

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 03.02.2017

Judgment Pronounced on : 03.03.2017

CORAM:

THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

C.M.A.No.1633 of 1999

1.Rajammal (deceased)

2.Subbulakshmi

.. Appellants

[2nd appellant is brought on record as legal heir of the deceased sole appellant (Rajammal) vide order dated 15.7.2005 in CMP.No.8240 of 2003]

Vs.

1.Chinnathayee (died)

2.Gangammal

3.Santha

4.Arumugam

5.Kuppusamy

6.Sugumar

7.Sakunthala Rani

.. Respondents

[7th respondent brought on record as legal heir of the deceased first respondent vide order dated 09.2.2016 in CMP.No.11125 of 2005 in CMA.No.1633 of 199]

(Respondents 2 to 4 are given up)

Prayer : Civil Miscellaneous Appeal filed under Order 43 Rule 1 (u) of C.P.C. against the order of remand by the judgment and decree dated 16.3.1998 in A.S.No.228 of 1998 on the file of the Principal District Court, Coimbatore reversing the judgment and decree dated 21.12.1992 in O.S.No.963 of 1987 on the file of the III Additional Subordinate Court, Coimbatore.

For Appellant : Mr.C.R.Prasanan

For Respondents : No Appearance

JUDGMENT

The plaintiff in a suit that she had filed for declaration of title over the plaint A-Schedule property and for consequential mandatory injunction seeking eviction of first defendant from plaint B-Schedule property which is part of A-Schedule property, has come forward with this appeal challenging the order of remand passed by the first appellate court.

2.1. The brief sketch of facts on which the plaintiff rests her cause for her action may be stated: Plaint A-Schedule property

was purchased by one Rangappa Naicker on 06.8.1919 vide Ext.A3, sale deed. Rangappa Naicker's wife was one Rangammal, and sometime in the year 1931, she purchased another property adjacent to the property covered under Ext.A3. The couple had one son Rangasamy and five daughters, of whom their youngest daughter was one Rangammal (should not be confused with the wife of Rangappa Naicker). On 19.11.1962, Rangappa Naicker executed a Will under which he bequeathed A-Schedule property to his youngest daughter Rangammal (henceforth, she would be termed as legatee Rangammal to avoid confusion with her name sake, her mother). The legatee Rangammal married one Govindasamy and the couple had no issues. While so, on 21.3.1979, legatee Rangammal died and her husband Govindasamy became her sole heir. Be that as it may, on 14.10.1983 under Ext.A2, sale deed Govindasamy sold plaint A-Schedule property to the plaintiff.

2.2. A-Schedule property has a total extent of 788 sq.ft., and it exists in two plots of 374 sq.ft. and 414 sq.ft. and there were three houses therein. They bear the door numbers as 75, 76 and 77.

2.3. The first defendant is one Chinnathayi and she is a widow of legatee Rangammal's brother Rangasamy. As Chinnathayi asserted some title in the suit property, the plaintiff had come forward with the suit for the reliefs already indicated.

3. Chinnathayi's defence to plaintiff's contention are three-fold :

- That the suit property is not a self-acquired property of her father-in-law Rangappa Naicker, but was an ancestral property in his hand;
- That after the demise of Rangappa Naicker, his son Rangasamy (husband of Chinnathayi) managed the property and has been in possession of the property;
- Ext.A-2 Will of Rengappa Naicker, dated 19.11.1962, is not genuine and it is alleged that legatee Rangammal would have unduly influenced her father, misrepresented and fraudulently obtained the Will.

Alternatively, she pleaded that she has perfected title to the A-Schedule property by adverse possession. She also contended that she is living in the portion of the property which the plaintiff herself admitted.

4. The trial court has framed a set of issues and two sets of additional issues, of which the first three issues it initially framed are critical. These are the first three issues and they are as below :

1. Whether the suit property is a self-acquired property of Rangappa Naicker?
2. Whether Ext.A2-Will is genuine?

3. Whether the first defendant has perfected title to the suit property by adverse possession.

5. Before the Trial court, plaintiff had examined as many as six witnesses. Of them P.W.1, P.W.4 and P.W.6 speak to the execution of the Will. P.W.3 is legatee Rangammal's husband Govindasamy. P.W.5 is another sister of legatee Rangammal. Since both the attesting witnesses of the Will namely Kembanna Naicker and Kaliappa Nadar have died by the time the Will was sought to be proved before the Court, the plaintiff attempted to prove it through P.W.1, the scribe of the Will and P.W.4 who is the son of Kembanna Naicker and P.W.6, the son of the other attesting witness Kaliappa Nadar. Both P.W.4 and P.W.6 have also produced Ext.A-22 and Ext.A-23 mortgage deeds that were executed respectively by their respective fathers around the time when the Will was executed to enable the comparison of their admitted signatures with the signatures found in Ext.A-2 Will.

6. On the first issue, the trial court held that the property was the self acquired property of Rangappa Naicker. To arrive at this finding it essentially relied on the recital in Ext.A-3 sale deed dated 06-08-1919 under which Rangappa Naicker purchased the property.

7. Turning to Ext.A-1 Will, after analysing the evidence of P.W.1, P.W.4 and P.W.6 along with documents Ext.A-22, Ext.A-23 which contained the admitted signature of the attesting witnesses, the trial court found that the Will is genuine. On first defendant's claim of prescribing title by adverse possession the trial court rejected it as devoid of merits. The trial court then proceeded to declare plaintiff's title but declined to grant a decree for mandatory injunction seeking eviction of Chinnathayi from B-Schedule property on the ground that while plaintiff pleaded that she was in possession of house in door No.75 evidence made available indicated that she lived only in the house bearing door No.77 regarding which there was no prayer.

8. Aggrieved by the decree of trial Court, Chinnathayi preferred A.S.No.228 of 1994 before the Principal District Court, Coimbatore. The first appellate court Vide its impugned judgment negated everyone of the finding of the trial Court on each of the issues. It would first observe that issue No:1 and additional issue:2 were in effect the same and that it was not known which one these two issues the trial court had considered. As to the question whether the plaint A schedule property was Rangappa Naicker's self acquisition and whether he had the right to execute the Will, the first appellate Court observed that even though there were prima facie materials to hold so, the evidence on it was inadequate to conclude thus. Regarding genuineness of the Ext.A-3 Will, the learned District Judge has held that it was necessary that an expert's opinion was required to be obtained by comparing the admitted signature of Rangappa Naicker with that of his purported and disputed signature. The

learned district Judge also felt a need to appoint a Commissioner for measuring the property and note down its physical features. For reworking on all the above aspects, it remanded the matter back to the trial court. This order of remand is now under challenge.

9. The learned counsel for the appellant contended that the first appellate Court has erred in stretching the scope of the suit to require a finding on the genuineness of the signature of the testator of Ext.A- 1 Will, when there was hardly any dispute. It requires the suit property to be measured by a Commissioner in the absence of any pleading by the first defendant doubting its identity or description. And, in a context where Rangappa Naicker was not known to possess ancestral property of any kind when he purchased A- schedule property under Ext.A-3 sale deed, the first appellate Court considers the same only as prima facie proof and as one requiring deeper and stronger proof. In a matter where decisions are to be made based on rule of probability the approach of the first appellate court to hunt for material more than what can be produced defies law and logic. In the end, the first appellate Court has in effect ordered re-trial of the matter which is impermissible in law. To fortify his submissions the learned counsel placed reliance on the authority in *Jegannathan Vs Raju Sigamani & Another* [(2012) 5 SCC 540].

10. I find considerable merit in the submissions of the learned counsel. An appellate Court shall use its power of remand sparingly. In this regard the circumstances in which remand may be ordered as illustrated in *Elumalai Vs Kanthamani Ammal* [(2017) 1 MLJ 379] may have some utility. Turning to facts of the present case, first, so far as the character of the suit property in the hands of Rangappa Naicker is concerned the available material should be adequate. In this regard the first appellate Court's approach lacked clarity as it does not state where exactly it required additional evidence to decide the issue. If according to it, the trial court has not adequately applied its mind to the evidence available before it, it only requires that it applied its mind to the same. After all it is the final court of facts and it has a duty to appreciate the evidence de novo. Secondly, on the question of genuineness of Will, genuineness per se can operate at two levels: One at the point of very execution of the Will, where the signature of its executant itself can be disputed; at the next level the genuineness of a Will can be disputed as vitiated by suspicious circumstances. A careful scanning of the first defendant's pleadings reveals that her defence fall under the second category. If so, why should there be a remand of the case to obtain an expert's opinion on genuineness of Rangappa Naicker's signature in Ext.A-1 Will? Thirdly, there is hardly any dispute as to the description or identity of the suit property as to warrant appointment of a Commissioner. The only dispute pertains to the house in which the first defendant lives. Fourthly, it is not a case where the trial court has passed a

decree by deciding the case on a preliminary point. The decision in Jegannathan's case that the appellant relies on applies on all fours to the case at hand.

11. In the end I find merit in the submissions of the appellant and accordingly this appeal is allowed. The first appellate Court is directed to dispose of this matter by a thorough appreciation of the entire evidence available on record within a period of one month from the date of receipt of the records of this case. No costs.

Sd/-

Asst.Registrar (CS VII)

/true copy/

Sub Asst. Registrar

To:

1.The Principal District Court,
Coimbatore.

2.The III Additional Sub Court,
Coimbatore.

+1 cc to Mr.C.R.Prasanan,advocate,sr.14310.

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krd 27/3

C.M.A.No.1633 of 1999

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