



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 29.06.2015

CORAM :

THE HONOURABLE MR.JUSTICE P.R.SHIVAKUMAR

Second Appeal (MD) No.355 of 2015

WILDCOPY

Sumathi

... Appellant/Appellant/Plaintiff

Vs.

Velu Nachiyar

... Respondent/Respondent/Defendant

Second Appeal is filed under Section 100 C.P.C against the judgment and decree in A.S.No.25 of 2013, dated 01.04.2014 on the file of the Sub Court, Sankarankovil, confirming the judgment and decree in O.S.No.110 of 2011, dated 05.09.2013 on the file of the Principal District Munsif Court, Sankarankovil.

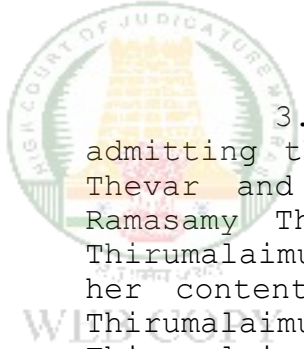
For Appellant

: Mr.F.X.Eugene

JUDGMENT

The Second Appeal arises out of the judgment and decree of the lower Appellate Court, namely the Sub Court, Sankarankovil, dated 01.04.2004 made in A.S.No.25 of 2013 by which the decree of the trial Court dated 05.09.2013 made in O.S.No.110 of 2011 on the file of the trial Court, namely the Court of the Principal District Munsif, Sankarankovil came to be confirmed.

2.The plaintiff in the Original Suit is the appellant in the Second Appeal. The sole defendant in the Original Suit is the respondent in the Second Appeal. The appellant filed the said Original Suit for a bare injunction contending that she was the absolute owner of the suit properties described in 9 items and that the respondent herein/defendant who had got nothing to do with the suit properties, out of jealousy, was trying to interfere with the peaceful possession and enjoyment of the appellant herein/plaintiff in respect of the suit properties. However, the appellant herein/plaintiff chose to trace her title from the original owner Late.Sankarapandia Thevar. Sankarapandia Thevar died leaving two sons: (i) Thirumalaimuthu Thevar and (2) Ramasamy Thevar. According to the appellant herein/plaintiff, the above said sons of Sankarapandia Thevar effected an oral partition before their death (without stating even the year in which such oral partition took place) and in the oral partition, item Nos.1 to 9 of the suit properties came to be allotted to the share of Thirumalaimuthu Thevar. The share of Thirumalaimuthu Thevar was succeeded to by his wife Gomathi Ammal as Thirumalaimuthu Thevar had no child. Gomathi Ammal executed a registered will on 27.12.1982 and she died on 17.04.1992. By virtue of the said will, the bequest made therein took effect and the legatee Rajendran became the owner of all the 9 items of the suit properties. Rajendran married the appellant herein/plaintiff and he settled all the suit properties in favour of his wife, namely the appellant herein/plaintiff under four settlement deeds marked as Exs.A.3 to A6. Thus, the appellant herein/plaintiff traced her title and claimed that she was in possession and enjoyment of the suit properties as on the date of filing of the plaint.

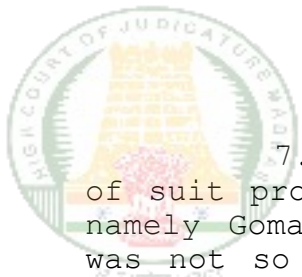


3.The suit was resisted by the respondent herein/defendant admitting that the suit properties originally belonged to Sankarapandia Thevar and it delved upon his two sons Thirumalaimuthu Thevar and Ramasamy Thevar. But she denied the alleged oral partition between Thirumalaimuthu Thevar and Ramasamy Thevar. On the other hand, it was her contention before the trial Court that after the death of both Thirumalaimuthu Thevar and Ramasamy Thevar, Gomathi Ammal, widow of Thirumalaimuthu Thevar and Muthathal, widow of Ramasamy Thevar effected oral partition in which items 1 to 8 of the suit properties were allotted to the share of Muthathal representing the line of Ramasamy Thevar. It is an admitted fact that the respondent herein/defendant Velu Nachiyar is the posthumous child of Ramasamy Thevar as she was born after the death of Ramasamy Thevar. According to her, oral partition between Gomathiammal and Muthathal took place prior to her birth. In support of her contention, she also relied on the fact that the suit 9th item and some other properties which are not shown in the plaint schedule were sold by Gomathiammal in favour of Murugaiya, the husband of the respondent herein/defendant. Relying on the said document, the respondent herein/defendant also contended that the will relied on by the appellant herein/plaintiff as the one left as a lost will and testament of Gomathi Ammal could not be true.

4.The learned trial Judge after trial accepted the defence version of the respondent herein/defendant and disbelieved the case of the appellant herein/plaintiff, with the result that the suit was dismissed by the trial Court by a judgment and decree dated 05.09.2013. On appeal, the learned lower Appellate Judge also concurred with the findings of the trial Court and dismissed the appeal preferred by the appellant herein/plaintiff by a judgment and decree dated 01.04.2014. The revenue records, namely patta, chitta, kist receipts were found to be insufficient to prove even the alleged possession of the appellant herein/plaintiff. Thus, both the Courts below non suited the appellant herein/plaintiff for the relief of permanent injunction. It is as against the above said decree of the lower appellate Court confirming the decree of the trial Court, the present Second Appeal has been preferred.

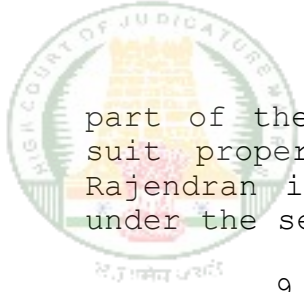
5.Today, the matter stands listed for admission. The arguments advanced by Mr.F.X.Eugene, learned counsel for the appellant are heard. The copies of the judgments and decrees of the Courts below and the copies of other materials produced in the form of typed set of papers are also perused.

6.As against the concurrent judgments of the Courts below, the present Second Appeal came to be filed. Admittedly, the suit properties originally belonged to one Sankarapandia Thevar and on his death, his two sons Thirumalaimuthu Thevar and Ramasamy Thevar became entitled to half share each. According to the appellant herein/plaintiff, the said Thirumalaimuthu Thevar and Ramasamy Thevar effected oral partition and in the said oral partition, all 9 items of suit properties came to be allotted to Thirumalaimuthu Thevar. The said contention of the appellant herein/plaintiff is denied by the respondent herein/defendant. However, she contends that the properties left by Sankarapandian Thevar were divided between the branches of Thirumalaimuthu Thevar and Ramasamy Thevar after the death of both of them and in such partition, items 1 to 9 of the suit properties fell to the share of the legal representatives of Ramasamy Thevar and the plaint item 9 and other properties fell to the share of the legal representatives of Thirumalaimuthu Thevar.



7. According to the appellant herein/plaintiff, all the 9 items of suit properties were allotted to Thirumalaimuthu Thevar's legal heir namely Gomathi Ammal. According to the respondent herein/defendant, it was not so and Gomathi Ammal was allotted the 9th item and some other properties, whereas items 1 to 8 of the suit properties were allotted to the legal heirs of Ramasamy Thevar. In this regard, it is pertinent to note that the dispute is not merely a dispute regarding enjoyment of the properties, but it is a dispute as to title. Under the said circumstances, the appellant herein/plaintiff chose to file the suit suppressing the fact that there was a dispute regarding title. Pretending as if there was no dispute regarding title, the appellant herein/plaintiff chose to file the suit for bare injunction valuing the relief under Section 27 (c) of the Tamil Nadu Court fees and Suits Valuation Act, 1955. Since the title claimed by the appellant herein/plaintiff was disputed by the respondent herein/defendant, the appellant herein/plaintiff chose to produce Ex.A.1-copy of the registered will alleged to be the last will and testament left by Gomathi Ammal. Though the copy of the will is not available for verification, learned counsel for the appellant herein/plaintiff admits that the properties bequeathed in the said will were none other than the properties mentioned as items 1 to 9 in the plaint schedule. In order to prove the execution of the said document, one of the attestors was also examined as P.W.2. However, the genuineness seems to have been successfully challenged by the respondent herein/defendant by producing Ex.B.1-sale deed under which not only the suit 9th item but three more items which are not found in Ex.A.1-will were sold by the alleged testator Gomathiammal herself in favour of Murugaiah, the husband of the respondent herein/defendant. The said sale deed was executed on 12.02.1982 10 months before the date of execution of Ex.A.1-will. Ex.A.1-will was claimed to have been executed by Gomathi Ammal. But in the said will dated 27.12.1982, the property already sold by her under Ex.B.1, namely item 9 of the suit properties was also sought to be bequeathed. If at all, the will was true, she would not have included the said property as one of the properties bequeathed under the will after having disposed of the same prior to the date of the will.

8. A consideration of Ex.B.1-sale deed will make it clear that not only the 9th item of the suit properties but also three more properties which were not shown to be the properties allotted to the share of the said Gomathi Ammal in the oral partition were also sold to that Murugaiah, the husband of the respondent herein/defendant. A proper analysis of the said fact will lead to the inevitable conclusion that the division made in the oral partition as projected by the appellant herein/plaintiff is quite improbable, whereas the division made according to the contention of the respondent herein/defendant alone is probable. The respondent herein/defendant does not claim that the 9th item of suit property was allotted to the share of legal heirs of Ramasamy Thevar and it is also not her contention that the other three properties which were the subject matters of Ex.B.1 were also the properties allotted to the legal heirs of Ramasamy Thevar. On the other hand, it is her contention that they were the properties allotted in the oral partition to Gomathi Ammal. So far as the items 1 to 8 are concerned, it is the claim of the respondent herein/defendant that they were the properties allotted to the legal heirs of Ramasamy Thevar and only in order to make a claim in respect of those properties, the will marked as Ex.A.1 came to be brought into existence. It is also her contention that lack of bona fide on the



part of the appellant would also be revealed by the fact that all the suit properties were purported to have been settled by the legatee Rajendran in favour of his wife, namely the appellant herein/plaintiff under the settlement deeds marked as Exs.A3 to A6.

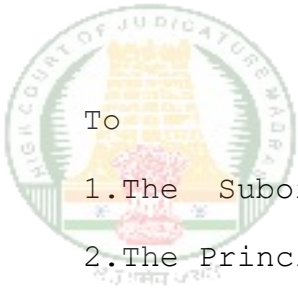
9.First of all, when there is such an obvious dispute regarding title, the appellant herein/plaintiff ought not to have chosen to file the suit for bare injunction suppressing the said fact that too, valuing the relief under Section 27(C) of the Tamil Nadu Court fees and Suit Valuation Act, 1955. Secondly, the revenue records relied on by the appellant herein/plaintiff are only the documents that came into existence in the year 2006 and subsequently. The pattas marked as Exs.A7 and A8 cannot be taken as documents of title or the evidence proving the possession of the appellant herein/plaintiff. The kist receipts issued in the name of the appellant herein/plaintiff, in line with the patta, also cannot be relied upon. Hence, the finding of the Courts below that the appellant herein/plaintiff failed to prove her possession and the alleged attempts by the respondent herein/defendant to disturb the same was not substantiated cannot be said to be either defective or infirm, much less perverse.

10.Even assuming that the appellant herein/plaintiff is in possession of the suit properties at present, she cannot successfully sustain her claim against the real owner namely, the respondent herein/defendant. There is a possibility of contending that even though the appellant herein/plaintiff could not have proved her possession should not be allowed to be disturbed without having recourse to due process of law. Now the question of adopting due process of law in such cases has been finally interpreted to mean that the character of possession has got to be decided in a judicial proceeding irrespective of the fact that the suit is filed by the person claiming to be in possession and that finding of the Court that the person claiming to be in possession is not the real owner and his claim is against the real owner will be the due process of law as contemplated in law. It is not the case of the appellant herein/plaintiff that though the respondent herein/defendant is the title holder she has a better right to overtake or restrict the right of the title holder in which case alone such right can be enforced by such a suit for injunction.

11.Taking all the above mentioned aspects into consideration, this Court comes to the conclusion that no substantial question of law is shown to have arisen for consideration in this Second Appeal and all the questions suggested by the appellant herein/plaintiff in the memorandum of grounds of Second Appeal are not in fact substantial questions of law involved in the Second Appeal. There is no merit in the Second Appeal and in fact, the Second Appeal does not even admission merit. The Second Appeal deserves to be dismissed at the threshold.

12.In the result, the Second Appeal is dismissed. However, there shall be no order as to costs. Consequently, M.P(MD)No.2 of 2015 is closed.

Sd/-
Assistant Registrar(AS)



To

1.The Subordinate Judge, Sankarankovil, Tirunelveli District

2.The Principal District Munsif Court, Sankarankovil, Tirunelveli District

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Second Appeal (MD) No.355 of 2015
29.06.2015

TR/PRV : 01.08.2015 : 5p/4c