

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :05.03.2018

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

S.A.No.1767 of 1997

Ramakrishnan

... Appellant/Appellant/
2nd Defendant

Vs.

1.Vadivel
2.Kamalam
3.Manickam Pillai
4.Krishnaswamy
5.Ponnuswamy

...1 to 5 Respondents/
Respondents 2 to 6/
Defendants 1,3 to 6

6.Subramaniam
7.Mahalingam
8.Govindaraj
9.Savithiri Ammal
10.Thillainayagam

...6 to 10 Respondents/
Respondents 7 to 11/Nil

PRAYER: The Second Appeal has been filed under Section 100 of C.P.C., to set aside the Judgment and Decree of the learned Subordinate Judge, Udumalpet dated 14.03.1996 in A.S.No.56/1990 confirming the Judgment and Decree of the learned District Munsif, Udumalpet dated 20.12.1989 in O.S.No.605/1987.

For Appellant : Mr.N.E.A.Dinesh
for M/s.V. Nicholas

For RR6 to R9 : Mr. S. Thangavel for

For R1,to & 10 : No appearance

J U D G M E N T

As against the concurrent findings, the appellant/defendant has filed the present second appeal.

2. For the sake of convenience, the defendants 1 to 3 are hereinafter referred to as 'appellants' and the plaintiff is referred to as the 'respondent' and the defendants 4 to 6 as 'tenants'. The second defendant/appellant has filed the second appeal before this court.

3. The plaintiff has filed a suit for partition and separate possession and also for the payment of compensation towards loss in revenue. The suit has been decreed in favour of the plaintiff and the defendant/appellant preferred a suit to be heard along with O.S.No.488/1986 and the common evidence was recorded for both the suits and after perusal, common documents were marked in the suits. After trial, the suit was decreed in favour of the respondent/plaintiff with regard to the partition. However, the lower court has rejected the future mesne profits. Aggrieved by the same, the defendant/appellant has preferred an appeal before the lower appellate court wherein the order of the lower court was confirmed. As against the concurrent findings, the defendant/appellant is before this court by way of the present second appeal.

4 The averments contained in the plaint, in brief, are as follows:

The suit properties belonged to the father of the plaintiff and the defendants 1 to 3 namely Rangasamy Achary. The father of the plaintiff was in possession and enjoyment of the same and he died on 26.01.1976. Prior to his death, he had executed a Will dated 05.02.1972. Even though the plaintiff's father had three sons, he executed the Will only in favour of defendants 2 and 3. Thereafter, the said Rangasamy Achary felt that the Will was not properly written and he revoked the Will on 05.02.1972. In the above said cancellation deed itself, it had been mentioned that the second defendant/Rangasamy Achary and third defendant/Kamalam had no right in connection with the suit property. But, the appellant/2nd defendant suppressed all the particulars in O.S.No.488/1986 as if 2nd defendant alone has got right over the suit property and sued for declaration and permanent injunction. The plaintiff has got right for one-fourth share over the suit property. Prior to the filing of the suit, the 2nd defendant encroached the suit properties and he is getting annual rental income of Rs.2,160/-. Therefore, the appellant/2nd defendant is paying one-fourth share in the abovesaid income. Further, the plaintiff has been remitting the house tax. Therefore, the defendants are bound to pay three-fourth share in the amount spent by the plaintiff. On the above ground, the plaintiff filed a suit for partition of the suit property by metes and bounds and by dividing the same into four equal shares and as such, one share should be allotted exclusively to the plaintiff and further from the date of the suit till the date of delivery of possession, the plaintiff is

entitled to Rs.540/- per annum towards loss of income.

5. The averments contained in the written statement filed by the appellant/2nd defendant and adopted by the defendants 4 to 6, in brief, are as follows:

The defendants admitted that the suit property belonged to the Rangasamy Achary, who is none other than the father of the plaintiff and the defendants 1 to 3. Prior to his death, the said Rangasamy Achary executed a Will on 05.02.1972 in favour of the defendants 2 and 3 and as per the Will, the suit property exclusively belongs to appellants/defendants 2 and 3. However, the appellants denied the cancellation of the Will on 23.01.1976. Even during the life time of Rangasamy Achary, the suit properties were in enjoyment of the 2nd defendant. As per the Will dated 05.02.1972, the suit property had been divided into 'A' and 'B' schedule properties and 'A' schedule properties had been allotted to the 2nd defendant and the 'B' schedule properties had been allotted to the 3rd defendant. The appellant's father Rangasamy Achary died on 26.01.1976. Since the 3rd defendant was residing at Pollachi for the past several years, only the 2nd defendant is in possession of the suit properties. Prior to the filing of the suit, due to heavy rain, the buildings in the suit properties crumbled down and the electrical connections were got damaged. In view of the above, since the plaintiff has not come forward for reconstruction, appellant/defendant repaired and reconstructed only the front portion of the suit property and let out for rent to the defendants 4 to 6. The appellant/2nd defendant is residing at the rear side by putting up a thatched shed. Therefore, the plaintiff has no right over the suit property and consequently, he is not entitled to obtain any future income from the appellant/2nd defendant. Further the appellant/2nd defendant remitted the taxes. On 03.09.1986, the defendants issued a legal notice to the Kaniyur Panchayat Administrative Officer for collecting the tax from him. But no reply was received from the authority. In the mean time, the plaintiff and his sons attempted to evict the 2nd defendant forcibly from the suit property. Therefore, the 2nd defendant filed a suit in O.S.No.488/1986 for the relief of permanent injunction. In view of the above, the plaintiff is not entitled to obtain any share in the suit property.

6. Based on the oral and documentary evidences, the lower court decreed the suit in favour of the plaintiff. However, the rejected the mesne profits and the lower appellate court also confirmed the order of the lower court. As against the concurrent findings, the appellant/2nd defendant filed this present second appeal.

7. At the time of admission, this court has framed the following substantial questions of law:

"1) In a joint trial on the basis of common evidence two suits were decided in respect of the same subject matter and on appeals against the said simultaneous judgment of the trial court, the substantial and main finding with regard to revocation of Will was set aside in one appeal and the suit was remitted back to decide the said question on merits on production of the original revocation deed, whether the lower appellate court is correct in upholding the finding of revocation of Will in the connected appeal which has been set aside in the other appeal?

2) When the original revocation deed was not filed and the attestors of the said deed did not support the due execution of the sale deed. Thus the said deed has not been proved in a manner known to law. Whether the courts below are correct in accepting the execution of the revocation deed?"

8. Learned counsel for the appellant/2nd defendant would submit that admittedly the suit property belonged to the appellant's father and he executed a Will in favour of the appellant as well as third defendant on 05.02.1972. Thereafter, they took possession and enjoyment of the property. Since appellant's father felt that the Will was not properly written, he revoked the Will dated 05.02.1972 and the said Will was cancelled on 23.01.1976. Though the Registrar came to the residence of the defendants and allegedly executed a cancellation of deed in the presence of the appellant, the same was not proved by the plaintiff. However, on perusal of Exs.A1, A13 & A14, there is a contrary statement among the witnesses and the Registering Officer and there was a confusion in the registration of the documents on 23.01.1976. On one hand, PW2-Registering Officer registered the document on 23.01.1976 and on the other hand, he has taken oath of the executor of the Will. Rangaswamy Achary died on 26.01.1976, there is no categorical date for execution of the Will. Accordingly, the plaintiff has not established the Will and was cancelled by the appellant's father on 25.01.1976. In view of the above, it is seen that the facts were not properly analysed by the lower court. Without valuable documents and proper analysis, granting decree in favour of the plaintiff, is not sustainable and the lower appellate court also without verifying the veracity of the documents filed by the appellant, concurrent view expressed by the lower court is unsustainable. Accordingly, the appellant is entitled to succeed the second appeal.

9. Learned counsel for the respondent/plaintiff would submit that there is no dispute with regard to the relationship of the

plaintiff and the defendants. Admittedly the plaintiff is the co-parcener of the Hindu Joint Family. The said Rangaswamy Achary is the karta of the Hindu joint family and the suit properties are the ancestral properties and the same was inherited by the Rangaswamy Achary. The facts remains that the Rangaswamy Achary executed a Will in favour of the appellant and third defendant. Subsequently, before the death of the plaintiff's father, cancelled the Will on 23.01.1976 and the same was recorded by the Registering Officer on 25.01.1976. Thereafter the Rangaswamy Achary died on 26.01.1976.

10. On the side of the respondent/plaintiff, four witnesses were examined and fourteen documents were marked. After perusal of the entire documents as well as depositions of PWs.1 and 2, the lower court has arrived at a conclusion that the plaintiff is entitled to one-fourth share in the suit property. Accordingly, preliminary decree was granted in favour of the plaintiff. The mesne profits were rejected by the lower court. As against the said rejection, the plaintiff has not filed any appeal before the lower court. The decree passed by the lower court regarding mesne profits is confirmed. The lower court as well as lower appellate court have arrived at a fair conclusion that the plaintiff is entitled to one-fourth share in the suit schedule property and accepted the cancellation deed executed by Rangaswamy Achary in the presence of PW2. Hence, the well considered decision need not be interfered with the second appeal.

11. The other defendants have not file any appeal. The second defendant alone has filed an appeal against the lower court and the lower appellate court and the decree passed by the lower court was confirmed by the lower appellate court which does not require interference by this court. Accordingly, he prayed for dismissal of the second appeal.

12. On perusal of the entire records, admittedly Rangaswamy Achary was the Karta and father of the Hindu Joint Family. The plaintiff and the defendant was a co-parcener in the Hindu joint family property. The said Rangaswamy Achary had inherited the property from his father. Thereafter, he executed a Will in favour of the defendants 2 and 3. The said Will was executed on 05.02.1972. Thereafter, the said Rangaswamy Achari has appointed one Kadambari to cancel the Will dated 23.01.1976 and the said Will was handed over to Kadambari in order to present the same before the Registering Officer. Accordingly, Kadambari, who is also one of the witnesses in the documents presented the documents before the said Registering Officer. He received the cancellation of Will dated 23.01.1976 and on payment, he went to the house of Rangaswamy Achary and registered a Will dated 25.01.1976. After recording the statement of Rangaswamy Achary, he ensured that all the

witnesses were present and signed in the cancellation of deed. On perusal of Exs.A1, A13 and 14, the Registering Officer registered the cancellation of Will on 25.01.1976. After registration of cancellation of the Will dated 25.01.1976, the said Rangaswamy Achary died on 26.01.1976 leaving behind the plaintiff and the defendants as his legal heirs and the suit schedule property to all the plaintiffs and defendants 1 to 3. There are two suits initially recorded by the lower court. The respondent filed a suit for partition and the appellant filed a suit for declaration and permanent injunction. The partition suit was decreed in favour of the respondent and the declaration suit filed by the appellant was dismissed by the lower court.

13. The learned counsel for the appellant would fairly considered the case on merits. However, they preferred the appeal before the lower appellate court as against the declaration relief in O.S.No.488/1986. The lower appellate court also confirmed the dismissal order passed by the lower court. However, no documents were filed before the lower court.

14. On perusal of the entire records, it is seen that though the Will is executed by Rangaswamy Achary on 05.02.1972, even thereafter the property stands in the name of him and continued as joint family property and tax and other revenue receipts assessed in the name of Rangaswamy Achary. The appellant/2nd defendant, not able to establish his case, after the Will, he is in possession and enjoyment of the property and the property exclusively belongs to the appellants and third defendant. In the absence of any valuable material, I do not find any error in the findings of the courts below that the appellant as well as the third defendant enjoying the property. After execution of Will, the said Will is not acted upon till the filing of the suit.

15. In view of the above, I do not find any error in the preliminary decree passed by the lower court and confirmed by the lower appellate court. Accordingly, the substantial questions of law are answered against the appellant.

In the result, the second appeal is dismissed confirming the preliminary decree granted by the lower court and lower appellate court. No costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

gv

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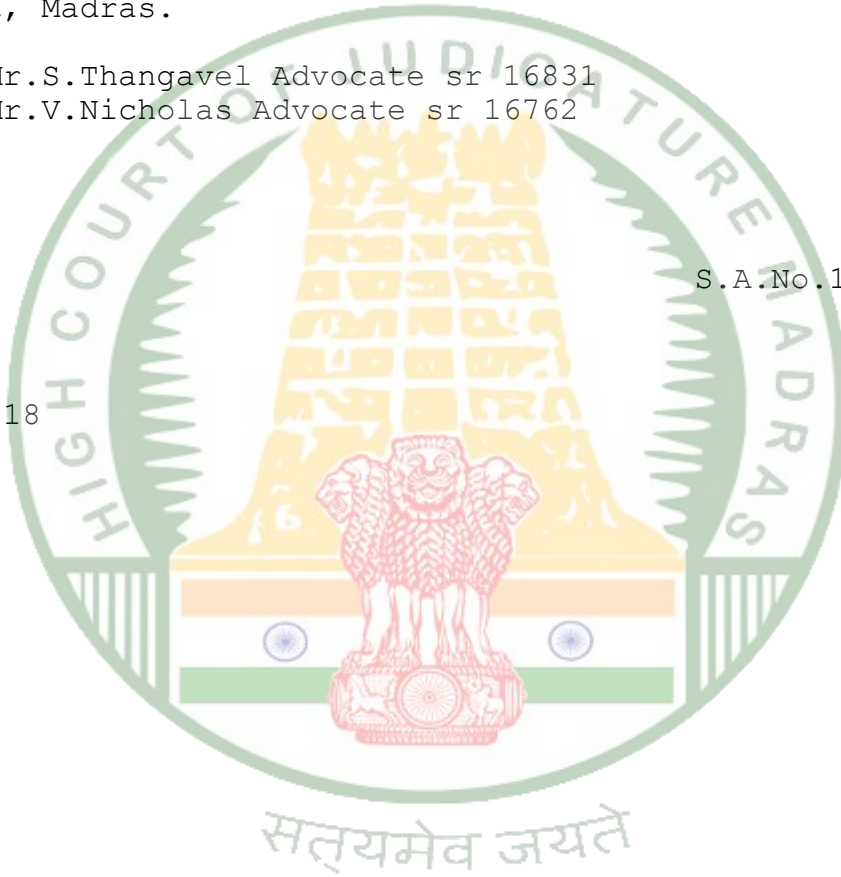
1. The Subordinate Judge,
Udumalpet.
2. The District Munsif,
Udumalpet.

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High Court, Madras.

+1 cc to Mr.S.Thangavel Advocate sr 16831
+1 cc to Mr.V.Nicholas Advocate sr 16762

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