

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.01.2016

CORAM

THE HON'BLE MR.JUSTICE S.NAGAMUTHU

Second Appeal No.1009 of 2015
and M.P.No.1 of 2015

Chellammal (Died)

- 1.S.Murugan
- 2.M.Saravanavel
- 3.M.Mahalakshmi
- 4.T.Kalaivani

[Appellants 1 to 4 were impleaded as legal representatives
of the deceased 5th defendant-Chellammal]

... Appellants/ 7 TO 10TH Respondent LRS of the
5th Defendant

-Versus-

- 1.Sadhu
- 2.Gajendran
- 3.Jayaraman
- 4.Amirthammal @ Ponammal

Kasi (Died)

- 5.Pushparaj
- 6.K.Dhinakaran
- 7.K.Kanthammal
- 8.A.Geenasenan
- 9.N.Muninathan

... Respondents 1 to 9/ Appellants 1 to 3/ I & 2nd ,4,6,11 and 12
Respondents/ Defendants 1 to 3/ Plaintiff/ 4th Defendant/ LRS of
the 4th Defendant

This second appeal is filed against the judgment and decree
dated 18.04.2015 made in A.S.No.46 of 2012 made by the learned
II Additional District Judge, Poonamallee, Thiruvallur District,
reversing the judgement and decree dated 22.01.1993 made in
O.S.No.245 of 1987 on the file of the learned Subordinate Judge,
Poonamallee, Thiruvallur District.

For Appellants : Mr.R.Sankarasubbu for
Mr.D.Dhayalan

For Respondents : Mr.R.Muthukumaraswamy,
Senior Counsel for
Mr.E.Mahadevan for R1 to R3 and
for Mr. Mohanasundararajan for
R 8 & R9

JUDGMENT

The 4th respondent Mrs.Amirthammal @ Ponammal filed a suit in O.S.No.245 of 1987 on the file of the learned Subordinate Judge, Poonamallee, for partition and for allotment of her 1/5th share in the suit properties. One Mrs.Chellammal was the 5th defendant in the suit. The respondents 1 to 4 herein are the defendants 1 to 4 in the suit. During the pendency of the suit, 5th defendants Mrs.Chellammal died and in her place the appellants herein were brought on record as the legal heirs. The trial court by decree and judgement dated 22.01.1993 decreed the suit as prayed for. As against the same, the defendant 1 to 3 filed an appeal in A.S.No.46 of 2012 before the learned Additional District Judge, Poonamallee. The first appellate court by decree and judgement dated 18.04.2015, allowed the appeal and set aside the decree and judgement of the trial court. Aggrieved by the same, the legal representatives of the 5th defendant have filed the present second appeal.

2. The case of the plaintiff - Mrs.Amirthammal @ Ponammal/4th respondent herein is as follows;-

The suit properties were originally owned by one Sri.Chinnappa Naicker. The said Sri.Chinnappa Naicker had a son by name Sri.Kuppusamy Naicker. The said Sri.Kuppusamy Naicker's wife is Mrs.Dhanammal. Sri.Kuppusamy Naicker and his wife Mrs.Dhanammal had 3 sons and 2 daughters by name, (1) Kanniappa Naicker, (2) Jayaraman, (3) Kasi, (4) Amirthammal and (5) Chellammal. Sri.Chinnappa Naicker died. The said Sri.Kuppusamy Naicker died in the year 1963 while Mrs.Dhanammal died in the year 1981. The defendants 1 and 2 are the children of Sri.Kanniappa Naicker and their father died in the year 1976. Sri.Jayaraman is the 3rd defendant and Sri.Kasi is the 4th defendant in the suit. Mrs.Amirthammal @ Ponammal, who one of the daughters of Kuppusamy Naicker, is the plaintiff. Mrs.Chellammal, the 2nd daughter of Sri.Kuppusamy Naicker and Mrs.Dhanammal, was the 5th defendant in the suit. The appellants herein are the children of Kasi Naicker. He also died during the pendency of the first appeal. The respondents 5 to 7 are his legal representatives.

3. According to the plaintiff, Sri.Chinnappa Naicker died intestate and, therefore, the suit properties were inherited by Sri.Kuppusamy Naicker. The said Sri.Kuppusamy Naicker also died intestate and, therefore, his 3 sons and 2 daughters are entitled

for equal shares. That is how, the plaintiff claims 1/5th share in the suit properties.

4. The 1st defendant-Sri.Sadhu and the 2nd defendant Sri.Gajendran have filed their written statement wherein they have stated that the plaintiff-Mrs.Amirthammal @ Ponnammal and the 5th defendant - Mrs.Chellammal have got no right whatsoever over the suit properties. They were in fact ousted from the possession of the suit properties.

5. The the 5th defendant was sailing with the plaintiff. The defendants 3 and 4 remained ex parte.

6. Based on the above pleadings, the trial court framed appropriate issues. During trial, on the side of the plaintiff, she was examined as P.W.1 and as many as Exs.A1 to A6 were exhibited while on the side of the defendants, the 1st defendant was examined as D.W.1, 3rd defendant was examined as D.W.2 and Sivanantham was examined as D.W.3 and the 5th defendant was examined as D.W.4 and Exs.B.1 to B4 were exhibited.

7. Having considered all the above, the trial court held that the plea of ouster had not been proved by the defendants 1 and 2. As against the same, the defendants 1 to 3 filed an appeal before the II Additional District Judge, Poonamallee. The first appellate court reversed findings of the trial court and held that the plea of ouster has been proved. The first appellate court has further went into the validity of the Will said to have been executed by Sri.Chinnappan Naicker and held that the Will was proved and as per the Will the plaintiff and the 5th defendant are not entitled for any share. It was on those grounds, the appeal was allowed and the decree and judgment of the trial court was aside.

8. As against the said decree and judgment of the first appellate court, the plaintiff has not come up with any appeal. The legal representatives of the 5th defendant for whom the trial court had granted 1/5th share have now come up with the present second appeal.

9. This second appeal has come up today for admission. I have heard the learned counsel for the appellants and the learned senior counsel for the respondents 1 to 3, 8 and 9 and also perused the records carefully.

10. The learned counsel for the appellants would submit that from the evidence it is crystal clear that the plea of ouster has not been proved whereas, the first appellate court has held that the plea of ouster has been proved. Thus, the said finding is patently a perverse finding, the learned counsel contended. He would further contend that though the Will has been pressed into

service by way of Ex.B3, there is no corresponding pleading and there is also no evidence to prove the same. Thus, according to the learned counsel the first appellate court ought not to have reversed the well considered decree and judgment of the trial court.

11. The learned senior counsel appearing for the defendants 1 to 3/respondents 1 to 3 per contra would submit that it is true that the Will has not been proved as required under The Evidence Act. According to him, when the said Will was marked under Ex.B.3 on the side of the defendants, the plaintiff's counsel ought to have objected to mark the same. But, he did not do so. Thus, the silence of the plaintiff to raise any objection regarding the Will would amount to admission of the correctness and the execution of the Will. Therefore, according to the learned senior counsel, it is too late in the day for the first time to raise objection regarding the genuineness of the Will exhibited under Ex.B.3. In this regard, the learned senior counsel would rely on a judgment of the Hon'ble Supreme Court in Remco Industrial Workers House Building Cooperative Society v. Lakshmeesha M. and others, (2003) 11 SCC 666.

12. So far as the plea of ouster is concerned, the learned senior counsel would submit that for sound reasons, the first appellate court found that the plea of ouster has been proved which does not require any interference at all at the hands of this court.

13. From the above submissions made by the learned counsel on either side and upon perusing the records, I find the following substantial questions of law in this second appeal for consideration:-

(1) Whether the first appellate court was right in holding that the plea of ouster stands proved?

(2) Whether the first appellate court was right in holding that on account of Ex.B.3 Will, the appellants who are the legal representative of the 5th defendant and the plaintiff have got no share in the suit properties?

14. I have considered the above submissions carefully.

15. So far as the first question of law is concerned, I find that the trial court without assigning any reason has simply held that the plea of ouster has not been proved. The first appellate court has, of course, found that the plea of ouster has been proved. In my considered opinion, the said finding is perverse inasmuch as there is no discussion on the above issue.

Above all, the evidence on the question of ouster is also wanted. It is for the parties to lead further evidence on this issue.

16. Insofar as the second question of law is concerned, I find that there is no pleading at all in respect of the existence of the Will. Further, the Will has also not been proved in accordance with The Indian Evidence Act. In my considered view, the mere absence of any dispute raised either by the plaintiff or by the 5th defendant when Ex.B.3 Will was marked, would not amount to admission of the execution of the Will. In my considered view, if it is any other document, the same being primary, the execution can be proved by mere production of the same as per Section 63 of the Indian Evidence Act. If it is a Will though it is a primary evidence, the law mandates that the same requires to be proved by following special procedure contemplated in the Indian Evidence Act. Even by consent of parties, a Will cannot be stated to have been proved if the procedure contemplated in the Indian Evidence Act is not followed. In the instant case, mere fact that the plaintiff and the 5th defendant did not raise any objection in respect of Ex.B.3 Will at the time when it was marked in evidence would not go to automatically prove the execution of the Will. In other words, there is a vast difference between mere marking of the document and proving its execution and also the contents. When the law relating to Will is so clear that the execution itself is to be proved by following the special procedure, there is no escape for the parties from the said procedure. The person who wants to take the advantage of the Will is bound to prove the execution of the said Will by following the procedure. In this case, admittedly, the Will has not been proved by following the special procedure. So far as the judgment of the Hon'ble Supreme Court reported in Remco Industrial Workers House Building Cooperative Society v. Lakshmeesha M. and others, (2003) 11 SCC 666 relied on by the learned senior counsel is concerned, it does not pertain to a Will and it relates to a document which is per se admissible in evidence as a primary evidence. Therefore, the aforesaid judgment has got no application to the facts of the present case. At any rate, the absence of pleadings in respect of the existence of the Will is also a matter which needs to be considered.

17. In view of the above, I have to necessarily answer both the questions of law in favour of the appellants. But, at the same time, in my considered view, the matter requires reconsideration by the trial court. It is for the parties to lead additional evidence, if any, and to make additional pleadings before the trial court so as to establish their respective case.

18. In the result, the second appeal is allowed. The decree and judgment of both the courts below are set aside. The suit in O.S.No.245 of 1987 is remitted back to the trial court for fresh disposal in accordance with law. The trial court shall afford sufficient opportunity to both parties to amend the pleadings and to make additional pleadings and also lead additional evidence, if any. At any rate, the trial court shall dispose of the said suit within a period of six months from the date of receipt of a copy of this judgment. No costs. Consequently, connected MP is closed.

Sd/-

Asst.Registrar (CO)

/true copy/

Sub Asst.Registrar

kmk

To

1.The II Additional District Judge,
Poonamallee, Thiruvallur District.

2.The Subordinate Judge,
Poonamallee, Thiruvallur District.

3. The Section Officer
VR Section,
High Court, Madras

2 ccs to Mr.S. Mohanasundrajan, Advocate, Sr. 1696

2 ccs to Mr.E. Mahadevan, Advocate, Sr. 1699

1 cc to Mr.D.Dhayalan, Advocate, Sr. 1983

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PUR (CO)
kk 1/2

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