

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 28 - 10 - 2015

Coram

The Hon'ble SMT. JUSTICE PUSHPA SATHYANARAYANA

Second Appeal No. 305 of 2009
and
M.P. Nos. 1 of 2009 and 1 of 2015

G. Raja Anand .. Appellant/defendant

vs.

S.R. Sivakumar .. Respondent/Plaintiff

Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 19.01.2009 in A.S. No.52 of 2007 on the file of the Court of Additional Subordinate Judge, Salem reversing the judgment and decree dated 01.12.2006 made in O.S. No. 74 of 1999 on the file of the I Additional District Munsif Court, Salem.

For Appellant : Mr. R. Subramanian

For Respondent : Mr. K.M.J. Jayapal

JUDGMENT

The defendant, who suffered a decree in O.S. No. 74 of 1999 has filed the instant Second Appeal.

2. The case of the plaintiff in the suit is that the properties scheduled in the plaint absolutely belong to him. The plaintiff has based his claim on a deed of adoption dated 09.6.1976 and family arrangement dated 10.10.1983 and by way of Will dated 15.6.1987. The plaintiff went in adoption to the family Ramalinga Chettiar and his wife Radha Bai Ammal. Ever since adoption, he has been in actual and peaceful possession of properties as their own son. His adoptive mother Radha Bai Ammal purchased the properties on 02.02.1966 under Ex. A.1.

Thereafter, the adoption took place and the same was reduced to writing under Ex. A.2 Adoption Deed on 09.6.1976 subsequent to which, in a family arrangement dated 10.10.1983 marked as Ex. A.5, the properties were given to the plaintiff. While so, the said Radha Bai Ammal has executed a Will dated 16.11.1983 marked as Ex. B. 50. According to the plaintiff, though the Will was executed, it had not come into effect and even during her lifetime, the executrix had executed the Will dated 15.6.1987 under Ex. A.9 in favour of the plaintiff by cancelling the earlier Will. The said Radha Bai Ammal / executrix died on 14.10.1987 leaving the plaintiff as her only heir to succeed to the properties. The further case of the plaintiff is that the defendant herein, who is the son of his biological brother, has no manner of right or title in the suit properties. While so, the defendant tried to interfere with the possession of the plaintiff without any right or title to the suit properties which resulted in the suit.

3. The suit was resisted by the defendant denying all the facts giving rise to the cause of action for the suit. The defendant while admitting the adoption of the plaintiff, denied the family arrangement dated 10.10.1983 and also the Will dated 15.6.1987. The possession of the suit properties with the plaintiff was also denied by the defendant. The execution of the Will dated 16.11.1983 alone was admitted by the defendant. According to the defendant, he has been in possession of the properties pursuant to the Will dated 16.11.1983. He also contended that the Will dated 15.6.1987 was forged one and that the testatrix never cancelled the previous Will dated 16.11.1983. The defendant also claimed that he was paying Municipal taxes and other taxes. Hence, he denied the claim of the plaintiff and prayed for dismissal of the suit.

4. The trial Court dismissed the suit and on appeal, it was reversed by the First Appellate Court decreeing the suit as prayed for. Hence, the present Second Appeal by the defendant.

5. At the time of admission of this Second Appeal, the following Substantial questions of law were formulated for consideration:-

- (a) Whether the First Appellate Court despite inconsistencies in the evidence of P.Ws. 2 and 3 was justified in upholding the validity of the Will Ex. A.9 and that

- ignoring the well settled principles of law relating to proving of the Will?
- (b) Whether the First Appellate Court was perverse in giving a finding that possession was with the plaintiff and that too in the wake of Ex. B.32 and other oral and documentary evidence?

6. Heard the learned counsel appearing for the parties and perused the records.

7. The plaintiff has based his claim on the adoption which was reduced to writing as per Adoption Deed Ex. A.2 dated 09.6.1976. As the adoption is not disputed and the same has been admitted by the defendant in the written statement and both the Courts below have concurrently held that the adoption is valid, the same is not taken up for consideration.

8. The plaintiff is claiming under a Will Ex. A.9 dated 15.6.1987 whereas the defendant is claiming under the Will dated 16.11.1983 marked as Ex. B.50. The executrix of both the Wills is the same person. The plaintiff's Will is subsequent to the Will of the defendant. The Will under Ex. B.50 is admitted by both the parties. According to the defendant, though the Will will come into effect on the death of the executrix, he has been in possession of the properties even during her lifetime. To evidence the same, the defendant also had filed the property tax receipts and house tax receipts in B.43 and B.44 series. The properties were dealt with by the defendant by leasing out the same to T.Stannes Company Limited, Coimbatore, jointly with the plaintiff.

9. Admittedly, the plaintiff is the holder of the Will which is subsequent to Ex. B.50. As stated earlier, the plaintiff has not disputed Ex. B.50 Will in favour of the defendant. It is his only contention that the said Will was superseded by Ex. A.9.

10. Learned counsel appearing for the appellant contended that the suit itself is filed after 11 years from the death of Radha Bai Ammal which would go a long way to show that the claim

of the respondent / plaintiff is false. To substantiate his claim, the defendant / appellant placed reliance on Exs. B.28 to B.39 more particularly, on Exs. B.32 and B.33 which are the letters from the lessee T. Stanes Company Limited addressed to the plaintiff and the defendant. Therefore, the learned counsel contended that the properties have not been dealt with exclusively by the plaintiff but jointly by both the plaintiff and the defendant.

11. Insofar as the proof of execution of the Will is concerned, the burden is on the plaintiff who has propounded the Will Ex. A.9. In the process of proving the Will, the plaintiff had examined P.W.2 and P.W.3 who are the attestors to Ex. A.9. It is the definite case of the plaintiff / respondent that the previous Will Ex. B.50 was cancelled in Ex. A.9. However, the appellant / defendant had contended that Ex. A.9 is a forged document. According to the learned counsel for the appellant, the First Appellate Court failed to consider the contradictions in the depositions of the attestors examined as P.W.2 and P.W.3. Admittedly, Ex. A.9 is an unregistered Will. The reason for the suit being filed belatedly was attributed to the ignorance of the plaintiff about Ex. A.9 Will. Though the plaintiff had not taken active participation in execution of the Will, the burden is on him to establish the genuineness of the same. P.W.2 one Thangavelu had categorically deposed that the plaintiff was present at the time of execution of the Will whereas the plaintiff has pleaded no knowledge about the same. Similarly, the other witness P.W.3 had deposed that Ramalingam Chettiar, who is the husband of the testatrix, was present along with her when Ex. A.9 was executed. When admittedly Ramalingam Chettiar died on 18.9.1983 and the Will was executed on 15.6.1987, it is un-understandable as to how could Ramalingam Chettiar be present at the time of execution. Ironically, in the said Will itself it is stated that Ramalingam Chettiar was dead. Therefore, the deposition of P.W.3 is also not believable. The plaintiff had also not explained the delay in producing the Will before the Court. There is no explanation from the plaintiff for the suit being filed after several years.

12. The suit properties are the land and building and the property tax receipts produced by the plaintiff are all in the name of Radha Bai Ammal. As seen earlier, the defendant had produced Exs. B.2 and B.6 to B.8 which are communications

between the defendant and the Tamil Nadu Civil Supplies Corporation, L&T Limited, etc. to substantiate that he had been dealing with the suit properties by leasing them out. From the above documents, it is clear that the defendant has been in possession of the properties and that the plaintiff has not established his case. However, the First Appellate Court, being the final Court of facts, had not discharged the duty expected of it.

13. The judgment of the trial Court has extensively dealt with the oral and documentary evidence threadbare and while deciding the issues between the parties, the trial Court also concluded that the evidence of the attestors were mutually contradictory and hence, discredited the same. But the First Appellate Court reversed the judgment of the trial Court in a cryptic manner without keeping the fact in mind that the First Appellate Court has to hear the appeal as a re-hearing on the questions of facts and law. The First Appellate Court while reversing the finding of the fact, ought to have given its own reason for a different finding. However, in the present case,

- (a) the First Appellate Court had not even framed point for determination;
- (b) evidence was not dealt with in full independently;
- (c) the discrepancy in the evidence of P.W.2 and P.W.3 had not been considered independently; and
- (d) After the death of Radha Bai Ammal, the conduct of the parties ought to have been considered.

14. For the foregoing reasons, this Court is of the opinion that the First Appellate Court had not discharged the duty cast on it as a Court of First Appeal. The failure on the part of the plaintiff in not discharging the burden of proof caused on him could only disentitle him from getting a decree. The trial Court had considered the evidence of the attestors in proof of the Will and come to the definite conclusion that the Will is not true and genuine. Accordingly, the points are answered in favour of the appellant / defendant. Hence, the finding of the First Appellate Court in this case cannot be sustained in law and, therefore, it has to be set aside and it is, accordingly, set aside. Consequently, the Second Appeal succeeds.

In the result, the Second Appeal is allowed leaving the parties to bear their own costs. Consequently, the judgment and decree of the First Appellate Court dated 19.01.2009 in A.S. No. 52 of 2007 are hereby set aside by this Court for the reasons assigned in this Appeal. As a logical corollary, the judgment and decree of the trial Court dated 01.12.2006 passed in O.S. No. 74 of 1999 are restored dismissing the suit. As a sequel thereto, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar (CO)

True Copy

Sub Assistant Registrar

To

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

+1cc to Mr.R.Subramanian, Advocate Sr.58568
+1cc to Mr.S.RameshKumar, Advocate sr.59074

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srg 16/11/2015

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