

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.06.2015

CORAM

THE HON'BLE MS. JUSTICE R. MALA

S.A.No.2292 of 2004

Date of Reserving the Judgment 11.06.2015	Date of Pronouncing the Judgment 15.06.2015
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Kamala
W/o.Nachiappan

.... Appellant/ Defendant

Vs

Valli
W/o.Ponnusamy

.... Respondent/Plaintiff

Prayer:

Second appeal filed under Section 100 of CPC against the judgment and decree dated 30.06.2004 made in A.S.No.82 of 2002 on the file of the Subordinate Court, Kallakurichi, confirming the judgment and decree dated 17.04.2002 passed in O.S.No.12 of 1999 on the file of the I Additional District Munsif Court, Kallakurichi.

For Appellant : Mrs.A.Nilaphar,
for Mr.R.Subramanian

For Respondent : Mr.V.R.Kamalanathan

J U D G M E N T

The second appeal arises out of the judgment and decree dated 30.06.2004 made in A.S.No.82 of 2002 on the file of the Subordinate Court, Kallakurichi, confirming the judgment and decree dated 17.04.2002 passed in O.S.No.12 of 1999 on the file of the I Additional District Munsif Court, Kallakurichi.

2. The respondent herein as plaintiff has filed the suit for declaration and recovery of possession in respect of the suit

property stating that suit property originally belonged to her father viz., Kuppa Kounder, s/o.Moonga Kounder of Valayapattu Village, Sankarapuram Taluk. The said Kuppa Kounder had a son named Moongan and a daughter named Valli, the plaintiff in the suit. After making adequate provision of properties to his son Moongan, the said Kuppa Kounder retained the suit property for himself and thereby he is in possession and enjoyment of the same. Thereafter, Kuppa Kounder executed a Will on 15.03.1992 by which he had bequeathed the suit property to the plaintiff/Valli to be taken by her absolutely. He died on 09.09.1992 and thereafter, the Will came into effect and thereunder the plaintiff has become the owner of the property comprised in the Will. However, since the plaintiff was residing in her husband's place at Moorarpalayam Village and the suit property was situated in Valayampattu Village, the defendant trespassed into the suit property and is in illegal possession and enjoyment of the same. Though the plaintiff demanded the defendant to deliver possession of the suit property, the defendant not only failed to hand over possession but also denied title of the plaintiff to the suit property. Thus, the plaintiff was forced to file the suit for declaration of her title to the suit property and for recovery of possession.

3. The appellant herein who is the defendant in the suit had filed the written statement wherein it was stated that the averment made by the plaintiff that the suit properties originally belonged to her father viz., Kuppa Kounder, s/o.Moonga Kounder of Valayapattu Village, Sankarapuram Taluk is false and that the suit properties were originally owned by one Narayana Gounder. It was further stated that the Will under which the plaintiff is claiming title to the suit property is not true and genuine but it is a forged one. The defendant had purchased the suit property from the said Narayana Gounder and was in possession and enjoyment of the same. At no point of time, the plaintiff was in possession and enjoyment of the suit property. Thus, the appellant/defendant sought for dismissal of the suit.

4. The Learned Trial Judge after considering the averments both in the plaint and written statement and arguments on either side counsel, has framed necessary issues and on perusing the oral and documentary evidence viz., P.W.1, P.W.2, D.W.1, D.W.2 and Exs.A.1 to A.9 and Exs.B.1 and B.2, decreed the suit. Aggrieved against the judgment and decree of the trial court, the defendant preferred an appeal in A.S.No.82 of 2002 on the file of the Subordinate Court, Kallakurichi.

5. The learned First Appellate Court has considered the argument advanced on either side and framed necessary point for consideration and confirmed the Judgment and Decree passed by the Trial Court and dismissed the appeal. Against the Decree and Judgment of the first Appellate Court, the present second appeal has been preferred by the defendant.

6. At the time of admission, the following question of law has been framed.

"1. Is there not a legal duty on the propounder to establish the due execution of a 'Will' when the due execution of the same is denied by the contesting party?

2. Is not the judgment of the Courts below vitiated in law in this case since there is no application of mind by both the Courts below as to whether there is due execution of the 'Will' in question?"

7. The learned counsel for the appellant would submit that the respondent herein as plaintiff has filed the suit for declaration of title and for possession on the basis of the Ex.A.9/Will alleged to have been executed by her father, bequeathing the properties which are ancestral properties. He would further submit that the contention of the appellant that he had purchased the property under oral sale and from then on, the appellant is in possession and enjoyment of the suit property was not considered by the trial Court. The learned counsel would further submit that the respondent/plaintiff has not filed any document to show that his father Kuppa Kounder has got right over the property. Ex.A.1/Patta document stands in the name of one Thandava Gounder and Exs.A.2 to A.6/Kist receipts are not related to the suit property. Ex.A.8/Adanagal relates to Fasili 1386. Further, Ex.A.9/Will has not been proved in accordance with law as D.W.2/Raja, one of the attester of the Will, who was examined on the side of the defendant/appellant had deposed that he had not attested the Will. Those factum were not considered by the Trial Court. Hence, the learned counsel for the appellant prayed for setting aside the decree and judgment passed by both the Courts below.

8. Resisting the same, the learned counsel appearing for the respondent would submit that the suit properties were originally owned by one Thandava Kounder who is the great grandfather of the respondent herein. The son of the said Thandava Kounder is Moonga Kounder, who is none other than the father of Kuppa Kounder. The said Kuppa Kounder had a son named Moogan and a daughter by name Valli, who is the plaintiff/respondent. The said Kuppa Kounder had executed the Ex.A.9/Will in favour of his daughter Valli. The

genuineness of the Ex.A.9/Will was proved by examining the attesor Kannan as P.W.2. That factum was rightly considered by the Courts below. Furthermore, though the appellant herein had putforth the claim that she had purchased the properties by oral sale, the same was not proved. The respondent has only filed Ex.B.1/Patta document which is in respect of another survey No.119/4B. The Ex.B.2/Kist receipt had come into existence only after the filing of the suit. Thus, the learned counsel for the respondent prayed for dismissal of the appeal. To substantiate his argument, the learned counsel relied upon the following decisions:

1. (2000) 7 Supreme Court Cases 409, Thimmaiah and Others v. Ningamma and Another.
2. 2006 (5) CTC 639, Manivanna Gounder v. Pachiappa Gounder.

9. Considered the rival submissions made by both sides and perused the typed set of papers.

10. The suit has been filed for declaration of title and for recovery of possession. So, the plaintiff/respondent herein has to prove her case. Admittedly, both the Court below had held that the respondent herein has proved her title and ordered for recovery of possession. It is an admitted fact that Ex.A.1/Patta Book stands in the name of Thandava Kounder. In that it was specifically mentioned that it is an ancestral property of an extent of 62 cents in S.No.119.4. Further, Exs.A.2 to A.6/Kist Receipts have been marked for Fasili 1370, but the patta number has been mentioned as 151. However, as per Ex.A.1/Patta Book, the patta number is 241. The Exs.A.5 and A.6/Kist receipts for Fasili 1375 and 1385 alone pertains to the suit property. In the Ex.A.7/Chitta, the name of Kuppa Kounder has been modified and as per transfer proceedings No.769/91, it has been transferred to the name of Krishnasami Chettiar, son of Narayana Chetty. The original patta stands in the name of Kuppa Kounder and the Chitta has been issued in Fasili 1386. Whereas in the Ex.A.8/Adangal document pertaining to Fasili 1386, the patta no.241 was mentioned and it was in possession of Kuppa Kounder and he had raised groundnut and millet crops. The said document would clearly reveal that the Kuppa Kounder was in possession and enjoyment of the property and so, he is the owner of the property.

11. Further, though the appellant herein had stated that she had purchased the property from Narayana Gounder by oral sale for a sum of Rs.200/-. However, the appellant/defendant had not stated in the written statement that she had purchased the property by oral sale for Rs.200/-. It is also pertinent to note that oral sale for Rs.200/- is invalid as per Section 54 of the Transfer of Property Act, 1882. To prove the sale, she had not examined her vendor.

Moreover, Exs.B.1 and B.2, the patta and kist receipt filed by the appellant/defendant relates to Survey No.119-4B for an extent of 0.10.5 ares. So, it is entirely for a different survey number. Further, the appellant/defendant had not proved that her predecessor has got right over the property. In such circumstances, no relevancy can be placed on Exs.B.1 and B.2, which came into effect only after the filing of the suit. So, as already stated, Exs.A.1, A.5 to A.8 has clearly proved that Kuppa Kounder has inherited the property as it is an ancestral property and he alone is in possession of the same. So, he has got every right to bequeath the property in favour of the plaintiff/respondent herein.

12. Now this Court has to decide whether both the Courts below has come to the correct conclusion that the Ex.A.9/Will is true and genuine and whether it was proved in accordance with law?

To prove Ex.A.9/Will, P.W.2/Kannan, the attesor of Will was examined. On perusal of his evidence, I do not find any reason to discard the same since it inspires confidence. It is true that another attesor of the Will namely, Raja has been examined as D.W.2. However, he has stated that he has not signed the document. But to prove the genuineness of Ex.A.9/Will, the evidence of P.W.2/Kannan, the attesor of the Will is sufficient, as it would prove the due execution of the Will. Thus, the substantial question of law 1 and 2 is answered in favour of the respondent herein.

13. Thus, I am of the view that the respondent herein has got the property as legate and hence, she is owner of the property and entitled for declaration of title. Since the property is in the possession of the appellant, the respondent/plaintiff is entitled for recovery of possession. Both the Courts below had rightly held that the respondent is entitled for the reliefs sought for. Hence, the judgment and decree passed by the Courts below does not warrant interference by this Court.

14. At this juncture, it would be appropriate to consider the decisions relied on by the learned counsel for the respondent.

14.1. In the decision reported in (2000) 7 Supreme Court Cases 409, Thimmaiah and Others v. Ningamma and Another, it was held that unless the High Court in the second appeal expressly comes to the conclusions contrary to concurrent findings of lower Courts, such findings must be accepted. It is appropriate to incorporate paragraph 13 of the said decision:

"13. But at the same time, this Court has noted that the High Court has no jurisdiction to entertain a second appeal "on the ground of an erroneous finding of fact

however gross or inexcusable the error may seem to be". In other words, if there is some evidence and the appreciation of the evidence is erroneous, a second appeal will not lie." There is no quarrel over the said preposition.

14.2. In the decision reported in 2006 (5) CTC 639, Manivanna Gounder v. Pachiappa Gounder, this Court had relied upon the above decision of the Hon'ble Apex Court and it was held that the concurrent findings of the lower Courts could not be interfered with as High Court in Second Appeal cannot re-appreciate evidence and come to different conclusion unless the findings of Courts below are not based on record or same are perverse. There is no quarrel over the said preposition.

However, the above decisions are not relevant because this Court had already come to a conclusion that the finding of the Courts below are well-reasoned and the same does not warrant interference by this Court. Thus, the second appeal deserves to be dismissed.

15. In fine,

- (a) The Second Appeal is dismissed. No costs.
- (b) The concurrent judgment and decree passed by the Trial Court as well as the first appellate Court is hereby confirmed.
- (c) The time granted for delivery is two months.

Sd/-
Deputy Registrar

//True Copy//

Sub Assistant Registrar

To

- 1.The Subordinate Court, Kallakurichi.
- 2.The I Additional District Munsif Court, Kallakurichi.

+1cc to Mr.R.Subramanian, Advocate, S.R.No.29296
+1cc to Mr.V.R.Kamalanathan, Advocate, S.R.No.29138

KGK(CO)
CA(30/06/2015)

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