

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.01.2017

Coram

The Hon'ble Mr. Justice M.M.SUNDRESH

Second Appeal Nos.762 and 763 of 2015

N.Manickam

..Appellant in
both the appeals/Plaintiff

Vs

1.R.Saraswathi
2.R.Veeralakshmi
3.R.Nallakumar

..Respondents 1to3 in SA.762/15
Respondents 2to4 in SA.763/15/
Defendants 3,4,5

4.Chandraleka

..4th respondent in SA.762/15 & 1st
Respondent in SA.763/15/
1st Defendant

N.Vajaravel (died)

5.V.Rathamani
6.V.Rajeshwari
7.E.Rani

..Respondents 5to7 in
both the appeals/Defendants 6to8

SA.762 of 2015:

Second Appeals filed under Section 100 C.P.C. against the judgment and decree dated 12.12.2014 made Cross in A.S.No.9 of 2014 on the file of the II Additional District Court, Erode, reversing the judgment and decree passed in O.S.No.53 of 2011 dated 22.07.2013 by the II Additional Subordinate Judge, Erode.

S.A.NO.763 of 2015: to set aside the Judgment and decree dated 12.12.2014 passed in AS.No.9/2014 on the file of the II Additional District Court, Erode, confirming the Judgment and decree dated 22.07.2013 passed in O.S.NO.53/2011 on the file of II Additional Subordinate Judge, Erode.

For Appellant

.. Mr.I.C.Vasudevan in
both the appeals

For Respondents .. Mr.P.Immanuel Prakasam
in both the appeals

COMMON JUDGMENT

The plaintiff, who lost before both the Courts below in a suit for partition, is the appellant herein.

2.The brief facts are that the suit property to the extent 1710 sq.ft. was originally purchased by Nallakumara Gounder. He had one son by name Karumana Gounder. His wife purchased another extent of 462 sq.ft. on 15.09.1930. Nallakumara Gounder died and Karumana Gounder died on 24.04.1968 and his wife Nallammal died in the year 1987 respectively. Thus the suit property is the total extent of 2172 sq.ft., over which, a residential house stands as of now. Karrmana Gounder had two children by name Ramasamy and Ponnammal. Ramasamy died on 24.09.1996 leaving behind his wife Saraswathi - third defendant and a daughter and son - R.Veeralakshmi and R.Nallakumar/defendants 4 and 5. His another son died in 2002 as unmarried. The plaintiff is the son of Ponnammal, who died in the year 1952. Defendants 1 and 2 are the other daughter and son of Ponnammal. Defendants 6 to 8 are also the legal heirs through Ponnammal.

3.The suit has been laid by the plaintiff on two grounds. According to the plaintiff, the deceased Ramasamy had first wife by name Sorna @ Sornathal (since deceased). From her, he has purchased an extent of 271 ½ sq.ft. in the suit property. The remaining share is claimed by the plaintiff, being the legal heir of Ponnammal. Secondly, the claim has been made based upon the Will alleged to have been executed by the deceased Karrmana Gounder in his favour. This is an unregistered Will. There is no other witness who speaks about the Will except one, who though put himself for chief examination, did not turn up for cross-examination and therefore, even that was eschewed by the trial Court. From the pleadings, it is seen that the plaintiff has claimed the suit property as the one purchased by Nallakumara Gounder from the joint family income in the name of the deceased Nallammal. After the second purchase in the name of the deceased Nallammal, both the properties have been clubbed and jointly enjoyed.

4.It is the case of the contesting defendants that the suit property absolutely belongs to them. They have also questioned the genuineness of Ex.A3 the Will allegedly executed by Karumana Gounder. Reliance has been made on Ex.B1, which is a letter sent by the appellant/plaintiff to the Erode Municipality, acknowledging the title in favour of the defendants and thus expressing no objection for changes in the official records.

5.The trial Court dismissed the suit after holding that Sorna @ Sornathal was the first wife of the deceased Ramasamy and thus, the alienation made by her is valid. The appellant filed an appeal before the lower appellate Court. A cross objection was also filed by the contesting defendants against the finding qua the status and alienation of Sorna @ Sornathal. The lower appellate Court, though dismissed the suit, reversed the finding rendered by the trial Court with respect to the status of Sorna @ Sornathal and the consequential alienation made by her. Thus it was held that the factum of marriage between Sorna @ Sornathal and Ramasamy has not been proved. Aggrieved over the same, the appellant has come forward to file these appeals.

6.At the time of admission, the following substantial questions of law have been framed:

S.A.No.762 of 2015:

a. Whether the Courts below are justified in holding that Sornathal is not the wife of the deceased Ramasamy merely because her name was not found in the legal heirship certificate obtained by the second wife?

b.Whether the legal heirship certificate issued by the Tahsildar is the conclusive proof of marriage to succeed the estate of the deceased?

S.A.No.763 of 2015:

1.Whether the legal heirs of the mother of the plaintiff/appellant namely Ponnammal is entitled to $\frac{1}{2}$ share in the suit property, which originally belong to her grandparents namely Karumana Gounder (1710 sq.ft), who died on 24.04.1968 and Nallammal (462 Sq.ft), who died in the year 1987 respectively since both of them died only after the enactment of Hindu Succession Act 1956?

2.Whether the revenue records are sufficient to hold that the appellant was out of possession especially when the appellant was a co-sharer in the suit property and there are no pleadings to that effect?

3. Whether the presumption available under Section 90 of the Indian Evidence Act is available to the Will ie. Ex.A3 since it is more than 30 years old?

4. Whether the Courts below are correct in holding that Will was not acted upon is not sustainable in law especially when the same could be enforced only after the date of the knowledge of the existence of the same?

7. Learned counsel appearing for the appellant submits that inasmuch as the part of the suit property stands in the name of Nallammal and Ponnammal having predeceased her, the appellant is entitled for a share. The revenue records are not sufficient to hold that the appellant was out of possession. There is a presumption available under the Indian Evidence Act to Ex.A3 and the provision contained in the Hindu Succession Act would apply.

8. Learned counsel appearing for the contesting respondents submits that the findings are mostly on facts and thus no interference is required under Section 100 C.P.C. as there is no substantial question of law involved. The signature contained in Ex.B1 is admitted and therefore, it is not open to the appellant to contend to the contrary. The Will has not been proved as mandated under Section 68 of the Indian Evidence Act. There is no evidence, as found by the Courts below, to correlate Ex.A8 with the deceased Ramasamy Gounder. There are certain discrepancies in the place of residence attributable to the deceased Sorna @ Sornathal and Ramasamy. Thus the factum of marriage was not proved. Hence no interference is required.

9. The appellant did not claim that the property purchased, though for lesser extent, in the name of Nallammal as her self-acquired property. On the contrary, the averment made in the plaint is very specific that it is a joint family property purchased from the income derived from the other joint family properties. Even thereafter, both Nallammal and her husband were enjoying the property as joint family property by combining it with the other extent. Thus, having made a specific averment in the plaint itself, it is not open to the appellant to contend that the extent purchased in the name of Nallammal is her self-acquired property. The Courts below have found that it is the appellant who signed Ex.B1. In Ex.B1 also, there is a specific reference that the suit property is the ancestral property. In Ex.B1, the appellant has accepted the title of the contesting defendants. Though the contents are disputed, having admitted the signature, the Courts below have rightly made reliance upon it. The lower appellate Court has rightly found the discrepancies in the case of the appellant with respect to the status of the deceased Sorna @ Sornathal and the finding, being

one of fact, this Court does not find any perversity in that, warranting interference. When once the existence of Sorna @ Sornathal, being the first wife of the deceased Ramasamy could not be proved, the consequential sale effected by her will not give any right. Strangely, the appellant has also sought the relief based upon the unregistered Will allegedly executed by Karumana Gounder. Apart from the said Will, it has been marked as Ex.A3 dated 21.03.1966 being unregistered, the same has not been proved in the manner known to law. Neither the attestor nor the scribe has been examined. One person who has been examined in chief was not available for cross-examination and therefore, his evidence was rightly eschewed by the trial Court. It is also to be noted that if Ex.A3 gives a right to the appellant, the necessity to purchase an extent from Sorna @ Sornathal would not have arisen. The submission made by the counsel for the appellant that only on seeing the documents from the custody of Sorna @ Sornathal, he came to know that Ex.A3 does not merit acceptance. It is also strange as to how Sorna @ Sornathal could get the said documents. Therefore, this Court is of the view that Ex.A3 has not been proved in the manner known to law. For the aforesaid reasons, the said document, being unregistered, a presumption under Section 90 of the Indian Evidence Act would not apply and even otherwise, a mere registration per se will not prove a Will notwithstanding Section 63 of the Indian Succession Act and 68 of the Indian Evidence Act. The Courts below have also found that the appellant was not in possession.

10. Under those circumstances, this Court does not find any substantial question of law, warranting interference. Accordingly, both the second appeals stand dismissed. No costs.

Sd/-

Assistant Registrar(CO)

//True Copy// सत्यमेव जयते

Sub Assistant Registrar

mmi

To

1.The II Additional District Judge,
Erode.

2.The II Additional Subordinate Judge,
Erode.

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3. The Section Officer, VR Section,
High Court, Madras.

+ 1 cc to M/s. I.C. Vasudevan, Advocate SR.3823

+ 1 cc to Mr.P. Immanuel Prakasam, Advocate SR.3592 (30.1.17)

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of 2015

SAI (CO)
Eu 27.1.17



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