

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED DATE : 27.11.2019

PRONOUNCED DATE : 19.05.2020

CORAM:

THE HONOURABLE MR.JUSTICE P.RAJAMANICKAM

S.A.NO.804 OF 2005

G.Natarajan

(Declared as major and permitted by
this Court to conduct the proceedings by
himself vide order dated 17/06/2019
in CMP.No.12482/2019)

... Appellant/Plaintiff

Vs.

1.Perama Moopar (died)

2.Kuppusami Moopar (died)

3.Manickammal

4.P.Sengan

5.Anjali

6.Alamelu

7.Srinivasan

... RR3 to 6/Proposed Respondent/
LR of the R1/Defendants 3 to 6

8.Sakunthala

9.Murugan

10.Rani

11.Vijayalakshmi

12.Illayaraja

... RR8 to 12/Proposed/Respondent/
LR of the R2/Defendants 8 to 12

(RR3 to R7 brought on record as L.Rs of the
deceased R1 vide order of court dated 29/07/2019
made in CMP.Nos.12486,12488 and 12489/2019)

... Respondents/
Defendants

PRAYER:

Second Appeal has been filed under Section 100 of Code of Civil Procedure to set aside the judgment and decree of the Sub-ordinate's Judge's Court, Kallakurichi in AS.No.122 of 2002 dated 29.10.2004, reversing the judgment and decree of the I Additional District Munsif Court, Kallakurichi, in OS.No.561 of 1990 dated 29.10.2002.

For Appellant : M/s.Mythili Suresh
for M/s.Sarvabhauman Associates

For Respondents : M/s.R.Meenal
for R3 to R12

JUDGMENT

This Second Appeal has been filed by the third plaintiff against the judgment and decree passed by the Sub-Judge, Kallakurichi in A.S.No.122 of 2002 dated 29.10.2004 reversing the judgment and decree passed by the First Additional District Munsif, Kallakurichi in O.S.No.561 of 1990 dated 29.10.2002.

2. Originally, one Nallathambi Moopar (first plaintiff) and Kandhasamy Mooper (second plaintiff) had filed a suit in OS.No.561 of 1990 on the file of the First Additional District Munsif for the relief of partition of the half share in Item Nos.1 to 3 of the suit properties and for separate possession to the second plaintiff and half share in Item Nos.4 to 6 of the suit properties and for separate possession to the first plaintiff and also for mesne profits. Subsequently, the first plaintiff had withdrawn the suit in respect of item Nos.4 to 6 of the suit properties. Thereafter, the second plaintiff died. Thereafter the third plaintiff viz., Minor Natarajan had impleaded himself as a party through his Next friend -cum-father claiming that the second plaintiff had executed a registered Will dated 20.05.1998 in his favour in respect of his right over the Item Nos.1 to 3 of the suit properties and conducted the suit.

3. The learned First Additional District Munsif, Kallakurichi by the judgment and decree dated 29.10.2002 had decreed the suit as prayed for without costs. Aggrieved by the same, the defendants 1 and 2 had filed an appeal in AS.No.122 of 2002 on the file of the Sub-Judge, Kallakurichi. The learned Sub-Judge by the Judgment and decree dated 29.10.2004 had allowed the said appeal with costs and set aside the judgment and decree passed by the trial court and dismissed the suit with costs. Feeling aggrieved, the third plaintiff has filed the present second appeal.

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

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

a) The suit properties belonged to the first plaintiff and the defendants 1 and 2. The first plaintiff's grand father Karutha Mooper and the grand father of the defendants 1 and 2 namely Chengan Mooper are brothers. The suit properties originally belonged to the said Karutha Mooper and Chengan Mooper. After the demise of Karutha Mooper his half share was succeeded to by the first plaintiff. The first plaintiff's father Ayyamperumal Mooper predeceased to the said Karutha Mooper. The remaining half share of Chengan Mooper devolved on his son Nallathambi Mooper and after the death of the said Nallathambi Mooper, the defendants 1 and 2 succeeded to the said half share. The first plaintiff had sold his share in respect of Item Nos.1 to 3 of the suit properties to the second plaintiff under a registered sale deed dated 09.11.1980. Hence, the second plaintiff had filed a suit in OS.No.14 of 1981 on the file of the District Munsif, Kallakurichi against the defendants 1 and 2 for the relief of declaration and recovery of possession. The said suit was decreed in favour of the second plaintiff. As against the same, the defendants 1 and 2 filed an appeal in AS.No.40 of 1989 on the file of Sub-Judge, Cuddalore. The learned Sub-Judge had modified the judgment and decree of the trial court and granted decree for declaration alone and directed the parties to file a suit for partition and separate possession. Hence, the defendants 1 and 2 have no right to deny the half share of the second plaintiff in Item Nos. 1 to 3 of the suit properties. The first plaintiff is entitled to half share in Item Nos.4 to 6 also.

b) The defendants 1 and 2 had sold Item Nos.4 and 5 to the defendants 3 and 4. Hence the plaintiffs 1 and 2 had filed the above suit for partition of half share in the suit properties. Subsequently the first plaintiff had withdrawn his suit in respect of Item Nos.4 to 6. Thereafter, the second plaintiff died. Thereafter, the third plaintiff impleaded himself as third plaintiff stating that the second plaintiff had executed a registered Will dated 20.05.1998 in his favour in respect of his share in Item Nos. 1 to 3 of the suit properties. Accordingly the third plaintiff is claiming half share in Item Nos.1 to 3 of the suit properties.

6. The averments made in the written statement and Additional written statements filed by the defendants 1 and 2 are in brief as follows:-

a) The suit as framed is not maintainable. Two suits ought to have been filed. The suit is bad for mis-joinder of causes of action. The court fee paid is not correct. The plaintiffs have claimed a larger extent than they had claimed in the earlier suit i.e., in OS.No.14 of 1981. In view of the appellate court judgment, the second plaintiff is entitled to only half share in half of plaint Items 1 to 3. In fact the Item Nos. 1 to 3 originally belonged to the father of the defendants 1 and 2 namely Nallathambi Mooper and that the same are the ancestral properties of the defendants 1 and 2. The defendants 1 and 2 are openly in continuous possession of the Item Nos. 1 to 3 of suit properties for more than the statutory period and they had prescribed title by adverse possession.

b) The second plaintiff died on 12.08.1998 He is survived by his sons Ponnai, Sakkarai @ Govindasami and three daughters. They all are the legal heirs of the deceased second plaintiff and hence they all are to be impleaded as necessary parties. Suppressing the said facts, the said Sakkarai @ Govindasamy has impleaded his minor son Natarajan as third plaintiff, as if he is the only legal heir of the second plaintiff. The alleged Will is a fabricated and forged one.

c) Since this is a suit for partition and the defendants 1 and 2 have been impleaded as the legal heirs of the deceased Chengan Mooper, the two daughters of the said Chengan Mooper, viz, the sisters of the defendants 1 and 2 also have to be impleaded as necessary parties. Hence, the suit is bad for non-joinder of necessary parties. Therefore, the defendants 1 and 2 prayed to dismiss the suit.

7. Based on the aforesaid pleadings, the learned District Munsif had framed necessary issues and tried the suit. During trial, on the side of the plaintiffs, three witnesses were examined as P.Ws 1 to 3 and 5 documents were marked as Exs.A1 to A5. On the side of the defendants, one witness was examined as DW1 and 33 documents were marked as Exs.B1 to B33.

8. The learned District Munsif, after considering the materials placed before her, found that by virtue of the judgment and decree passed in AS.No.40 of 1989 on the file of the Sub-Court, Cuddalore, the second plaintiff is entitled to half share in Item Nos.1 to 3 of the suit properties. She further found that the second plaintiff had executed a registered Will dated 20.05.1998 (Ex.A5) in favour of the third plaintiff in respect of his share in Item Nos.1 to 3 of the suit properties and as such the third plaintiff alone entitled to get half share in the aforesaid items. She also found that the suit is not bad for non-joinder of necessary parties. Accordingly, she decreed the suit as prayed for without costs.

9. Aggrieved by the aforesaid judgment and decree of the trial court, the defendants 1 and 2 had filed an appeal before the Sub-Court, Kallakurichi. The learned Sub-Judge had allowed the said appeal with costs and set aside the judgment and decree passed by the trial court and dismissed the suit with costs. Feeling aggrieved the third plaintiff has filed the present second appeal.

10. This court at the time of admitting the second appeal has formulated the following substantial questions of law:-

"A) When as per Ex.A3 dated 30.11.1989 judgment passed by the Appellate court in the earlier suit, the appellant is entitled to the suit items 1 to 3, whether the lower Appellate Court is correct in law in non-suiting the appellant, by misconstruing the scope of Ex.A3?

B) When Ex.A5 Registered Will dated 20.05.1998 has been proved in accordance with Section 63 (c) of the Indian Succession Act, 1925 read with Section 68 of the Evidence Act 1872 by examining the attesting witness and the same was not controverted, whether the lower appellate court is correct in law in not upholding the same?

C) Whether the lower appellate court is correct in law in holding that the suit for partition is not maintainable on the ground that the daughter of the deceased second plaintiff was not impleaded, especially when the appellant claimed exclusive right. Under the Will executed by the deceased second plaintiff and no one else has any share?"

11. Heard Mrs.Mythili Suresh for M/s.Sarvabhauman Associates, the learned counsel for the appellant and Mrs.R.Meenal, the learned counsel for the respondents 3 to 12.

12. The substantial questions of law A to C:-

The learned counsel for the appellant/third plaintiff has submitted that the first appellate court erred in reversing the well considered judgment of the trial court. She further submitted that the first appellate court failed to consider that in AS.No.40 of 1989, it was held that the second plaintiff is entitled to half share in Item Nos.1 to 3 of the suit properties. She further submitted that in the judgment passed in AS.No.40 of 1989 the appellate court had clearly held that the defendants 1 and 2 failed to prove adverse possession and that being so, the lower appellate court should not have held that the defendants 1 and 2 perfected title by adverse possession.

She further submitted that the first appellate court failed to consider that the appellant has proved the execution of Ex.A5 Will by examining one of the attestors as contemplated under the law. She further submitted that once Ex.A5 Will is proved, the other legal heirs of the second plaintiff need not be impleaded as parties. She further submitted that though the defendants 1 and 2 had taken a plea that their sisters also necessary parties, they have not pleaded that their sisters also got share in the suit properties and that being so, the first appellate court ought not to have dismissed the suit as it is bad for non-joinder of necessary parties. She further submitted that the first appellate court erred in holding that since Ex.A5 Will does not contain any specific recital as to bequeathing the Item Nos.1 to 3 of the suit properties in favour of the third plaintiff, the third plaintiff cannot claim right based on the said Will and therefore she prayed to allow the second appeal and set aside the judgment and decree passed by the first appellate court and restore the judgment and decree passed by the trial court.

13. Per contra, the learned counsel for the respondents has submitted that the previous suit i.e., OS.No.14 of 1981 itself was filed by the second plaintiff for the relief of declaration and recovery of possession and that though the trial court had decreed the said suit, the appellate court did not grant decree for delivery of possession. She further submitted that the documentary evidence produced by the defendants would clearly show that the defendants 1 and 2 have been in continuous possession for more than 40 years excluding the plaintiffs and considering the same, the first appellate court had rightly held that the defendants 1 and 2 have perfected title by adverse possession. She further submitted that the execution of Ex.A5 Will has not been proved in accordance with the law. She further submitted that PW2 is the scribe and as such he cannot depose about the attestation of the Will. She further submitted that though PW3 claimed that he is the attestor, he did not say that the other attestor signed before him and considering the same, the first appellate court had rightly rejected his evidence. She further submitted that in Exs.A5 Will it is not stated that any specific property had been bequeathed to the third plaintiff. She further submitted that admittedly, the second plaintiff got sons and daughters, but they have not been impleaded as parties. She further submitted that the sisters of the defendants 1 and 2 are also not added as parties. Since this is a suit for partition, all the aforesaid persons are necessary parties, but they have not been impleaded as parties. Therefore, the suit is bad for non-joinder of necessary parties. She further submitted that the trial court without considering the aforesaid facts, had erroneously decreed the suit and hence the first appellate court had rightly reversed the findings of

the trial court and in the said factual findings, this court cannot interfere and therefore, she prayed to dismiss the second appeal.

14. It is not disputed that the first plaintiff's grand father KaruthaMooper and the grand father of the defendants 1 and 2 namely Chengan Mooper are brothers. According to the plaintiffs, the suit properties originally belonged to the said Karutha Mooper and Chengan Mooper. Their further case is that the first plaintiff's father Ayyamperumal predeceased to the said Karutha Mooper and hence after the death of Karutha Mooper, the first plaintiff succeeded to the half share in the suit properties and the defendants 1 and 2 entitled to the remaining half share. Their further case is that the first plaintiff had sold his share in Item Nos.1 to 3 of the suit properties to the second plaintiff through a registered sale deed dated 09.11.1980 and as such the second plaintiff got half share in Item Nos.1 to 3 of the suit properties.

15. The further case of the plaintiffs is that the first plaintiff got half share in Item Nos. 4 to 6 of the suit properties. But subsequently, the first plaintiff had withdrawn the suit in respect of Item Nos. 4 to 6 and hence the dispute is only with regard to Item Nos.1 to 3 of the suit properties.

16. A perusal of Exs.A1 and A2 (copies of judgment and decree passed in OS.No.14 of 1981 on the file of the District Munsif, Kallakurichi dated 08.12.1986) shows that already the second plaintiff, based on the sale deed dated 09.11.1980 executed by the first plaintiff had filed a suit in OS.No.14 of 1981 on the file of the District Munsif, Kallakurichi against the defendants 1 and 2 herein for declaration of his title and recovery of possession in respect of his half share in Item Nos.1 to 3 of the suit properties. The said suit was decreed in favour of the second plaintiff herein. Ex. A3 (A copy of the judgment passed in AS.No.40 of 1989 on the file of the Sub-Court, Cuddalore dated 30.11.1989) shows that aggrieved by the judgment and decree passed by the District Munsif, Kallakurichi in OS.No.14 of 1981, the defendants 1 and 2 herein had filed an appeal in AS.No.40 of 1989 on the file of the Sub- Court, Cuddalore. The learned Sub-Judge, Cuddalore by the judgment dated 30.11.1989 had modified the trial court's judgment and decree and granted decree for declaration of title alone, however, she dismissed the suit in respect of recovery of possession, by giving liberty to the parties to file a suit for partition and separate possession. Challenging the said judgment and decree of the Appellate Court, second appeal has not been filed. Hence the judgment and decree passed in AS.No.40 of 1989 has become final.

17. Since the second plaintiff's half share in Item Nos.1 to 3 of the suit properties had been declared in OS.No.14 of 1981 and confirmed in AS.No.40 of 1989 and in that proceedings, the defendants 1 and 2 herein were parties, they are estopped from denying the second plaintiff's half share in Item Nos.1 to 3. Further, the principle of resjudicata also will apply.

18. It is also to be pointed out that in the previous suit i.e., OS.No.14 of 1981, the defendants 1 and 2 herein had taken a specific plea of adverse possession and an issue also framed to that effect and that the trial court and also the appellate court had categorically held that the defendants 1 and 2 herein failed to prove adverse possession. The said finding also will bind upon the defendants 1 and 2 and therefore it is not open to them to raise the same plea again in the present suit. Further, it is well settled that mere possession for so many years will not create any title, unless it is specifically pleaded and proved from which date the said possession has become adverse to the knowledge of the true owner. In this case, the defendants 1 and 2 have not specifically pleaded from which date their possession has become adverse to the knowledge of the plaintiffs. Therefore, the findings of the first appellate court that the defendants 1 and 2 perfected title by adverse possession are not correct.

19. In so far as the third plaintiff's claim is concerned, according to him, the second plaintiff, when he was in sound disposing state of mind, had executed Ex.A5 Will in his favour in respect of his right over item Nos.1 to 3 of the suit properties. Ex.A5 is a registered Will. In order to prove the execution of the said Will, the third plaintiff has examined one of the attestors as PW3 as mandated under Section 63 of the Indian Succession Act and Section 68 of the Evidence Act. PW3 has deposed that the deceased second plaintiff had executed Ex.A5 Will on 20.05.1998 when he was in sound disposing state of mind and he has signed as one of the attestors. So, the third plaintiff has proved the execution of Ex.A5 Will. Further, if the second plaintiff had died without executing a Will, the defendants 1 and 2 would not inherit his properties and that being so, they cannot question the genuineness of Ex.A5 Will.

20. It is true that in Ex.A5 Will that there is no specific recital bequeathing the rights of the second plaintiff over Item Nos.1 to 3 of the suit properties in favour of the third plaintiff. But that will not bar the third plaintiff from claiming right over Item Nos.1 to 3 of the suit properties. In Ex.A5, it is stated as follows:

“இந்த உயில் சாசனத்தில் ஏதேனும் சொத்துக்கள் விட்டு போயிருந்தாலும் அவைகளையும் என் ஆயுள் காலத்திற்கு பிறகு என் பேரன் மைனர் நடராசன் சர்வ சுதந்திரமாய் அடைந்து கொள்ள வேண்டியது.”

In view of the aforesaid residuary clause, the third plaintiff is entitled claim right over the Item Nos.1 to 3 of the suit properties.

21. Once it is held that Ex.A5 is a genuine Will and that the second plaintiff had validly bequeathed his right over Item Nos.1 to 3 of the suit properties in favour of the third plaintiff under Ex.A5 Will, the third plaintiff alone is entitled to represent the estate of the deceased second plaintiff as legal representative. The other legal heirs of the deceased second plaintiff are not necessary parties.

22. The next question that has to be considered is whether the suit is bad for non-joinder of the sisters of the defendants 1 and 2. The defendants 1 and 2 in their Additional written statement have simply stated that they have been impleaded as the legal heirs of the deceased Chengan Mooper and hence the two daughters of the said Chengan Mooper viz, their sisters also have to be impleaded as necessary parties. But they have not pleaded that their sisters also entitled to get shares in the suit properties. So, this court is of the view that the sisters of the defendants 1 and 2 are not necessary parties. Hence, the suit is not bad for non-joinder of necessary parties.

23. The trial court taking in to consideration of all the aforesaid facts had rightly upheld the claim of the third plaintiff, but the first appellate court erroneously reversed the findings of the trial court. Hence the judgment and decree passed by the first Appellate court are liable to be set aside and that the judgment and decree of the trial court have to be restored. Accordingly, the substantial questions of law are answered in favour of the appellant/third plaintiff.

24. In the result, this second appeal is allowed. The judgment and decree passed by the first appellate court are set aside. The judgment and decree passed by the trial court are restored. A preliminary decree is passed as follows:-

(1) That the Item Nos.1 to 3 of the suit properties be divided in to two equal shares and one such share be allotted to the third plaintiff;

(2) that in respect of mesne profits a separate enquiry shall be conducted as per order 20 Rule 12 of CPC and

(3) that considering the facts and circumstances of the case, the parties are directed to bear their own costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

GV

To

1. The Sub-ordinate's Judge's,
Kallakurichi.
2. I Additional District Munsif,
Kallakurichi.

Copy To

The Section Officer,
VR Section, High Court,
Madras-600 104.

S.A.No.804 of 2005

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