

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.03.2015

CORAM

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

Second Appeal No.1149 of 2011

1.Mr.S.Manivannan

2.Mrs.S.Sulochana

...Appellants/1 & 2 Respondents

Vs.

Mr.S.Venkatesan

...Respondent/Plaintiff

Prayer:- This second appeal has been filed under Section 100 C.P.C., against the judgement and decree of the learned Judge of II Additional City Civil Court, Chennai dated 29.04.2011 passed in A.S.No.297 of 2010 allowing the appeal reversing the decree and judgement of learned VII Assistant Judge, City Civil Court, Chennai, in O.S.No.508 of 2009 dated 04.11.2009.

For Appellants : Mr.C.Sundaramurthy

For Respondent : Mr.S.Sadasivan

JUDGEMENT

The respondent is the sole plaintiff in O.S.No.508 of 2009 on the file of the learned VII Assistant Judge, City Civil Court, Chennai. The appellants are the defendants 1 and 2 in the suit. The said suit was filed seeking three reliefs viz., (i) permanent injunction to restrain the defendants from interfering with the rights of the plaintiff's peaceful possession and enjoyment of the suit schedule property, except under due process of law; (ii) permanent injunction restraining the defendant from in any manner interfering with the day to day basic need like water, electricity, etc., in future of the plaint schedule property and (iii) for permanent injunction restraining the first defendant from in any manner not to obstruct the plaintiff's ingress and egress to take things in the shelf and lofts and also to dry clothes on the second floor terrace.

2.The trial Court by decree and judgement dated 04.11.2009 dismissed the suit. As against the same, the respondents filed an appeal in A.S.No.297 of 2010 on the file of the learned II Additional Judge, City Civil Court, Chennai. By decree and judgement dated 29.04.2011, the First Appellate Court allowed the appeal thereby setting aside the decree and judgement of the trial Court and decreed the suit as prayed for. As against the same, the defendants are before this Court with this second appeal.

3.The case of the plaintiff is as follows:-

The suit property is a house having ground floor, first floor and second floor. It is a self acquired property of one Mr.Srinivasan. The plaintiff and the first defendant are the sons of Mr.Srinivasan. The second defendant is the wife of Mr.Srinivasan. Mr.Srinivasan died on 09.04.2006. Admittedly, during his life time, Mr.Srinivasan executed a Will dated 14.09.2005, thereby creating life interest in the suit property for the second defendant namely, his wife and thereafter, the same should be shared equally by the plaintiff and the first defendant. The Will has not been so far probated. According to the plaintiff, he has been permitted to occupy the ground floor of the house exclusively and he has got right to use the open terrace and also to enjoy water, electricity, etc. Since, the defendants attempted to evict the plaintiff, according to him, he was forced to file the present suit.

4.The case of the defendants is that, as per the terms of the Will, the second defendant has got life interest in the suit property and the plaintiff has got no right whatsoever in respect of the suit property, so long as the second defendant is alive. Since, the plaintiff has got no right whatsoever over the suit property, the present suit is liable to be dismissed, it was contended.

5.Based on the above pleadings, the trial Court framed appropriate issues. On the side of the plaintiff, three witnesses were examined including the plaintiff and on the side of the defendants, two witnesses including the first defendant were examined. As many as 10 documents were exhibited on the side of the plaintiff. Will dated 14.09.2005, was marked as Ex.B.1 on the side of the defendants.

6.Having considered all the above evidences, the trial Court dismissed the suit which was reversed by the First Appellate Court thereby decreeing the suit as prayed for. That is how the appellants are before this Court with this second appeal.

7.When the second appeal was admitted, this Court framed the following substantial questions of law:-

"1. Section 14 of Hindu Succession Act operates on its own force once the facts requisite for attracting its applications are established so long as the second appellant widow of the deceased testator of the Will has a right to possession over the said suit schedule property, Section 14(1) is attracted. The bequest to Mrs. Sulochana the second appellant was only for her and the bequest to legal heirs rested in them on the death of testator. But all this is subject to the statutory provisions contained in Section 14(1) of the Hindu Succession Act. This statutory Provision supersedes the recitals in the Will. By virtue of Section 14(1) of the said Act, the limited estate of Mrs. Sulochana, the second appellant herein given to her by virtue of the registered Will dated 14.09.2005 (Exhibit B1) would be ripped into absolute estate if the Mrs. Sulochana the second appellant has been possessed of the entire property in question. Thus the second appellant has already been possessed with the suit schedule property, the respondent has not been clothed with any right or claim detrimental to the interest of the second appellant in the enjoyment of the suit property for her during her life time as per the admitted Will, so also is the case in respect of first appellant.

(2) Section 68 of Indian Evidence Act, "Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being the Will, which has been registered in accordance with the provisions of Indian Registration Act, 1908. Unless its execution by the person by whom it purports to have been executed is specifically denied". Whereas mere concession of knowledge of Will in cross examination is much and requisite enough to satisfy the law regarding its genuineness as the respondent himself admitted the execution of the Will by his father and status of life interest given to his mother in his plaint filed in the trial court and during cross examination.

(3) Section 119 of Indian Succession is poised for consideration in this case. "Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper

time shall, unless a contrary intention appears by the Will, become vested in the legatee on the Testator's death and in such cases the legacy is from testator's death said to be vested in interest. Therefore immediate possession is deferred and no right flow from in favour of respondent in view of Section 14(1) of Hindu Succession Act.

(4) Section 120(1) of the Indian Succession Act says a legacy bequeathed in case specified uncertain event shall happen does not rest until that event happens. Therefore the respondent cannot make any claim until specified event happens.

(5) Section 124 of the same Act prescribes where a legacy is given, if a specified uncertain event shall happen and no time mentioned in the Will for occurrence of that event, the legacy cannot take effect, unless such event happens before when the bequeathed is distributable.

(6) Section 141 of the same Act also states if a legacy is bequeathed to a person who is named an executor of the Will, he shall not take the legacy unless he proves the Will or otherwise manifests an intention to act as executor. The respondent herein is the one of the executor along with first appellant another executor named in the Will for probate of Will.

(a) Therefore the Appellate Court's contention at para 15 of the judgment dated 29.04.2011 "that the respondents have to initiate a probate proceedings under Section 217 read with Section 57 of Indian Succession Act", is a direction to the respondent herein to do such act as he was an executor named in the Will to act in such manner.

(b) The respondent herein, instead of taking steps to probate the said Will, he comes to the Appellate Court to get his appeal succeeded as he very well knew the Will dated 14.09.2005 Exhibit B1 cannot be probated as long as the second appellant survives.

(c) Hence, the respondent as an executor failed to prove the Will if that is the case in

accordance with Appellate Court order and he not even manifested his intention to act as an executor.

(7) Section 213 of the Indian Succession Act, prescribes that no right as executor or legatee could be established in any Court of Justice, unless a Court of competent jurisdiction in India, has granted probate of the Will under which right is claimed, or has granted letters of Administration with the Will or with a copy of an authenticated copy of Will annexed - the respondent and the first appellant being executors of the Will precluded from Probate of Will until the death of life interest fed widow.

(8) Section 19 of Transfer of Property Act also concludes where a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such enforceable is rested, unless a contrary intention appears from the forms of transfer."

8.I have heard the learned counsel for the appellants and the learned counsel for the respondent and I have also perused the records carefully.

9.The learned counsel for the appellants would submit that the Will Ex.B.1, though, has not been probated, the same is admissible in evidence for a "collateral purpose". The learned counsel would further submit that as per the terms of the Will, the second defendant has got life interest over the entire suit property and the plaintiff will have half share in the property after the life time of the second defendant. The learned counsel would further submit that the suit filed by the plaintiff is thus, not maintainable as the same has been filed against the person having life interest and the person in possession of the suit property.

10.The learned counsel for the respondent/plaintiff would vehemently oppose this appeal. According to him, the alleged Will is inadmissible in evidence, as the same has not been probated. If the Will is excluded from consideration, according to the learned counsel, it is to be concluded that the plaintiff has got his share in the suit property. If that legal position is accepted, then, according to the learned counsel, the First Appellate Court was right in decreeing the suit as prayed for, because, the plaintiff is the son of the deceased and he is in possession and enjoyment of the ground floor.

11.I have considered the above submissions.

12.As rightly contended by the learned counsel for the appellants and as has been held by a Division Bench of this Court in G.Ganesan v. P.Sundari (2011 (2) CTC 437) an un-probated Will, will certainly be used as evidence for "collateral purposes" to know the nature of the possession, though, such un-probated Will cannot be used for the "main purposes" of claiming title under the same.

13.The learned counsel for the appellants would submit that the Will can be probated only after the demise of Mrs.Sulochana, the second defendant. In my considered opinion, I need not enter into this question at all. For the sake of argument, even assuming that the Will is sought to be used for the 'main purpose' and not for the 'collateral purpose', it can only be concluded that on the demise of Mr.Srinivasan, the plaintiff will have only 1/3rd share in the suit property. It is not the case of the plaintiff at all that there was partition among them, at any point of time, ignoring the Will. If one has to go by the Will, it is crystal clear that the plaintiff will have half share as vested remainder, after the demise of the second defendant. On the other hand, if one goes by ignoring the Will, even then, the plaintiff is entitled only for 1/3rd share in the suit property which remains undivided. At any rate, the plaintiff cannot have a decree for injunction against the defendants.

14.Going by the Will, since, the second defendant has got right till her life time, the plaintiff cannot maintain the suit for injunction against her. Ignoring the Will, going by Section 8 of the Hindu Succession Act, even then, the plaintiff cannot maintain the suit against the defendants seeking the relief of injunction, because, they are all co-owners.

15.Though, the learned counsel for the respondent would submit that the plaintiff is in possession of ground floor and therefore, the relief sought is only in respect of ground floor, a reading of the plaint would go to show that the relief of injunction is sought for in respect of the entire property as though he has got exclusive right to be in possession of the same. Thus, in my considered opinion, the First Appellate Court was not at all right in reversing the decree and judgement of the trial Court. Hence, I am inclined to allow this second appeal and it is for the plaintiff to work out his remedies in the manner known to law either for partition or to wait till the death of the second defendant. At any rate, in my considered opinion, the decree granted by the First Appellate Court deserves to be set aside and all the substantial questions of law framed by this Court are to be answered in favour of the appellants.

16.In the result, the second appeal is allowed and the decree and judgement passed by the First Appellate Court is set aside and the decree and judgement passed by the trial Court is restored. No costs.

Sd/-
Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

jbm

To

1.The VII Assistant Judge,
City Civil Court, Chennai.

2.The II Additional Judge,
City Civil Court,
Chennai.

1 CC to Mr.G.R.S. Chandar Rao, Advocate SR.No. 13071

1 CC to Mr.C.Sundaramurthy, Advocate SR.No. 12686

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UG (CO)
PSI (23.03.2015)

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