



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 07.02.2017

CORAM

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

A.S. (MD) No.192 of 2014

and

M.P. (MD) No.2 of 2014

1. S.K.Mani .. Appellant/Defendant

Vs.

1. K.Kamalam
2. K.Prema
3. K.Ganesh

.. Respondents/Plaintiffs

PRAYER: Appeal Suit filed under Section 96 of Civil Procedure Code r/w Order 41 Rule 1 of Civil Procedure Code, to set aside the Judgment and Decree, dated 29.11.2011, passed in O.S.No.34 of 2009 on the file of the learned Additional District Judge, Fast Track Court No.2, Tirunelveli, by allowing this First Appeal.

For Appellant : Mr.V.Meenakshi Sundaram
for Mr.D.Nallathambi

For Respondents : Mr.G.Prabhu Rajadurai

J U D G M E N T

This Appeal Suit has been filed against the Judgment and Decree passed in O.S.No.34 of 2009, dated 29.11.2011, on the file of the learned Additional District Judge, Fast Track Court No.2, Tirunelveli.

2. Heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondents.

3. The defendant in the suit in O.S.No.34 of 2009 on the file of the learned Additional District Judge, Fast Track Court No.2, Tirunelveli, is the appellant before this Court. The respondents in this appeal as plaintiffs filed the suit in O.S.No.34 of 2009 for partition of their one half share in the suit property. The suit property consists of 2 residential buildings bearing Old Door No.25 and 25A, corresponding to New Door No.55 and 56, Sasthri Street @ Sankarasubramaniya Street, 1st Ward Kalankarai, Senkottai.



4. The case of the respondents is that the suit property was purchased by their grand mother one K.Pitchammal by two registered Sale Deeds, dated 19.01.1978 and 27.06.1979 out of the income of the first respondent's husband one S.K.Kutty. The said K.Pitchammal died on 13.03.1999 leaving behind the first plaintiff who is the daughter-in-law and the plaintiffs 2 and 3 who are the grand-children. Since the husband of the first plaintiff and the father of the plaintiffs 2 and 3 died on 28.06.1992, the plaintiffs contended that they are entitled to a share in the suit property.

5. The defendant in the suit is none else than the other son of the said K.Pitchammal. Since the said K.Pitchammal died, the plaintiffs claimed that they are entitled to half share in the suit property. The suit was contested by the defendant on many grounds. It is the case of the defendant that the suit property was purchased by the defendant in the name of his mother in the year 1978 and 1979. It was further pleaded that the vacant site which was purchased on 27.06.1979 was acquired by him in the name of his mother and that he put up a construction and enjoyed the property as his own.

6. Taking into consideration the fact that the residential building was constructed by the defendant, the defendant contended that his mother executed a Will, dated 27.07.1992. Since the defendant is entitled to the property by virtue of the Will executed by his mother K.Pitchammal, he claimed exclusive right over the suit properties and raised objection that the suit itself is not maintainable as the suit has been filed by valuing the suit only under Section 37(2)(ii) of Tamil Nadu Court Fees Act. The plaintiffs have produced Ex.A.1 to Ex.A.5 apart from examining the first plaintiff as P.W.1. The defendant filed Ex.B.1 to Ex.B.10 and examined himself as D.W.1. The defendant examined D.W.2 who signed the Will as an attester. The defendant also examined D.W.3 who is stated to be his relative and neighbour.

7. The trial Court after framing necessary issues, found that the suit property was purchased by the mother of the defendant on 19.01.1978 and 26.07.1979 and that the defendant has not proved his case that the property was purchased by him in the name of his mother K.Pitchammal. The trial Court also found that the Will set up by the defendant is a concocted Will and that the same cannot be acted upon. The trial Court also found that the superstructure, namely, the residential house in the land which was purchased in the year 1979 did not belong to the defendant as he has not proved his case that the building was put up by the defendant. Since the suit property were held to be actually the properties of the said K.Pitchammal and the Will set up by the defendant was negatived and disbelieved, the trial Court decreed the suit as prayed for. Aggrieved by the findings of the trial Court, the defendant has preferred the above First Appeal.



8.Mr.V.Meenakshi Sundaram, learned counsel appearing for the appellant/defendant vehemently contended that the Will executed by the said K.Pitchammal under Ex.B.10, dated 27.07.1992 has been proved by the defendant in accordance with law and that the findings of the trial Court are not sustainable. The learned counsel further submitted that the Will under Ex.B.10, dated 27.07.1992 is only with reference to the vacant site. The learned counsel for the appellant/defendant argued that the superstructure was put up by the defendant as the same is evident from various circumstances and that the trial Court has given finding ignoring the material evidence. Finally, the learned counsel submitted that the fact that the defendant was in possession and enjoyment of the superstructure is not in dispute and that therefore, the residential house put up by the defendant, namely, the building bearing Door No.25A should be allotted to him in equity. However, the learned counsel for the respondents would justify the conclusions of the trial Court, and he relied upon the findings given by the trial Court on every issue that were framed for consideration.

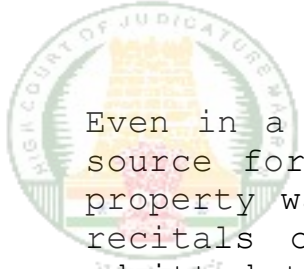
9. It is no doubt true that the defendant has examined D.W.2 who is one of the attester of the Will Ex.B.10. However, the trial Court has elaborately discussed the evidence regarding the due execution of the Will and its genuineness. The trial Court has found that the Will on the face of it, appeared to be fabricated. This Court also gets the same impression, when this Court perused the Will. The document Ex.B.10 contains 4 sheets and the thumb impression is found only in the last page. Though the Will is typed, the papers used for making the Will are found to be artificially handled to make it appear as if the papers used for making Ex.B.10 Will are very old. However, the attester signed in the year 1992. The Will never saw the light of the day till the suit was filed. In such circumstances, the doubt entertained by the trial Court and the learned counsel for the respondents are justified.

10. Regarding Will, the burden lies on the defendant who is the propounder to prove the due execution of the Will and to explain all the suspicious circumstances. In this case, it is found that the papers used for the Will appeared to be artificially soaked in mud. The papers appeared to be spoiled carefully. However, the letters have been typed after the papers were made to appear old. The trial Court found that the Will could not have been executed on 27.07.1992, as the stamp papers utilised for the Will were released in the Treasury only on 28.07.1992. This serious aspect is not explained even before this Court. There is no explanation from the defendant, for the various



11. When the document, namely, the Will, indicates not only an unnatural disposition, it is pointed out that the propounder of the Will failed to explain the suspicious circumstances by adducing proper evidence. In the present case, except the attester there is no independent witness. The fact that the mutation of the Property Tax Assessment was effected in the name of the defendant only in the year 2007 also indicate that the Will was not released before 2007. Even the witness D.W.2 who was examined to prove the attestation did not know the date on which he put his signature in the Will. The trial Court after considering the evidence found that the Will is not a genuine document and that it has not been proved in accordance with law. There was no mutation of records till the year 2007. The contention of the plaintiffs that the Will must have been fabricated was accepted by the trial Court. The other contention of the defendant claiming ownership of the superstructure put up by him found in the suit property was also disbelieved by the trial Court. The defendant himself admitted that the Property Tax Assessment is standing in the name of the said K.Pitchammal. There is no independent evidence to prove that the construction was put up by the defendant in the suit property. Since the mutation has taken place in respect of the superstructure in the year 2007 and the defendant has not produced any evidence, the findings of the trial Court is unassailable.

12. The trial Court justified in rendering a finding that the defendant has not established the title to the superstructure. Regarding the case of the defendant that the suit property was purchased by the defendant in the name of his mother K.Pitchammal, this Court find such contention is contrary to the pleading in the written statement. The case of the defendant in setting up the Will that he has title to the property by virtue of the Will executed by his mother K.Pitchammal, shows that the defendant has admitted the title of his mother K.Pitchammal who was the owner of the suit property. Except the bald version of the defendant, during the course of the evidence, absolutely, there is no document to suggest that the suit property was purchased by the defendant in the name of his mother. The documents in Ex.B.1 and Ex.B.2 clearly shows that the suit property was purchased by K.Pitchammal and the two sons of the said K.Pitchammal were admittedly of tender age, when the said Pitchammal's husband died. The defendant himself admitted that he was only three years old when his father died. Since, it was the mother of the defendant who admittedly brought up her two children, it is very difficult to accept the case of the plaintiffs or defendant about the source for purchasing the property. No independent witness was examined to prove that the defendant had sufficient means to contribute for the purchase of the suit property even in the year 1978 and 1979. The evidence on record is in favour of the plaintiffs in the sense that the property which was purchased in the name of the said Pitchammal can be presumed to be her acquisition for her benefit.



Even in a case, when there is no positive proof to indicate the source for purchasing the property, it can be presumed that the property was purchased out of the income of Pitchammal as per the recitals of the Sale Deeds. In the written statement, it is admitted that the suit property belonged to Pitchammal under the two Sale Deeds and that she was enjoying the same as her property by paying Property Tax to local body. The appellant's further case in the written statement is not proved by any independent evidence. Hence, the trial Court has found that the suit property was the self acquisition of Pitchammal and that the plaintiffs are entitled to half share in the suit property. The first plaintiff, widow of predeceased son is not a heir of Pitchammal under Section 15(1) of Hindu Succession Act. However, a decree for partition has been granted for $\frac{1}{2}$ share in favour of all the plaintiffs. Since the plaintiffs 2 and 3 have no objection for the decree, this court is not inclined to alter the decree.

13. Having regard to the circumstances in this case, I find that there is no legal infirmity in the findings of the trial Court. There is no compelling reasons to interfere with the findings of the trial Court which has analysed almost all the factual and legal issues in the light of the materials on record and precedents. In such circumstances, the Appeal Suit deserves to be dismissed and hence dismissed. However, the learned counsel for the appellant/defendant submit that the defendant is in enjoyment of the building bearing Old Door No.25A and New Door No.56.

14. The learned counsel for the respondents also admit that the defendant is in enjoyment of one of the two buildings. Though there is no evidence in this case that the superstructure bearing Old Door No.25A and New Door No.56 was constructed by the defendant, the fact that the defendant was residing in one of the building is not seriously disputed.

15. Having regard to the fact that the defendant is residing for a long time in one of the buildings, in equity, the defendant may opt to allot the same to his share. However, even such allotment will be subject to the other consideration which may arise at the time of passing of final decree. Hence, this appeal is dismissed with an observation that the defendant is given liberty to seek allotment of the residential building in his possession to his share at the time of passing of final decree. There is no order as to costs. Consequently, connected Miscellaneous petition is closed.

Sd/-

Assistant Registrar(CO)

/True Copy/



To

1.The Additional District Judge,
Fast Track Court No.2,
Tirunelveli.

2.The Record Keeper, V.R.Section,
Madurai Bench of Madras High Court, Madurai.

+1cc to Mr.D.Nallathambi, Advocate Sr.No.6789

+1cc to Mr.G.Prabhu Rajadurai, Advocate Sr.No.6830

PMU

VB/MR/KKR/SAR2/07.07.2017/6P/5C

**JUDGMENT MADE IN
A.S. (MD) No.192 of 2014 and
M.P. (MD) No.2 of 2014
07.02.2017**