

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :02.08.2017

Pronounced on: 07.08.2017

Coram

The Honourable Dr.Justice G.JAYACHANDRAN

Second Appeal No.107 of 2000

and

C.M.P.No.1394 of 2000

Ganesan

..Appellant/Respondent/
Plaintiff

/versus/

Thangavel

..Respondent/Appellant/
Defendant

Second Appeal has been filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 23.03.1999 and made in A.S.No.5 of 1998 on the file of Sub Court, Athur, reversing the judgment and decree dated 26.11.1997 and made in O.S.No.192 of 1991 on the file of District Munsif, Athur.

For Appellant :Mr.R.Siddharth for
Mr.T.R.Rajaraman

For Respondent :Mr.R.Marudhachalamurthy

J U D G M E N T

The plaintiff in the suit is the appellant. Aggrieved by the judgment of the lower appellate Court reversing the trial Court decree passed in his favour the second appeal is preferred.

2. The case of the plaintiff is that the suit property was purchased by his mother Parvathi ammal on 27.01.1950. She bequeathed the property in favour of the plaintiff through unregistered sale deed dated 13.12.1984. After the demise of the said Parvathiammal on 05.01.1985, the plaintiff has become the absolute owner of the suit property as per the Will. In the year 1988, the plaintiff mortgaged the suit property in favour of one Ponnuvel, which was later redeemed on 18.04.1990. The defendant, who is another son of Parvathi ammal claiming right over the property trying to interfere his lawful right of enjoyment. Hence, the suit for permanent injunction restraining the defendant from interfering the peaceful possession.

3. The suit was resisted by the defendants on the ground that Parvathi ammal died intestate leaving behind two sons and two daughters. The suit property was purchased by Manicka mudaliar in the name of his wife Parvathiammal. One Krishnan oldest son of Manickam left the family after executing a release deed in the year 1963. The plaintiff and the defendant are sons of Parvathiammal. The marriage of the defendant in the year 1969, they all were living jointly. After 1969, the plaintiff started living on the eastern portion of the suit property and the defendant on the western portion. Parvathi ammal died after prolonged illness. 11 months after her demise, the defendant shifted his family to Puthiragoundanpalayam from Athapur. In the year 1988, he started a tea shop at Puthiragoundanpalayam. He mortgaged his portion of the property to one Marimuthu for Rs.4,000/- and permitted him to occupy the western side of the property. Thereafter, in the year 1989, the defendant and his father jointly remortgaged the western portion to one Subramani Chettiar for Rs.6,000/-. The Will purported to have been executed by Parvathiammal in favour of his son is denied as false and forged. She was not keeping good health before her death. She was not conscious for 40 days before her death. She was also speechless. The thumb impression found in the Will denied. Without seeking declaration of title, relief of bare injunction is not maintainable. The suit property is undervalued and the suit is bad for non-joinder of necessary parties.

4. The trial Court framed six issues. Examined three witnesses on the side of the plaintiff and three witnesses on the side of the defendants. The plaintiff marked 13 exhibits and the defendants marked 3 exhibits. After appreciating the evidence, the trial Court allowed the suit and granted injunction against the defendants.

5. On appeal by the defendants, the lower appellate Court set aside the trial Court judgment and decree dismissed the suit. Hence, the present appeal raising the following Substantial Questions of Law:-

(i) Is the learned Subordinate Judge correct in dismissing the suit for injunction on the ground that the plaintiff has not proved his title to the suit property?

(ii) When admittedly the plaintiff is in lawful possession of the suit property, is the learned Subordinate Judge correct in dismissing the suit?

6. Heard the counsel appearing for the appellant and the respondent.

7. The learned counsel for the appellant submitted that, the lower appellate Court overlooked the admission of the respondent regarding the possession of the plaintiff in respect of eastern side of the suit property. The lower appellate Court overlooked the revenue receipts Ex.A2 to A15 and the mortgage executed in favour of Ponnuvel. While the execution of the Will by Parvathiammal has been proved in the manner prescribed under law by examining the scribe and attesting witness. The lower appellate Court has reversed the well considered judgment of the trial Court, while the witness has given a plausible explanation for using two different para while writing the Will, the lower appellate Court has relied his finding on comparing the signature of PW2 found in the document and in deposition disbelieve to the Will. The lower appellate Court has wrongly relied upon the notices marked as Ex.B2 and Ex.B3, which were produced belatedly through DW3 and not confronted those document with the PW1(plaintiff) while he was in the witness box. When PW1 has denied the issuance of notice marked as Ex.B2 and B3, no credence should have been given by the lower appellate Court. Further, the learned counsel strongly relied upon the admission of the defendant made in the written statement that the eastern portion of the suit property bearing Door No.10-A is in possession of the plaintiff, the lower appellate Court ought not to have dismissed the suit in entirety.

8. Per contra, the learned counsel for the respondent referring the relevant portion of the lower appellate Court judgment submitted that, the deposition of DW2, who is none other than the sister of the contesting parties has categorically stated about the ill-ealth of her mother Parvathiammal before her death. The Will purported by the plaintiff is just one month prior to the death of the Executrix. The oral evidence of PW3 found not inspiring by the lower appellate Court is based on sound reasoning which required no interference. Further, PW3, Marimuthu, a tenant who is in occupation of the western portion of the property has categorically deposed about facts that the suit property is not in possession of the plaintiff. The plaintiff has issued notice to vacate the suit property under Ex.B2 and B3 while the title and possession not established by the plaintiff, injunction against the co-owner is unsustainable.

9. It is an admitted fact that the suit property was purchased by Parvathiammal. Though in the written statement, it is pleaded that the property was purchased by Manicka Mudaliar in the name of his wife Parvathiammal, there is no evidence to that effect. The Will propounded by the plaintiff is an unregistered document. In the Will the date '13'' found in different ink. The evidence of PW2 has not inspired the confidence of the lower appellate Court. Further, the death of Parvathi ammal 22 days after the alleged will and the evidence

of DW2 regarding the prolonged illness before her demise has caused doubt in the mind of lower appellate Court regarding the genuineness of the Will. Further, the exclusion of other legal heirs from devolution is one of the doubtful circumstances, which the lower Court has highlighted to disbelieve the genuineness of the Will.

10. It is time and again held by the courts that one of the purpose of executing a Will is to deviate from the normal course of devolution. The exclusion of other legals cannot be a sound reason to disbelieve a Will. The trial Court has considered the admission of the defendant during the cross examination about the allocation of immovables, cart and bulls to his share and another ancestral residential property to him. The trial Court has taken note of the fact that 2 daughters of Parvathi ammal were married 25 years ago and were provided with adequate "'seer' during their marriage. Whereas the lower appellate Court has totally ignored to consider these facts elucidated during trial and relied by the trial Court. Without assigning any reason to differ the findings of the trial Court and ignoring substantial part of evidence, the lower appellate Court has set aside the judgment of the trial Court.

11. The lower appellate Court referring Section 213 of the Indian Succession Act has held that the plaintiff can not claim right over the property based on the unprobated Will of Parvathiammal. He has cited the judgment of Hon'ble Supreme Court reported in AIR 1959 SC 443 and has observed that "Mere execution of Will, thus, by producing scribe or attesting witness or proving genuineness of testator's thumb impressions by themselves was not sufficient to establish validity of Will unless suspicious circumstances, usual or special, are ruled out and the Court's conscience is satisfied not only on execution but about its authenticity".

12. At this juncture it is pertinent to note that before the Trial Court one of the issues framed and decided is whether the suit is bad for non-joinder of necessary parties namely the other legal heirs of parvathiammal. The Trial Court has decided in favour of the plaintiff holding that in a suit for injunction, the parties who interfere the possession alone are necessary parties. Hence, the suit for bare injunction as against the person who threatens the possession is maintainable. Thus the parties as well the Courts below were conscious of the fact in dispute. The Will has been subjected to test for the collateral purpose of establishing the possession. While so, even if the lower appellate Court was not satisfied about its execution or authenticity, it ought not to have overlooked the admission of the defendant regarding possession of the plaintiff in respect of western part of suit property.

13. Further the lower appellate Court has accepted the defendants plea of the suit property bearing Door No.10-B was mortgaged to DW2(Marimuthu) by the defendant for Rs.4000/- and DW2 is in possession of the same. The lower appellate Court has wrongly relied upon the ocular evidence of DW2 to hold that the plaintiff is not in possession of the suit property. When the alleged mortgage of the eastern portion of the suit property to Marimuthu is not supported by any documentary evidence and when the defendant himself has expressly admits that western portion of the suit property(bearing Door No.10-A) is with the plaintiff, the lower appellate Court ought to have granted the relief of injunction to the portion of the property bearing Door No.10-A, since the plaintiff has proved his possession in respect of that portion.

14. For the aforesaid reasons, this Court set aside the judgment of the lower appellate Court and partly allow the suit by granting the relief of injunction in respect of the portion of the suit property bearing Door No.10-A, Natham S.No.226/1, AlA, Ward 2, Ethappur Village, Athur Taluk, Bethanaickenpalayam, Salem District.

15. As a result, this Second Appeal is Partly allowed. No costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

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To

1.The Subordinate Judge Athur.

2.The District Munsif, Athur.

3.The Section Officer

VR Section High Court Madras

S.A.No.107 of 2000 and
C.M.P.No.1394 of 2000

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