

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.01.2017

Coram

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

Second Appeal No.438 of 2016

Mahalingam ...2nd Plaintiff/Appellant/Appellant

Vs

1.Ramalingam ...Ist Plaintiff/2nd Respondent/Ist Respondent
2.Rajambal ... Nil/3rd Respondent/2nd Respondent

Second Appeal filed under Section 100 C.P.C. against the judgment and decree dated 28.04.2015 passed in A.S.No.149 of 2012 on the file of the Principal District Judge, Ariyalur, confirming the judgment and decree dated 29.06.2011 in O.S.No.71 of 2009 on the file of the District Munsif, Ariyalur.

For Appellant ... Mr.K.Gandhikumar

For Respondents ... Ms.Mythili Suresh
for M/s.Sarvabhauman Associates
for R2

JUDGMENT

The second plaintiff is the appellant herein and he along with the first plaintiff filed a suit for declaration and permanent injunction with an alternative prayer for possession. As the Courts below concurrently rejected the case of the plaintiffs, the present appeal has been filed by raising the following substantial questions of law:

(a)Whether in law the Courts below are justified in holding the due execution of the registered Will dated 08.07.1963 (certified copy) - Ex.A1 has not been not proved by the plaintiffs, for want of production of original of the said Will when the fact remains that subsequent to the death of plaintiffs' father, they were under the guardianship of Chinnasamy with whom the custody of original Will was there and he himself in collusion with his son, has acted total detriment to

the interest of the plaintiffs taking advantage of their fiduciary capacity, indulging in fraudulent transactions under Ex.B2 to Ex.B7?

(b) Having regard to the fact that subsequently the attestors are also dead and the Will was executed in the year 1963 at that time that too the plaintiffs were minors and now it is hard to find the persons acquainted with the signature of the attestors, whether the Courts below are right in discarding the Will?

(c) Whether the Courts below are not erred in not presuming the genuineness of the subject matter of Will, under the provisions of the Registration Act and Indian Evidence Act, especially when the Will is a registered instrument?

(d) Having regard to the peculiar facts and circumstances of the present case, whether the Courts below erred in not presuming that genuineness of Will, by widely applying the scope and ambit of Section 90 of the Indian Evidence Act?

(e) Whether in law the suit is barred by limitation, since the suit has been filed by the plaintiffs immediately after when they came to know about the fraudulent transactions of Ex.B2 to Ex.B7 while the defendant created problem?

2. The suit property originally belonged to one Govindasamy Chettiar, who died on 24.12.1966. He had two daughters viz., Pachayammal and Dhanammal. Govindasamy had two brothers viz., Krishnasamy and Chinnasamy. Krishnasamy had one son by name Kaliyaperumal, who died on 22.08.1963. The appellant/second plaintiff, the first plaintiff and one Narayanan (since deceased) are the sons of the deceased Kaliyaperumal. There is one more brother of the deceased Govindasamy by name Chinnasamy (since deceased). He had one son by name Pandurangan.

3. The suit has been filed on the premise that the deceased Govindasamy despite having two daughters executed a registered Will dated 08.07.1963 - Ex.A1 in favour of the plaintiffs and the deceased brother. As their father Kaliyaperumal died immediately thereafter - 22.08.1963, the plaintiffs went into the custody of their paternal uncle Chinnasamy. Suppressing the Will, Chinnasamy got the sale deed to the suit property from the daughters of Govindasamy viz., Pachayammal and Dhanammal. Thereafter, there was a partition between Chinnasamy and

Pandurangan. The suit property was allotted to Pandurangan, who thereafter sold the suit property in favour of the defendant by way of the registered sale deed dated 03.12.1990 under Ex.B5.

4.Incidentally, there was a partition under Ex.D1 between the plaintiffs. The appellant, being the second plaintiff, has deposed that the partition deed does not include the suit property. However, with the pleading that the suit property has been in possession and enjoyment of the plaintiffs for quite a number of years and placing reliance upon the registered Will dated 08.07.1963, the suit has been laid.

5.The Courts below dismissed the suit on the premise that the plaintiffs are not in possession and enjoyment of the suit property and therefore, the basic averment made is not true and genuine. Incidentally, it has been held that the Will has not been proved in the manner known to law as a mere registration per se cannot be a ground to uphold its validity de hors Section 68 of the Indian Evidence Act.

6.Learned counsel appearing for the appellant submits that the Will, being a registered one, a presumption is drawn under Section 90 of the Indian Evidence Act. As the plaintiffs were minors in the custody of Chinnaasamy, they have been cheated. Under those circumstances, the suit ought to have been decreed by the Courts below.

7.Per contra, learned counsel appearing for the second respondent submits that curiously, the partition deed between the plaintiffs under Ex.B1 did not include the suit property. Therefore, the very foundation of the plaintiffs would fall to the ground. The suit has been filed in the year 2009 seeking declaration and injunction and therefore, it is barred by limitation. The suit is also liable to be dismissed for non-joinder of necessary parties as neither Chinnaasamy nor Pandurangan and the daughters of the deceased Govindasamy were made as party defendants. Thus, no interference is required.

8.Registration of a Will is only an incidental factor. Though it can be stated that the rigour of Section 90 of the Indian Evidence Act would apply, such a presumption would not take away the mandate of Section 68 of the Indian Evidence Act. In other words, a person, who relies upon the Will either registered or otherwise, will have to satisfy the parameters of Section 68 of the Indian Evidence Act read with Section 63 of the Indian Succession Act. Unfortunately, in the case on hand, the appellant is unable to examine any of the attestors nor fall back Section 69 of the Indian Evidence Act. Thus, the Will could not be proved in the manner known to law. Coupled with this, the plaintiffs have made the false statement in their plaint about

the factum of possession and enjoyment of the suit property. The fact that the suit property was purchased by the deceased Chinnasamy decades ago from the daughters of the deceased Govindasamy is not in dispute. Similarly, the subsequent partition and the sale deed in favour of the defendant is also not in dispute. Even assuming that the plaintiffs are not aware of this, at least from the date of knowledge, they could have challenged it either directly or indirectly, which could have been done by impleading necessary parties. Now the defendant is only the subsequent purchaser having purchased the suit property pursuant to the sale deed executed decades ago in favour of Chinnasamy followed by the partition deed in favour of Pandurangan. Even the sale deed of the defendant is of the year 1990 and pursuant to which, mutation has been made in the revenue records including patta under Ex.B6. These facts would clearly show that the appellant does not have a case. The Courts below considered all these factors in extenso while dismissing the suit.

9. In such view of the matter, this Court does not find any substantial question of law involved in this appeal, warranting interference under Section 100 of the Code of Civil Procedure. Accordingly, the second appeal is dismissed. No costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1. The Principal District Judge,
Ariyalur.

2. The District Munsif, Ariyalur.

Copy to

The Section Officer,
VR Section, High Court, Chennai-104.

+1cc to M/s. Sarvabhauman, Advocate Sr.2775

+1cc to Mr. Gandhikumar, Advocate Sr.3105

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