

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 01.12.2015

CORAM

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

Second Appeal Nos.110 to 112 of 2009

and

MP.Nos.1 of 2009 in all S.As.

T.Chinnaraj ...Appellant in all S.A.s/Plaintiff

Vs.

1.T.Rangasamy
T.Muthusamy (Died)

2.M.Rangasamy ...Respondents in all S.A.s/Defendants

Prayer in S.A.No.110 of 2009 : Second Appeal filed under Section 100 of Code of Civil Procedure against the judgment and decree in A.S.No.19 of 2007 dated 29.08.2008 on the file of the Additional District Court-cum-Fast Track Court No.IV, Bhavani, Erode District, confirming the judgment and decree in O.S.No.394 of 2005 dated 22.08.2006 on the file of the Principal District Munsif Court, Bhavani, Erode District.

Prayer in S.A.No.111 of 2009 : Second Appeal filed under Section 100 of Code of Civil Procedure against the judgment and decree in A.S.No.20 of 2007 dated 29.08.2008 on the file of the Additional District Court-cum-Fast Track Court No.IV, Bhavani, Erode District, confirming the judgment and decree in O.S.No.387 of 2005 dated 22.08.2006 on the file of the Principal District Munsif Court, Bhavani, Erode District.

Prayer in S.A.No.112 of 2009 : Second Appeal filed under Section 100 of Code of Civil Procedure against the judgment and decree in A.S.No.21 of 2007 dated 29.08.2008 on the file of the Additional District Court-cum-Fast Track Court No.IV, Bhavani, Erode District, confirming the judgment and decree in O.S.No.386 of 2005 dated 22.08.2006 on the file of the Principal District Munsif Court, Bhavani, Erode District.

For Appellant
in all S.As : Mr.V.Bharathidasan

For Respondents
in all S.As : Mr.T.Murugamanickam

C O M M O N J U D G M E N T

Mr.T.Chinnaraj the appellant in all these three appeals is the sole defendant in O.S.No.386 of 2005 and OS.No.387 of 2005 on the file of the learned District Munsif, Bhavani. The respondents herein were the plaintiffs in both the suits.

2. The respondents in these appeals filed OS.No.394 of 2005 against the appellant herein on the file of the same court for permanent injunction to restrain the respondents herein from in any manner interfering with his exclusive peaceful possession of the suit properties.

3. The suit in OS.No.386 of 2005 was filed for partition and for allotment of 8/9th share in the suit properties to the respondents herein together. The suit in OS.No.387 of 2005 was filed by the respondents herein for partition and for allotment of 2/3rd share in the suit properties.

4. The suit properties in OS.No.386 of 2005 are the first item of the suit properties in OS.No.394 of 2005 and the suit properties in OS.No.387 of 2005 are the second item of the suit properties in OS.No.394 of 2005. Thus, the suit properties are common. The Trial Court held joint trial. Finally, the trial court decreed the suit in OS.No.386 of 2005, thereby granting a preliminary decree allotting 8/9th share to the respondents herein. In OS.No.387 of 2005, the Trial Court decreed the suit, thereby allotting 2/3rd share to the respondents herein by passing a preliminary decree. In OS.No.394 of 2005, the Trial Court dismissed the suit.

5. As against the decree and judgment in OS.No.386 of 2005, the appellant herein filed AS.No.21 of 2007 on the file of the learned Additional District Judge, Fast Track Court No.IV, Bhavani. As against the decree and judgment in OS.No.387 of 2005, the appellant filed an appeal in AS.No.20 of 2007 on the file of the learned Additional District Judge, Fast Track Court No.IV, Bhavani. As against the dismissal of OS.No.394 of 2005, the appellant herein filed an appeal in AS.No.19 of 2007 before the learned Additional District Judge, Fast Track Court No.IV, Bhavani. The lower appellate court heard all the three appeals together and by a common judgment dated 29.08.2008, dismissed all the appeals, thereby confirming the decrees and the common judgment of the trial court. Challenging the decree and judgment in AS.No.20 of 2007, the appellant has come up with SA.No.111 of 2009. Challenging the decree and judgment in AS.No.21 of 2007, he has come up with SA.No.112 of 2009 and challenging the decree and judgment in AS.No.19 of 2007, he has come up with SA.No.110 of 2009. That is how the three appeals are before me for disposal.

6. While admitting these appeals, this Court framed the following common substantial questions of law :

"1. Have not the courts below committed an error of law to the facts and circumstances of the case, in not holding that a prayer for declaration is not necessary in view of the earlier suits filed by the respondents for the very same suit properties seeking partition and separate possession?

2. Have not the Courts below committed an error of law to the facts and circumstances of the case, in not holding that Ex.A1 and A2 being a registered documents there is a statutory presumption under the Indian Evidence Act regarding the genuineness of the same and therefore the suit filed by the appellant ought to have been decreed and the suits filed by the respondents ought to have been dismissed ?"

7. I have heard the learned counsel on either side and also perused the records carefully.

8. The case of the appellant who is the plaintiff is OS.No.394 of 2005 is as follows:

In this suit, there are two items of properties. The item No.1 contains two properties and item No.2 contains five properties. According to the plaintiff, the first item of the properties comprised in survey No.632/1 and 632/6 were purchased jointly by his mother Muthayammal, Rangasamy and Muthusamy under Ex.B1 in the year 1957. Rangasamy and Muthusamy are none else than the brothers of the appellant. Muthusamy, who is one of the brothers of the appellant, died during the trial of the suit. Therefore, his son Rangasamy [second respondent herein] was impleaded. Thus, the plaintiff Chinnaraj, first respondent Rangasamy and the father of the second respondent by name Muthusamy are brothers.

9. It is the further case of the appellant that the suit properties of item No.1 in O.S.No.394 of 2005 were partitioned, during the lifetime of his mother Muthayammal with his brothers, namely, Rangasamy and Muthusamy. In that partition, according to him, a total extent of 28 ares was allotted to his mother. His mother, during her lifetime, executed a Settlement-Deed under Ex.A1 on 23.01.1996, thereby settling her divided share in favour of the appellant. Thus, accordingly, the plaintiff is the absolute owner of the first item of the suit properties in OS.No.394 of 2005. Therefore, according to him, the respondents have got no right over the said properties. Since according to the appellant, the defendants are attempting to disturb his possession, he filed

the suit in OS.No.394 of 2005 for permanent injunction to restrain the defendants from in any manner interfering with his peaceful possession and enjoyment of the suit properties.

10. So far as the second item comprising of five properties are concerned, they are self acquired properties of his father Thimmanaicker. During his lifetime, he executed a Will under Ex.A2 dated 14.09.1992. After the demise of Thimmanaicker on 12.11.1992, the Will had taken effect and according to the same, the appellant has become the absolute owner of the second item of the properties in OS.No.394 of 2005. According to the appellant, the respondents herein have got no right whatsoever over the second item of properties also. The respondents filed OS.No.387 of 2005 and sought for partition and for allotment of 2/3rd share. According to him, he filed the suit in OS.No.394 of 2005 in respect of the second item of the suit properties also for permanent injunction to restrain the respondents from in any manner interfering with his peaceful possession and enjoyment.

11. The respondents herein have got a different story to say. According to them, the properties purchased under Ex.B1 in the year 1957 by Muthayammal and the respondents Rangasamy and Muthusamy remain undivided. Since they had contributed equally along with the mother for the purchase of these properties, according to them, they are entitled to 8/9th share in toto and the appellant herein is entitled to 1/9th share. They disputed the execution of the Settlement-Deed by their mother. They have further contended that assuming that the execution of the Settlement-Deed is accepted to be true, even then, it is void, because in a settlement, an undivided share cannot be conveyed. With these allegations, the respondents filed OS.No.386 of 2005 for partition. So far as the second item of the suit properties in OS.No.394 of 2005 are concerned, the respondents submitted that admittedly they are the self acquired properties of their father Thimmanaicker. They disputed the Will said to have been executed by Thimmanaicker in favour of the appellant under Ex.A2 on 14.09.1992. They further submitted that the Will had been created for the purpose of grabbing the entire properties. They further contended that Thimmanaicker died intestate and therefore, they are entitled for 1/3rd share each and the appellant is entitled for 1/3rd share. They further contended that the appellant has got no exclusive possession of all the suit properties and therefore, he is not entitled for permanent injunction as prayed for in OS.No.394 of 2005.

12. Based on the above pleadings, the trial court framed appropriate issues in all the three suits, conducted joint trial and evidence was recorded in OS.No.394 of 2005. On the side of the appellant herein, he was examined as PW1 and two other witnesses by name V.L.Loganathan and K.C.Elango were examined as PW2 and PW3 and as many as twenty five documents were examined. Ex.A1 is the Settlement-Deed said to have

been executed by Muthayammal in favour of the appellant on 23.01.1996 and Ex.A2 is the Will said to have been executed by Thimmanaicker in favour of the appellant on 14.09.1992. PW2 is one of the attestors of Ex.A1 as well as Ex.A2 and PW3 is the scribe of Ex.A1 and Ex.A2. On the side of the respondents, the first respondent was examined as DW1 and the third respondent was examined as DW2. On their side, as many as nineteen documents were exhibited. Having considered all the above, the trial court decreed the suit in OS.No.386 of 2005 and OS.No.387 of 2005 as prayed for and dismissed the suit in OS.No.394 of 2005. As I have already pointed out, the appeals preferred by the appellant herein before the lower court are dismissed. Therefore, the appellant is before this Court with these three appeals. When these appeals were admitted, this Court has framed the substantial questions of law as detailed herein above.

13. I have heard the learned counsel for the appellant and the learned counsel appearing for the respondents and I have also perused the records carefully.

14. The learned counsel for the appellant would submit that the execution of Ex.A1-the Settlement-Deed has been duly proved by the oral evidence of PW2 and PW3 who are the attesor and scribe respectively of the said document. But the Courts below have not appreciated the same. Similarly, the learned counsel for the appellant contended that so far as Ex.A2 Will is concerned, the same has been duly proved by means of the oral evidence of PW2 and PW3. This has also not been properly appreciated by the Courts below. Thus, according to the learned counsel, the execution of Ex.A1 and Ex.A2 have been duly proved and therefore, the courts below were in error in dismissing the suit in OS.No.394 of 2005 and in granting decree as prayed for in OS.No.386 of 2005 and OS.No.387 of 2005.

15. But the learned counsel appearing for the respondents would submit that there are lot of suspicious circumstances regarding these two documents. He would submit that the attesor in both the documents are one and the same. Similarly, the scribe is also one and the same. He would further submit that so far as the Will is concerned, their father has no reason to bequeath the entire properties belong to him, only to the appellant, to the detriment of his other two sons who are the respondents herein. This suspicious circumstance has not been obviated. It is stated that the Will was executed by their father on 14.09.1992 and he died on 12.11.1992. The learned counsel would submit that therefore it is doubtful as to whether on 14.09.1992, the deceased would have been in a sound disposing state of mind. The learned counsel would further submit that absolutely there is no evidence that on 14.09.1992, he was in a sound disposing state of mind. But to the contrary, there is evidence that he was ill and he was not in sound disposing state of mind. These

are all questions of facts which cannot be gone into by this Court in the Second Appeal, he contended.

16. So far as the Settlement-Deed is concerned, he would submit that though the appellant claims that the properties were divided between his mother and the respondents herein, absolutely there is no evidence at all for the same. Though it is admitted by DW1, during cross-examination that they were enjoying separate portions in the properties covered under the Settlement-Deed, it would not go to indicate that there was actually a partition. Can only be said at the most, that it is only convenient enjoyment. Regarding this document also, he would submit that there is no reason for his mother to execute Settlement-Deed in favour of the appellant. Assuming that the said Settlement-Deed is true as contended by the learned counsel for the appellant, the same would not convey title to the appellant, because the properties remain undivided. Thus, according to the learned counsel, the trial court was right in granting decree as prayed for in OS.Nos.386 of 2005 and OS.No.387 of 2005 and in dismissing the suit in OS.No.394 of 2005. The learned counsel would further submit that therefore these three appeals are liable to be dismissed.

17. I have considered the above submissions.

18. Let me now take up the case in respect of the suit properties in OS.No.387 of 2005. These properties are precisely the second item of the properties described in OS.No.394 of 2005. There is no dispute between the parties that these properties are the self acquired properties of Thimmanaicker. As per law, if Thimmanaicker had died intestate, certainly, as prayed for by the respondents, they are entitled for $1/3^{\text{rd}}$ share each. If for any reason, it is concluded that Thimmanaicker had left behind Ex.A2 Will, which is valid, then, the appellant is bound to succeed. Therefore, the crux of the issue is as to whether Ex.A2 Will has been proved or not. In order to prove the same, the appellant examined PW2 and PW3, who are the attesor and scribe respectively of the document.

19. Two courts below have appreciated the oral evidence let in by these two witnesses and have come to the conclusion that the Will is not genuine and its execution has not been proved. The courts below have pointed out that Thimmanaicker died on 12.11.1992, that is, hardly within two months of the alleged execution of Ex.A2. There are circumstances to infer that on 14.09.1992 he would not have been in a sound disposing state of mind. This conclusion arrived by the courts below is based on sound reasons. I do not find anything perverse or unreasonable in the said findings arrived by the courts below.

20. But the learned counsel for the appellant would submit that since Ex.A2 is a registered Will, there shall be a presumption, under the Indian Evidence Act, regarding its

genuineness. The second question of law is based on the said submission. In my considered view, in the Indian Evidence Act, nowhere there is a provision which gives rise to such a presumption that a Will is a genuine Will, simply because the same is a registered document. Therefore, the second question of law framed is totally baseless and therefore, the same is answered against the appellant.

21. So far as the first question of law is concerned, it relates to maintainability of the suit for bare injunction without asking for decree of declaration of title and for a consequential relief of injunction. In view of the conclusion in this Common Judgment that the suit properties are undivided properties of the appellant and the defendants, this question need not be answered. In view of the findings of the court below that Ex.A2 is a suspicious document and its execution has not been proved by the appellant, I hold that so far as the second item of the suit properties in OS.No.394 of 2005 are concerned, the courts below were right in dismissing the said suit and in granting preliminary decree in OS.No.387 of 2005, thereby allotting 1/3rd share to each respondent. Since the Will is held to be not proved, it is to be held that Thimmanaicker died intestate and therefore, the parties are entitled for equal share.

22. Now, turning to the suit properties in OS.No.386 of 2005, which are the first item of the suit properties in OS.No.394 of 2005, the crux of the issue is as to whether the Settlement-Deed under Ex.A1 alleged to have been executed by Muthayammal is true and genuine and even assuming that the same was executed by her, whether the same would convey title to the appellant. In this regard, the learned counsel for the appellant would submit that the execution of Ex.A1 has been proved by the oral evidence of PW2 and PW3. He would further submit that DW1 himself has admitted during cross-examination that there was a partition of these properties between Muthayammal and the respondents namely, Rangasamy and Muthusamy. This contention does not persuade me at all for many reasons.

23. First of all, absolutely there is no evidence to prove that there was partition of these properties between Muthayammal and the respondents herein. Even in the pleadings, the appellant has only made a vague statement that there was partition between Muthayammal and the respondents herein. In the evidence also, there is only vague reference about the same. They have also not given the details as to how, when and by what means, the partition was effected and in whose presence. No witness has been examined to prove the partition. Above all, the total extent of these properties is only 64.5 ares. But he claims that Muthayammal was allotted 28.0 ares. When the pleadings is that, she was allotted 1/3rd share out of the total extent of 64.5 ares, it is not explained to the Court as to how she was allotted 28 ares.

Further, in the description of the property in OS.No.394 of 2005, had it been true that 1/3rd share was divided by metes and bounds, the description of the property should contain the same. But the description of the property covers the entire extent of 64.5ares and it also states that the property covered under the Settlement-Deed is the middle portion.

24. Considering all these aspects only the courts below, have held that the so called partition said to have been effected between Muthayammal and the respondents Rangasamy and Muthusamy has not been proved. But the learned counsel for the appellant would submit that DW1 himself has admitted that the respective portions allotted in the partition are enjoyed by each party separately. He has admitted that he is enjoying 67cents and the deceased Muthayammal was enjoying 40cents, whereas, the appellant is enjoying 1½acres. In my view, this would not go to establish that there was partition between the parties as the enjoyment is not in equal moieties. Therefore, I hold that the courts below were right in holding that there was no partition between the parties at all, in respect of the suit properties in OS.No.386 of 2005. Thus, the courts below are right in holding that these properties are available for partition between the appellant and the respondents.

25. The learned counsel for the appellant would submit that assuming that there was no partition in the suit properties in OS.No.386 of 2005 and are available for partition, even then, allotment of 8/9th share to the respondents is not correct. I find every force in the said argument. Admittedly the suit properties in OS.No.386 of 2005 which are the first item of the suit properties in OS.No.394 of 2005 were purchased jointly in the name of Muthayammal and the respondents Rangasamy and his deceased brother Muthusamy under Ex.B1 in the year 1957. Admittedly the respondents Rangasamy and his deceased brother Munusamy were all minor children in the year 1957, who had no independent income at all.

26. Therefore, it is crystal clear that they would not have contributed any amount to purchase the properties under Ex.B1. Therefore, there is every reason to hold that the suit properties were purchased independently by Muthayammal and she had joined the name of her children also in the document out of love and affection. Simply because the first respondent herein and his deceased brother Munusamy were added as parties to Ex.B1, it cannot be held that they contributed for the purchase of property in Ex.B1. Therefore, it is to be held in law that the suit properties in OS.No.386 of 2005 are the self acquired properties of Muthayammal. Since the Settlement-Deed said to have been executed by her, would not convey any title as there was no partition, it has to be held that she died intestate. If that is so, the parties are entitled for 1/3rd share each and therefore, the allotment of 8/9th share together to the respondents cannot be allowed to sustain. To that

extent, the preliminary decree passed in OS.No.386 of 2005 requires to be altered. Accordingly, the questions of law framed in SA.No.112 of 2009 are answered. So far as questions of law framed in SA.Nos.110 and 111 of 2009 are concerned, they are answered against the appellant.

27. In the result,

i. Second Appeal No.110 of 2009 is hereby dismissed and the decree and judgment passed by the trial court and confirmed by the lower appellate court is hereby confirmed.

ii. Second Appeal No.111 of 2009 is dismissed and the decree and judgment of the courts below is hereby confirmed.

iii. Second Appeal No.112 of 2009 is partly allowed; the decree and judgment of the trial court and confirmed by the lower appellate court is modified and there shall be a preliminary decree allotting 1/3rd share each to the first respondent, the third respondent and the appellant.

Considering the facts and circumstances of the case, there shall be no order as to cost. Consequently, all connected miscellaneous petitions are closed.

gya

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

TO

1. THE ADDITIONAL DISTRICT JUDGE-CUM
FAST TRACK COURT JUDGE NO.IV,
BHAVANI, ERODE DISTRICT.
 2. THE PRINCIPAL DISTRICT MUNSIF,
BHAVANI, ERODE DISTRICT.
 3. The Section Officer, VR Section, High Court, Madrs.
- + 1 CC TO Mr.V.Bharathidasan, ADVOCATE SR 65419/15

KR/01/02/16

S.A.Nos.110 to 112 of 2009