

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.11.2018

CORAM:

THE HONOURABLE MRS.JUSTICE R. HEMALATHA

S.A.No.2108 of 2002
and
C.M.P.No.18358 of 2002

Rajammal ... Appellant/Plaintiff

..Vs..

1.M.Ramasamy

2.Kuppammal

3.Ramu

4.Laxmi

5.Shanmugavel

... Respondents/Respondents

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the decree and judgment of the learned Subordinate Judge, Pollachi, dated 23.04.2002 in A.S.No.131 of 2001 reversing the decree and judgment of the learned District Munsif Court, Pollachi, dated 20.04.2001 in O.S.No.865 of 1997.

For Appellant : Mr.S.V.Nicholas

For Respondents : Mr.R.Venkatajalapathy for

: Mr.S.Kadarkarai

JUDGMENT

The appellant is the plaintiff in O.S.No.865 of 1997 on the file of the District Munsif, Pollachi. She had filed the above suit for declaration of her title to the suit property situate in Natham Survey No.65/1, Somanthurai Urkattu, Thiruppur District. She had also prayed for a permanent injunction restraining the respondents/defendants from interfering with her peaceful possession and enjoyment of the suit property.

2. The brief facts of the case of the plaintiff Rajammal (PW1) is as follows:

The suit property originally belonged to one late Ramaboyan, who is the paternal grandfather of the plaintiff. The said Ramaboyan had two sons by name Kanthaboyan and

Muthuboyan and a daughter by name Chinna Ammulu. Ramaboyan purchased the suit property along with other items of the properties through a sale deed dated 22.05.1919(Ex.A5) and ever since, the date of purchase, he was in possession and enjoyment of the suit property and also executed a Will dated 05.10.1967 (Ex.A2). As per the Will (Ex.A2), Kanthaboyan and Muthuboyan were given only life estate and their male issues were given absolute right.

3. The specific contention of the plaintiff is that an oral partition took place between Kanthaboyan and Muthuboyan and that they did not give effect to the will (Ex.A2) and were in possession and enjoyment of their respective shares by paying necessary house tax in their individual names and that after the demise of Muthuboyan, his only son the first defendant was in possession and enjoyment of his father's property. Though, the defendants 2 to 5 had a share in the properties through their mother Chinna ammulu, they did not claim any right over the properties of Ramaboyan. Moreover, the first defendant along with his mother sold a portion of the property to one Jayalakshmi during the year 1993 and sold the remaining portion to one Manoharan through a sale deed dated 13.04.1994 (a Certificate copy of which is marked as Ex.A5). According to the plaintiff, since the properties sold by the first defendant are the properties which were allotted to the share of Muthuboyan by way of an oral partition and it is clear that the Will dated 05.10.1967 executed by Ramaboyan was not at all acted upon. Kanthaboyan, father of the plaintiff executed a registered Will dated 22.12.1988 (Ex.A3) in favour of the plaintiff bequeathing the suit property in her favour and died on 26.08.1997. Thereafter, she became the absolute owner of the suit property. Now, the first defendant with a view to have unlawful enrichment is claiming right over the suit property.

4. The suit was resisted by the first defendant contending that as per the Will Ex.A2, the plaintiff, who is the daughter of the Kanthaboyan cannot claim any right over the suit property. It is also contended by the first defendant that though both Kanthaboyan and Muthuboyan were separately residing in their respective shares they did not have absolute right over the suit properties. He has also contended that the plaintiff cannot say that the Will Ex.A2 was not given effect to by Muthuboyan and Kanthaboyan.

5. On the above pleadings, the trial Court framed the following issues:

"1. Whether the Will dated 22.12.1988 said to have been executed by Kanthaboyan is genuine and whether it will

bind the defendants in any manner?

2. Whether the plaintiff is entitled for the relief of declaration as prayed for?

3. Whether the plaintiff is entitled for the relief of permanent injunction has prayed for?

4. To what other reliefs, the plaintiff is entitled to?

6. After full contest, the suit was decreed in favour of the plaintiff. Aggrieved over the same, the first defendant filed an appeal in A.S.No.131 of 2001 before the learned Subordinate Judge, Pollachi. The learned Subordinate Judge, Pollachi, after analyzing the entire evidence on record allowed the appeal.

7. In the trial Court, the defendants 2 to 5 remained absent and were set ex-parte.

8. Now, the Second appeal is filed by the plaintiff on the following substantial question of law:

"1. Whether the lower appellate Court is correct in allowing the first appeal without framing the points for decision which is mandatory under Order 41 Rule 24 CPC?"

9. Mr.S.V.Nicholas, the learned counsel appearing for the appellant contended that though Ramaboyan executed a will dated 05.10.1967, the said Will was not acted upon and his sons Kanthaboyan and Muthuboyan were enjoying the suit properties by way of an oral partition. He would further contend that this is clear from the recitals of the sale deed executed by the first respondent/first defendant who is the son of Kanthaboyan.

10. Mr.R.Venkatajalapathy, the learned counsel appearing for the respondents relied on the decision in Bhura and others Vs. Kashiram reported in AIR 1994 SC 1202 and contended that when the testator has created only a life estate in favour of his two sons and clearly indicated in the Will that the property would devolve upon the male heirs born to his sons, the appellant/plaintiff cannot claim any right over the suit property.

11. He also relied upon the decision in Ramkishorelal and

another vs. Kamalnarayan reported in AIR 1963 SC 890 and contended that the intention of the parties to the instrument after considering all the words, in the ordinary, natural sense should be ascertained and reading of the Will (Ex.A2), would clearly go to show that the testator had intended to give only a life estate in favour of his two sons.

12. The execution of the Will dated 05.10.1967 (Ex.A2) by Ramaboyan has been admitted both the parties. It is also an admitted fact that the suit property and the properties bequeathed through the Will are the self acquired properties of late Ramaboyan and that Ramaboyan died in the year 1978. After his death, the Will has come into existence and even if it is assumed that there was an oral partition between Kanthaboyan and Muthuboyan, the same can be presumed only for convenient enjoyment of both the brothers till their death and they cannot claim any absolute right over the same. However, even assuming that Kanthaboyan and Muthuboyan did not give effect to the Will executed by their father, the plaintiff cannot claim exclusive right over the suit property when there are other sharers namely, the defendants 2 to 5. The defendants 2 to 5 are born to Chinna Ammulu, who is the daughter of late Ramaboyan.

13. Therefore, the will executed by Kanthaboyan (Ex.A3) dated 22.10.1988 in favour of the plaintiff is not a valid document. All these aspects have infact been dealt with in extenso by the first Appellate Court and all the observations of the first Appellate Court are well founded.

14. In the facts and circumstances of the present case, I do not see any reason to interfere with the findings of the first Appellate Court and therefore, the appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

सत्यमेव जयते
Assistant Registrar

//True Copy//

WEB COPY

Sub Assistant Registrar

mbi/dna

To

1.The Subordinate Judge,
Pollachi.

2.The District Munsif,
Pollachi.

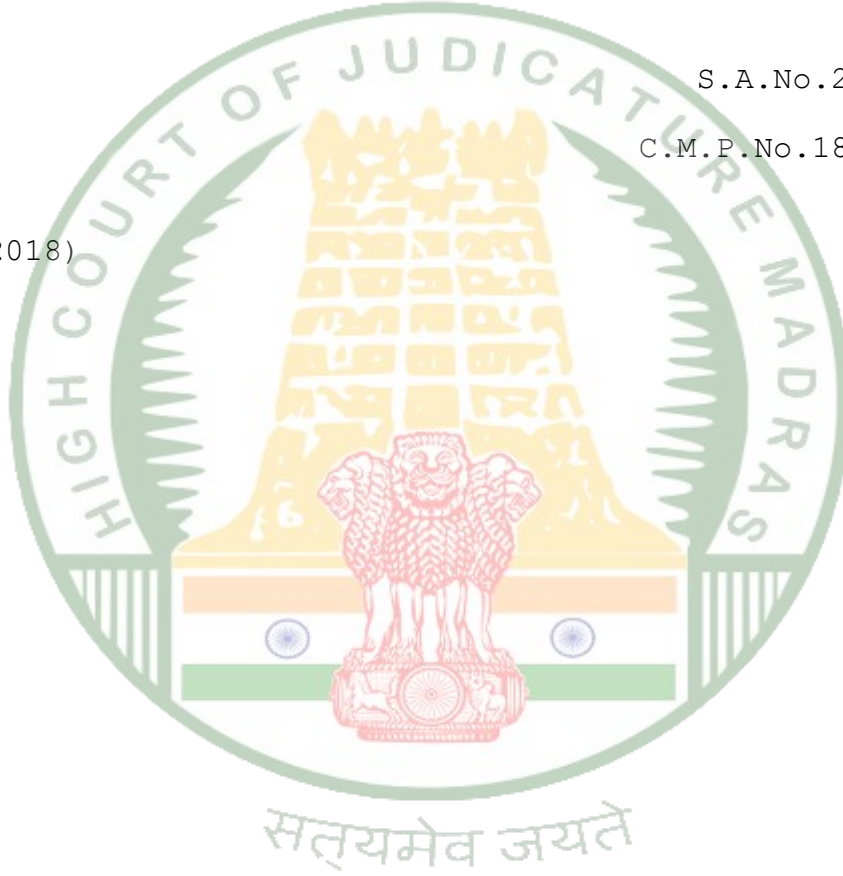
Copy TO

The Section Officer,
VR Section, High court,
Madras.

+lcc to Mr.V.Nicholas, Advocate, S.R.No. 75387
+lcc to Mr.S.Kadarkarai, Advocate, S.R.No. 75839

S.A.No.2108 of 2002
and
C.M.P.No.18358 of 2002

SAI (CO)
GN(21/12/2018)



WEB COPY