

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.04.2016

CORAM

THE HONOURABLE MR. JUSTICE P.KALAIYARASAN

S.A. No.1515 of 1999

Bagyamma

... Appellant/Defendant

Vs.

Ramachandrappa

... Respondent/Plaintiff

Second Appeal is preferred under Section 100 of the Code of Civil Procedure against the Judgment and Decree, dated 16.02.1999 made in A.S.No.12 of 1997 on the file of the Subordinate Court, Hosur, confirming the Judgment and Decree, dated 24.12.1996 made in O.S.No.26 of 1993 on the file of the District Munsif Court, Hosur.

For Appellant : Mr.M.V.Krishnan

For Respondent : Mr.J.Hariharan for
Mr.V.Nicholas

J U D G M E N T

The Second Appeal is filed against the Judgment and Decree, dated 16.03.1999 made in A.S.No.12 of 1997 on the file of the Subordinate Court, Hosur.

2. This Second Appeal arises from O.S.No.26 of 1993, a suit for declaration and permanent injunction filed by the respondent / plaintiff. Both the trial court as well the lower appellate court, decreed the suit.

3. In this Judgment, reference to parties will be according to their rank in the suit.

4. The facts for the purpose of adjudication of the present appeal need to be stated in brief. The plaintiff's father Bethaoppiah along with his brother sold 29 1/4 cents in S.F.No.23 of Halekota village, out of 1.17 acres, under Sale deed, dated 29.03.1976 to the defendant. The plaintiff's father

Bethaoppiah sold 7 cents in the same survey number to the defendant, under sale deed, dated 10.06.1981. The remaining 80 cents in S.F.No.23 remained with Bethaoppiah. He bequeathed the said property to his son, the plaintiff, under the unregistered Will, dated 15.10.1985. UDR patta was also issued in the name of the plaintiff's father and he died on 25.11.1986. Plaintiff has been enjoying the suit property. The defendant attempted to dispossess the plaintiff from the suit property, i.e., 80 cents in S.F.No.23 on 20.01.1993. Hence, the present suit.

5. The defendant admits the sale of 29 1/4 cents in S.F.No.23 by Bethaoppiah and his brother and also 7 cents by Bethaoppiah to her. The alleged Will is not true and genuine and it is forged one. The issuance of UDR patta in the name of the plaintiff's father is also denied. There was oral partition between brothers of Bethaoppiah. There was also oral partition between the plaintiff and his father. Though the defendant purchased 36 1/4 cents, she has been enjoying the entire S.F.No.23, including the suit property.

6. The trial court, after recording evidence, both oral and documentary, framed 7 issues, found that the plaintiff has title over the suit property and decreed the suit. The lower appellate court, also concurred with the findings of the trial court and dismissed the appeal.

7. At the time of admission, the following Substantial Questions of Law were framed for consideration :

"1. Whether the learned Subordinate Judge, having held that the unregistered Will, Ex.A.7 was a document, suspicious on many points has erred in accepting it on the ground that the defendant cannot question the validity of the Will ?

2. Whether lower appellate court ought to have followed the maxim "Boundaries prevail over Extent" and held that the defendant had proved her title to the suit property under registered sale deeds, Ex.B.2 and B.3 ?"

8. From the pleadings and evidence, it is clear that though Bethaoppiah purchased the properties in his name, as head of the family, there was oral partition between him and his brother. Admittedly, there was also oral partition between the plaintiff and his father Bethaoppiah. The defendant also purchased portion of the property in the same survey number under two sale deeds, one from Bethaoppiah and his brother and another from

Bethaoppiah exclusively. There is no dispute with respect to the land, so purchased in S.F.No.23 by the defendant. The remaining portion in the same S.F.No.23 is the suit property. The defendant, though purchased only 36 1/4 cents in S.F.No.23, she claims that she has been enjoying the whole S.F.No.23, i.e., 1.17 acres, including the suit property.

9. The plaintiff claims title under the unregistered Will executed by his father. No doubt the lower appellate court pointed out certain interpolation and correction in the Will, leading to suspect the Will; yet both the trial court as well as the lower appellate court found that the defendant being the third party claiming right over a portion of the property in the same survey number only under the sale deed, cannot raise such a plea.

10. The attestors to the Will were examined on the side of the plaintiff as P.W.3 and P.W.4. Through them execution of the unregistered Will, dated 15.10.1985 has been proved.

11. Learned counsel appearing for the respondent cited our High Court Judgment, in Valliammal v. S.Arumugha Gounder, reported in 2001 (1) CTC 708, wherein it has been held as follows :

"The lower Appellate Court ought to have considered the evidence adduced on the side of the plaintiff to prove the execution of the Will. Under such circumstance, the defendant who is stranger to the family will not be competent to urge other contentions to hold that there are suspicious circumstances regarding the execution of the Will. Therefore, the findings with regard to the validity of the Will made by the first Appellate Court is set aside and I hold that Ex.A.8, Will is the true and genuine executed by Muthusamy Gounder, while he was in sound and disposing state of mind."

12. Learned counsel appearing for the respondent also cited our High Court Judgment in S.Ganesan, v. S.Kuppuswamy & another, reported in 2009-2-LW 636, for the ratio that the person having no cavetable interest or in any way related to the testator cannot insist to prove the Will. In this ruling, it has been held as follows :

"In view of the decision of the Hon'ble Apex Court reported in (2008) 4 SCC 300 (cited

supra), when a person having no cavetable interest or in any way related to the testator cannot insist upon the Will being proved strictly in accordance with Section 68 of the Indian Evidence Act. In this case, the defendants admittedly are not in any way related to the deceased and obviously they are not the legal heirs of the deceased testator and in such a case, the defendants cannot call upon the plaintiff to prove Ex.A.17, the Will in accordance with Section 68 of the Indian Evidence Act."

13. In this case on hand, the defendant claims right over the suit property only on the basis of the sale deed, executed in her favour. The defendant, being third party claiming right under the sale deed, cannot insist even for the proof of the Will, as per Section 68 of the Indian Evidence Act, much less raising suspicious circumstances in the Will. Thus, the appellant / defendant cannot question the validity of the Will.

14. The argument advanced by the learned counsel appearing for the appellant that the burden is on the propounder of the Will to remove any suspicious circumstances, no doubt is settled in law. When the appellant being a stranger cannot even insist to prove the Will, as found earlier, the burden of removing the suspicious circumstances does not arise.

15. Though the appellant raised the substantial question of law that lower appellate court should have followed the maxim "Boundaries prevail over Extent", it is to be pointed out that there is no plea to that effect. It is seen from the oral evidence on the side of the defendant, that there is ridge between the purchased property and the suit property.

16. It is pertinent to note that boundaries are not mentioned in both the sale deeds, Ex.B.2 and Ex.B.4, under which the defendant claim right. Under Ex.B.2, 29 1/4 cents of land in S.F.No.23 with one another property was sold to the defendant by Bethaoppiah and his brother and under Ex.B.4, Bethaoppiah sold 7 cents of land in S.F.No.23 to the defendant. In the absence of any demarcation, as to boundaries in both the sale deeds, the contention of the appellant that boundaries prevail over the extent does not arise. Therefore, this Court answers both the substantial questions of law against the appellant and in favour of the respondent and accordingly, the second appeal is liable to be dismissed.

In the result, this Second Appeal is dismissed. However, there shall be no order as to costs.

Sd/-
Assistant Registrar(CS IV)

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Sub Assistant Registrar

tsvn

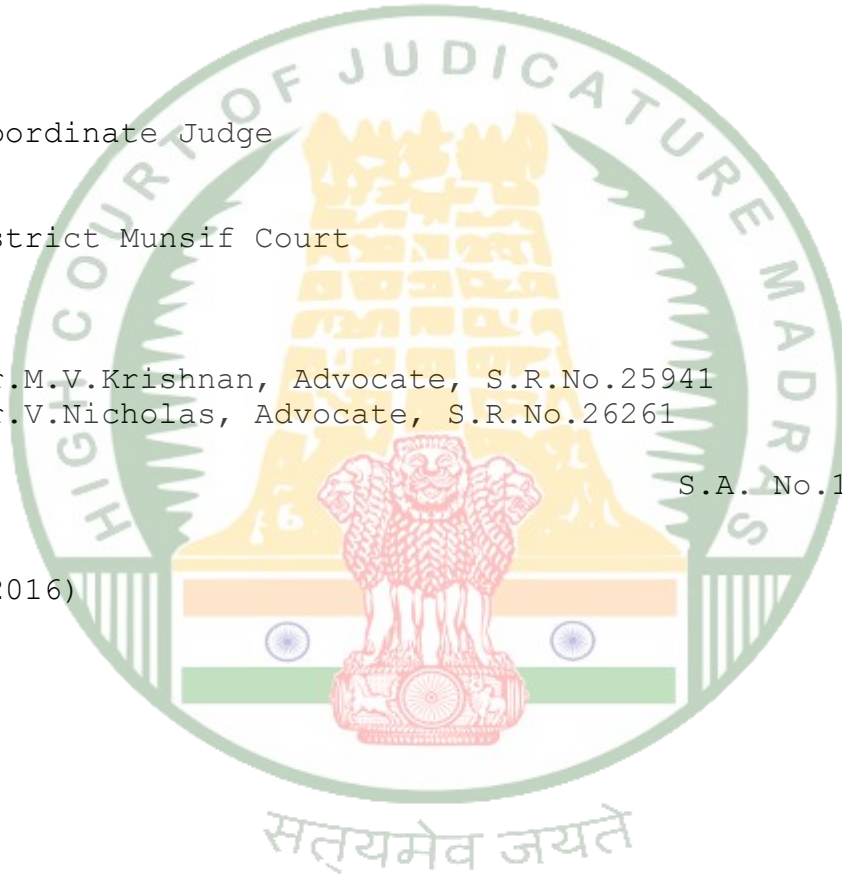
To

1. The Subordinate Judge
Hosur.
2. The District Munsif Court
Hosur.

+1cc to Mr.M.V.Krishnan, Advocate, S.R.No.25941
+1cc to Mr.V.Nicholas, Advocate, S.R.No.26261

S.A. No.1515 of 1999

KSJ(CO)
CA(12/05/2016)



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