

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 25.10.2019	Delivered on 08.11.2019
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THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.526 of 2014
and MP No. 2 of 2014

G.R.Sridharan

..Appellant

vs.

R.Damodharan

... Respondent

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against the Judgment and Decree dated 08.01.2014 made in A.S.No.48 of 2012 on the file of the Subordinate Judge, Thiruvallur reversing the judgment and decree dated 26.07.2012 made in O.S.No.11 of 2004 on the file of the District Munsif, Thiruvallur.

For Appellant : Mr.T.R.Rajagopalan, SC
for Mr.Navaneethakrishnan

For Respondent : Mr.S.V.Jayaraman, SC
for Mr.N.Nithianandam

J U D G E M E N T

The plaintiff in OS No.11 of 2004 on the file of the District Munsif Court, Tiruvallur, has come up by way of this Second Appeal, since the decree for declaration of title and injunction granted in his favour by the Trial Court was reversed by the Lower Appellate Court in AS No.48 of 2012.

2. The plaintiff sought for a declaration of his title and permanent injunction claiming that the suit properties belonged to his maternal uncle Rajaram Naidu, who purchased them under various Sale Deeds between 1949 and 1968. It is the case of the plaintiff that Rajaram Naidu had two wives, namely, Sulochana and Indumathi. He had no issues born out of both these wives. While Sulochana, predeceased Rajaram Naidu, Indumathi survived him. The said Rajaram Naidu lived along with his brother's children Sriramalu and Srinivasan. It is also claimed that

Rajaram Naidu executed a Will on 02.04.1998 appointing his brother's son Sriramalu as an executor. Rajaram Naidu eventually died on 04.05.2001. The executor namely, Sriramalu, died on 18.10.2002, without taking any steps to obtain probate for the Will dated 02.04.1998.

3. The properties were bequeathed to Indumathi for life and the children of Lokaiya, brother of Rajaram Naidu were to take the properties after the life time of Indumathi. Even during the life time of the executor, namely, Sriramalu, he had allowed the plaintiff to cultivate the suit properties by executing a Power of Attorney along with Indumathi, the second wife of Rajaram Naidu, and his brother Srinivasan. The plaintiff was enjoying the properties as the power agent of the executor as well as the legatees. On the death of Sriramalu on 18.10.2002, his wife and daughters who were residents of Chennai, requested the plaintiff to purchase the properties. The plaintiff also agreed to such a course and paid the necessary consideration and purchase the suit properties from the wife and daughters of Sriramalu and Indumathi, the second wife of Rajaram Naidu, under the three Sale Deeds dated 22.09.2003, Srinivasan the brother of Sriramalu, figured as an attesting witness to all the three sale deeds. Claiming that the plaintiff has been in possession of the suit properties as the power agent prior to the Sale Deeds and as owner on and from 22.09.2003, the plaintiff sought for a declaration of his title and permanent injunction, inasmuch as, the defendant who is the brother of the plaintiff attempted to interfere with the possession of the property.

4. The suit was resisted by the defendant contending that the Sale Deeds dated 22.09.2003, which were marked as Exs.A1 to A3 are not valid. It was the further contention of the defendant that the Will dated 02.04.1998 is not true. Sriramalu namely, the executor of the Will was never put in possession of the property and the plaintiff was also not in possession. The truth and validity of the Power of Attorney dated 26.11.2002 was also denied. It is claimed that the defendant has been in possession and enjoyment of the suit property for more than 40 years. According to the defendant, it is the first defendant and his other brothers who were cultivating the suit properties. Neither Rajaram Naidu nor Sriramalu took possession of the property, according to the defendants. On the above contentions, the defendants sought for dismissal of the suit.

5. The Trial Court on a consideration of the evidence on record found that the Rajaram Naidu was the original owner of the property having purchased the same under various Sale Deeds between 1949 and 1968. The said Sale Deeds were marked as Exs.A5 to A21. The Sale Deeds executed by wife and daughters of Sriramalu and Indumathi, in favour of the plaintiff were marked as Ex.A1 to A3. The Trial Court concluded that Exs.A1 to A3 would confer a valid title on the plaintiff. The Trial Court

also found that the defendant, who claims to be in possession for more than 40 years, has not produced any document to establish his claim that he has been in possession for more than 40 years. Except the notice issued in the year 1991 and a reply, no other documents were filed by the defendants.

6. The Trial Court also concluded that even though the Will has not been probated, since the plaintiff had purchased the property from Indumathi, the second wife of Rajaram Naidu, who would have inherited the property in the absence of the Will found no difficulty in upholding the title of the plaintiff.

Upon finding that the defendant has not established his possession and faulting the defendant for not disclosing in the source of his title or possession, the Trial Court granted the decree for permanent injunction also. Aggrieved, the defendant preferred an appeal in AS No.48 of 2012 on the file of the Sub Court, Tiruvallur.

7. The learned Subordinate Judge allowed the appeal on the conclusion that the plaintiff traces his title under the Will and in the absence of probate or Letters of Administration having been granted by a Court of Competent jurisdiction, the plaintiff cannot claim title or possession. On the said conclusion, the Lower Appellate Court allowed the Appeal and dismissed the suit. The Lower Appellate Court concluded that the non production of the Will and the fact that the Will has not been probated are fatal to the case of the plaintiff. Aggrieved by the Judgment and decree of the Lower Appellate Court in dismissing the suit, the plaintiff has come up with this Second Appeal.

8. The following questions of law have been framed at the time of admission of the appeal:

1. When the plaintiff had based his claim for title on the basis of the Sale Deeds evenly dated 22.09.2003 marked as Exhibits A1 to A3 executed by Smt.Indumathi, the widow and the only legal heir, under the Law of Succession, of late Rajaram Naidu and by the legal heirs of the legatee under the Will dated 02.04.1998, is the learned Appellate Judge right in dismissing the suit for non-production of the Will?

2. Whether the learned Appellate Judge is right in dismissing the suit, when the sale by Smt.Indumathi, the widow and the only Class I legal heir as per Hindu Law of Succession of late Rajaram Naidu, viz., the original owner, the testator, joining along with the legatees under the Will dated 02.04.1998 left by late Rajaram Naidu had validly conveyed the title in favour of the

plaintiff?

3. When the Will dated 02.04.1998 is not probated, the title passes on only to the legal heirs of the testator, is the learned Appellate Judge right in committing an error in holding that the non-filing of the Will would disentitle the plaintiff to claim title based upon the Sale Deeds executed by the lawful owners in favour of the plaintiff which are marked as Exhibits A1 to A3?

9. Along with the Appeal, the appellant had filed an Application in MP No.2 of 2014 seeking to produce the copy of the order of this Court made in OP No.423 of 2008 granting Letters of Administration to the Will dated 02.04.1998 at the instance of one of the legatees namely, Srinivasan.

10. In the affidavit filed in support of the Application, the plaintiff had stated that he came to know of the order in OP No.423 of 2008 only on 5th day of September 2012 and immediately he had applied for certified copies and the copies were made available on 25.09.2012. According to him, the non-production of the order before the First Appellate Court is neither wilful nor wanton.

11. This application is opposed by the respondent contending that the delay in production of the order granting Letters of Administration, made in OP No.423 of 2008, has not been explained properly by the petitioner/appellant. It is the further contention that the non production of the Will cannot be cured at the second appellate stage. Only point that arises for determination in the application is, as to whether, the order in OP No.423 of 2008 should be received in evidence in order to have a complete adjudication of the lis between the parties.

12. I have heard Mr.T.R.Rajagopalan, learned Senior Counsel appearing for Mr.Naveeneethakrishnan, for the appellant and Mr.S.V.Jayaraman, learned Senior Counsel appearing for Mr.Nithianandam for the respondent.

13. Mr.T.R. Rajagopalan, learned Senior Counsel appearing for the appellant would contend as follows:

The case of the plaintiff is that Rajaram Naidu was the owner of the properties and he had by a Will dated 02.04.1998 bequeathed the properties to his second wife Indumathi for life and after the lifetime the properties were to be taken by his brother's children viz., Sriramalu and Srinivasan. From the documents produced in the suit viz., Ex.A28, it is seen that Indumathi had executed a Power of Attorney in favour of the plaintiff authorising him to look after the properties. It is also not in dispute that Rajaram Naidu, died on 04.05.2001 and

the executor appointed under the Will dated 02.04.1998, Sriramalu died on 18.10.2002, no steps were taken either get probate or Letters of Administration for the Will dated 02.04.1998, by the executor or the legatee. In the mean time, Indumathi the second wife of Rajaram Naidu and the wife and daughters of Sriramalu, the executor/legatee under the Will dated 02.04.1998, had sold the property to the plaintiff under three Sale Deeds, namely, Exs.A1 to A3 dated 22.09.2003.

14. In the absence of the Will, it is Indumathi, who would be the absolute owner of the properties of Rajaram Naidu, as his sole surviving legal heir, she had also joined execution of Exs.A1 to A3 Sale Deeds in favour of the plaintiff. Therefore, dehors the Will the plaintiff would get an unimpeachable title. Therefore, according to him, the Lower Appellate Court was not right in dismissing the suit on the premise that the plaintiff seeks to establish his title under the Will dated 02.04.1998. He would further add that now that the other legatee, namely, Srinivasan had applied for the grant of Letters of Administration for the Will dated 02.04.1998 and the same having been granted by this Court, the defendant cannot be heard to contend that the Will is not valid. Since according to him, the judgment rendered in a proceeding for Probate or Letters of Administration is a judgment in rem and is binding on all persons, insofar as, it relates to the truth and genuineness of the Will though not the testamentary capacity of the testator.

15. Mr.T.R.Rajagopalan, learned Senior Counsel would also draw my attention to Section 273 of the Indian Succession Act, which makes an order granting Probate or Letters of Administration, conclusive as to the representative title of the grantee. He would also draw my attention to the judgment of the Division Bench of Bombay High Court in Jerbanoo Rustomji Garda v. Pootlamai Manecksha Mehta, reported in AIR 1955 Bombay 447, wherein the Division Bench after having referred to the judgment of this Court in Chinasami and Another v. Hariharabadra and another, reported in 1893 (ILR) 16 Mad 380, held that the judgment of a Probate Court granting or refusing probate is a judgment in rem, and therefore the judgment of any other Court in a proceeding inter partes cannot be pleaded in bar of an investigation in the Probate Court as to the factum of the Will propounded in that Court. The Division Bench had quoted and followed the judgment in Chinasami and Another v. Hariharabadra. Therefore, according to Mr.T.R.Rajagopalan, the judgment of the Probate Court granting Letters of Administration in OP No.423 of 2008, is a judgment in rem and it would have binding on all and nobody can question the truth and validity of the Will. He would also point out that the plaintiff by producing Exs.A5 to A21 has established the title of Rajaram Naidu to the suit properties. Therefore, according to him, the Lower Appellate

Court was in error in dismissing the suit on the sole ground that the Will has not been produced.

16. Per contra, Mr.S.V.Jayaraman, learned Senior Counsel appearing for the respondent would submit that the respondent has been in possession for over 40 years and he has perfected title by adverse possession. The learned Senior Counsel would further add that if the order in OP No.423 of 2008 is received in evidence by the second Appellate Court, the respondent should be given an opportunity to lead evidence in rebuttal of the same.

17. I have considered the rival submissions.

18. I shall first decide the question relating to reception of additional evidence.

19. The power of the second Appellate Court to receive additional evidence under Order XLI Rule 27 is not in dispute. Order XLI Rule 27 of the Code of Civil Procedure is an enabling provision, which confers the power of the Court to receive additional evidence in order to do complete justice between the parties. The plaintiff is a purchaser from the heir and the legatee of Rajaram Naidu. The executor appointed by Rajaram Naidu, died on 18.10.2002, i.e., within a year and 5 months of the death of Rajaram Naidu, without taking any steps for getting Probate of the Will dated 02.04.1998. Thereafter, his younger brother Srinivasan, who also happens to be the legatee under the Will, filed OP No.423 of 2008, before this Court and the said Original Petition came to be allowed by this Court on 06.07.2010, the plaintiff has specifically stated in his affidavit that he came to know about the grant of Letters of Administration only sometime in September 2012 and from the copy of the order produced, it is seen that the plaintiff has obtained a copy on 25.09.2012. However, the plaintiff/appellant has not chosen to produce it before the Lower Appellate Court. He cannot be blamed for non-production, inasmuch as, the Trial Court had held in his favour and the Appeal was only pending before the Lower Appellate Court. Yet another circumstance which would tilt the case in favour of the plaintiff/appellant the fact that he had not relied upon the Will to establish his title. As already adverted to the plaintiff had purchased the property from Indumathi, the second wife of Rajaram Naidu and the wife and daughters of Late Sriramalu, the executor/legatee. Therefore, de hors the Will, the plaintiff would get an absolute title to the property, in view of the fact that Indumathi was the sole heir of Rajaram Naidu, in the absence of the Will.

20. Now that the Appellate Court had chosen to non suit the plaintiff solely due to the non production of the Will, the plaintiff had filed this application along with Appeal to

produce the Will along with the copy of the order in OP No.423 of 2008. I therefore, see no negligence or in action on the part of the plaintiff/appellant in filing this application. The documents sought to be produced, namely, the certified copy of the Will dated 02.04.1998, the certified copy of the Original Petition in OP No.423 of 2008 and the certified copy of the Order in OP No.423 of 2008 granting Letters of Administration, inasmuch as, they would aid this Court in deciding the lis between the parties comprehensively.

21. Of course Mr.S.V.Jayaraman, learned Senior Counsel appearing for the respondent/defendant would strenuously contend that if the Second Appellate Court receives additional evidence, he should be given an opportunity to let in rebuttal evidence. The opportunity to let in rebuttal evidence would depend on the nature of the documents that are received in evidence by the Second Appellate Court. What is sought to be received an evidence is the certified copy of the Will dated 02.04.1998, accompanied by an order in OP No.423 of 2008, granting Letters of Administration to the Will with the copy of the Will annexed.

22. I have already referred to the contentions of Mr.T.R.Rajagopalan, learned Senior Counsel, based on Section 273 of the Indian Succession Act and the judgment of the Division Bench of the Bombay High Court reported in Jerbanoo Rustomji Garda v. Pootlamai Manecksha Mehta, reported in AIR 1955 Bombay 447. I am in agreement with the said contentions of the learned Senior Counsel appearing for the appellant. An order granting Probate or Letters of Administration is undoubtedly an order-in-rem and is binding on all concerned with reference to the truth and genuineness of the Will and bequest made there under.

23. Once it is held that the order in OP No.423 of 2008, is the order-in-rem and it precludes any one from disputing the genuineness of the Will, I do not find any necessity for another opportunity to the respondent/defendant to contest the Will. As already adverted to even de hors the Will in view of the fact that the second wife of Rajaram Naidu had joined the execution of the Sale deeds dated 22.09.2003, in favour of the plaintiff. The plaintiff's title would become unimpeachable. The production of the copy of the Will along with the order in OP No.423 of 2008 is only to buttress the title of the plaintiff. I therefore, see no necessity for giving any opportunity to the defendant to dispute the Will which he is disentitled to under law.

24. In view of the foregoing reasons, the petition in MP No.2 of 2014 seeking production of additional evidence is allowed and the three documents, namely, the certified copy of the Will dated 02.04.1998, the certified copy of the Original

Petition in OP No.423 of 2008 and the certified copy of the Order in OP No.423 of 2008 granting Letters of Administration, are received as evidence and marked as Ex.A35 to A37.

25. Now coming to the questions of law framed in the Appeal. I have already adverted to the arguments of the learned Senior Counsel on either side. The Lower Appellate Court was essentially in error in concluding that the plaintiff has based his title on the Will dated 02.04.1998. A perusal of the pleadings as well as the evidence of the plaintiff would show that the plaintiff had traced his title only under the three Sale Deeds dated 22.09.2003 executed in his favour by Indumathi, the second wife of Rajaram Naidu and the legal representatives of Sriramalu, the legatee under the Will.

26. Even assuming that the plaintiff has traced his title through the Will dated 02.04.1998, now that this Court has granted Letters of Administration with the copy of the Will annexed to the said Will in OP No.423 of 2008, the said reasoning of the Lower Appellate Court really is nonexistent as of today. Therefore, the conclusion of the Lower Appellate Court, in my considered opinion, is erroneous and the same has to be set aside.

27. All the three questions of law framed only relate to the production or non-production of the Will. The said defect namely, the non production of the Will has been cured by production of Will along with the copy of the order granting Letters of Administration in favour of the legatee, Srinivasan. Therefore, the Will has been proved as required under law before a Court of Competent Jurisdiction. The only reason assigned by the Lower Appellate Court for non suiting the plaintiff does not survive any more. Hence, I see no difficulty in answering the questions of law in favour of the plaintiff/appellant.

28. In view of the same, the Second Appeal is allowed, the judgment and decree of the Lower Appellate Court are liable to be set aside and they are accordingly set aside, restoring the judgment and decree of the Trial Court. However, considering the relationship between the parties, there will be no order as to costs in this Appeal.

Jv

List of Additional documents received as evidence under Order XVI Rule 27 of the Code of Civil Procedure.:

Exhibits	Description
Ex.A35	The certified copy of the Will dated 02.04.1998
Ex.A36	The certified copy of the Original Petition in OP No.423 of 2008
Ex.A37	The certified copy of the Order in OP No.423 of 2008

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

jv

To

1. The Subordinate Judge,
Thiruvallur.
2. The the District Munsif,
Thiruvallur.
3. The Section Officer,
V.R.Section,
High Court of Madras.

+1cc to Mr.N.Nithanandan, Advocate, S.R.No. 92946

+1cc to Mr.S.Navaneetha Krishnan, Advocate, S.R.No. 92952

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S.A.No.526 of 2014
and MP Nos.1 and 2 of 2014

CNR(CO)
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