

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.10.2019

CORAM:

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

S.A.NOS.338 AND 339 OF 2014

K.R.Ramudu (Died)

1.K.R.Lalitha

2.Ravishankar Ramudu Kondi

3.K.R.Vijaya

4.K.R.Sumathi

...Appellants in both the Second Appeals

Vs.

1.K.R.Narayana Rao

2.Santha

..Respondents in both the Second Appeals

PRAYER in S.A.No.338 of 2014:

Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 30.10.2012 in A.S.No.80 of 2010 on the file of Principal District Judge, Salem, reversing the judgment and decree dated 23.08.2010 in O.S.No.174 of 2005 on the file of II Additional Subordinate Judge, Salem.

PRAYER in S.A.No.339 of 2014:

Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 30.10.2012 in A.S.No.7 of 2011 on the file of Principal District Judge, Salem, confirming the judgment and decree dated 23.08.2010 in O.S.No.174 of 2005 on the file of II Additional Subordinate Judge, Salem.

For Appellants : Mr.P.Jagadeesan

For Respondents: Mr.T.M.Hariharan

J U D G M E N T

The legal representatives of the plaintiff in O.S.No.174 of 2005 have come forward with the above Second Appeals challenging the dismissal of their suit for partition.

2. According to the plaintiff, the 1st item of the suit properties belonged to Kupputhayammal viz., mother of the plaintiff and the defendant. She died intestate on 01.01.2001. Therefore, the plaintiff and the defendant are each entitled to ½ share in the suit properties. Insofar as the 2nd item of the suit properties are concerned, the plaintiff would claim that the properties belonged to Ramuthayammal, the grandmother of the plaintiff and the defendant and on her death, the property devolved on the plaintiff and the defendant in equal moieties.

3. Insofar as the 3rd item of the suit properties are concerned, it is claimed that it originally belonged to one Subbammal, who had mortgaged the property in order to secure a borrowing of Rs.700/- in favour of Pondi Ramasamy Iyer, father of the plaintiff and the defendant on 10.03.1952. Unable to repay the debt, the said Subbammal conveyed the property to the 1st defendant for a sum of Rs.1,000/-. A sum of Rs.825/- due under the mortgage was adjusted towards mortgage deed and the balance of Rs.175/- was paid to Subbammal. Therefore, it is the claim of the plaintiff that the property belonged to Pondi Ramasamy Iyer and on his death he would be entitled to ½ share in the suit properties.

4. The suit was resisted by the defendant contending that the 2nd defendant is the owner of the properties subject matter of the suit, hence she is a necessary party. Upon such a plea, the 2nd defendant was impleaded in the suit. She is the wife of the 1st defendant.

5. Insofar as the 1st item of the suit properties, the defence was that Kupputhayammal had left a registered Will dated 27.12.1985 bequeathing the properties in favour of the 2nd defendant. Therefore, the plaintiff has no right over the same. As regards the 2nd item it was claimed that Ramuthayammal, grandmother of the parties had executed a registered settlement deed dated 28.08.1981 settling the property on the 2nd defendant. Therefore the 2nd defendant is the absolute owner of the property and the plaintiff cannot claim a share over the said property.

6. As regards the 3rd item, it was claimed that the sale was taken by 1st defendant out of his own funds and a sum of Rs.825/- was paid over to the heirs of Pondi Ramasamy Iyer who died even on 18.04.1957 before the sale. The sale by Subbammal in favour of the 1st defendant was on 31.07.1957. It is also claimed that on 01.03.1972, the 1st defendant conveyed the suit property to his sister Mahalakshmi and the said Mahalakshmi had executed a registered Will in favour of the 2nd defendant bequeathing the properties to the 2nd defendant.

7. On the above pleadings, the defendants sought for dismissal of the suit. Upon consideration of the evidence on record, the trial court accepted the Will dated 27.12.1985 (Ex.B9) executed by Kupputhayammal and the settlement deed dated 28.08.1981 (Ex.B1) executed by Ramuthayammal and dismissed the suit in respect of items 1 and 2.

8. However, with reference to item 3, the learned subordinate Judge concluded that the sale was for the benefit of the family, though the sale deed stood in the name of the 1st defendant. It was also concluded that since only a sum of Rs.175/- was paid towards consideration and the balance went towards adjustment of mortgage debt advanced by Pondi Ramasamy Iyer, the property should be deemed to have formed part of the estate of Pondi Ramasamy Iyer. On the said findings, the trial court decreed the suit in respect of item 3 alone granting 1/3rd shares to the plaintiffs. Inasmuch as it was held that one of the daughters of Ramasamy Iyer viz., Sumithra, is entitled to 1/3rd share.

9. Aggrieved both the plaintiff and the defendants filed appeals in A.S.No.7 of 2011 and A.S.No.80 of 2010. The lower appellate court agreed with the conclusions of the trial court in respect of items 1 and 2. Insofar as the item 3 is concerned, the lower appellate court concluded that the plea that the 1st defendant was only a name lender and the property belonged to the estate of Pondi Ramasamy Iyer was barred under the provisions of the Prohibition of Benami Property Transactions Act, 1988.

10. The lower appellate court also concluded that one of the daughters of Pondi Ramasamy Iyer viz., Sumithra was not made a party to the suit and hence, the suit is bad for non-joinder of necessary parties. On the said conclusions, the lower appellate court allowed the appeal filed by the defendants viz., A.S.No.80 of 2010 and dismissed the appeal in A.S.No.7 of 2011. As a result, the entire suit stood dismissed. Aggrieved the plaintiff has come forward with the above two Second Appeals. Since the plaintiff died, his legal representatives are shown as the appellants.

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

(a) Whether the lower appellate court is right in holding that the defendants have proved the validity, genuineness and due execution of the alleged Will Ex.B9 in the manner known to law?

(b) Whether or not the lower courts erred in holding that the settlement deed Ex.B1 executed by Ramuthayammal is valid in law and also proved by the defendants, is erroneous and unsustainable in law?

(c) Inasmuch as, item No.3 of the suit properties are the joint family property of the plaintiff and 1st defendant, whether the alienations effected by the 1st defendant in favour of Mahalakshmi Ammal is valid in law and binding on the plaintiff?

(d) Whether the lower courts right in holding that the plaintiff is not entitled to claim partition in the suit properties merely because there is a delay in approaching the court and ignoring that there is a delay in approaching the court and ignoring that there is no limitation for filing a suit for partition and also in the absence of any plea of adverse possession or ouster by the defendants?

(e) Whether the lower appellate court right in holding that the plaintiff is not entitled to seek for partition as the delay on his part would amount to acquiescence?

12. I have heard Mr.P.Jagadeesan, learned counsel appearing for the appellants and Mr.T.M.Hariharn, learned counsel appearing for the respondents.

13. Elaborating on the questions of law Mr.P.Jagadeesan, learned counsel appearing for the appellants would contend that the defendants have not proved the Will and the settlement deed viz., Ex.B9 and Ex.B1 dated 27.12.1985 and 28.08.1981 respectively. It is also his further contention that the lower appellate court was not right in holding that the Prohibition of Benami Property Transactions Act, 1988, would bar the claim of the plaintiff inasmuch as the 1st defendant was the son of Pondi Ramasamy Iyer and the sale deed came close to the heels of death of Pondi Ramasamy Iyer. Therefore, it should be taken that the sale deed was executed in the name of 1st defendant for the benefit of the family and the 1st defendant held the property only on a fiduciary capacity. It is also the claim that the courts below were not right in dismissing the suit on the ground of delay.

14. Contending contra Mr.T.M.Hariharan, learned counsel appearing for the respondents would submit that as regards Ex.B9 Will is concerned, PW2 and PW4 viz., Scribe and Attestor to the document have been examined. The courts below have considered their evidence and concluded that the execution of the Will by Kupputhayammal has been established beyond doubt.

15. It is pointed out by Mr.P.Jagadeesan, learned counsel appearing for the appellants that the thumb impression of the executant of Ex.B9 and Ex.B1 have not been obtained in the reverse of first page of the document would show that there was no valid evidence of admission of execution before the Registering Authority.

16. The courts below have also considered the said question and found that it is only the irregularity which will not nullify the documents. As far as the Will Ex.B9 is concerned, the scribe has been examined as DW2 and attestor has been examined as DW4. Both the courts have concurrently held that their evidence is sufficient and the Will of Kupputhayammal has been established. I do not find any perversity in the findings of the courts below which are based on the evidence available on record.

17. Insofar as the settlement deed (Ex.B1) dated 28.08.1981 is concerned, the scribe has been examined as DW2 and attestor has been examined as DW5. Again the courts below on appreciation of the evidence on record have concluded that the evidence available is sufficient to uphold the execution of the settlement deed by Ramuthayammal. I do not see any perversity in the findings of the courts below in order to enable me to entertain the Second appeal on the factual conclusion regarding the execution of the documents viz., Ex.B9 and Ex.B1. Therefore, the questions of law (a) and (b) are answered against the appellants.

18. As regards the 3rd item, though Mr.P.Jagadeesan would contend that the 1st defendant held the property in a fiduciary capacity on behalf of the estate of Pondi Ramasamy Iyer, unfortunately for him there is no plea to that effect. The sale deed Ex.B2 itself was executed on 31.07.1957 after the death of Pondi Ramasamy Iyer. The 1st defendant had under Ex.B3 dated 01.03.1972 alienated the property in favour of his sister Mahalakshim. The said Mahalakshmi viz., the sister had executed a registered Will, Ex.B10 dated 17.06.1987 in favour of the 2nd defendant. The attestor to the said Will has been examined as DW3 and the scribe has been examined as DW5. Their evidence has also been considered by the courts below. The courts below have held that the execution of Will by Mahalakshmi has been proved in accordance with law.

19. That apart all these three documents viz., Ex.B1, Ex.B9 and Ex.B10 are registered instruments which are entitled to presumption under Section 60(2) of the Registration Act. In the absence of any evidence to rebut the said presumption, I do not think that I can interfere with the findings of the courts below which are factual in nature. Hence, the question of law (c) is also answered against the appellants.

20. On the questions of law regarding delay, I do not think that the courts have taken the delay alone as a basis for dismissal of the suit. It is seen from the records that the courts below have not dismissed the suit only on the ground of delay and found that the defendants have established their defence by proving the documents viz., Ex.B9, Ex.B1 and Ex.B10 as required under law. All the three documents being the documents that require attestation, the attestors have been examined and the evidence of attestors was believed by the courts below. Hence, the questions of law raised are answered against the appellants.

21. Accordingly, both the appeals fail and therefore they are dismissed. Considering the relationship between the parties there shall be no orders as to costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

dsa

To

1. The learned Principal District Judge,
Salem.

2. The learned II Additional Subordinate Judge,
Salem.

+1cc to Mr.P.Jagadeesan, Advocate, S.R.No.85030
+1cc to Mr.T.M.Hariharan, Advocate, S.R.No.84951

S.A.Nos.338 and 339 of 2014

RSV(CO)
CS/16/03/2020