

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.10.2016

PRONOUNCED ON : 18.10.2016

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.73 of 2011

and

M.P.No.1 of 2011

Sekar

...

Appellant

Vs.

Ganesan

Represented by his Power Agent,

Thiruvengadam,

...

Respondent

Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and decree passed in A.S.No.24 of 2010 dated 27.08.2010 on the file of the Court of Additional Sub-ordinate Judge, Mayiladuthurai in confirming the Judgment and Decree passed in O.S.No.237 of 2004 dated 20.04.2009 on the file of the Court of District Munsif, Sirkali.

For Appellant : Mr.A.Muthukumar

For Respondent : Mr.S.Sounthar

JUDGMENT

Challenge in this second appeal is made by the defendant against the Judgment and Decree dated 27.08.2010 passed in A.S.No.24 of 2010 on the file of the Court of Additional Subordinate Judge, Mayiladurai, confirming the Judgment and Decree dated 20.04.2009 passed in O.S.No.237 of 2004 on the file of the Court of District Munsif, Sirkali.

2. The suit is for Permanent Injunction.

3. The plaint averments are briefly stated as follows:

The suit "A" schedule property is an old house in survey No.65/5B and the suit "B" schedule property is a shop in the same survey number, which were purchased by the plaintiff's maternal grandmother Parvathi Ammal through a registered sale deed dated 06.07.1973. The said Parvathiammal had four daughters and two sons and the plaintiff's mother Thaiyalnayaki @ Dhanalakshmi, who is one of her daughters, was alone given in marriage in India and the other sons and daughters of Parvathi Ammal are residing in Singapore. Parvathi Ammal often goes to Singapore and the plaintiff's grandfather Manickam died in the year 1980. The plaintiff's grandmother Parvathi Ammal, before leaving for Singapore, on 20.12.1980, executed a Will bequeathing her properties in favour of the plaintiff and Parvathi Ammal died and the Will executed by her has come into force and as per the Will dated 20.12.1980, the plaintiff is entitled to the suit property. The front portion of the suit property is a small shop building, which is rented out to the defendant and marked as "CDEG"

in the plaint plan. In respect of this property, no relief is sought for in the present suit and in respect of the remaining property "ABCDEF", the plaintiff is in possession and there is a house in the said property and the same has been described in "A" Schedule. The plaintiff demanded the defendant to vacate the "B" Schedule property and hand over possession, but, the defendant did not yield to the same and threatened the plaintiff that he is going to trespass into "A" schedule property and making attempts to encroach into "A" schedule property. Hence, the suit for Permanent Injunction.

4. The averments contained in the written statement are briefly stated as follows:

The suit property belongs to Parvathi Ammal. It is false to state that Parvathi Ammal had executed a Will dated 20.12.1980 bequeathing the suit property in favour of the plaintiff. The will is a forged document and the signature in the Will is not that of Parvathi Ammal. After the death of plaintiff's mother in a suspicious manner, Parvathi Ammal did not have any contact with the plaintiff's family. The certificate of Village Administrative Officer declaring the death of Parvathi Ammal is not admissible. Parvathi Ammal came to India

during the death of her husband and before leaving for Singapore, she handed over her property to the defendant asking him to take care of it. When she came to India in the year 1983, she opened a joint account with the defendant in State Bank of India, Tiruvengadu and asked the defendant to act as her power agent and enquired about drafting the document through her letter dated 25.12.1987. The signature of Parvathi Ammal in the said letter and her signature in the Will would disclose that the Will is a forged document. If she had executed a Will, there is no need to execute the power of attorney deed. The defendant is residing in the house which was handed over to him by Parvathi Ammal. The defendant had constructed the shop building in the suit property and it is enjoyed by him. The defendant had not attempted to trespass into the suit "A" schedule property as claimed by the plaintiff. The suit is a false one and is liable to be dismissed.

5. In support of the plaintiff's case, PWs1 to 3 were examined and Exs.A1 to 4 were marked and on the side of the defendant, DWs1 and 2 were examined and Exs.B1 to 35 were marked.

6. On consideration of the oral and documentary evidence adduced by the respective parties, the trial Court was pleased to decree the suit as prayed for. The Lower Appellate Court has also confirmed the Judgment and Decree of the trial Court and dismissed the first appeal filed by the defendant.

7. The Second Appeal was admitted on the following substantial questions of law:

(a) Whether the courts below erred in law in holding that Parvathy Ammal had died prior to the suit in the absence of any evidence such as Death Certificate or examination of any one of her heirs viz., her other daughters or sons?

(b) Whether the courts below erred in law in placing burden on the defendant to prove that Parvathy Ammal is still alive when the plaintiff had not discharged his burden?

(c) Whether mere suit for permanent injunction is maintainable in law when the title of the plaintiff was denied and the suit property is not a vacant site?

(d) Whether the decree for permanent injunction is sustainable in law when the plaintiff had not adduced any evidence to show his continuous possession of the suit properties from 1980?

(e)Whether the Courts below erred in law in holding that Ex.A2, Will, said to have been executed by Parvathy Ammal, is true and genuine when the plaintiff, the propounder of the Will, failed to examine himself and in the absence of any explanation?

(f)Whether the Will, Ex.A2, is surrounded by suspicious circumstances and not dispelled by the propounder of the Will?

8. The suit has been laid for Permanent Injunction. The plaintiff claims title to the suit property by virtue of the Will dated 20.12.1980 executed by Parvathi Ammal. That the suit property belongs to Parvathi Ammal is not an issue. The plaintiff's mother is one of the daughters of Parvathi Ammal. The defendant has disputed the genuineness of the Will dated 20.12.1980 and according to the defendant, the said Will is a forged document.

9. According to the plaintiff, after the death of Parvathi Ammal, the Will executed by her in his favour has come into effect and accordingly, he is entitled to suit property and he is in possession and enjoyment of the suit property and inasmuch as the defendant attempted to interfere with his possession and enjoyment, he has been necessitated to file the suit for permanent injunction.

10. The plaintiff has averred in the plaint that Parvathi Ammal had died and to establish the same, he has filed VAO's certificate along with the plaint. The defendant has disputed the factum of the death of Parvathi Ammal in the written statement. Accordingly, it could be seen that the trial Court has framed an issue, whether the case of the plaintiff that Parvathi Ammal had died is true or not.

11. According to the defendant, inasmuch as the plaintiff had not established the factum of death of Parvathi Ammal, the alleged Will said to have been executed by Parvathi Ammal could not come into force and therefore, the plaintiff, having failed to prove the death of Parvathi Ammal, may not be allowed to claim title to the suit property under the alleged Will and therefore, the plaintiff should not be non suited on the said ground alone.

12. In the light of the defence put forth by the defendant, as rightly argued, the plaintiff is duty bound to establish that Parvathi Ammal, who is his maternal grandmother, had died, as pleaded by him.

13. In the plaint, the plaintiff has vaguely averred that Parvathi Ammal had died and to establish the same, he had produced the VAO's certificate. It has not been stated by the plaintiff in the plaint, as to when and where Parvathi Ammal had died. Therefore, it could be seen that the date of death and place of death of Parvathi Ammal had not been furnished in the plaint by the plaintiff.

14. The plaintiff's father Thiruvengadam has been examined as PW1. PW1, in his evidence, has also deposed that Parvathi Ammal had died and that VAO's certificate had been filed along with the plaint to establish the same. In the evidence of PW1 also, he has not stated as to when and where Parvathi Ammal had died. The alleged VAO's certificate said to have been filed by the plaintiff, along with the plaint, has also not been exhibited. However, the Courts below have proceeded on the footing that the plaintiff has established the death of Parvathi Ammal on the basis of the alleged VAO's Certificate. When the defendant has seriously disputed the factum of death of Parvathi Ammal, as rightly argued by the learned counsel for the appellant, the plaintiff should have adduced acceptable and reliable evidence to establish that Parvathi Ammal had died. As seen earlier, the plaintiff

has not disclosed as to when and where Parvathi Ammal had died either in the plaint or during the course of evidence. No documentary evidence has been filed by the plaintiff to establish that Parvathi Ammal had died on such and such date. Further, the plaintiff has also not cared to establish through the other heirs of Parvathi Ammal to hold that she had died.

15. On the other hand, the only document relied on by the plaintiff in the plaint to show the death of Parvathi Ammal is the VAO's Certificate. However, the said VAO's certificate has also not been exhibited. Therefore, the findings of the Courts below that the plaintiff has established the factum of death of Parvathi Ammal, on the basis of the VAO's Certificate, as rightly argued by the learned counsel for the appellant, is perverse and unacceptable.

16. It is argued by the learned counsel for the respondent that Parvathi Ammal, having expired in Singapore, the plaintiff was unable to produce any certificate to establish her death. However, as rightly argued by the learned counsel for the appellant, the factum of death of Parvathi Ammal having been denied, the plaintiff is duty bound to produce the death certificate of Parvathi Ammal issued by Singapore

Authorities and in the absence of such document, he contended that the Court should draw adverse inference against the plaintiff. The above argument seems to be acceptable.

17. The Courts below having failed to note that the plaintiff has failed to establish the death of Parvathi Ammal, on the other hand, erred in shifting the burden on the defendant and decided the issue against the defendant holding that inasmuch as the defendant has failed to establish that Parvathi Ammal is alive as on date, the plaintiff's case should be accepted. Therefore, the approach of the Courts below in shifting the burden on the defendant to prove the fact that Parvathi Ammal is alive, is erroneous, both on facts and on law.

18. The plaintiff, having come forward with the specific case that Parvathi Ammal had died and having claimed title to the suit property on the basis of the Will alleged to have been executed by Parvathi Ammal, as rightly argued by the learned counsel for the appellant, only on the death of Parvathi Ammal, the plaintiff would be entitled, at the most, to claim title to the suit property on the basis of the alleged Will said to have been executed by Parvathi Ammal.

19. On the other hand, when the plaintiff has failed to establish the death of Parvathi Ammal by producing acceptable and reliable evidence, as rightly argued by the learned counsel for the appellant, the Courts below erred in law in holding that Parvathi Ammal had died and also erred in law in placing the burden on the defendant to prove that Parvathi Ammal is still alive, when the plaintiff had not discharged his burden. Therefore, the findings of the Courts below that Parvathi Ammal had died in the absence of evidence whatsoever, is perverse and cannot be countenanced in the eyes of law.

20. In the light of the above discussions, I hold that the plaintiff has miserably failed to establish that his maternal grandmother Parvathi Ammal had died.

21. Parvathi Ammal is said to have executed a Will bequeathing her properties in favour of the plaintiff. Therefore, only on the death of Parvathi Ammal, the Will would come into force. When the disputed factum of death of Parvathi Ammal has not been established by the plaintiff, whether the Will alleged to have been executed by Parvathi Ammal is true or not and the genuineness of the Will marked as Ex.A2 need not be gone into further.

22. The plaintiff claims title to the suit property based upon the Will alleged to have been executed by Parvathi Ammal. However, in the absence of proof of death of Parvathi Ammal, the question of the alleged Will coming into force does not merit acceptance. In such circumstances, as rightly argued by the learned counsel for the appellant, in the absence of the Will, the plaintiff would not be entitled to lay any claim over the suit property. Therefore, it could be seen that the plaintiff should be non suited on the sole ground that he has no document of title in his favour, in respect of the suit property. No doubt, the plaintiff is the grandson of Parvathi Ammal. The suit has been simpliciter laid for Permanent Injunction. In such circumstance, the focus should be on the aspect as to whether the plaintiff is in possession and enjoyment of the suit property. Barring Exs.A1 and 2, the house tax receipts are projected by the plaintiff and marked as Exs.A3 and A4 to show that he is in possession and enjoyment of the suit property. These two documents viz., Exs.A3 & 4 have come into existence, barely, three months prior to the filing of the suit. Those documents are standing in the name of Parvathi Ammal. On the basis of the above said two documents, this Court cannot safely come to a conclusion that the plaintiff is in legal possession and enjoyment of the suit property. Therefore, as rightly argued by the learned counsel for

the appellant, the plaintiff, having failed to establish that he has title over the suit property and that the suit property is in his possession and enjoyment, it could be seen that the plaintiff would not be entitled to obtain the relief of Permanent injunction, as claimed in the suit.

23. The learned counsel appearing for the respondent/plaintiff contended that the death of Parvathi Ammal is established by preponderance of probabilities through the evidence of PW1. Apart from the *ipse dixit* testimony of PW1, this Court has no other reliable evidence to come to the conclusion that Parvathi Ammal had died. When it is the specific case of the defendant that the plaintiff has projected a false case of death of Parvathi Ammal, in the absence of any proof adduced by the plaintiff with regard to the same, it could be seen that the plaintiff cannot be allowed to contend that he has established the death of Parvathi Ammal by preponderance of probabilities merely on the sole oral testimony of PW1.

24. It is further argued by the learned counsel for the respondent that the Court should draw a conclusion that Parvathi Ammal had died based upon the joint account said to have been established in the name of Parvathi Ammal and the defendant. Ex.B25 is the passbook for the joint account in the name of Parvathi Ammal

and the defendant, E (or) S Account. From that document, this Court cannot infer that Parvathi Ammal had expired. As rightly contended by the learned counsel for the appellant, the account being E (or) S, the defendant would be entitled to operate the account alone, even during the absence of Parvathi Ammal. Therefore, Ex.B25 would not serve any purpose to hold that Parvathi Ammal had died as claimed by the plaintiff.

25. The suit has been laid for Permanent Injunction. The defendant has disputed the title of the plaintiff in respect of the suit property. Despite the same, the plaintiff has not taken steps to claim the relief of declaration over the suit property by seeking suitable amendment. As rightly projected by the learned counsel for the appellant, when the plaintiff has not placed any acceptable evidence to hold that he has a prima facie title, it could be seen that a mere suit for Permanent injunction is not maintainable in the eyes of law. As found earlier, the plaintiff has failed to establish that he is in possession and enjoyment of the suit property, prior to the suit, on the date of the suit or after the institution of the suit. In such circumstances, the plaintiff would also not be entitled to obtain a decree for permanent injunction as prayed by him.

26. In the light of the above facts, it could be seen that the Courts below have erroneously proceeded to decree the suit on the footing that Parvathi Ammal had died. The plaintiff, having failed to establish that Parvathi Ammal had died, the resultant conclusion could only be that the plaintiff has no title to the suit property and that he is not in possession and enjoyment of the suit property.

27. Further, as rightly argued by the learned counsel for the appellant, the suit filed by plaintiff appears to be a speculative one. If really, the plaintiff had a valid title over the suit property as projected by him, nothing prevented him from taking steps against the defendant in respect of the "B" schedule property, which is admittedly to be in possession and enjoyment of the defendant and which is also the property of Parvathi Ammal. However, for the reasons best known to the plaintiff, he has cleverly not filed the suit against the defendant in respect of the "B" schedule property and has reserved the lis in respect of the same, to a future date and has laid the suit against the defendant only in respect of the "A" schedule property. However, as found earlier, even in respect of "A" schedule property, the plaintiff having failed to establish his title, possession and enjoyment over the same, the plaintiff has to be non suited.

28. In the light of the above facts, the plaintiff having failed to establish legal title, possession and enjoyment in respect of the suit property, as rightly argued by the learned counsel for the appellant, the decision relied on by the learned counsel for the respondent reported in **(1989) 4 Supreme Court Cases 603 (Southern Roadways Ltd., Madurai, Represented by its Secretary Vs. S.M.Krishnan)** would not be applicable to the facts and circumstances of the present case.

29. In conclusion, the second appeal is allowed and the Judgment and decree passed in A.S.No.24 of 2010 dated 27.08.2010 on the file of the Court of Additional Subordinate Judge, Mayiladuthurai confirming the Judgment and Decree passed in O.S.No.237 of 2004 dated 20.04.2009 on the file of the Court of District Munsif, Sirkali are hereby set aside and the suit filed by the plaintiff/respondent is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

18.10.2016

Index : Yes/No
Internet:Yes/No
sms

To

1. The Additional Subordinate Court,
Mayiladuthurai.
2. The District Munsif Court,
Sirkali.

T.RAVINDRAN,J.

sms

Pre-delivery order in
S. A.No.73 of 2011

18.10.2016