

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.08.2017

PRONOUNCED ON : 17.08.2017

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.1584 of 2000

1.Kaliammal

2.Lakshmiammal

3.Peruma

...Appellants

Vs

1.Krishnaveni

2.Kala

3.Jothi

... Respondents

Prayer:- Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree of the the Principal District Judge, Krishnagiri in A.S.No.19 of 2000 dated 27.07.2000 in confirming the judgment and decree of the Court of the District Munsif, Krishnagiri in O.S.No.679 of 1995 dated 30.07.1999.

For Appellants : Mr.M.Muruganandam,
for Mr.V.Ragavachari

For Respondents : Mr.J.Hariharan,
for Mr.V.Nicholas

JUDGMENT

This second appeal is directed against the concurrent finding of the courts below dismissing the indigent Suit filed for declaration, possession and mesne profits claiming that the plaintiffs are the daughters of Thimmaryan @ Periannan and Chinnammal.

2.The facts leading to the case are as follows:-

Item I of the 'A' schedule property is the plaintiffs father's property. Item II of the 'A' schedule property was purchased by their mother Chinammal on 06.04.1960. Thimmaryan died 37 years ago leaving behind his wife, 3 daughters (plaintiffs) and a son by name Ramasamy. The said Ramsamy did not marry anybody. He died in the year 1970. During his life time, in respect of item I of 'A' schedule property, the said Ramasamy has executed a settlement deed on 16.06.1959 in favour of the plaintiffs. Chinammal died 10 years ago. During the life time of Chinammal, she was allowed to reside in the suit houses, and to cultivate the suit lands. The plaintiffs were given some mahasool by their mother. Being the legal heirs of Chinammal, the plaintiffs alone are entitled to inherit item II of the 'A' schedule property. While so, after the demise of Chinammal, the first defendant, a cocubine of Ramasamy, was allowed to reside in the suit schedule houses along with her daughters, who are the second and third

defendants. When the plaintiffs asked the defendants to vacate the premises and hand over the possession, they refused to give possession. Hence, the plaintiffs have filed the present suit.

3.The suit was resisted by the defendants denying the plaintiff allegations and by placing their version of defence that, the first defendant is a legally wedded wife of Ramasamy. Second and third defendants are his children. When Thimmarayan died, his son Ramasamy was minor. So, his mother Chinnammal took over the administration of the family properties. She was in possession and enjoyment of entire properties. As a widow of Thimmarayan, after 1956, her right got enlarged under Section 14 (1) of the Hindu Succession Act, to succeed along with her son Ramasamy. On the death of Ramasamy, Chinnammal became the full owner of the suit properties described as item I of the 'A' schedule property. The II Item of 'A' schedule property was purchased by Chinnammal in the year 1960. During her life time, Chinnammal executed a Will dated 21.11.1976, bequeathing the suit properties in favour of the 2nd and 3rd defendants appointing their mother, the first defendant as guardian. The defendants are in absolute possession and enjoyment of the property as the legal heirs of Ramasamy and through the Will of Chinnammal. The alleged settlement deed of Ramasamy in favour of the plaintiffs is not a valid deed. The

plaintiffs got married long ago and living separately. They have no right in the suit properties. They were not sharing the mahazool nor there was any mediation to handover the possession to the plaintiffs as alleged in the plaint.

4.Before the trial Court, the second plaintiff was examined as P.W.1 and the settlement deed dated 16.06.1959 executed by Ramasamy to the plaintiffs and the sale deed dated 06.04.1960, in favour of Chinnammal in respect of II Item of the 'A' schedule properties were marked as Exs.A.1 and A.2 respectively. On behalf of the defendants, four witnesses were examined and 4 exhibits were marked as Exs.B.1 to B.4.

5.The trial Court declined to accept Ex.A.1 - settlement deed, as a valid deed, for the reason that the plaintiffs have not explained how Ramasamy derived right over entire properties of the Thimmarayan to settle in favour of the plaintiffs, when Chinnammal the widow of Thimmarayan was alive. The plaintiffs have failed to give the date or year of death of their parents or their brother. Without proving the right of Ramasamy to settle the entire properties or a portion of the property, no title over the property through the settlement deed - Ex.A.1 gets conferred on the plaintiffs to grant the relief of declaration of title.

6.Regarding possession, the trial Court pointing out that, though in the plaint, it is pleaded that the defendants came into possession of the properties after the demise of Chinnammal, in the deposition P.W.1, admits that their mother Chinnammal during her life time permitted the defendants to occupy in the suit premises and even after the demise of Chinnammal, the defendants were permitted to continue the occupation. Whereas, the defendants have established their continuous possession of the property along with Ramasamy and Chinnammal through house tax receipts and kist receipts marked as Exs.B.1 series and B.2 series; the Will Ex.B.3 and mortgage deed – Ex.B.4. The genuiness of the Will is proved through the testimony of first defendant and D.W.2 – Ramachandran, who scribed the Will Ex.B.3 and D.W.3 – Padmanaban one of the attesting witnesses to the Will. The plaintiffs claim title and possession over I item of 'A' schedule property through the settlement deed – Ex.A.1 dated 16.06.1959. However, the suit for possession is filed only in the year 1994. Since, the defendants are in possession of the suit property open, continuous and hostile to the plaintiffs for more than 12 years, the trial Court has dismissed the suit.

7.On appeal, the First Appellate Court, after reappreciating the evidences confirmed the trial Court judgment. The First Appellate Court while considering the right of Ramasamy to settle the property in favour of the

plaintiffs had also pointed out that neither of the parties have establish, 'Whether the property held by Thimmarayan @ Periyannan is an ancestral property or, his self acquired property to ascertain how it has to devolve on his demise. Through the testimony of the witnesses, the First Appellate Court presumed that Thimmarayan died in the year 1948 after Hindu Women's Right to Property Act, 1937 come into force. Therefore, Chinnammal the widow of Thimmarayan who got limited right in the property of her husband on his death, which got enlarged into absolute right after 1956. Ramasamy who died after 1956 is not entitled to settle the entire property of Thimmarayan @ Periyannan. Further, the settlement deed not proved through witnesses to the document. It also held that the Will – Ex.B.3 also not proved since, the defendants failed to examine the Attestor to the Will or explained why the attesting witnesses could not be examined by them. Thus, after holding both the settlement deed relied by the plaintiffs as well as the Will relied by defendants are not proved in the manner know to law, the First Appellate Court dismissed the appeal on the ground of open, continuous and hostile possession of the defendants adverse to the true owner i.e., plaintiffs.

8. Aggrieved by the judgment of the First Appellate Court, the plaintiffs are before this Court with this Second Appeal. At the time of admission, this Court has formulated the following substantial question of law:-

“Whether the lower appellate court is right in dismissing the suit after holding that the appellants are entitled to a share in the property ?”

9.The learned counsel for the appellants submitted that, the Courts below had erroneously rejected the duly registered settlement deed of Ramasamy for non examination of witnesses to the document and for failure to establish the right of Ramasamy to settle the entire properties. After rejecting the Will relied on by the defendants, the First Appellate Court ought to have moulded the relief at least to the extent of Ramasamy share which he is entitled from the estate of his father Thimarayan @ Periyannan. Having held that the Ramasamy have share in the properties and after rejecting the Will of Chinnammal, as not proved, the plaintiffs as co-sharers are entitled for lesser relief than what claimed. Dismissing the suit in its entirety on the ground of adverse possession is against law.

10.Refering the judgments of this Court and the Hon'ble Supreme Court, wherein the Courts have moulded the relief and granted lesser relief than what prayed for, the learned counsel submitted that even assuming that the settlement deed executed by Ramasamy in respect of entire

properties of Thimmarayan is bad, atleast to the extent of Ramasamy share Court has to pass a decree in favour of the defendants. Likewise, having held that the Will of Chinnammal not proved, it has to be taken that she died intestate and her properties, that is item II of the 'A' schedule property has to be divided among her legal heirs. Any event, the plaintiffs are entitled to share the suit properties as per the Hindu Law of Succession and the First Appellate Court instead of dismissing the appeal, ought to have given the lesser relief in the facts and circumstances of the case.

11.Per contra, the learned counsel for the respondents submitted that, the finding of the First Appellate Court regarding the Will Ex.B.3 is totally perverse and out come of non application of mind. The learned First Appellate Judge has misread the deposition of D.W.3 who is one of the attesting witnesses to the Will. The learned judge has wrongly understand that D.W.3 has deposed in his capacity of Junior Assistant in the Registrar Office since, he was at the time of giving evidence serving as Junior Assistant, in the registration Department. As a fact of the matter, at the time when the Will was executed in the year 1976, he was not in employment. D.W.3 has affixed his signature as one of the attesting witnesses to the Will. His presence and affixture of signature has been spoken by D.W.2 - the Scribe to the document. The trial Court after proper

appreciation of evidence, has rightly held that the Will of Chinnammal marked as Ex.B.3 is proved in the manner known to law. Whereas, the First Appellate Court has miserably failed to appreciate the testimony of D.W.3, leading to perverse finding on the veracity of the Will.

12.The plaintiffs who have approached the Court with suppression of fact and falsehood are not entitled for any relief whatsoever. Moulding the relief or granting lesser relief is to be exercised only when the plaintiffs established their case not as claimed but to a lesser extent. In the absence of plea and proof for lesser relief, the question of moulding the relief does not arise.

13.On examining the judgments cited by the learned counsel for the appellants, we find in **Angammal and v. Komara Gounder** (2002(1) CTC 472), while the plaintiffs claimed title to the entire extent of 3.58 acres of land, the defendant conceded title to an extent of 3.48 acres. The defendants pleaded and proved before the Courts that 10 cents of land was returned by the plaintiffs vendor, upon which, construction was put up and enjoyed by the defendants predecessor in title. In the said context, this Court has held as follows:-

“2..... The plaintiffs also claim that even assuming defendants have any right or title, they

have lost their right by non-enjoyment over the statutory period. The plaintiffs sought for declaration that they are entitled to the suit property and for consequential permanent injunction.

3. The first defendant filed a written statement adopted by defendants 2 and 3 contending that defendants retaining for themselves 10 cents of land sold only the balance to Vaiyapuri Gounder in the said survey number 299/8 and actually the sister of the defendants was in possession of that property (10 cents) and residing therein. After her death, it is the defendants who have been in possession and enjoyment of the said 10 cents of land. The further case set out in the written statement is that in fact in respect of that 10 cents of land, they have entered into an agreement to sell to one Palanisamy, son of Chinnusamy Goundar for a total consideration of Rs.9,000/- and in fact received an advance of Rs.3,500/-. It is also contended by the defendants that since they refused to sell the property viz., 10 cents of land at a cheaper rate to the plaintiffs, they have filed the suit only to harass them.

8. From the pleadings as well as the evidence adduced before the Court it is fairly clear that the appellants/ plaintiffs are entitled for 3.48 acres. Now the question is as to whether the suit has to be

dismissed in its entirety because appellants/ plaintiffs filed a suit claiming declaration and enjoyment for the entire extent of 3.58 acres in survey No.299/8. To put it differently, when the respondents/ defendants themselves admit before the Court the title of the appellants/plaintiffs for an extent of 3.48 acres, can the Court refuse to declare that on the ground that the appellants/plaintiffs have not come forward before the Court with the claim for a larger area."

14. In the above said judgment, the learned Judge has referred the judgment of the Hon'ble Supreme Court in **Hindalco Industries Ltd., v. Union of India** (1994 (2) SCC 594) wherein it has been held as follows:-

"But however, the legal position is, where the plaintiff claims less than what he is entitled to, the Court will not grant him any relief he has not specifically claimed unless the plaint is amended before the judgment. It was so held way back in the year 1838 in SOORIAH ROW v. COTAGHERY, (1838) 2 M.I.A. 113 and the said view was later on confirmed in a subsequent ruling of Calcutta High Court in the case PERCIVAL v. COLLECTOR OF CHITTAGONG, (1900) I.L.R. 30 CALCUTTA 516. At the same time, the Court should not refuse to grant a relief not specifically claimed in the plaint, if such

relief is obviously required by the nature of the case and is not inconsistent with the relief specifically claimed and raised by the pleadings. The Full Bench of the Lahore High Court in MEHER CHAND v. MILKHI RAM, A.I.R. 1932 LAHORE 40 1 (F.B.), held that it is the duty of the Court to mould the relief to be granted to the parties according to the facts proved which, however, should not be inconsistent with the pleadings.

Also relevant to mention in this context the ruling of the Supreme Court in KEDAR LAL v. HARILAL, A.I.R. 1952 SUPREME COURT 47 where it is held that the Court would be slow to throw out a claim on a mere technicality of pleading when the substance of the thing is there and no prejudice is caused to the other side however clumsily or inartistically the plaint may be worded and that in any event, it is always open to a Court to give a plaintiff such general or other relief as it deems just to the same extent as if it had been asked for, provided that occasions no prejudice to the other side beyond what can be compensated for in costs."

(Emphasis applied)

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15.In **Visalakshi Ammal v. Narayanaswami Naidu** (AIR 1978 Mad 72), in paragraph No.11, it has been held as follows:-

“It is well settled that when the plaintiff claims a larger interest but was able to establish a lesser interest, to the extent he was able to establish his interest, a decree could be granted. The plaintiff is accordingly, given a preliminary decree for partition and separate possession of his one-third share in the suit properties, I may add that in the view that he will be a co-owner of the suit property, the defendants will not be entitled to any improvements even if they had made any such improvements.”

16.From the above judgments relied by the learned counsel for the appellants, what could be derived is that to grant lesser relief or mould the relief sought, first the plaintiffs should have established lesser interest through evidence adduced before the Court. Second, no prejudice should be caused to the other side beyond what can be compensated for its costs.

17.The case of the plaintiffs in this case is that the defendants are strangers to the properties, they were permitted to occupy the property 10 years ago after the demise of Chinnammal. Their brother Ramasamy settled the property to them in the year 1959. Based on these pleadings without adequate proof of settlement deed, without proof of constructive possession, without any plea or proof, how their setlee Ramasamy entitle to settle the property and even without a specific plea that the properties are ancestral

property or self acquired property, how could Court mould the relief or grant lesser relief in the absence of plea and proof ? Just because the First Appellate Court has said Ramasamy has share in the property of his father, Thimmarayan @ Periannan, it does not mean the plaintiffs will get share in the property as per the settlement deed – Ex.A.1 without the settlement deed is properly proved.

18.The First Appellate Court though dismissed the appeal, the reasoning for disbelieving Ex.B.3 – Will, is contrary to fact. The learned First Appellate Judge has wrongly understood the evidence of D.W.3 as the person who was working as Junior Assistant in the Registrar Office when Ex.B.3 was registered. In fact, the Will was executed and registered in the year 1976. At that time, D.W.3 was not a Junior Assistant in the Registrar Office. In his deposition, D.W.3 has clearly stated that during the relevant point of time (1976), he was a Document Writer at Registrar Office as a free lancer. He was asked to witness the execution of the Will by Chinnammal. Ramachandran (D.W.2) wrote the Will and read over it to Chinnammal. He saw Chinnammal affixing her thumb impression with full consent. When he was examined as witness on 22.06.1999 (nearly after 23 years), he has deposed that he is presently employed as Junior Assistant. The learned First Appellate Judge has erroneously held that attesting witness to the Will was

not examined to prove the Will – Ex.B.3. This is a wrong determination of issue. It is a patent error on appreciation of evidence by the First Appellate Court to hold that the genuineness of Will Ex.B.3 not proved. This is totally a perverse finding contrary to fact and well considered finding of the trial Court. Hence, exercising the power of the High Court under Section 103 of the Code of Civil Procedure, the fact wrongly determined by the First Appellate Court regarding the genuineness of Will – Ex.B.3, is hereby pointed out and the same is eschewed.

19. When the plaintiffs' have consistently pleaded that the defendants are total strangers and they occupied the suit property 10 years before the filing of the suit wherein, contrary to their pleadings, evidence shown that the defendants are the wife and children of Ramasamy and they are in possession of the property ever since first defendant married Ramasamy. In the absence of specific date on which Ramasamy died, or Chinnammal died, the plaintiffs cannot take advantage of a stray observation made by the First Appellate Court regarding the right of Ramasamy and the erroneous finding regarding the genuineness of Will Ex.B.3.

20. The plaintiffs have come with unclean hands, suppressing several vital informations regarding the property. Further, suggesting falsehood

about the defendants' relationship with their brother Ramasamy dis-entitle them for any relief. The pleadings and evidence of the plaintiffs is not sufficient to grant any relief to them. The First Appellate Court is right in dismissing the suit, inspite of observing that as legal representatives of Thimmarayan, they are entitled for share in the property. The substantial question of law is accordingly answered.

21.In the result, the Second Appeal is dismissed. Except the finding in respect of genuineness of Will – Ex.B.3, the decree and judgment passed by the First Appellate Court is confirmed. The decree and judgment passed by the trial Court is restored. No costs.

jbm

Index: Yes

Speaking order/non speaking order

17.08.2017

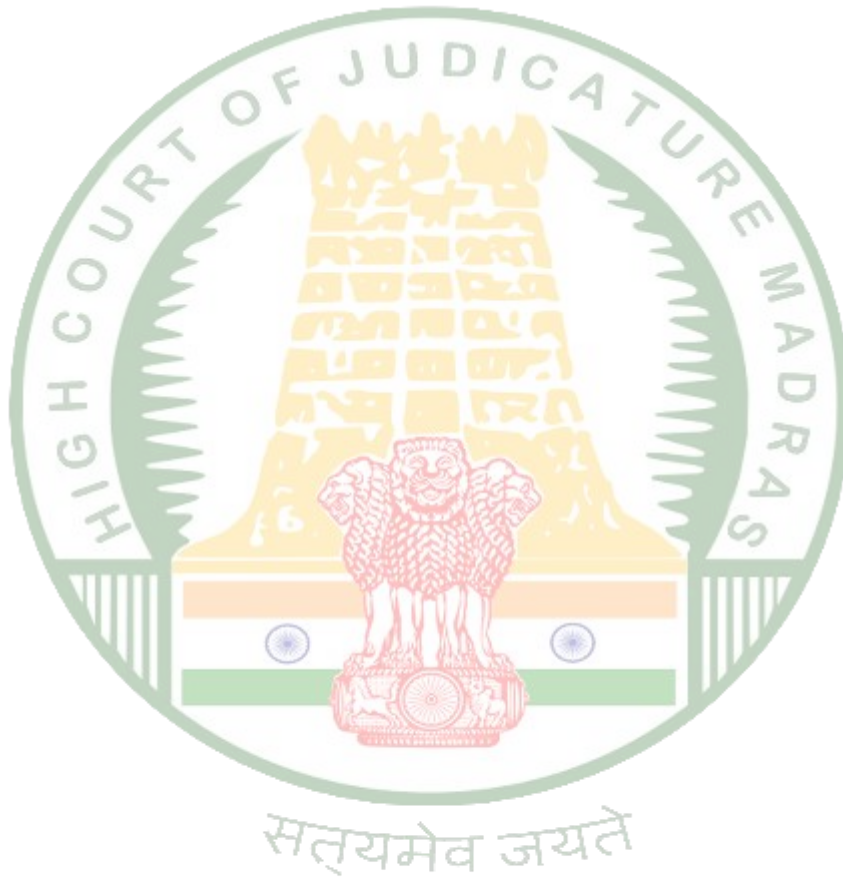
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To

1.The District Munsif,
Krishnagiri.

2.The Principal District Judge,
Krishnagiri.



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Dr.G.JAYACHANDRAN.J.,

jbm



Pre Delivery Judgment made in
Second Appeal No.1584 of 2000

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