

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.07.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

S.A.No.374 of 2018
and C.M.P.No.10548 of 2018

1.T.E.Jagadeesan
2.J.Sathish
3.J.Rajesh

... Appellants/Defendants

Vs.

T.E.Thulasi

.. Respondent/Plaintiff

PRAYER: Second Appeal is filed under Section 100 of C.P.C against the judgment and decree dated 24.11.2017 made in A.S.No.127 of 2017 on the file of Sessions Court, Magalir Neethi Mandram (Fast Track Mahila Court), Vellore, confirming the judgment and decree dated 31.03.2016 made in O.S.No.11 of 2013 on the file of District Munsif Court, Katpadi, Vellore District.

For Appellants : Mr.S.Kannan
for Mr.Stanley John
For Respondent : Mr.A.Arokiadoss for
Mr.K.V.Ananthakrishnan

J U D G M E N T

Second Appeal is filed against the judgment and decree dated 24.11.2017 made in A.S.No.127 of 2017 on the file of Sessions Court, Magalir Neethi Mandram (Fast Track Mahila Court), Vellore, confirming the judgment and decree dated 31.03.2016 made in O.S.No.11 of 2013 on the file of District Munsif Court, Katpadi, Vellore District.

2.The appellants are defendants and respondent is plaintiff in O.S.No.11 of 2013 on the file of District Munsif Court, Katpadi, Vellore District. The appellants are challenging the concurrent findings of the Courts below. First appellant and respondent are brothers and the appellants 2 & 3 are sons of first appellant. The respondent filed said suit for declaration of title to the suit property and for recovery of possession.

3. According to the respondent, the suit property and other properties originally belonged to one Gnanammal, mother of the respondent and first appellant. She purchased the property by the deed of sale dated 29.11.1963 and out of love and affection, she bequeathed the suit property to the respondent and one another property to another son T.E.Vivekanandhan by the registered Will dated 04.11.1987. She had seven sons including respondent and first appellant and one daughter. The mother of the respondent and first appellant viz. Gnanammal died on 21.09.1998, the Will dated 04.11.1987 came into force and respondent became absolute owner of the suit property and other properties bequeathed to him by his mother. The first appellant was residing away from the Ponnai village, where the suit property is situate. After the first appellant came to Ponnai village in the year 2006, he requested the respondent to permit him to reside in the suit property till he gets accommodation in the village and agreed to vacate the suit property as and when required by the respondent. The respondent agreed for the same and permitted the first appellant to reside in the suit property. In the year 2012, when the respondent required the suit property, the appellants refused to vacate and handover the vacant possession to the respondent. Hence, the respondent filed the present suit for the reliefs stated above.

4. The second appellant filed written statement and the same was adopted by the defendants 1 and 3. The appellants denied all the averments made in the plaint and also denied that mother of the first appellant and respondent executed a Will dated 04.11.1987 bequeathing the properties mentioned therein to the respondent and another brother. They further contended that the alleged Will is forged one and their mother died intestate. Seven sons and one daughter inherited all the properties equally and first appellant is having 1/8 share in all the properties including the suit property. First appellant is in possession of the suit property as a co-sharer and he is not a permissive occupant. The appellants are residing in the suit property for a long time since 1990 along with first appellant's mother. They denied that the appellants are residing in the suit property from the year 2006 with the permission of the respondent. The respondent has no locus-standi to file the suit and prayed for dismissal of the suit.

5. Based on the pleadings, the learned trial Judge framed necessary issues. Before the learned trial Judge, the respondent examined himself as P.W.1, one Purushothaman as P.W.2 and marked eight documents as Exs.A1 to A8. The second appellant examined himself as D.W.1, one P.G.Subramani as D.W.2 and marked four documents as Exs.B1 to B4.

6. The learned trial Judge considering the pleadings, oral and documentary evidence, decreed the suit.

7. Against the said judgment and decree dated 31.03.2016 made in O.S.No.11 of 2013, the appellants filed A.S.No.127 of 2017 on the file of Sessions Court, Magalir Neethi Mandram (Fast Track Mahila Court), Vellore.

8. The learned First Appellate Judge framed necessary points for consideration. The learned First Appellate Judge independently considering the materials on record, judgment of the trial Court and arguments of counsel for the parties, dismissed the First Appeal.

9. Against the said judgment and decree dated 24.11.2017 made in A.S.No.127 of 2017, confirming the judgment and decree dated 31.03.2016 made in O.S.No.11 of 2013, the appellants/plaintiffs have come out with the present Second Appeal.

10. The learned counsel for the appellants contended that the respondent failed to prove the execution of the Will as per the provisions of the Evidence Act. P.W.2 attesting witness in the cross-examination has stated that he is not aware of other attesting witness. The Courts below failed to consider the contradiction of the evidence of P.W.2. The Courts below have decreed the suit and dismissed the First Appeal on presumption and assumption. The appellants are in possession of the suit property as legal heirs of Gnanammal and they are in possession on their own right. They are not in occupation as per the permission given by the respondent. The respondent has come out with the suit prayed for declaration and recovery of possession and it is for the respondent to prove his case. The Courts below failed to consider the documents filed by the appellants.

11. The learned counsel for respondent contended that respondent has proved the execution and genuineness of Will as per law. The appellants are in occupation of suit property only as per permission granted by respondent and not as co-sharers.

12. Heard the learned counsel for the appellants as well as respondent and perused the materials available on record.

13. The respondent is claiming relief of declaration on the ground that the suit property was bequeathed by his mother by the registered Will dated 04.11.1987. P.W.2 is one of the attesting witnesses to the Will. In the proof affidavit filed by P.W.2, he has stated on oath that testatrix was hale and healthy, when she executed the Will. The scribe read the Will

to her and then only she put her thumb impression in the Will. After that all the attesting witnesses including P.W.2 put their signatures in the Will and the Will was registered. Contrary to the said statement on oath in the proof affidavit, P.W.2 in his cross-examination has stated that he was not aware of other attesting witness and not aware of the contents of the Will. The learned trial Judge has taken into consideration that P.W.2 was cross-examined after six months of filing of proof affidavit and would have been won over by the appellants. The learned trial Judge relying on the proof affidavit and after extracting the relevant portion of P.W.2 in his cross-examination held that the respondent has proved the Will dated 04.11.1987 through one of the attesting witnesses and the same was confirmed by the First Appellate Court.

14.The appellants have filed evidence of P.W.2 in the typed set of papers. A reading of the proof affidavit as well as cross-examination of P.W.2 reveal that P.W.2 was one of the attesting witnesses, he was present, when the testatrix put the thumb impression in the Will, then he signed the Will along with other attesting witness. P.W.1 also stated that testatrix was hale and healthy and was in sound disposing mind and she put her thumb impression without being influenced by others. In the cross-examination, P.W.2 has stated that he does not remember the details as to the execution of the Will which was 30 years earlier. He has answered most of the questions put to him in cross-examination as he does not know. Considering the chief-examination as well as cross-examination of P.W.2 in entirety, I hold that the respondent has proved the Will as per law and there is no error in the findings of the Courts below.

15.As far as possession of the appellants are concerned, respondent has stated that the appellants are in occupation as per the permission given by the respondent. Whereas appellants claim that they are in occupation on their own right. The respondent has deposed as P.W.1 about the permission given by him. The first appellant, who is brother of the respondent to whom according to the respondent permission was granted, did not get into witness box, to deny the same. Only second appellant gave evidence and stated that he is not aware of any communication between the respondent and first appellant, who is his father. There is a contradiction in his evidence with regard to time, from when first appellant is in possession of the suit property. The Courts below have appreciated all these facts in proper perspective and held that the appellants are in possession of the suit property as permissive occupants. There is no error of law warranting interference by this Court with the judgments and decrees of the Courts below. No question of law much less than the substantial question of law has arisen in this Second Appeal.

16.In the result, the Second Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

kj

To

1.The Sessions Judge, Magalir Neethi Mandram
Fast Track Mahila Court, Vellore.

2.The District Munsif, Katpadi.

3. The Section Officer, V.R. Section, High Court, Madras.

+ 1 cc to M/s. K.V. Anantha Krushanan, Advocate Sr.46508

+ 1 cc to M/s. S. Stanley John, Advocate Sr.45915

S.A.No.374 of 2018
and C.M.P.No.10548 of 2018

SKV(CO)
EU(04/09/2018)



WEB COPY