

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 06.11.2019

PRONOUNCED ON : 20.11.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.1515 of 2005

1. K. Lenin Rathinam (deceased)
2. S. Baggyalakshmi
3. L. Madheshwari
4. L. Samundeeswari
5. L. Eswari
6. L. Sundareswaran ... Appellants/LRS of the plaintiffs
(2nd appellant recorded as LR of 1st appellant;
Appellants 3 to 6 are LRs of deceased 1st appellant
as per order of the Court dated 23.09.2013
in CMP.No.463/2013)

Vs.

1. Rajamaniammal
2. K. Kuppulakshmi
3. K. Muthulakshmi ... Respondents/Defendants

(RR2 and 3 remained exparte vide order of court
dated 22.10.2019 made in SA.No.1515/2005 vide
memo dt 22.10.2019; their LRs need not be impleaded)

PRAYER : Second Appeal filed under Section 100 of C.P.C.,
against the judgment and decree made in A.S.No.57 of 2004 on the
file of the Principal Sub-Court, Erode dated 31.12.2004 as
confirmed by the judgment and decree made in O.S.No.4 of 1994 on
the file of the Principal District Munsif Court, Erode dated
05.01.2004.

For Appellants : Mr.R.G.Narendhiran

For Respondents : M/s.T. Murugamanickam
Senior Counsel
for M/s.Zeenath Begum for R1

: R2 and R3 set exparte

JUDGMENT

This second appeal has been filed by the plaintiffs against the judgment and decree passed by the Principal Sub-Judge, Erode, in A.S.No.57 of 2004 dated 31.12.2004 confirming the Judgment and Decree passed by the Principal District Munsif, Erode, in O.S.No.4 of 1994 dated 05.01.2004.

2. The appellants 1 and 2 herein had filed a suit in O.S.No.4 of 1994 on the file of the Principal District Munsif, Erode, for the relief of mandatory injunction directing the first defendant to handover the possession of the suit properties and to direct the first defendant to render accounts for rental income in respect of the house property (Item No.1) and to direct the first defendant to pay the said amount and also to direct the first defendant to return the item No.2 of the suit properties (2½ sovereign jewels). The learned Principal District Munsif, Erode, by the judgment dated 05.01.2004 had dismissed the suit without costs. Aggrieved by the same, the plaintiffs had filed an appeal in A.S.No.57 of 2004 on the file of the Principal Sub-Judge, Erode. The learned Principal Sub-Judge, Erode, by the judgment dated 31.12.2004 had dismissed the said appeal and thereby confirmed the judgment and decree passed by the trial court. Aggrieved by the same, the plaintiffs have filed the present second appeal.

3. During pendency of the second appeal, the first appellant died and hence her legal representatives have been impleaded as appellants 3 to 6.

4. For the sake of convenience, the parties are referred to as described before the trial court.

5. The averments made in the plaint are in brief as follows:

The first plaintiff and the defendants are brother and sisters. The second plaintiff is the wife of the first plaintiff. The father of the first plaintiff and the defendants namely Kuppusamy Chettiar had executed a Will on 20.08 1997 bequeathing his properties to his sons and daughters. In the said Will, item No.1 of the suit properties was bequeathed to the defendants 2 and 3 by giving life interest to them and after their life time, the said property should devolve upon the plaintiffs. The said Kuppusamy Chettiar died on 21.06.1979 and thereafter the Will came into force. After the death of Kuppusamy Chettiar, the defendants 2 and 3 did not claim any right over item No.1 of suit properties. By their act and conduct, waived their right and consequently, the plaintiffs entitled to the item No.1 of the suit properties. At the time of

death of Kuppusamy Chettiar, as a family property, the first defendant was permitted to reside in their house as a licensee. Subsequent to the death of the said Kuppusamy Chettiar from 1978, the first defendant had rented out the suit premises to various parties and received rental income; she did not account for the same. Further, the first plaintiff gave 2½ sovereigns of jewels to the first defendant for repairing them, but she failed to return the same. Hence, the plaintiff was constrained to file a suit for mandatory injunction directing the first defendant to handover the possession of the suit properties and also for rendition of accounts and for payment of rents.

6. The averments made in the written statement filed by the first defendant are in brief as follows:

The Item No.1 of the suit properties is a separate property of the first defendant. She purchased the said properties out of her own funds. Further she has been in possession and enjoyment of the Item No.1 of the suit properties, for more than 30 years continuously uninterruptedly as absolute owner and as such, she perfected title by adverse possession also. Their father Kuppusamy Chettiar was not competent to execute the Will dated 28.09.1977. The first defendant does not admit the genuineness and validity of the said Will. The said Kuppusamy Chettiar died in the year 1978. For the past 16 years, the plaintiffs have not claimed any right over the suit properties. Hence, the suit is barred by limitation. It is false to state that the first plaintiff gave 2½ sovereigns of jewels for repairing. The suit has not been properly valued. As per the alleged Will, it is only after the life time of Kuppulakshmi and Muthulakshmi (defendants 2 and 3), the plaintiff and his wife have to enjoy the property till their life time without any power of alienation. Hence, the suit is not maintainable. Therefore, the first defendant prayed to dismiss the suit.

7. The averments made in the first additional written statement filed by the first defendant are in brief as follows:

The suit is bad for non-joinder of necessary parties. Since the right and title of the suit property is in dispute, the plaintiffs ought to have filed a suit for declaration of their right and for consequential reliefs.

8. The averments made in the second additional written statement filed by the first defendant are in brief as follows:

After the marriage, the first defendant along with her family settled at the suit property and ever since she is the absolute owner and further exercised her right as a owner enjoying the suit property with the knowledge of everyone including the plaintiffs. The plaintiffs ought to have filed a suit for delivery of possession and instead of that, they cannot

file a suit for mandatory injunction. Therefore, the first defendant prayed to dismiss the suit.

9. Based on the aforesaid pleadings, the learned Principal District Munsif, Erode, had framed necessary issues and tried the suit. During trial, on the side of the plaintiffs, the first plaintiff examined himself as PW1 and two more witnesses were examined as P.Ws 2 and 3. They also marked Exs.A1 to A3 as exhibits. On the side of the defendants, neither oral nor documentary evidence adduced.

10. The learned Principal District Munsif, Erode, after considering the materials placed before him, found that the plaintiffs failed to produce the original Will said to have been executed by the deceased Kuppusamy Chettiar and also failed to prove the execution of the said Will by examining one of the attestors as contemplated under Section 68 of the Indian Evidence Act. He further found that the plaintiffs failed to prove that the first defendant was permitted to occupy the suit property only as a licensee and as such, they should have filed the suit for delivery of possession and instead of that, filing of the suit for mandatory injunction is not maintainable. He further found that the plaintiffs failed to prove that the first plaintiff gave 2½ sovereigns of jewels to the first defendant for repairing. Accordingly, he dismissed the suit. Aggrieved by the same, the plaintiffs had filed an appeal in A.S.No.57 of 2004 on the file of the Principal Sub-Judge, Erode. The learned Principal Sub-Judge, Erode, had dismissed the said appeal confirming the judgment and decree passed by the trial court. Feeling aggrieved, the plaintiffs have filed the present second appeal.

11. This court at the time of admitting the second appeal has formulated the following substantial question of law:

“Whether the courts below erred in law is not holding that Ex.A3 Will has been proved by the plaintiffs/appellants by marking copy of the registered document and also examining PW3 especially under circumstances where the attestors and scribe of the documents are not alive?”

12. Heard Mr.R.G.Narendhiran, learned counsel for the appellants and M/s.T.Murugamanickam, the learned senior counsel for M/s.Zeenath Begum, learned counsel for the first respondent.

13. Substantial question of law:

The learned counsel for the appellants/plaintiffs has submitted that the courts below erred in holding that the

plaintiffs failed to prove the execution of the Will by Kuppusamy Chettiar. He further submitted that Ex.A3 would clearly show that the original Will was presented by the third defendant for registration and at that time, after enquiry with the first defendant, the Sub-Registrar passed an order under Section 41 (2) of the Registration Act and therefore, the first defendant is estopped from denying the execution of the Will by their father Kuppusamy Chettiar. He further submitted that the evidence of PW1 would show that the original Will is only with the third defendant Muthulakshmi, but she did not produce the original before the court and in the said circumstances, the plaintiffs are entitled to prove and adduce secondary evidence. He further submitted that the evidence of PW3 would show that the attestors are not alive and hence the courts below ought not to have held that the plaintiffs did not discharge their burden. He further submitted that the evidence of P.Ws.1 to 3 would clearly show that the defendants 2 and 3 have orally relinquished their right over item No.1 of the suit properties and further, even after impleading them as defendants 2 and 3 in the suit, they remained exparte and that also would show that they have accepted the case of the plaintiffs and therefore there is no bar for filing suit by the plaintiffs during the life time of the defendants 2 and 3. He further submitted that the evidence of P.Ws.1 and 2 would clearly show that the first plaintiff had permitted the first defendant to occupy the item No.1 of the suit properties only as a licensee and as such, the suit filed for the relief of mandatory injunction for delivery of possession is maintainable. He further submitted that to controvert the evidence of P.Ws 1 to 3, the first defendant did not adduce either oral or documentary evidence and in such a case, an adverse inference has to be drawn against her, but the courts below had mechanically rejected the claim of the plaintiffs and therefore, he prayed to allow the second appeal and set aside the judgment and decree passed by the courts below and decree the suit as prayed for.

14. In support of the aforesaid contentions, the learned counsel for the appellants has relied upon the decision in R. Sourirajan Vs. The District Registrar, Thanjavur and others 1992 -2 - LW - 591.

15. Per contra, the learned Senior Counsel for the first respondent/first defendant has submitted that since the first defendant had denied the execution of the Will by their father, the propounder of the said Will should have produced the original Will and prove the execution of the same by examining atleast one of the attestors as contemplated under Section 68 of the Indian Evidence Act. He further submitted that though the first plaintiff while examining himself as PW1 has deposed that the original Will is with the third defendant, he has not issued

any notice to the third defendant to produce the original Will as contemplated under Section 66 of the Indian Evidence Act and as such, the plaintiffs are not entitled to adduce secondary evidence by producing copy of the Will. He further submitted that even according to the plaintiffs, in the said Will, life interest was given to the defendants 2 and 3 and only after their life time, the plaintiffs can claim any right if at all. But during the life time of the defendants 2 and 3, the plaintiffs cannot file the suit. He further submitted that there is no evidence that the plaintiffs had permitted the first defendant to reside in item No.1 of the suit properties and there is no evidence that the first defendant leased out the said property to the third party and collected rent and paid to the plaintiffs at any point of time and therefore, the contention of the plaintiffs that the first defendant is in possession of the suit property only as licensee and as such, they are entitled to file the suit for mandatory injunction for delivery of possession and they need not file a regular suit for delivery of possession, is not correct. He further submitted that the trial court taking into consideration of the aforesaid facts, had rightly dismissed the suit and the same has been confirmed by the first appellate court and in the said factual concurrent findings, this court cannot interfere and therefore he prayed to dismiss the suit.

16. In support of the aforesaid contentions, the learned Senior Counsel for the first respondent has relied upon the decision in C.Kumarasamy Vs. P.Thamayanthi & Another 2019-5-L.W. 128.

17. It is an admitted fact that the first plaintiff and the defendants 1 to 3 are brother and sisters and their father Kuppusamy Chettiar died on 21.06.1979 and it is also an admitted fact that the second plaintiff is the wife of the first plaintiff.

18. According to the plaintiffs, the said Kuppusamy Chettiar had bequeathed his properties to his sons and daughters by executing a Will dated 20.08.1977. Their further case is that after the death of the said Kuppusamy Chettiar, the Will came into force and the sons and daughters of the said Kuppusamy Chettiar had succeeded to the respective schedules mentioned in the said Will. Their further case is that the 'B' schedule property in the said Will was bequeathed to the defendants 2 and 3 by giving life interest and after their death, the plaintiff's are entitled to get said properties. Their further case is that since the defendants 2 and 3 did not claim any right and by their act, waived their right over the item No.1 of the suit properties. Their further case is that they permitted the first defendant to reside in the said house as a licensee and

subsequently, the first defendant had leased out the said properties to third parties and collected the rents and paid to them for certain period, thereafter, she refused to pay and that is the reason for filing this suit.

19. The case of the first defendant is that she has been in possession and enjoyment of the Item No.1 of the suit properties for more than 30 years continuously and openly without any interruption and as such, she preferred title over the same. Her further case is that she denied the execution of the Will by their father Kuppusamy Chettiar. She also denied the contention of the plaintiffs that she occupied the suit houses only as a licensee.

20. In this case, the plaintiffs have not produced the original Will which was said to have been executed by Kuppusamy Chettiar on 20.08.1977. On the contrary, they have produced a registration copy of the said Will and marked as Ex.A3. The first plaintiff while examining himself as PW1 has deposed that the original Will is with the third defendant. But he has not issued any notice as contemplated under Section 66 of the Indian Evidence Act, 1872 directing the third defendant to produce the original Will. Therefore, the plaintiffs are not entitled to adduce the secondary evidence.

21. In C.Kumarasamy Vs. P.Thamayanathi & Another 2019-5-L.W. 128, (cited supra), this court in paragraph Nos.31 to 33 has observed as follows:

"31. In H. Siddiqui (Dead) by LRs Vs.A.Ramalingam, the Hon'ble Supreme Court in Paragraph 12 has observed as follows:

" 12. The provisions of Section 65 of the 1872 Act provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where the original documents are not produced at any time, nor has any factual foundation been laid for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non-production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in

accordance with law. The Court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon "

32. In Rakesh Mohindra Vs. Anita Beri and others (cited supra), the Hon'ble Supreme Court in Paragraph Nos. 15 and 20 has observed as follows:

" 15. The preconditions for leading secondary evidence are that such original documents could not be produced by the party relying upon such documents in spite of best efforts, unable to produce the same which is beyond their control. The party sought to produce secondary evidence must establish for the non-production of primary evidence. Unless, it is established that the original document is lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used, secondary evidence in respect of that document cannot be accepted.

20. It is well settled that if a party wishes to lead secondary evidence, the Court is obliged to examine the probative value of the document produced in the Court or their contents and decide the question of admissibility of a document in secondary evidence. At the same time, the party has to lay down the factual foundation to establish the right to give secondary evidence where the Original document cannot be produced. It is equally well settled that neither mere admission of a document in evidence amounts to its proof nor mere making of an exhibit of a document dispense with its proof, which is otherwise required to be done in accordance with law "

33. From the aforesaid decisions, it is clear that the preconditions for leading secondary evidence are that such original documents could not be produced by the party relying upon such documents inspite of best efforts, unable to produce the same which is beyond their control. It is also clear that the parties sought to be produced secondary evidence must establish for the non-production of primary evidence. Unless, it is established that the original document is lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used, secondary evidence in respect of that document cannot be accepted. It is also clear that it is well settled that neither

mere admission of a document in evidence amounts to its proof nor mere making of an exhibit of a document dispense with its proof, which is otherwise required to be done in accordance with law. In this case, as already stated that the first defendant has not established that the original settlement deed has been taken away by the plaintiff or the second defendant from the custody of their mother. Under the said circumstances, the first defendant is not entitled to adduce secondary evidence."

22. From the aforesaid decision, it is clear that the preconditions for leading secondary evidence are that such original documents could not be produced by the party relying upon such documents inspite of the best efforts, unable to produce the same which is beyond their control. It is also clear that the parties sought to produce secondary evidence must establish for the non-production of primary evidence. In this case, as already pointed out that though the first plaintiff, in his evidence has stated that the original Will is with the third defendant, he has not issued any notice, directing her to produce the original Will as contemplated under Section 66 of the Indian Evidence Act. Therefore, the plaintiffs are not entitled to adduce secondary evidence.

23. The learned counsel for the appellants/plaintiffs relying upon the endorsement of the Sub-Registrar in Ex.A3 has submitted that after the death of the said Kuppusamy Chettiar, the third defendant had presented the Will for registration and the Sub- Registrar after conducting enquiry under Section 41 (2) of the Registration Act, registered the said Will and during enquiry, the first defendant also adduced evidence before the Sub-Registrar and therefore, it is not open to the first defendant to deny the execution of the said Will.

24. In support of the aforesaid contention, the learned counsel for the appellants relied upon the decision in R. Sourirajan Vs. The District Registrar, Thanjavur (cited supra). In the said decision, the petitioner therein challenging the order passed by the District Registrar Thanjavur, filed a writ petition. This court has held that the petitioner can challenge the said Will before the civil court. Further, it was held that mere fact that the Will was registered, was not by itself sufficient to dispel the suspicion without scrutiny of the evidence of registration. It was further held that the registration simpliciter cannot be regarded as a talisman casting away all suspicions against the evidence of the Will. With regard to the proof of the Will, Section 68 of the Indian Evidence Act clearly says that if a document is required by law

to be attested, it shall not be used as evidence until one attesting witness atleast has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. In this case, except the ipse dixit of Pws.1 and 3, no evidence adduced before the court that the attestors are not alive. Therefore, the aforesaid decision will not help the appellants/plaintiffs.

25. Even in the alleged Will (Ex.A3) it is clearly stated that life interest has been given to the defendants 2 and 3 and only after their death, the plaintiffs can take possession of Item No.1 of the suit properties, but the plaintiffs claimed that after the death of Kuppusamy Chettiar, they permitted the first defendant to occupy the suit property as licensee. The said contention cannot be accepted because after the death of the said Kuppusamy Chettiar, as per the Will, the only defendants 2 and 3 are entitled to get the suit property. Only after their life time, the plaintiffs can claim right over the suit property. Further there is no evidence before the court that the defendants 2 and 3 have relinquished their life interest over the suit property. In the absence of any documentary evidence, the contention of the plaintiffs that the defendants 2 and 3 have relinquished their life interest over the suit property, cannot be accepted. Once it is held that the plaintiffs would not have taken possession of the suit property, after the death of Kuppusamy Chettiar, the contention of the plaintiffs that they have permitted the first defendant to reside in the suit properties as licensee and subsequently, the first defendant has leased out the property to the third parties and collected rent and paid to the plaintiffs also cannot be accepted.

26. If the property is in possession of the licensee, then only the licensor, after revoking the license, can file a suit for mandatory injunction directing the licensee to handover the possession, but in this case, there is no evidence that the first defendant is in possession of the suit property as a licensee and hence, the plaintiffs ought to have filed a regular suit for delivery of possession.

27. As already pointed out that during the life time of defendants 2 and 3, the plaintiffs cannot claim any right over the suit properties and they are not at all having any cause of action for filing the suit. Further, there is no evidence that the plaintiffs have handedover the 2½ sovereign jewels to the first defendant for repairing work. Except the epsi dixit of PW1, no other evidence is available with regard to handing over of the jewels to the first defendant.

28. The trial court taking into consideration of the aforesaid facts had rightly dismissed the plaintiffs' suit and the same has been confirmed by the first appellate court. In the said factual concurrent findings, this court cannot interfere and therefore, the second appeal is liable to be dismissed. Accordingly, the substantial questions of law is answered against the appellants.

29. In the result, the second appeal is dismissed. No costs. Liberty is given to the plaintiffs to file a fresh suit for appropriate reliefs after the life time of the defendants 2 and 3. If the defendants 2 and 3 already died, the plaintiffs may file a fresh suit by impleading the LR's of the defendants 2 and 3.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

gv

To

1. The Principal Subordinate Court,
Erode.
2. The Principal District Munsif,
Erode.
3. The Section Officer, VR Section,
High Court, Madras.

+1cc to Mr.R.G.Narendhiran, Advocate Sr.96454
+1cc to M/s.Zeenath Begum, Advocate Sr.96946

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