful possession and enjoyment of the property and therefore, they were constrained to file a suit for declaration of title and for injunction.

3. The Defendant entered appearance and took two pleas, namely that the property does not belong to Virudhambal herself but was acquired by her husband Perumal Gounder for the benefit of the family in the name of Virudhambal. He would state that he filed a suit in O.S.No.123 of 1991 for partition where this item was shown as the 8th item of the property. He stated that on the basis of the partition suit, in which he obtained an *ex parte* decree, he filed R.E.P.No.76 of 2004 and took delivery of the property. According to him, this property was allotted to him in the partition suit and hence he is in possession and enjoyment of the same. Surprisingly, the defendant would also project a Settlement Deed said to have been executed by Ramasamy Gounder in his name for the very same schedule mentioned property.

4. On the side of the plaintiffs, first plaintiff Mallika entered the witness box and she examined three other witnesses and Exs.A1 to A8 were marked. On the side of the defendant, the sole defendant Elumalai entered the witness box and examined two other witnesses. On his side Exs. B1 to B10 were marked. On the side of the Court, Exs.C1 to C3 were marked.



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5. The learned trial Judge framed the following issues:

“i) தாவாச்சொத்து விவரம் சரியாக கொடுக்கப்படவில்லை என்பதும் அதன் நான்கு பக்க எல்லைகள் தவறாக கொடுக்கப்படவில்லை என்பதும் உண்மையா?

ii) விருத்தம்பாள் அம்மால் தாவாச்சொத்தின் முழுஉரிமை பெற்றவர் என்பது உண்மையா?

iii) விருத்தம்பாள் தாவாச் சொத்தை தனது மகன் ராமசாமிக்கு செட்டில்மெண்ட் எழுதி வைத்து விட்டார் என்பது உண்மையா?

iv) தாவாவில் வாதி கோரியுள்ள விளம்புகை பரிகாரம் பெறத்தக்கவரா?

v) வாதி தாவாவில் கோரியுள்ள நிலை உறுத்துக்கட்டளைப் பெறத்தக்கவரா?

vi) வாதி பெறக்கூடிய வேறு பரிகாரம் என்ன?

6. On an analysis of the oral and documentary evidence let in before the trial Court, the learned trial Judge came to the conclusion that the Settlement Deed that had been projected under Ex.A1 i.e., Settlement Deed from Virudhambal in favour of Ramasamy Gounder had not been proved as the attesting witness turned hostile but the learned Judge compared the signature in exercise of the powers under Section 73 of the



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Evidence Act and came to the conclusion that the Settlement Deed had been executed. On the aspect of title, he came to the conclusion that as Ramasamy Gounder had been seen within 7 years, he cannot be said to have attained civil death and therefore, dismissed the suit for declaration. However, finding that the plaintiffs are in peaceful possession and enjoyment of the same, he decreed the suit to that extent

7. It is pertinent to note that prior to decreeing of the suit, the learned trial Judge compared the schedule mentioned property in Ex.B2 along with plaint and came to the conclusion that they are not identical and rejected the argument that the defendant is in possession of the property. Aggrieved by the same, defendant preferred an appeal before the learned Subordinate Judge at Tiruvannamalai in A.S.No.47 of 2011.

8. The learned Subordinate Judge concurred with the findings of the trial Judge and dismissed the appeal suit. Insofar as the relief of denial of declaration, the plaintiffs did not prefer any appeal and it has attained finality. As against the portion granting injunction alone, the sole defendant is on appeal before me.

9. Heard Mr.M.Manokaran for Mr.G.Rajan and Mr.R.P.Rooban Chakravarthy for the respondents.



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10. This second appeal had been admitted on the following substantial questions of law:

“(i) Is not the first appellate Court wrong in confirming the decree of the trial Court, granting the relief of injunction, on the strength of title, without dealing with the issue of title by re-appreciation of oral and documentary evidence?”

“(ii) Whether the first appellate Court is correct in confirming the findings of the title by the trial Court on the basis of Ex.P2 settlement deed which is not proved in accordance with the terms of connotations under Section 68 of Indian Evidence Act?”

11. Mr.M.Manokaran would contend that the plaintiffs have not proved the Settlement Deed executed by Virudhambal and Ramasamy Gounder and therefore, it cannot be said to be proved.

12. Mr.R.P.Rooban Chakravarthy would argue that the learned trial Judge had examined the document and compared the same in exercise of powers under Section 73 of Evidence Act and therefore the same stood proved.

13. I am in entire agreement with the argument of Mr.M.Manokaran that the proof of document cannot be done by way of comparing the signature under Section 73. This is because where the



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attesting witnesses are not available for denying the same, the same has to be proved in terms of Section 69 or 71 of the Indian Evidence Act.

Prior to invoking the benefit of Section 69, the party relying upon the document has to prove to the Court due diligence on his part that he has attempted to trace the witness. In other words, he must convince the Court to its satisfaction that despite all the efforts taken the witness is not traceable.

14. When there is a specific provision available for the same, the general provision under Section 73 should not have been resorted to. Therefore, as argued by Mr.Manokaran, resorting to Section 73 alone does not satisfy the requirements of law. The plaintiffs should have attempted to let in positive proof by examining other attesting witness or should have resorted to Section 71 by calling for admitted document of the attesting witness and comparing with the document.

15. The learned trial Judge had compared the signature of the witness found in the document along with the signature given at the time of deposition. The document under Ex.B1 is nearly three decades before the evidence was given in the suit. In the course of three decades, the signature of the parties would have varied. The plaintiffs could have



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always summoned the admitted signature of the attesting witnesses and had it compared by using an expert as required under Section 45 with the signature found under Ex.A1 and by other means as was available to prove the signature. As argued by Mr.M.Manokaran the comparison of signature under Ex.A1 with the signature given by the witness is totally unacceptable. Therefore, I am of the correct view that the settlement deed has not been proved

16. It matters not whether the settlement deed has been proved or not because the witnesses examined by the plaintiffs themselves have stated that Ramasamy Gounder was seen within a period of three years from the time of their deposition. As required under Section 108 of the Indian Evidence Act, the person should not have been seen for seven years or above for the Court to presume the death of the said person. As the witnesses have stated that they have seen Ramasamy Gounder within that period, the Court had rightly come to the conclusion that there is no question of presumption of Civil death of Ramasamy Gounder. Unless and until Ramasamy Gounder dies, his legal heirs will not be entitled to succeed. Therefore, the Courts below have rightly rejected the relief of declaration in favour of the plaintiffs.



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17. Now turning to the relief of injunction, the defendant also does not dispute that the plaintiffs are the children of Ramasamy Gounder, Plaintiffs have produced evidence in the form of tax receipts to prove that Ramasamy Gounder was in possession and enjoyment of the property. Therefore, as the possession of the plaintiffs is lawful, they are entitled to be protected. This protection for injunction has been granted by the Courts below.

18. Mr.Manokaran would argue if title has been rejected, injunction cannot be granted. This proposition would be right if injunction is consequential relief of declaration. When plaintiffs have sought for higher relief of declaration, the Court is always entitled to give a lesser relief and this is what has been done in the present case. I do not find any error in the orders of the Courts below.

19. In fine, holding that the settlement deed under Ex.A1 has not been proved, I would confirm the judgment and decree of the Court of Subordinate Judge at Tiruvannamalai in A.S.No.47 of 2011 dated 12.09.2012 confirming the judgment and decree of the Additional District Munsif at Tiruvannamalai in O.S.No.756 of 2004 dated 26.07.2011.



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Consequently, the second appeal is dismissed. No costs. Consequently,
the connected miscellaneous petition is closed.

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Index:Yes/No

Neutral Citation:Yes/No

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To

1. The Subordinate Judge
Tiruvannamalai
2. The Additional District Munsif
Tiruvannamalai
3. The Section Officer, V.R.Section,
High Court, Madras.



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V. LAKSHMINARAYANAN, J.

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