

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 22.02.2017
Pronounced on : 02.03.2017

CORAM

THE HON'BLE DR. JUSTICE G.JAYACHANDRAN

Second Appeal No. 575 of 2010

Jagadambai

.. Appellant/Appellant/Plaintiff

Versus

1. Suresh Kumar
2. Rahamatullah
3. Mrs. Heladt
4. Abdul Hafeex
5. Mohammed Hanees
6. Mir Zardar
7. Abdul Zardar

... Respondents/Respondents/Defendants

Appeal filed under Section 100 of Civil Procedure Code 1908, against the judgement and decree of the learned First Additional Judge, City Civil Court, Chennai, dated 24.09.2007 in A.S.No.459 of 2006, confirming the judgment and decree of the learned II Assistant Judge, City Civil Court, Chennai, dated 14.02.2005 in O.S.No.665 of 1995.

For Appellant : Mr.P. Mani for
Mr. P. Guru Ramachandran

For Respondents : Mr. M.L. Ganesh for RR4 to 7
R1 to R3- Exparte

JUDGMENT

The plaintiff is the appellant before this Court. The suit was filed for declaration to declare that the plaintiff is the absolute owner of the suit property, the sale made in favour of the defendants 4 to 7 is void and to direct the defendants to deliver vacant possession of the suit property.

2. The case of the plaintiff before is that she is the widow of late B.M.Murugesan, who is the owner of the suit property. The said Murugesan died on 05.05.1994. After his death, as a sole legal heir of Murugesan, the plaintiff succeed to his estate. Due to matrimonial dispute, the said Murugesan deserted the plaintiff and therefore, she filed M.C. No. 282 of

1988 on the file of the learned Additional Family Court, Chennai and obtained an order dated 20.06.1990 for payment of maintenance at the rate of Rs.350/- per month, which was paid to her till April 1994. According to the plaintiff, after deserting her, her husband Murugesan resided along with the first defendant and taking advantage of the same, the first defendant had let out the schedule property to the defendants 2 and 3 and the rent thereof was collected by the first defendant. After the demise of B.M.Murugesan, the plaintiff requested the first defendant to transfer the tenancy in her favour so that she could collect the rent from the defendants 2 and 3, but it was refused by the first defendant. In such circumstance, the plaintiff has filed the suit for declaration. Pending suit, the first defendant has sold the suit schedule property to defendants 4 to 7 on 26.05.1995. Therefore, the plaint was amended impleading the purchasers pendente lite, the defendants 4 to 7 and included the prayer to declare the sale in favour of the defendants 4 to 7 as void.

3. The first defendant filed his written statement claiming that he is the sole surviving legal heir of the deceased B.M.Murugesan, having born to his second wife. According to the first defendant, the deceased executed a Will dated 29.05.1986 registered in the office of the Sub Registrar Office, Periamet, whereby he had bequeathed the suit property in his favour. As per the intention of the testator, he paid a sum of Rs.200/- per month to the plaintiff. The specific case of the first defendant is that B.M.Murugesan had three wives, two of them predeceased B.M.Murugesan. The plaintiff and the first defendant are the surviving legal heirs of B.M.Murugesan. As per the will, the plaintiff is not entitled to succeed the estate of B.M.Murugesan but only entitled for Rs.200/- per month for her maintenance.

4. The plaintiff has filed a reply statement alleging that the first defendant is not the son of B.M.Murugesan and he was an orphan brought from Kasthuribai hospital. The deceased Murugesan, on account of his chronic ailment was keeping the first defendant as a helper. Taking advantage of the position, the first defendant has fabricated and created a "Will" alleged to have been executed by B.M.Murugesan. The Will was not probated as required by law and therefore, it cannot be relied upon by the first defendant. The first defendant, taking advantage of the ill health of the deceased, continued to exploit the situation. As regards the plaintiff, due to fear of her life, she has left the suit premises leaving the deceased. The Plaintiff has filed the suit prior to the purchase of the suit property by defendants 4 to 7. The defendants 4 to 7 have purchased the suit property to deprive the right of the plaintiff. Having purchased it on their own risk from a person who has saleable right, title, interest to the suit property,

these defendants have no locus to contest suit.

5. The defendants 4 to 7 also contended the suit by stating that the suit property was purchased by one Melliammal, the mother of the first defendant. The defendants 4 to 7, after verifying the title deeds and legal heir certificate issued by Tahsildar, have purchased the suit property after exercising prudent care and valid search. They denied the status of the plaintiff as legally wedded wife of deceased B.M.Murugesan. According to the defendants 4 to 7, the silence of the plaintiff between 1995 and 2001 is deliberate and wanton. The Plaintiff has not explained the reasons for not visiting the deceased for about six years besides that it was not clearly explained in the plaintiff, which is sufficient to dismiss her suit. It is the first defendant, who is the sole surviving legal heir of deceased Melliammal and the plaintiff has no right to claim any title in respect of the suit property. The suit is filed with malafide intention to extract money from the bonafide purchasers and therefore not sustainable.

6. Based on the pleadings, the trial Court has framed the following issues:

- a. Whether the plaintiff is entitled for the relief as sought for?
- b. What other relief the plaintiff is entitled?

7. On behalf of the plaintiff, the plaintiff and one Thamayanthi Moris were examined as P.W.1 and P.W.2 and seven exhibits were marked on behalf of the plaintiff. On the side of the defendants, three documents were marked and no witness was examined.

8. The trial Court as well as the appellate Court dismissed the suit holding that the plaintiff has failed to establish that the suit property is her absolute property as a legal heir of B.M.Murugesan, therefore, the plaintiff is not entitled for the property. In the absence of proof as to how the property devolved upon B.M.Murugesan, the plaintiff is not entitled for the relief sought. Regarding Ex.B1 and B2, sale deed in favour of the defendants 4 to 7 executed by the first defendant, the trial Court traced the title of the property from one Melliammal. According to the trial Court, the said Melliammal is the mother of first defendant. So relying upon the recital found in Ex.B1 and B2, which were executed by the first defendant in favour of defendants 4 to 7, the trial Court concluded that the plaintiff has not proved her right in the suit property. The first appellate Court on appeal by the plaintiff formulated the following for consideration.

1. Whether the appellants/plaintiffs is the sole legal heirs of the deceased B.M.Murugesan?
2. Whether the plaint schedule property belongs to

B.M.Murugesan?

3. Whether the first respondent/first defendant is the legal heir of the
B.M.Murugesan?

9. The lower appellate Court taking note of the order of the Family Court marked as Ex.A5 and the family pension paper Ex.A7 received by the plaintiff held that the plaintiff has not proved that she is the wife of deceased B.M.Murugesan besides that she has failed to prove as to how her husband B.M.Murugesan is entitle to the suit property. In the absence of any pleading the plaintiff's claim that she is the only surviving legal representative of the deceased B.M.Murugesan cannot be considered. The plaintiff has not produced legal heir certificate from the revenue authority or succession certificate from the Court to prove that she is the legal representative of the deceased B.M.Murugesan. The pension paper and Family Court order will prove that she is the legally wedded wife of the deceased B.M.Murugesan. Admittedly, the suit property stands in the name of Melliammal. The plaintiff contends that there was no issue born to her out of the wedlock with B.M.Murugesan or through his second wife and in the absence of any specific pleading in the plaint that she is the first wife of deceased B.M.Murugesan or Melliammal adopted the first defendant as her son or brought him as foster son, the relief of declaration cannot be granted. On the other hand, the defendants 4 to 7 have pleaded in the written statement that they are bonafide purchaser for valuable consideration after ascertaining the title of the first defendant and after perusing the parent document as well as encumbrance certificate. Therefore, the appellate Court confirmed the decree passed by the trial Court. Aggrieved by the concurrent finding of the Courts below, the plaintiff has preferred the second appeal raising the following substantial questions of Law:

1. Whether lower Courts could brush aside the legitimate public documents of the plaintiff filed in support of her legal claim?
2. Whether the Courts below could fail in dealing with the documents for purpose of giving proper findings?
3. Whether the Courts below could fail to recognise the plaintiff as wife as could be understood from the public documents for giving relief under the class I heir of the Hindu Law in her husband's property?

10. This Court before admitting the second appeal thought it fit to hear the respondents to ascertain whether the above said questions of Law raised by the appellant is sustainable.

The respondents entered appearance through counsel and made the submission.

11. According to the learned counsel for the appellant the judgment of the Courts below are perverse and illegal. The Courts below, in the absence of any piece of document to show that the first defendant is son of B.M.Murugesan, have merely relied upon Ex.B1 and B2 a document, which were executed subsequent to the filing of the suit. When neither the vendor/first defendant nor the purchasers/defendants 4 to 7, have come before the Court to give evidence, the Courts should have taken adverse interference about the genuineness and bonafideness of the sale deed executed in favour of the purchasers pendente lite.

12. Per contra, the learned counsel for the respondents 4 to 7 submitted that the Courts below have arrived at a conclusion only after proper appreciation of the evidence placed by the plaintiff and defendants, which was also examined by the appellate Court to come to a right conclusion that the plaintiff is not entitled to the relief sought for in the plaint. Further, the courts below found that the plaintiff has to prove her case on her own and she cannot take advantage of the weakness of the defendants in so far as it relates to non-examination of the witnesses on the side of the defendants. In such event, this Court, in exercise of the power conferred under Section 100 CPC need not interfere with the Judgment and decree passed by the Courts below when there is no substantial question of Law involved in this appeal.

13. The trial Court categorically held that the documents produced by the plaintiff are not sufficient to prove that suit property is her absolute property and would not prove that she is the sole legal heri of the deceased B.M.Murugesan. Further, as a bonafide purchaser the rights of the defendants 4 to 7 has to be protected. Therefore, both the Courts below have disbelieved the case of the plaintiff.

14. This Court on going through the judgment of the Courts below and the documents marked by the parties found that sinister design has been adopted in the sale transaction to deprive the right of the plaintiff. Unfortunately both the Courts below have totally misread the recitals found in Ex.B1 and B2, which has been executed after the institution of the suit. The specific case of the plaintiff and proved through evidence is that she is the legally wedded wife of deceased B.M.Murugesan. It is an admitted case of the parties that Melliammal is the first wife of B.M.Murugesan.

15. In the written statement filed by the first defendant, he claims himself as sole surviving legal heir of the deceased

B.M.Murugesan. It is also his specific averment in para 4 of his written statement that B.M.Murugesan had three wives and two wives pre-deceased him and he left behind him the first defendant and the plaintiff as his legal heirs. His further case is that B.M.Murugesan has executed a Will on 29.05.1986 bequeathing the suit property in favour of the defendants on condition that he should pay Rs.200/- as maintenance to the plaintiff. The Appellate Court observed that the Will has not been probated. Further, the defendants 4 to 7 have purchased the property not based on the Will but on the legal heirship and therefore, the sale is valid. Unfortunately, the legal heirship certificate referred by the first appellate court is also not a document marked in the suit.

16. The defendants 4 to 7 have pleaded as though they are bonafide purchaser for value from the first defendant after ascertaining the title of the first defendant and after perusing the parent documents as well as the encumbrance certificate. To buttress this submission, the trial Court has referred to the recitals in the sale deeds Ex.B1 and B2, which says the property was purchased by his mother Melliammal, leaving behind her husband B.M.Murugesan and the first defendant as her legal representative. Thereafter in the year 1994, the first defendant's father died intestate leaving the first defendant as the sole legal representative. The self-serving statement in a document which came to be executed subsequent to the filing of the suit will no way help the case of the defendants 4 to 7 to plead that they were bonafide purchasers. Further, neither the vendor/first defendant nor the purchasers/defendants 4 to 7 have entered the witness box to testify their averments made in the written statement.

17. When there is a specific denial of parentage of the first defendant and oral evidence of P.W.1 and P.W.2 that the first defendant is not related to B.M.Murugesan, it is the duty of the defendants to dislodge the said averment. They cannot keep quiet without producing birth certificate or legal heirship certificate or any document to prove that the first defendant was son of B.M.Murugesan. The two documents relied by the defendants are the sale deed executed in favour of Melliammal dated 02.12.1953 and the sale deed executed by the first defendant in favour of defendants 4 to 7. As pointed out earlier, the recitals found in the Ex.B1 and B2 will no way help the defendants 4 to 7 to claim themselves as bonafide purchasers. In fact, without perusing any document to show that first defendant is related to Melliammal or B.M.Murugesan they purchased the suit property. Pending litigation, by their own conduct, the defendants 4 to 7 have purchased the suit property and therefore it is obvious that they are not bonafide purchaser for value or purchaser from a lawful owner.

18. While, the Courts below have accepted that the plaintiff is legally wedded wife of B.M.Murugesan and the suit property stands in the name of Melliammal, who is the second deceased wife of B.M.Murugesan, the Courts below should have applied their mind as to how the property of the deceased wife should devolve on the first defendant. The Courts below have found fault that plaintiff cannot claim absolute title over the suit property since she has not traced her title to her husband. Well saying so, the Courts below also says as to how the first defendant is claiming right over the property. It should have considered the admission of the first defendant in the written statement that he and the plaintiff are the surviving legal representative of B.M.Murugesan. The Courts below should have applied their mind whether even assuming the first defendant is one of the legal heirs of B.M.Murugesan and he alienated the suit property to the defendants 4 to 7 in such capacity, the averment posing himself as absolute owner of the suit property cannot be accepted. In the written statement he has contended that though he and the plaintiff are the legal heirs of B.M.Murugesan, the property was bequeathed to him absolutely through the Will dated 29.05.1986. When the said Will is not probated in a manner known to law, the first defendant cannot claim any title to the suit mentioned property as per the Will. The lower appellate Court has also not gone into the legality of the sale deeds Exs.B1 and B2.

19. The Courts below have miserably failed to consider the evidence and the pleadings in the right manner. As a deserted widow like the appellant herein she claims title to the suit property and prayed for a declaration. The person, who pleads contrary and in possession of documents cannot retain those documents and yet dislodge the claim of the plaintiff. At least the defendants should have entered into box and should have re-confirmed what they have stated in the written statement and produced document in support of their contention.

20. This Court fails to understand that when there is a specific plea made in the plaint that the first defendant is not the son of B.M.Murugesan, but an orphan, the burden is on the first defendant to establish that he was not an orphan but son of B.M.Murugesan. As rightly pleaded by the counsel for the appellant, the defendants have not marked any document in support of their defence and in such event, the courts below ought to have taken an adverse inference especially the failure of the first defendant to produce the Will purported to have been executed by the deceased B.M.Murugesan in his favour. When the lower appellate Court was wise enough to say that though there is a Court proceedings holding the plaintiff is the legally wedded wife of B.M.Murugesan and the pension paper indicates that she was the wife of B.M.Murugesan, the failure to produce legal heirship certificate from Tashildar or succession

certificate from the Court will not disentitle her to right to make a claim over the suit property. Instead, the Courts below ought to have taken an adverse inference against the defendants for not producing any documents.

21. For the above said reason, this Court is constrained to set aside the judgment and decree passed by the Courts below by allowing this second appeal and consequently holds that defendants 4 to 7 are not having bonafides to claim themselves as a purchaser of the suit property from the first defendant under Exs.B1 and B2. Accordingly, the second appeal is allowed, with costs.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

To

1. The II Assistant Judge
City Civil Court
Chennai
2. The Judge
First Additional City Civil Court
Chennai
3. The Section Officer
VR Section
High Court, Madras

+1 Cc to M/s. M.L. Ganesh, Advocate sr 13767
+1 CC to Mr. P. Guru Ramachandran, sr 13689

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SA No 575 of 2010

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