

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 05-01-2017

CORAM:

THE HONOURABLE MR. JUSTICE M.M. SUNDRESH

Second Appeal No.716 of 2016
and
C.M.P.No.13499 of 2016

1. Anjalakshmi
2. Thenmozhi
3. Balaji
4. Kumar
5. Siva

... Appellants

Vs.

1. Amsavalli
2. Vetrivel

... Respondents

Second Appeal against the judgment and decree dated 22-12-2015 made in A.S.No.11 of 2012 on the file of Principal District Judge, Villupuram confirming the judgment and decree dated 26-09-2011 made in O.S.No.115 of 1998 on the file of the II Additional Sub Judge, Villupuram.

For appellant :: Mr. N. Suresh

For respondents:: Mr. S. Krishnaswamy, for R1

No appearance for R2

JUDGMENT

The defendants who are the legal heirs of the brother of the plaintiff deceased Kathavaraya Pillai are the appellants. The suit has been laid for a declaration to declare that the plaintiff is entitled for half share followed by a final decree for partition and delivery of possession apart from mesne profits. Admittedly, the suit property belong to one Kathavaraya Pillai, who is the father of the plaintiff. The first defendant since deceased was the mother of the plaintiff. The appellants, who were the defendant Nos.2 to 6 are the legal representatives of the brother of the plaintiff, namely deceased Kathavaraya Pillai. The seventh defendant is the subsequent purchaser. Before the Trial Court, the appellant placed reliance upon the Will alleged to have been executed by the deceased Kathavaraya Pillai. Incidentally, there was another Will executed by the first defendant, since deceased. The Will alleged to have been executed by

Kathavaraya Pillai is not proved to be genuine and thus not established in accordance with Section 68 of the Indian Evidence Act. However, the Will executed by the first defendant was accepted. Accordingly, the suit has been decreed granting one-third share of the suit properties by way of passing the preliminary decree. The appeal filed also confirmed the said order of the Trial Court. Challenging the same, the present appeal has been filed by the defendants by framing the following substantial questions of law:

"(i) Whether the Courts-below have erred in decreeing the suit although the relief of declaration sought for in the plaint is barred by limitation under Article 58 of the Limitation Act?

(ii) Whether the Courts below are right in decreeing the suit in favour of the plaintiff when on the face of admitted pleadings, the plaintiff having sought the relief of declaration, the Right to Sue first accrues to file the suit on 29.1.1994 when Kathavaraya pillai died and the suit filed on 8.7.1998 is barred by limitation?

(iii) Whether the courts below are right in decreeing the suit without the following the judgment of Hon'ble Supreme Court in 2016(1) SCC page 332?

(iv) Whether the courts below are right in decreeing the suit as prayed for by the plaintiff, when the plaintiff is not entitled to share as claimed by the plaintiff?"

2. The learned counsel appearing for the appellant submits that the suit is not maintainable since a declaration has been sought for. It is further submitted that the findings rendered by the Courts-below on the Will also requires to be looked into.

3. The counsel appearing for the plaintiff/respondent submits that as the onus to prove the Will, which is unregistered lies on the appellant and in view of the fact that the same has not been proved in the manner known to law, the Courts-below have concurrently found in favour of the first respondent/plaintiff. A further submission has been made that there is no question of limitation under Article 58 of the Limitation Act, since what has been sought for is only a partition and therefore, the declaration has to be understood in light of the shares, which the plaintiff is entitled to otherwise.

4. This Court does not find any substantial question of law. The prayer as sought for in the plaint though not happily worded is only for partition. The prayer has to be understood as a whole. It is the case of the plaintiff that she is

entitled to half share of the suit property by way of a preliminary decree of partition. That is the reason why she has also asked for a final decree. When the parties have understood each other's case, then the same would be sufficient for the Court to grant the relief. Therefore, the relief sought for is only a partition and not otherwise. In such view of the matter, the bar under Article 58 of the Limitation Act, would not come.

5. Insofar as the reliance on the Will is concerned, both the Courts-below have held that because Ex-B3 has not been proved in the manner known to law, the same cannot be relied. Such being the concurrent finding rendered by the Courts-below, no interference is required. The Courts-below have taken into consideration of the opinion of the handwriting expert while considering the genuineness of Ex-B3. The handwriting expert has been examined as P.W.3 and he clearly deposed that the signature as found in Ex-B3 does not tally with the admitted signature of the deceased Kathavaraya Pillai. Incidentally, it has been held that the appellants have not dispelled the suspicious circumstances surrounding the execution of Ex-B3. The evidence of D.W.3 was also not accepted being an interested witness. The Courts-below also took note of the fact that the other testator and its scribe has not been examined. The attendant circumstances, involved were also taken into consideration by the Courts-below. D.W.2 was living with the second defendant as per the evidence of the first defendant.

6. Accordingly, this Court is of the view that the questions of law sought to be raised insofar as the issue pertaining to the limitation are concerned are answered against the appellant. The other issues being one of fact are accordingly rejected. The appeal is dismissed. No costs. The connected miscellaneous petitions are closed.

Sd/-

Asst.Registrar (CS VI)

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Sub Asst. Registrar

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1. The Principal District Court, Villupuram

2. The II Additional Sub Court, Villupuram.

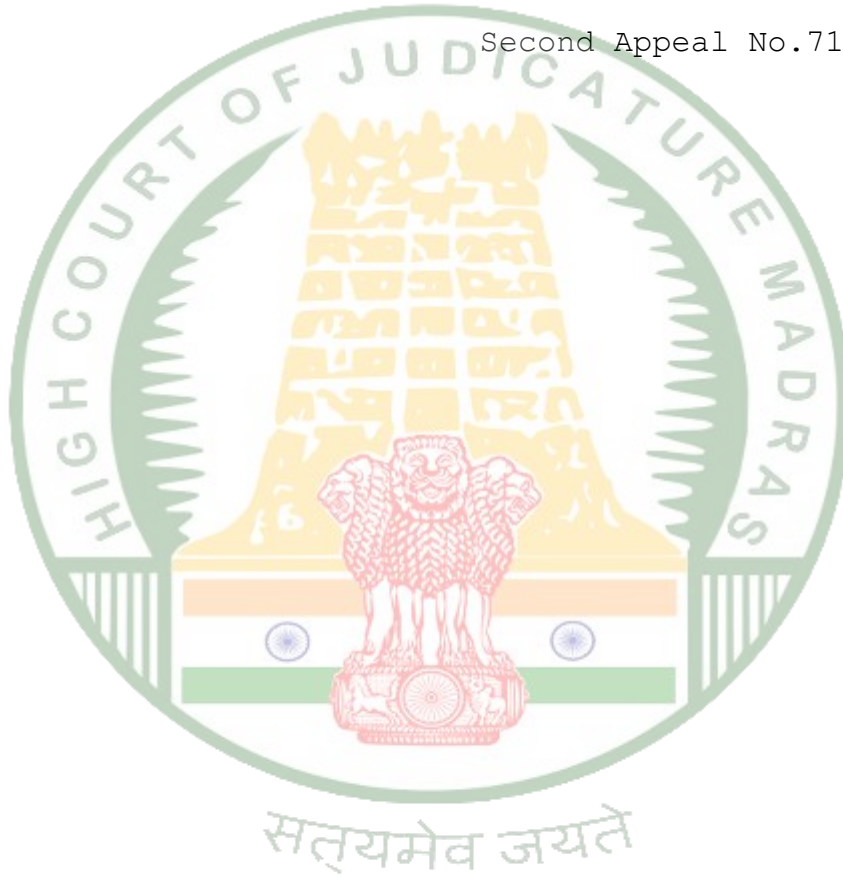
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