

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.01.2018
DELIVERED ON : 29.01.2018

CORAM:

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

S.A.No.168 of 2016

Thenayammal

.. Appellant/Plaintiff

Vs.

1. Ramu @ Ponnukasu
2. Boopathi
3. Kalaivani
4. Rathinammal (Deceased)
5. Dhana Urukannasamy
6. Kannayal

... Respondents/Defendants
3 to 6 /1 and 2

RR 1 to 3 are recorded as LRs of the
deceased R4 vide order dated 06.07.2016
made in Memo USR No.5225, dated 04.07.2016

RR 5 and 6 are already remained ex-parte before the Courts below.

Prayer : Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgement and decree dated 31.08.2009, passed in A.S.No.94 of 2008 on the file of the I Additional Sub Court, Gobichettipalayam, in reversing the well-considered judgement and decree made in O.S.No.359 of 2001, dated 29.01.2008, on the file of the District Munsif Court, Gobichettipalayam.

For Appellant : Ms.Sudharshana Sundar
for Mr.MA.P.Thangavel

For Respondents: Mr.P.Valliappan for RR 1 to 3
R4 - Died

R5 & R6 get exparte before lower
court.

J U D G E M E N T

This Second Appeal has been filed against the Judgement and Decree dated 31.08.2009, passed in A.S.No.94 of 2008 on the file of I Additional Subordinate Judge, Gobichettipalayam, reversing the Judgement and Decree dated 29.01.2008, passed in O.S.No.359 of 2001 on the file of District Munsif Court, Gobichettipalayam.

2. The plaintiff in the suit for permanent injunction, aggrieved by the judgement and decree of the Courts below, has preferred the above second appeal.

3. The plaintiff is the daughter of one Angappa Gounder and Sree Rangayammal. The first and second defendants are the brother and sister of the plaintiff. The plaintiff also had another brother, namely, Marimuthu, who is no more and his wife is shown as the sixth defendant. Defendants 3 to 5 are the children of the said Marimuthu.

4. The case of the plaintiff is that the suit property is a house property purchased by the said Angappa Gounder on 29.04.1935. Thereafter, it was gifted in favour of his wife - Sree Rangayammal on 07.11.1953, which was duly accepted and acted upon by her. The mother of the plaintiff - Sree Rangayammal also had purchased a landed property and a portion of the house property under a sale deed 28.01.1966. Ever since, the said Sree Rangayammal had been in possession and enjoyment of the said property.

4.1. The father of the plaintiff Angappa Gounder died on 09.02.2001 and Sree Rangayammal died on 23.01.1998. While in sound disposing state of mind, the said Sree Rangayammal executed a registered will dated 23.01.1995, in favour of her husband Angappa Gounder for life and thereafter, to the plaintiff absolutely. The Testatrix Sree Rangayammal died leaving her husband as life estate holder and the plaintiff, as the absolute owner, after his demise. Accordingly, it is stated that the plaintiff's father was in enjoyment of the suit property, till his death. He did not make any encumbrance during his lifetime and the suit property devolved upon the plaintiff as per the Will, on the death of her father on 09.02.2001.

4.2. Thus, the plaintiff claimed that she became absolute owner of the suit properties and continued to be in possession and enjoyment of the same by paying kist, house tax and electricity bills.

4.3. The defendants 3 to 6 picked up quarrel with the plaintiff and claimed right over the suit properties and tried to trespass into the same, during December, 2001. Hence, the suit has been filed for permanent injunction restraining the defendants from interfering with the peaceful possession of the plaintiff's enjoyment over the suit properties.

5. The suit was resisted by the defendants contending that the Will dated 23.01.1995 is not the last Will and that, the Testatrix had executed another Will dated 29.01.1996, which was not registered. So far as item No.2 of the suit property is concerned, the said Sree Rangayammal had also executed a sale deed dated 24.02.1994 in favour of defendants 3 and 4. From the date of sale, it is claimed that the said defendants are in possession of the said property. The defendants had also pointed out that the plaintiff had not produced the original Will said to have been executed by her mother. Thus, the defendants are in possession of the suit property and hence, dismissal of the suit was prayed for.

6. Before the Trial Court, the plaintiff was examined as P.W.1 and one Srirangan was examined as P.W.2. Exs.A.1 to A.32 were marked on her side. The defendants examined D.Ws.1 to 5, amongst whom D.W.1 is the first defendant, and marked Exs.B.1 and B.38.

7. Considering the above documents and evidence, the Trial Court had decreed the suit issue No.1 in favour of the plaintiff. In so far as issue No.2 is concerned, the suit was dismissed.

8. Aggrieved by the same, appeal was filed only by the defendant Nos. 3 to 6 and the plaintiff did not prefer an appeal against the dismissal of the second item. Hence, the right of the plaintiff over the second item has reached finality.

9. The defendant Nos.3 to 6 had preferred the appeal challenging the decree in favour of the plaintiff with respect to the first item. The First Appellate Court had allowed the appeal, thereby dismissing the right of the plaintiff with respect to the first item also.

10. Aggrieved by the same, the above second appeal is preferred by the plaintiff and at the time of admission, the following questions of law have been formulated for consideration :

"a) Whether the lower appellate court is right in disbelieving Ex.A.4 dated 23.01.1995, when it is admitted by the defendants which is against Section 57 of the Indian Evidence Act, 1872 ?

b) Whether the Courts below is right in dismissing the suit for bare injunction in toto holding that the plaintiff is not having any title over the suit property ?"

11. Learned counsel for the appellant/plaintiff contended that the Lower Appellate Court was wrong in disbelieving Ex.A.4-Will, when the same is admitted by the defendants.

12. Heard the learned counsel for the respondents and perused the materials available on record.

13. At the outset, it is to be stated that as the plaintiff had not challenged the decree dismissing her right with respect to the second item of the suit property, the same had become final. Now, the appeal revolves around only the first item of the property.

13.1. The first item of the suit property is the one purchased by the father of the plaintiff and later, it was settled in favour of her mother Sree Rangayammal, who had later said to have executed a Will in favour of the plaintiff, giving the lifetime to the father of the plaintiff and absolute right to the plaintiff, after his demise.

14. The suit, being one for injunction, only the factum of possession has to be gone into. In this case, the plaintiff, defendants 1 and 2 and defendants 3 to 6 are all co-owners of the property in the absence of any document. The second item of the property was sold by Sree Rangayammal in favour of defendants 3 and 4 on 24.02.1994. Therefore, the plaintiff has got no right over the same. While denying the execution of the Will dated 23.01.1995 as the last Will of Sree Rangayammal, the defendants also had produced an unregistered Will dated 29.01.1996 marked as Ex.B.1. However, the Trial Court had upheld the Will dated 23.01.1995, and based on the same held that the plaintiff is entitled for decree of injunction with respect to the first item, whereas, the Lower Appellate Court had specifically found that the Will had not been proved in the manner known to law and even if the defendants had admitted the Will, the plaintiff ought to have proved the genuineness of the same by examining the attester of the Will as prescribed under Section 68 of the Indian Evidence Act, 1872.

15. It is curious to note that the plaintiff, who has placed reliance on the Will, which is said to be registered, had not produced the same and marked only the copy of the original. It is stated that the Will was retained by the Testatrix Sree Rangayammal and later it was given to another person. The plaintiff did not even care to produce the same before the Court. Even presuming that the defendants had admitted the

execution of the Will, they have stated that the same was not acted upon and it had not come into force, as the Testatrix had written another Will dated 29.01.1996 superseding the previous Will dated 23.01.1995. The Testatrix Sree Rangayammal had earlier executed a sale deed in favour of the defendant Nos.3 and 4 on 24.02.1994. While so, the same person could not have executed the said property in the Will bequeathing the same in favour of the plaintiff.

16. In such circumstances, the Lower Appellate Court had correctly disbelieved the execution of the Will holding that the same was executed under suspicious circumstances.

17. Now the question that has to be decided is as to whether the plaintiff is in possession of the suit property to entitle her for a decree for injunction. As stated earlier, the parties are closely related and in the absence of any document, they would be co-owners. There cannot be a suit for bare injunction against co-owners, as the same is not maintainable. If the plaintiff otherwise had got better title than the defendants, then, it can be presumed that the possession followed title. In the absence of proof of Will, under which the plaintiff makes a claim, title cannot be with the plaintiff. The Will is specifically denied by the defendants. So far as the plaintiff is concerned, that is the only document of title. When the title of the plaintiff is denied in the written statement, then the plaintiff should have sought for amendment of plaint by adding the relief of declaration of title. That is not done. When the execution of the Will is not proved, the plaintiff is denied of her title and the defendants automatically become the owners of the property along with the plaintiff. Therefore, the prayer for injunction can be granted only with regard to the finding of possession. But in cases of de jure possession, the same has to be established on the basis of title of the suit property. Then, the issue of title directly and substantially arises for consideration. Without a finding on the title, it will not be possible to decide with respect to the legality of the possession.

18. Learned counsel for the respondents/defendants contended that when the title of the defendants is specifically denied, he ought to have amended the prayer by including the relief of declaration also. If the prayer for declaration is included, the Court fee would be payable under Section 27(a) and (b) of the Tamil Nadu Court Fee and Suit Valuation Act, 1955, whereas, in the present suit, the Court fee is paid only under Section 27 (c), which is exclusively for the relief of permanent injunction. Therefore, the title of the plaintiff cannot be gone into.

19. It is further contended by the learned counsel for the respondents that, when, the first Will is revoked and superseded by the second Will under Ex.B.1, the document Exs.A.1 to A.5 become irrelevant.

20. At this juncture, it would be relevant to refer to a decision of the Supreme Court in Anathula Sudhakar V. P.Buchi Reddy (Dead) by LRs and others, 2008 (6) CTC 237. In paragraph 11 of the above judgement, the general principles as to when a mere suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief are well-settled. Paragraphs 11.1 to 11.3 of the said judgement are extracted hereafter :

"11.1. Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.

11.2. Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.

11.3. Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction."

21. In the above said case, it is specifically made clear that a prayer for declaration will be necessary, when the denial of title by the defendant or challenge to plaintiff's title raises a cloud on the title of the plaintiff to the property.

22. In the absence of any clear title supported by documents, the plaintiff is not entitled to seek for injunction.

23. Accordingly, the questions of law raised do not merit any consideration.

24. In the result, the second appeal is dismissed and the Judgment and decree of the Lower Appellate Court reversing the judgement and decree of the Trial Court are confirmed. There shall be no order as to costs.

-s/d-

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

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To

1. The I Additional Subordinate Judge
Gobichettipalayam.

2. The District Munsif Court,
Gobichettipalayam.

3. The Section officer
VR Section, High Court, Madras.

+1 CC to Mr.P. Valliappan, advocate sr 7048.

+1 CC to Mr.Ma.P. Thangavel, advocate sr 6773.

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S.A.No.168 of 2016

KK (CO)

SP(14/02/2018)

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