

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.02.2020

CORAM

THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM

S.A.No.100 of 2020

Munisamy ... Appellant/Appellant/3rd Defendant

Vs

1.Muniammal ... 1st Respondent/1st Respondent/Plaintiff

2.Jayalakshmi ... 2nd Respondent/2nd Respondent/2nd Defendant

Second Appeal filed under Section 100 of the Code of Civil Procedure as against the judgment and decree dated 24.10.2019 made in A.S.No.73 of 2017 on the file of the Additional District Judge, Fast Track Court, Tiruvannamalai District, confirming the judgment and decree dated 09.09.2014 made in O.S.No.275 of 2001 on the file of the Sub Court, Arni.

For Appellant : Mr.P.Balaji

JUDGMENT

The 3rd defendant in O.S.No.275 of 2001 on the file of the Sub Court, Arni is the appellant herein. The 1st respondent, as plaintiff instituted the suit against the 2nd respondent, the appellant herein and her mother Thanjyammal claiming partition and separate possession of the suit properties and for permanent injunction.

2. The facts of the case in brief:

i) It is the case of the plaintiff that her father Kuppa Naicker originally owned the suit properties, after his demise his son Chellakutti Naicker inherited the suit property. The first defendant namely Thanjyammal is the wife, the plaintiff and the defendants 2 and 3 are children of the said Chellakutti Naicker. After the death of Chellakutti Naicker all the parties are in common enjoyment of the suit properties. While so, the third defendant prevented the other parties to take their share in the yield, claiming that his father executed a registered Will bequeathing the suit properties in his favour. According to the plaintiff, no such Will was executed by his father in favour of the third defendant and hence, they are entitled for share in the suit properties.

3. The suit was resisted by the 3rd defendant, by filing a written statement contending that his father Chellakutti Naicker executed a registered Will dated 24.12.1986 bequeathing the suit properties in his favour and hence, the other legal heirs have no claim over the same. The claim of joint possession and enjoyment of the properties was also disputed by him.

4. Based on the above pleading, the trial Court framed necessary issues. In order to prove the case, on the side of the plaintiff two witnesses P.Ws.1 and 2 were examined and Exs.A1 to A4 were marked. On the side of the defendants D.W.1 was examined and Exs.B1 to B13 were produced. The trial Court, upon consideration of both oral and documentary evidence decreed the suit. The findings of the trial Court was confirmed in the appeal preferred by the third defendant by the Additional District Judge, Arni. Aggrieved over the same, the present appeal has been filed.

5. The learned counsel for the appellant Mr.P.Balaji argued that the appellant has proved the execution of Will dated 24.12.1986 and hence, the respondents are not entitled for share in the suit properties. The findings of the Courts below are against law and they are liable to be set aside.

6. I have heard the submissions of the learned counsel for the appellant and perused the materials available on record.

7. In the instant case, it is not in dispute that the suit properties were originally owned by one Kuppa Naicker. After his demise, the property was inherited by his only son Chellakutti Naicker. The plaintiff and the defendants are the legal heirs of the said Chellakutti Naicker. Though, the wife of Chellakutti Naicker was impleaded as the first defendant in the suit, however, during the pendency of the suit she passed away. It is the case of the plaintiff that Chellakutti Naicker died intestate and she is entitled for equal share in the suit properties. According to the third defendant, his father bequeathed the entire property under Ex.B1 Will dated 24.12.1986 in his favour. The Will Ex.B1 was rejected by the Courts below, on the sole ground that no attesting witness was examined. It is settled law that atleast one of the attesting witness to the Will has to be examined in proof of execution of the Will as mandated in Section 68 of the Evidence Act.

8. Admittedly, in the case on hand the appellant has failed to examine atleast one of the attesting witnesses nor took steps to prove the Will in other modes provided under the Act. Further, it is not the case of the appellant that both the attesting witnesses are dead or they are not in the position to

give evidence. Since the appellant failed to prove the execution of Ex.B1, the Courts below rightly rejected the case of the appellant and granted preliminary decree in favour of the respondents.

9.The learned counsel for the appellant would submit that the appellant has sufficient materials to show that the property was under mortgage and it was discharged by the appellant, but, no evidence was produced to substantiate the same. Hence, this Court finds no substance in the contention of the learned counsel for the appellant. However, it is open to the appellant to produce the materials during the final decree proceedings.

10.With above observation, the Second Appeal is dismissed. However, there shall be no order as to costs.

Sd/-
Assistant Registrar(CCC)

//True copy//

Sub Assistant Registrar

ms

To

1.The Additional District Judge,
Fast Track Court,
Tiruvannamalai District.

2.The Sub Judge, Arni.

+1cc to Mr.P.Balaji, Advocate SR.No.8429

सत्यमेव जयते

S.A.No.100 of 2020

VSN II(CO)
GMY(21/08/2020)

WEB COPY