

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 24.01.2017

Date of Verdict : 31.01.2017

CORAM

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

S.A.No. 954 of 1999

Pothakudi Hyder Ali Shahib Dharga
By its sole Trustee Jainalubudeen
Ali Sha Kilbudeen/Sarguru S.B.
Abdul HusseinAppellant/Plaintiff

Vs.

Sheik AllauddinRespondent/Defendant

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree in A.S.No.78 of 1997 dated 19.08.1998 on the file of the Additional District Court, Nagapattinam reversing the judgment and decree in O.S.NO.148 of 1993 dated 24.12.1996, on the file of the Court of Additional Subordinate Judge, Nagapattinam.

For Appellant : Mr.A.Muthukumar

For Respondent : No appearance

JUDGMENT

The plaintiff is the appellant before this Court. The suit was filed for declaration and recovery of possession in respect of the suit schedule property which is admittedly owned by the plaintiff-Dharga. The defendant disputing the claim of the plaintiff as a sole trustee of the Dharga contended that the Dharga and its property are managed by two branches, for which the plaintiff is the representative of one branch and the defendant is the representative of the other branch. The affairs and income of the Dharga were managed on rotation. Insofar as the A schedule property is concerned, the defendant put up construction in it in the year 1989 and occupied the same and in respect of the B schedule property it is in possession of the defendant for a long time.

2. With those rival pleadings the suit was tried after

framing the following two issues as recasted:-

1. Whether the plaintiff is entitled for declaration and vacant ground possession of 'A' schedule property and whether the plaintiff is entitled for declaration and possession of 'B' schedule property?
2. What other reliefs the plaintiff is entitled to?

3. After examining the P.W.1 to 3 and D.W.1 and exhibits A1 to A21 and D1 to D4, the trial Court allowed the suit in favour of the plaintiff in respect of B schedule property and declared the title in respect of B schedule property and directed the defendant to vacate and hand over the vacant possession within two months from the date of decree. Insofar as the 'A' schedule property, the suit was dismissed. Aggrieved by the judgement and decree of the trial Court the defendant preferred a first appeal only in respect of 'B' schedule property, whereas the plaintiff preferred a Cross Objection in respect of 'A' schedule property.

4. The first appellate Court after formulating the points for determination, held that the plaintiff has failed to prove that he has been sole trustee of 'A' and 'B' schedule properties excluding the defendant and therefore he was not entitled for delivery of possession of both A and B schedule properties, therefore allowed the appeal filed by the defendant and dismissed the Cross Objection filed by the plaintiff. Aggrieved by the same, the plaintiff has preferred the present appeal.

5. This Court at the time of admission has formulated the following substantial question of law :-

1. Whether the learned District Judge erred in holding that both the plaintiff's line and defendant's line are entitled to the trusteeship in the absence of any decision in favour of the defendant holding that female heirs or their descendants are also entitled to trusteeship?
2. Whether the lower appellate Court erred in not granting decree for 'A' schedule property when admittedly it is Dharga property and that the defendant does not claim right by adverse possession on the basis of construction therein?
3. Whether the learned District Judge erred in law in reversing the decree of the trial Court with regard to 'B' schedule property in as much as the defendant is not entitled to continue in occupation of the same?

6. The learned counsel for the appellant submitted that a suit property is admittedly the property of the Dharga which was started for specific charitable purpose and trustees were named and authenticated by the author of the trust vide a

partition deed-Ex.A.1. As per the partition deed dated 09.06.1908, entered between Jainulabudeen Ali Sha, S/o. Ahemed Sha and Mohamathiya Sarguru, S/o. Kalanthar Ali Sha Pousthar, the eldest son among them should be the Sarguru of the Dharga and the younger son must be a Pousthar and manage the property and from out of the income, the person who is functioning as Sarguru will be entitled for 3/5 share and the person who is functioning as Pousthar is entitled for 2/5 share. On relying upon Ex.A.8, the extract of the Register, maintained by Nagoor Dharga, the Dharga Cherif pointed out that descendants of the plaintiff's family, viz., Jainulabudeen Ali Sha are always be a Sarguru of the plaintiff-Dharga and the defendant's family have neither taken administration nor management of the Dharga either as a Trustee or as a Sarguru. While so the first appellate Court has erroneously dismissed the suit without properly appreciating the admission of the defendant before the trial Court when he was examined as D.W.1.

7. The main contention of the learned counsel for the appellant is that the defendant is not a male descendant of the founder trustees. Admittedly, he trace the titled through one Maimoon Beevi, grandmother of defendant who is the wife of Kalanthar Ali Masthan and the defendant is the daughter's son of Maimoon Beevi. Further pointing out the evidence of D.W.1-son of the defendant who admits that the plaintiff is the Sarguru for the Dharga for the past 27 years and women cannot be a Sarguru for Dharga and they can only act as Trustee. The admission of party being the best evidence the first appellate Court ought to have dismissed the suit. In support of the contention the learned counsel appearing for the appellant relied upon the judgment of this Court rendered in "MLJ 1997 445. Sherwood Educational Society Vs. Abid Namazie and two others"

8. After notice to the respondent he had engaged a counsel, but he was not represented by counsel during the hearing. Hence this Court on hearing the submission of the appellant, proceed with the case by the available records.

9. The suit property consists of two items one is 'A' schedule property, which is a residential house bearing Door No.3/95A and another is residential property bearing No.3/94. As per Ex.A.1 the property has to be enjoyed by the male descendants of Hyder Ali Sha Shahib. The senior male descendant must be the Sarguru and the next senior will be Pousthar as per Ex.A.1. It is an admitted fact that the defendant is not the male descendant of Hyder Ali Sha Shahib. As per the record only male descendant may be a Sarguru or Pousthar of the property. Even if the defendant is in possession of the suit property and he put up construction over it, he cannot claim any rights over the suit property in the capacity of Sarguru or Pousthar. As pointed out earlier he is not a male descendant of Hyder Ali Sha

Shahib. Further the specific case of the defendant is that the plaintiff Dharga has been managed by two branches on rotation one by K.M. branch and another is R.S. Rasbit branch. Except pleading, there is no evidence to show that the Dharga is managed by two different branches. Further it is only the contention, without any evidence, more particularly contra to recital of Ex.A.1. Ex.A.1 is more than 100 years old and there is no document contrary to the recitals contemplated in Ex.A.1. If there is any document contrary to Ex.A.1, it is the duty of the defendant to establish the same. Without evidence to support, the defendant's case of joint management of Dharga, the first appellate Court just based on the possession had held in favour of the defendant by dismissing the suit in toto.

10. This Court has taken note of the fact that the defendant though not male descendant of Hyder Ali Sha Shahib, however is in possession of the property and such a possession is only permissive occupation and will not confer any right and construction put up by them is only at the risk of being evicted under due process of law. While the trial Court has properly considered the right of the respective party and had held in favour of the plaintiff in respect of 'B' schedule property and declined the claim of the plaintiff in respect of 'A' schedule property, where there is no adequate evidence to show that the 'A' schedule property is the property of the Dharga. However, contra to material evidence in respect of 'B' schedule property in favour of the plaintiff Dharga, the first appellate Court has rejected the claim of the plaintiff in toto, without giving due consideration of Ex.A.1 patta in respect of 'B' Schedule property and the admission of the defendant over the witnesses box in respect of the ownership of the 'B' schedule property favouring the plaintiff and admission of his occupation of the 'B' schedule property only after obtaining permission from the Sarguru of the plaintiff Dharga.

11. The Substantial question of law is answered accordingly. In the result, this appeal is partly allowed and the first appellate Court judgment is set aside and the trial Court judgment is restored. No order as to costs.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

1. The Additional District Court, Nagapattinam
2. The Additional Subordinate Judge, Nagapattinam.

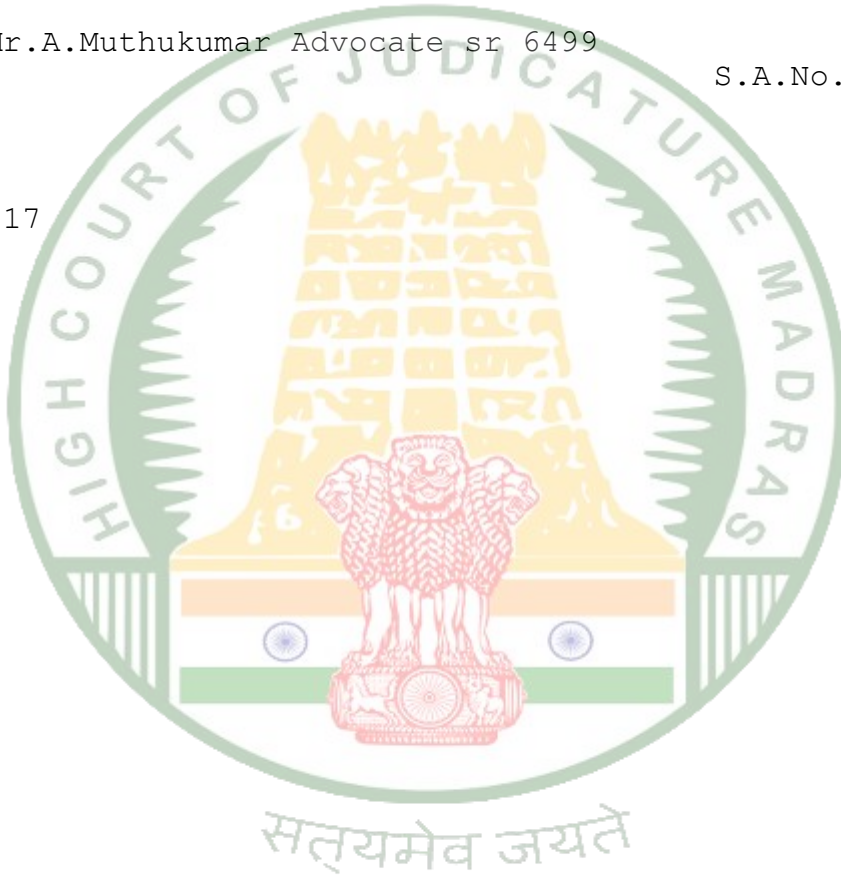
copy to:

The Section Officer
VR Section
High Court Madras

+1 cc to Mr.A.Muthukumar Advocate sr 6499

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