

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:09.09.2019

CORAM

THE HON'BLE MR. JUSTICE R.SUBRAMANIAN

S.A.No.401 of 2016

and CMP Nos.7051 & 7052 of 2016

and

S.A.No.292 of 2019

and CMP No.4412 of 2019

SA No.401 of 2016

Saroja : Appellant/Appellant/Plaintiff

vs.

1. Anjalaiammal

2. Vennila : Respondents/Respondents/Defendants

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against the Judgment and Decree passed in AS No.71 of 2006 dated 28.02.2008 on the file of Sub Court, Chidambaram and thereby confirming the decree and judgment dated 28.02.2006 passed in OS No.164 of 2001 on the file of District Munsiff cum Judicial Magistrate, Kattumannarkoil.

SA No.292 of 2019

Anjalaiammal : Appellant/Respondent/Plaintiff

vs.

1. Saroja

2. Arivalagan

3. Stalin

4. Janahiraman

5. Athenila

6. Singarammal : Respondents/Appellants/Defendants

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against the Judgment and Decree passed in AS No.41 of 2003 dated 19.04.2004 on the file of Sub Court, Chidambaram reversing the Judgment and Decree passed in OS No.46 of 2001 dated 14.08.2003 on the file of District Munsif cum Judicial Magistrate, Kattumannarkoil.

For Appellant in SA 401/2016
& Respondents in SA No.292/19

: Mr.J.Ramakrishnan
for M/s.A.Mayakrishnan

For Respondents in SA 401/2016
& Appellant in SA No.292/2019

: Mr.J.Antony Jesus

C O M M O N J U D G E M E N T

SA No.401 of 2016:

This Appeal is by the plaintiff in OS No.1099 of 1990, which was originally filed in the District Munsif Court, Virudhachalam. The same was transferred to District Munsif Court, Kattumannarkoil, and was renumbered as OS No.164 of 2001.

The said suit was filed by the plaintiff seeking declaration of title and for permanent injunction restraining the defendants from interfering with her possession.

2. The case of the plaintiff as set out in the plaint is as follows:

The suit properties numbering about 12 items originally belonged to the father of the plaintiff Chinnaswamy Padayachi. The said Chinnaswamy Padayachi had another daughter and one son Pattusami. It is stated that Pattusami predeceased Chinnaswamy Padayachi, leaving behind the defendants as his legal heirs, the first defendant is the wife and the second defendant is the daughter of the Late Pattusami. According to the plaintiff the said Chinnaswamy Padayachi was in possession and enjoyment of the suit property till his lifetime. On 08.05.1989, he executed a Registered Will bequeathing the suit properties to the plaintiff. The said Chinnaswamy Padayachi, died in March 1990 and his wife Periyammal died in April 1990. On the death of Chinnaswamy Padayachi, the plaintiff became the absolute owner in view of the Will dated 08.05.1989 and therefore, the plaintiff is entitled to the relief of declaration and injunction.

3. The suit was resisted by the defendant contending that suit items 4 and 11 have not been properly described. Suit items 1, 3 and 7 have been sold by Chinnaswamy Padayachi to the first defendant under the registered Sale Deed dated 12.06.1986. Suit items 2, 4, 6, 8 and 11 were settled by Chinnaswamy Padayachi in favour of the second defendant, who is the granddaughter. As regards suit 12th item, it was claimed that one Govindappa Padayachi has obtained a decree against the

Chinnaswamy Padayachi in SC No.783 of 1973 and execution of the said decree, the suit item 12, was sold to one Rajamanicka Padayachi on 18.09.1974, and the said sale was confirmed on 02.02.1979. The said Rajamanicka Padayachi took possession of the property on 24.12.1979. Subsequently the said Rajamanicka Padayachi sold the property to the first defendant on 24.04.1987. Therefore, according to the defendants, the deceased Chinnaswamy Padayachi was not the owner of items 1, 2, 3, 4, 6, 7, 8, 11 and 12 on the date of execution of the Will.

4. It is also claimed that Gangachalam, husband of the plaintiff had filed TR No.21 of 1989, on the file of the Revenue Court seeking to recognise him as a tenant under the first defendant, thereby admitting the title of the first defendant. The execution of the Will dated 08.05.1989 was also denied by the defendants. On the above contentions, the defendants sought for dismissal of the suit.

5. The Courts below on the consideration of the oral and documentary evidence concluded that the Sale Deed dated 12.06.1986 (Ex.B2), executed by Chinnaswamy Padayachi, conveying items 1, 3 and 7 in favour of the first defendant, the settlement deed dated 15.06.1986 (Ex.B4), executed by Chinnaswamy Padayachi settling items 2, 4, 6 8 and 11 in favour of the second defendant as well as the sale deed dated 24.04.1987 (Ex.B14) were all true and valid documents and as such the plaintiff is not entitled to any relief with reference to those properties.

6. The Trial Court, however, did not pronounce on the validity of the Will. The Lower Appellate Court pointing out certain contradictions in the evidence of P.W.2, viz. the attessor to the Will and the fact that there is some alteration in the Will concluded that the plaintiff has not proved the Will. On the above findings, the Courts below dismissed the suit.

7. Aggrieved the plaintiff is on appeal.

8. The following questions of law were framed at the time of admission.

1. Whether the examination of all the attestors is necessary to prove a Will?
2. Whether the examination of one attessor is enough to prove the Will under Section 68 of Evidence Act?
3. Whether the cross examination of any of the attestator of settlement deed will lead to have proof of settlement deed under Section 68 of Evidence Act? (sic)

4. Whether the transaction of testator done of 8 properties given in the Will, subsequent to Will, will not lead to falsity of Will because a Will will come into force as on the death of testator? (sic)
5. Whether in a suit for declaration of title based on Will, this title can be declared as heir to testator in case this Will is held to be not prove and whether the Court is justified in dismissing the entire suit? (sic)
6. Whether the legatee will get title in respect of items not alienated by testator?

SA No.292 of 2019

9. The case of the plaintiff as set out in the plaint is as follows:

During the pendency of the suit in OS No.164 of 2001, the first defendant in the said suit filed in OS No.46 of 2001 seeking declaration and recovery of possession of the suit item 12 in OS No.164 of 2001. In the said suit, the plaintiff had claimed title under the Court Sale and the sale deed executed by Rajamanickam Padayachi in her favour on 24.04.1987.

10. The suit was resisted by the defendants contending that the auction purchaser did not get the title under the Court sale and he never took possession of the property. It is also claimed that Chinnaswamy Padayachi had bequeathed the property to the second defendant and therefore, the suit is liable to be disposed of.

11. The learned Trial Judge on a consideration of evidence both oral and documentary evidence concluded that the Court sale proceedings are valid and the plaintiff had obtained a valid title under the Sale Deed dated 24.04.1987 and as such, she is entitled to the reliefs of declaration and recovery of possession.

12. The Lower Appellate Court however, reversed the findings of the Trial Court on the ground that there is a discrepancy in the description of the property and hence the plaintiff is not entitled to the reliefs of declaration and recovery of possession.

13. Aggrieved the plaintiff has come forward with this Second Appeal.

14. The following questions of law were framed in the Second Appeal at the time of admission:

1. Whether the findings of the lower appellate court are vitiated by its failure to consider Exhibits A1 to A3 and the description of property therein especially in the absence of any dispute regarding the identity of the property?
2. Whether the lower appellate court is correct in considering the identity of the suit property with reference to Exhibits A1 to A3 in the absence of any allegations in the written statement and evidence?
3. Whether the lower appellate court is right in not unholding the title of the appellate on the basis of Exhibits A1 to A3 in the absence of any better title established on the side of the respondents?

15. I have heard Mr.J.Ramakrishnan, learned counsel appearing for Mr.A.Mayakrishnan, for the appellant in SA No.401 of 2016 and the respondents in SA No.292 of 2012 and Mr.J.Antony Jesus, learned counsel appearing for the respondents in SA No.401 of 2016 and appellants in SA No.292 of 2012.

16. Mr.J.Ramakrishnan, learned counsel appearing for the appellants in SA No.401 of 2016, while elaborating on the questions of law would strenuously contend that in the absence of examination of any of the attesting witnesses to the sale deeds dated 12.06.1986, 15.06.1986 and 24.04.1987 the Courts below were not right in upholding the said documents. He would point out that Section 68 of the Evidence Act requires at least any one of the attesting witnesses to be examined to prove the execution of document which requires attestation. He would also point out that the proviso exempts examination of the attesting witness only when the execution of the document by the executants is not specifically denied.

17. According to him, in view of the suggestions in cross-examination of D.W.1 that the said Sale Deed marked as Ex. B2 and the Settlement Deed marked as Ex.B4 have not been executed by Chinnaswamy Padayachi, the defendant should have examined at

least any one of the attesting witnesses to prove the document. On the conclusion of the Appellate Court, the Will has not been proved, Mr.J.Ramakrishnan, would contend that one attesting witness has been examined and the document being a registered Will, it is entitled to the benefit of the presumption of Section 60(2) of the Registration Act. Therefore the learned Appellate Judge was not justified in disbelieving the Will on conjunctures and surmises. He would also fault the Appellate Court for concluding that the non-examination of the other attesting witness is fatal to the case of the plaintiff as regards the proof of the Will.

18. Contending contra, Mr.J.Antony Jesus, learned counsel appearing for the respondents in SA No.401 of 2016 would point out that there is no denial much less is specific denial of the execution of Exs.B2 and B4 by Chinnaswamy Padayachi, either in the pleading or in the proof affidavit filed by the plaintiff. He would also point out that the plaintiff has, conveniently, not disclosed the existence of the Settlement Deed and the Sale Deed in the plaint. Even in the proof affidavit all that is stated is that the Sale Deed was a sham document and the Settlement Deed was not acted upon. According to Mr.J.Antony Jesus, the said statement in the proof affidavit would amount to indirect admission of execution of the document. Therefore, according to him, in the absence of a specific denial of the execution of the documents by Chinnaswamy Padayachi, the defendant cannot be faulted for non-examination of the attesting witnesses by those documents.

19. As regards item 12 of the property, Mr.J.Antony Jesus would point out that the property was sold in Court auction as early as in the year 1974 and the Court auction sale was confirmed and the purchaser had taken possession and the defendant has purchased the property from the Court auction purchaser, namely Rajamanickam Padyachi on 24.04.1987. Therefore, according to him, the defence that the Will of Chinnaswamy Padayachi would be valid cannot be countenanced.

20. I have considered the rival submissions.

Questions of Law 1 and 2 in SA No.401/2016:

21. The substantial questions of law 1 and 2 deal with the proof of the Will. The Will is a registered instrument. The attester to the Will has been examined as P.W.2. He has deposed that he has seen the testator signing the Will in the presence of himself and the other attesting witness

Sekar. The statutory requirement under Section 68 namely, examination of at least one of the attesting witnesses has been satisfied. The Will being a registered instrument is entitled to the presumption under Section 60(2) of the Registration Act. Though, P.W.2 has been extensively cross-examined nothing has been brought about to discredit its testimony at least regarding the execution and the attestation of the Will.

22. I am therefore, of the considered opinion that the Lower Appellate Court was not right in holding that the Will has not been proved in accordance with law, despite the fact that an attesting witness has been examined and he has deposed, as required under law, regarding execution and attestation of the document.

23. I am therefore of the considered opinion that the reasons assigned by the Lower Appellate Court, particularly, the non examination of the other attesting witness cannot hold water and the findings of the Lower Appellate Court regarding execution of the Will dated 08.05.1989 are liable to be interfered with substantial questions of law 1 and 2 are answered in favour of the appellant and the finding of the Lower Appellate Court regarding the truth and genuineness of the Will are set aside and the Will is upheld.

Question of Law No3:

24. This question deals with the proof of the Sale Deed namely, Ex.B2 and the Settlement Deed namely, Ex.B4. As already pointed out that both these documents are registered instruments, the plaintiff has not specifically denied the execution of these documents by Chinnaswamy Padayachi. In the plaint she had not chosen to even disclose the existence of those documents. In the proof affidavit, she had said that the documents are either invalid or not acted upon. As rightly pointed out by J.Antony Jesus, learned counsel appearing for the respondent/plaintiff there is in fact a tacit admission of execution of these documents by Chinnaswamy Padayachi. These documents are registered instruments and they have been executed in the year 1986. Chinnaswamy Padayachi was alive at least till 1990 nearly 4 years after the execution of these documents and he never took any steps to either have these documents set aside or declared invalid. In view of the above, I find that the plaintiff has established the execution of Exs.B2 and B4 by Chinnaswamy Padayachi.

25. As regards item 12 of the property, it is seen that the property was subject matter of Court auction sale and one Rajamanickam Padayachi, had purchased the property in the Court auction sale. The said Rajamanickam Padayachi, had sold the property to the first defendant on 24.04.1987. This document was also not disclosed in the plaint and the plaintiff has not chosen to claim that this document is invalid.

26. Apart from the above, the husband of the plaintiff Gangachalam, had filed an application before the Tahsildar, Kattumannarkoil, in TR No.21 of 1989, seeking to record his name as a tenant, admitting the first defendant as the owner of the property. All these factors would only show that the sale deed dated 24.04.1987 cannot be now challenged by the plaintiff.

27. In view of the above, question of law No.3 is answered to the effect that the defendants have established execution of these documents namely, Exs.B2, B4 by Chinnaswamy Padayachi and the defendants are the owners of the property covered by Exs.B2, B4 and B14.

Question of Law 4:

28. In view of my answers to the questions of law Nos.1 to 3, I do not find any need to answer the question of law No.4, which relates to the conduct of the Chinnaswamy Padayachi, having executed the Will after having dealt with the properties in 1986.

Question Nos.5 and 6:

29. While answering the Question of law Nos. 1 and 2, I have concluded that the plaintiff has proved the Will and hence this question of law does not arise. Question of Law Nos.5 and 6 need not be answered.

30. In view of the answers given to the questions of law framed in Second Appeal in SA No.401 of 2016 is partly allowed and the suit in OSA No.164 of 2001 will stand decreed in respect of items 5, 9 and 10 alone, in other respects the suit will stand dismissed.

Question Law No.1 in SA No.292 of 2019:

31. The sole ground on which the Lower Appellate Court had dismissed the suit is that there are some

discrepancies in the boundary recitals in the plaint and in documents Exs.A1 to A3. Mr.J.Antony Jesus, learned counsel appearing for the appellant would contend that the identity of the property was never in question and therefore, the Lower Appellate Court was not justified in dismissing the suit on the ground that there are certain discrepancies in the boundaries. While deciding Second Appeal in SA No.401 of 2016 has been concluded that the plaintiff in OS No.46 of 2001 is entitled to the suit property, which forms part of the other suit namely, OS No.164 of 2001 as Item No.12.

32. In view of the said finding, the question of law No.1, framed in this Second Appeal is answered concluding that the Lower Appellate Court was not right in going into the question of identity of the property as there was no dispute regarding the identity of the property. The Lower Appellate Court had also failed to consider the description in Exs.A1 to A3 and the description in the plaint in the proper perspective, while coming to the conclusion that the plaintiff is not entitled to a decree for declaration and recovery of possession.

33. In view of the above conclusions, all the three questions framed for determination in SA No.292 of 2019 are answered in favour of the appellant concluding that the learned Subordinate Judge, Chidambaram, was not right in going into the question of description of the property and denying a relief of declaration as the identity of the property was never in dispute.

34. In fine, the Second Appeal No.292 of 2019 is allowed and setting aside the judgment and decree of the Lower Appellate Court in AS No.41 of 2003 and restoring that of the Trial Court in OS No.46 of 2001. However, there will be no order as to costs. Consequently the connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar

// True Copy//

Sub Assistant Registrar

jv

To

1. The Subordinate Judge,
Chidambaram.
2. The District Munsif cum Judicial Magistrate,
Kattumannarkoil.
3. The Section Officer,
V.R.Section,
High Court of Madras.

+4CCs to Mr.S.Manikannan, Advocate, SR.No.77071 & 77070.

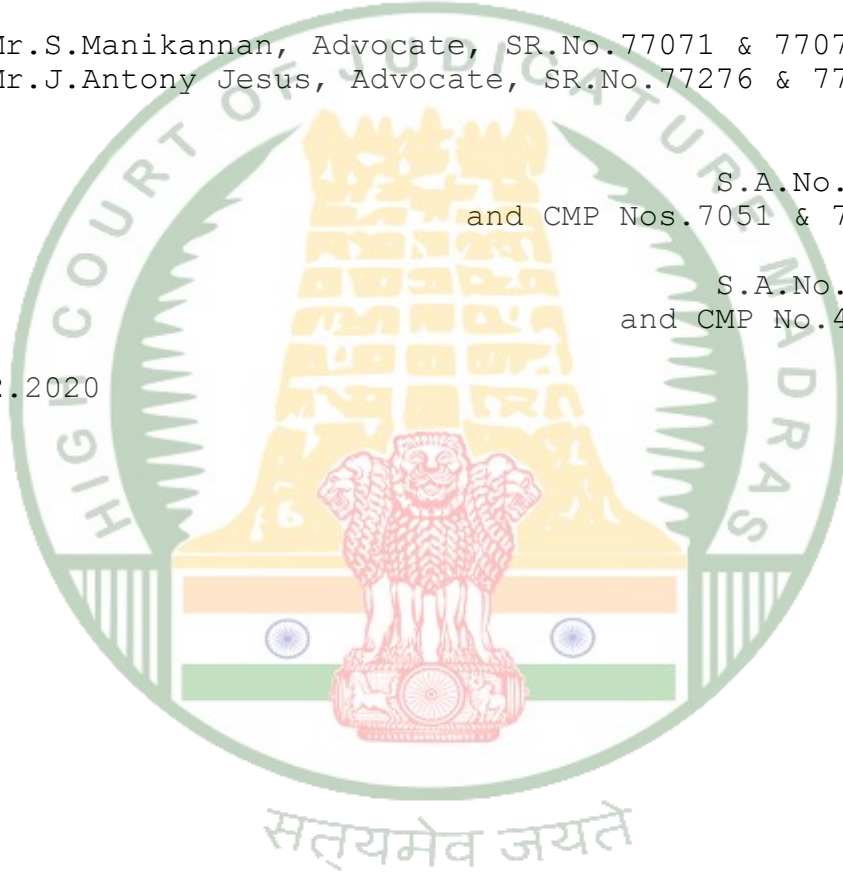
+2CCs to Mr.J.Antony Jesus, Advocate, SR.No.77276 & 77275.

S.A.No.401 of 2016
and CMP Nos.7051 & 7052 of 2016
and

S.A.No.292 of 2019
and CMP No.4412 of 2019

SSVC (CO)

CSR: 05.02.2020



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