



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.07.2021

CORAM:

THE HONOURABLE MS. JUSTICE P.T.ASHA

S.A. No.321 of 2008  
and  
M.P.No.1 of 2008

Varadarajan ... Appellant/Plaintiff/Appellant

Vs

1. Kalimurthy
2. Baskaran
3. Ilanjiyam
4. C. Usha
5. R. Sudha

...Respondents/Defendants/Respondents

Appeal filed against the Judgment and Decree of Additional Sub-Court, Mayiladuthurai, dated 16.02.2006 made in A.S.No.90 of 2005 confirming the judgment and decree of Additional District Munsif Court, Mayiladuthurai dated 18.04.2005 made in O.S.No.598 of 1999.

For appellant : Mr.A. Muthukumar

For respondents : Mr. S. Sadasharam for R2 to R5

R1-Died

#### J U D G M E N T

The plaintiff is the appellant before this Court. He has challenged the concurrent judgment and decree, in and by which his suit which was originally filed for a decree for permanent injunction and subsequently amended into one for recovery of possession, was dismissed and the appeal also ended in a dismissal.



#### Plaintiff's Case:

2. The plaintiff would contend that the suit property, which is a tiled and thatched house, bearing, Door No.3/18, comprised in R.S.No.149/1, Thiruvavaduthurai Village, Mayiladuthurai Taluk belonged to one Govindarasu, who was the father of the plaintiff and the first defendant. The said Govindarasu executed a Will dated 18.05.1997 in and by which he had bequeathed the suit property upon the plaintiff. The Will was duly executed, attested and registered. Govindarasu died on 31.08.1998 and the Will came into force.

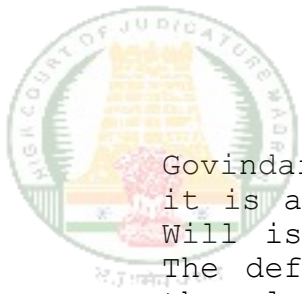
3. The plaintiff's case is that he was using the suit-property as his residence and kollai wherein he had raised coconut saplings, tamarind trees and other trees and flower-plants. The property had been fenced on all sides and the old house was in a dilapidated condition. The plaintiff had put up a thatched house also and has been in possession and enjoyment of the same as well.

4. The first defendant is the elder brother of the plaintiff and the second defendant is the son of the first defendant. The defendants were residing away from the suit-village and has no manner of right in the suit property. On 22.12.1999, the first defendant on the instigation of the second defendant attempted to put up a fence line in the Western half of the suit property claiming a half share to the same. This attempt was successfully prevented by the plaintiff with the help of the villagers. However the defendants had been threatening to enter into the suit-property somehow or the other. Therefore, the plaintiff had come forward originally with a suit for permanent injunction restraining the defendants from interfering with the plaintiff's peaceful possession and enjoyment of the property.

5. The plaintiff had obtained an ex-parte ad interim injunction in I.A.No.646 of 1999. After service of notice in the Interlocutory Application, the defendants with the help of the local police, took the plaintiff to the police station detained him there on 16.03.2000 and during that time, the defendants trespassed into the suit property, drove the wife of the plaintiff out of the thatched house and occupied it. They also put up a fence on the Western side of the property. Therefore, the plaintiff had amended the plaint to substitute the prayer with one for recovery of possession.

#### Written Statement of the First Defendant:

6. The first defendant had filed a written statement, which was adopted by the second defendant, wherein he had admitted that the suit property was belonged to his father,



Govindarasu. However the Will dated 18.05.1997 was denied and it is also the case of the defendants that even assuming such a Will is in existence, the same has been obtained fraudulently. The defendants had denied the contention of the plaintiff that the plaintiff was in possession of the suit property. On the contrary it is their contention that originally they were living along with Govindarasu as a joint family in the said property and it is the defendants income which has been spent for the expenditure of the family. The suit property was enjoyed as a joint family property. Since dispute arose between the parties there was a panchayat in which the suit property was divided into two shares with the first defendant being allotted the Western half and the plaintiff the Eastern half and that they are in possession of their respective shares. Hence he sought for the dismissal of the suit.

Additional Written Statement of the First Defendant:

7. In the additional written statement, the first defendant had stated that the plaintiff was not residing within the boundaries as stated in the plaint schedule.

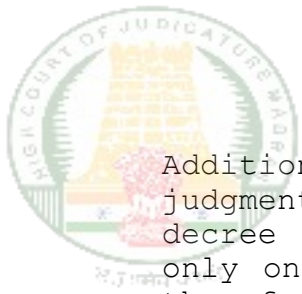
Trial Court:

8. Before the Trial Court, the plaintiff had examined three witnesses besides examining himself and on the defendants' side the first defendant had examined himself as D.W.1 and one Selvaraj as D.W.2. Exs. B.1 and B.2 were marked on their side.

9. The learned Additional District Munsif rendered a finding that when the genuineness of the Will had been denied by the defendant, the plaintiff has not proved the Will in the manner known to law. P.W.2 was examined as attesting witness, who turned hostile and had deposed that there was a partition in the family of the plaintiff and defendants in the presence of panchayadhars and the same had been reduced into writing and attested by P.W.2 himself. P.W.3, scribe of the Will, has deposed that the document Ex.A.1 which was produced for his perusal was a xerox copy whereas the same was different from the original Will and the other attesting witness would depose that he did not see the testator signing the will nor had he seen the other witness signing the Will. He would also admit about the panchayat. Therefore, the Will had not been proved. Though the defendants have pleaded a partition arrangement, the same was not marked and it was not stamped nor registered. However, the learned Judge has considered the same for collateral purpose. Ultimately, the suit was dismissed as not having been proved by the plaintiff.

Appellate Court:

10. The said judgment and decree was taken up on appeal by the plaintiff in A.S.No. 90 of 2005 on the file of the



Additional Subordinate Judge, Mayiladuthurai, who by his judgment and decree dated 16.02.2006 confirmed the judgment and decree of the Trial Court stating that the suit has been filed only on the strength of the Will which has not been proved and therefore the suit should have been filed seeking a declaration and recovery to the extent enjoyed by the plaintiff. Considering the fact that the plaintiff had miserably failed to prove the case, the appellate court has also dismissed the suit. Challenging the same, the plaintiff is before this Court.

11. The Second Appeal has not been admitted and only notice has been ordered. Heard the counsel on either side.

Discussion:

12. The plaintiff has based his entire case on the Will dated 18.05.1997 said to have been executed by his father bequeathing the suit property on him. To prove the Will, the plaintiff has examined P.W.2 and P.W.4 who are the attesting witnesses and P.W.3 the scribe of the Will. Both P.W.2 and P.W.4 have deposed that they have not seen the testator signing the Will. In fact, P.W.2 would go to say that the contents of the Will were not known to him, however his signature was obtained after the Testator had signed the Will. P.W.4 on the other hand would depose that not only he had not seen the testator signing the will but he also not seen the other witnesses signing the will. Therefore, the Will has not been clearly proved in the manner known to law.

13. Admittedly the property is belonged to the father Govindarasu. The defendants have contended that they are in possession of the western half and plaintiff is in possession of the eastern half of the suit property. However, since the plaintiff seeks to have recovery of possession of the entire property on the basis of the Ex.A.1 Will and as the Will has not been proved, the claim of the plaintiff fails. The plaintiff has not made out any substantial question of law warranting interference by this court.

14. The Second Appeal therefore stands dismissed. Consequently, connected Miscellaneous Petition is closed. No costs.

Sd/-  
Assistant Registrar

//True Copy//

Sub Assistant Registrar

mrn



To

1. The Additional Subordinate Judge,  
Mayiladuthurai,
2. The Additional District Munsif,  
Mayiladuthurai.

Copy to:

The Section Officer,  
V.R.Section,  
High Court, Madras.

+1cc to Mr.S.Sadasharam, Advocate, S.R.No.31883

+1cc to Mr.A.Muthukumar, Advocate, S.R.No.32165

S.A. No.321 of 2008  
and  
M.P.No.1 of 2008

MG(CO)  
SU(16/11/2021)