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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on 28.04.2022

Judgment delivered on 10.06.2022

CORAM:

THE HONOURABLE Mrs. JUSTICE J.NISHA BANU
S.A.Nos.643 to 651 of 1993
and
C.R.P.Nos.2164 to 2168 of 1993

S.A.Nos.643 to 651 of 1993

- 1.S.A.Sheik Davood
2. S.Asan Ibrahim
3. G.S.F.Shajahan
4. Jabarullakhan
5. S.Jahangeer
6. s.Iqbal
7. S.Abdul Hameed
8. S.Fazul-ul-Haque
9. Aisakani
10. Shakila Banu
11. Jailani Begum
12. Asmaan Beevi

(Appellants 2 to 12 are brought
on record as LR's of the deceased
sole appellant vide order dt.23.03.2004
made in CMP.Nos.4011 to 4037/2004) ...Appellants in all the S.As.

Vs

Mohamed Esa	... Respondent in S.A.No.643/1993
Tajudeen	... Respondent in S.A.No.644/1993
Haneefa	... Respondent in S.A.No.645/1993
Mohamed Abubacker	... Respondent in S.A.No.646/1993
Shaik Mohamed	... Respondent in S.A.No.647/1993



Balkis Beevi	... Respondent in S.A.No.648/1993
Kader Beevi	... Respondent in S.A.No.649/1993
Maimoon Beevi	... Respondent in S.A.No.650/1993
Madan Meera	... Respondent in S.A.No.651/1993

PRAYER in Second Appeals: Second Appeals filed under Section 100 C.P.C. against the common judgment and decree of the learned District Judge, East Tanjore, Nagapattinam dated 16.04.1991 and made in A.S.No.66, 67, 68, 69, 78,79, 80, 81 & 82/1990 on the file of the District Judge, East Tanjore, Nagapattinam, confirming the judgment and decree of the learned District Munsif, Tiruvarur dated 19.03.1990 in O.S.No.224, 226, 227, 228, 229, 284, 285, 311 & 312/1988 on his file.

For Appellant in all the Appeals : Mr.R.Subramaniam
for Mr.T.R.Rajaraman

For Respondent in all the Appeals: Mr.A.Muthukumar

C.R.P.Nos.2164 to 2167 of 1993

S.A.Sheik Dawood	..Petitioner in all the CRPs
vs	
M.Wahob	..Respondent in CRP.No.2164/1993
Abdul Jabbar	..Respondent in CRP.No.2165/1993
Sheik Meideen	..Respondent in CRP.No.2166/1993
Jagabar Ali	..Respondent in CRP.No.2167/1993



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S.A.Nos.643 to 651 of 1993 &
CRP Nos.2164 to 2168 of 1993

C.R.P.Nos.2168 of 1993

S.ASheik Dawood

..Petitioner in CRP.No.2168/1993

vs

1. Anjammal
2. Marimuthu
3. Subramanian
4. Murugaiyan

..Respondents in CRP.No.2168/1993

PRAYER in Civil Revision Petitions: Civil Revision Petitions filed under Section 115 of C.P.C. against the order dated 25.01.1993 made in CMA.No. 37, 38, 39, 40 & 41 of 1992 on the file of District Judge, Quaid-e-Millet, Nagapattinam, against the order dated 24.07.1992 made in I.A.No.447, 448, 449, 450 & 451 /1992 in O.S.No.498, 499, 500 & 501 /1989 & 209 of 1990 on the file of District Munsif Court, Thiruvarur.

For Petitioner in all the CRPs : Mr.R.Subramaniam
for Mr.T.R.Rajaraman

For Respondents in all the CRPs: Mr.A.Muthukumar

COMMON JUDGMENT

These Second Appeals have been filed against a common judgment and decree of the learned District Judge, East Tanjore, Nagapattinam dated 16.04.1991 made in A.S.No.66, 67, 68, 69,



78,79, 80, 81 & 82/1990 respectively on the file of the District Judge, East Tanjore, Nagapattinam, confirming the judgment and decree of the learned District Munsif, Tiruvarur, dated 19.03.1990 made in O.S.No.224, 226, 227, 228, 229, 284, 285, 311 & 312 of 1988.

ii) The plaintiff in all the nine suits viz., O.S.Nos.224, 226, 227, 228, 229, 284, 285, 311 & 312 of 1988 respectively is the appellant herein. All the suits have been filed for declaration, recovery of possession and also for mesne profits. The learned District Munsif, dismissed all the suits. Aggrieved over the common judgment and decrees, the appellant/plaintiff preferred First Appeals before the District Court, East Thanjavur at Nagapattinam,viz., A.S.Nos.66, 67, 68, 69, 78, 79, 80, 81 & 82/1990. All the appeals arising out of nine suits were heard together and a common judgment was passed on 16.04.1991, dismissing all the appeals. Aggrieved over the concurrent judgments of the Courts below, the appellant has preferred these Second Appeals before this Court.

iii) The Civil Revision Petitions have been filed against the orders dated 25.01.1993 dismissing CMA.Nos.37, 38, 39, 40 & 41 of 1992 on the file of District Judge, Quaid-e-Millet, Nagapattinam. CMAs



were filed to set aside the dismissal order dated 24.07.1992 made in I.A.Nos.447, 448, 449, 450 & 451 /1992 filed to restore the suits on file in O.S.No.498, 499, 500 & 501 /1989 & 209 of 1990 on the file of District Munsif Court, Thiruvarur.

iv) The plaintiff in all the suits is the revision petitioner herein. The plaintiff filed the suits for declaration of title and recovery of possession. The defendant in each suit are the tenants under the plaintiff. The said suits were dismissed for non-prosecution. Aggrieved over the same, the Interlocutory Applications in I.A.No.447, 448, 449, 450 & 451 /1992 in O.S.No.498, 499, 500 & 501 /1989 & 209 of 1990 were filed for restoration of the suits, which were dismissed. Challenging the said orders passed in the above I.As, the petitioner herein preferred appeals in CMAs and all the CMAs were also dismissed. Hence, the above CRPs.

2. The brief facts which led to the filing of all the suits are as follows:

i) The suit property belongs to one Pathamuthu Beevi, wife of Mohamed Ibrahim Rowther. The plaintiff, Sheik Dawood, was known to Pathamuthu Beevi from his childhood and he was very affectionate



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towards Pathamuthu Beevi and she also treated the plaintiff as her own son. Out of love and affection, Pathamuthu Beevi executed a Will on 11.04.1985 in favour of the plaintiff in a sound and disposing state of mind without any coercion or compulsion. Pathamuthu Beevi was having several other properties, 5 to 6 times more than the property bequeathed in favour of the plaintiff. On 19.04.1985, Pathamuthu Beevi passed away. After the death of Pathamuthu Beevi, on the basis of the Will executed by her, the plaintiff took possession of the suit property and was enjoying the same. The plaintiff got the patta transferred in his name. The property tax also stood transferred in his name. The defendants are the tenants under Pathamuthu Beevi and they were paying the rent of Rs.40/-, except the defendant in O.S.No.284/1988 who was paying the rent of Rs.20/-, till March 1985, i.e., till the death of Pathamuthu Beevi. After her death, the defendants/tenants have agreed to pay the rent to the plaintiff. But due to the instigation of some other person, they did not agree the landlord-tenancy relationship with Pathamuthu Beevi and also with the plaintiff and that they claim ownership right over the property by adverse possession.

ii) In the year 1986, the plaintiff filed RCOPs against the



defendants for declaration of title and recovery of possession. The defendants contested the same stating that the alleged Will executed by Pathamuthu Beevi is not genuine and hence, the plaintiff has no right over the property and therefore, the plaintiff is not the owner of the property under the Will executed by Pathamuthu Beevi and that the defendants have been residing in the property for more than 15 years by putting thatched shed and therefore, they are the owners of the property by adverse possession. The said RCOP petitions were dismissed with liberty to the plaintiff to approach the appropriate Civil Court by filing a petition to prove his title. Therefore, the plaintiff has filed the suits before the District Munsif Court, Thiruvavur, for declaration of title, recovery of possession and for mesne profits.

3. At the time of trial in O.S.Nos.229, 284, 285, 311 & 312/1988, necessary issues were framed and on the plaintiff's side P.Ws 1 to 4 were examined and Exs.A1 to A67 were marked. On the side of the defendants, D.Ws.1 to 5 were examined and Exs.D1 and D2 were marked. Considering the submissions made on either side, the trial Court dismissed the suits finding that the plaintiff has not proved the Will alleged to have been executed by Pathamuthu Beevi in his favour beyond reasonable doubt and that the landlord-tenant



relationship has also not been proved. Further, the trial Court held that though it is stated that Pathamuthu Beevi had bequeathed only less than $1/3$ share of her properties in favour of the plaintiff under the alleged Will Ex.A66, the plaintiff has not proved beyond suspicion that Pathamuthu Beevi was having properties of more than $2/3^{\text{rd}}$ share other than the property bequeathed under the Will. It is also the finding of the trial Court that though the plaintiff had filed proof for paying the property tax and kist receipt in respect of the suit property, it cannot be taken that Pathamuthu Beevi is the owner of the property and that the plaintiff has not proved as per law that a Mohamedean lady, Pathamuthu Beevi, has bequeathed only $1/3^{\text{rd}}$ share of her estate under the Will Ex.A66. Further, the trial Court had come to the conclusion that Pathamuthu Beevi, with bad intention, knowing fully well that it is a disputed property and that she is not the owner of the property, had bequeathed the property in favour of the plaintiff. This conclusion was arrived at because though Pathamuthu Beevi owned some other properties, she had particularly bequeathed these two items of properties in O.S.No.301/1960 in favour of the plaintiff under Ex.A66. Since the said property is in the prime area at Thiruvavarur, they have created the alleged Will Ex.A66, in order to grab the property fraudulently. Further, only on the next day of the



execution of the Will, the same was registered at the residence of Pathamuthu Beevi. At the time of registration of the Will, Abdul Waheed, son of Pathamuthu Beevi was available in her residence. There is no explanation for registration of the Will at the residence of Pathamuthu Beevi. It is stated by the defendants that the testator was bedridden at the time of execution of the Will Ex.A66. This created a suspicion in the mind of the trial Court and hence, came to the conclusion that the Will is not proved beyond suspicion. The averment of the defendants that they are neither the tenants under Pathamuthu Beevi nor under the plaintiff was not rebutted by the plaintiff by any documentary evidence. Further, the landlord-tenant relationship between the plaintiff and the defendants was also not proved by the plaintiff through any witness or by producing any document. The trial Court finds that since the plaintiff did not prove the landlord-tenant relationship between him and the defendants, he is not entitled for mesne profits as prayed for.

4. At the time of trial in O.S.Nos.224, 226, 227 & 228/1988, necessary issues were framed and on the plaintiff's side P.Ws.1 to 4 were examined and Exs.A1 to A90 were marked. On the side of the defendants, D.Ws.1 to 4 were examined and Exs.D1 and D2 were



marked. Considering the submissions made on either side, the trial Court dismissed the suits finding that the plaintiff has not proved the Will alleged to have been executed by Pathamuthu Beevi in his favour, beyond reasonable doubt and that the landlord-tenant relationship has also not been proved.

5. Challenging the same, the plaintiff filed A.S.Nos.66 to 69 of 1990 and A.S.Nos. 78 to 82 of 1990. Though the lower Appellate Court held that the Will executed by Pathamuthu Beevi is genuine and the execution has been proved and it was also found that based on the Will, the revenue records have been mutated in the name of the plaintiff, however, finds that as the testator did not have title to the entire property, the Will is not valid. Challenging the same, the present second appeals in S.A.Nos.643 to 651 of 1993 have been filed.

6. At the time of admission, the following substantial questions of law were framed for consideration.

i) Whether the lower appellate Court was right in dismissing the suits for recovery of possession when admittedly the defendants are only trespassers and the plaintiff was a purchaser from a co-sharer in spite of the well settled law that the co-owner can maintain an action



for ejectment against a trespasser?

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ii) Whether the lower appellate Court was justified in failing to give a finding of tenancy relationship between the parties and the malign possession of the defendants?

7. According to the learned counsel for the appellant, the suit property is an extent of 34 cents in T.S.No.26/2 in Sundara Vilagam Vattam in Thiruvarur Taluk. The property originally belonged to one Pathamuthu Beevi, who purchased the same from Abdul Majeed Rowther, under a registered sale deed dated 17.10.1955 (Ex.A1). She constructed small tenements and let it out to third parties. While Pathamuthu Beevi was in a sound and disposing state of mind, she executed a Will dated 11.04.1985 (Ex.A20) bequeathing the suit property to the plaintiff/appellant herein and registered the same on the next day. In the Will, she refers to the value of the property as $1/3^{\text{rd}}$ of her total assets. Her son Abdul Waheeb has accepted the Will vide his letter dated 04.08.1989 (Ex.A.89). After the death of Pathamuthu Beevi, the plaintiff took possession under the Will and got the patta transferred in his name. The property tax assessment also stood transferred in his name. He initiated eviction proceedings against the tenants/defendants. Since the tenants disputed the title, the



plaintiff/petitioner filed the present suits for declaration of title and recovery of possession.

8. Learned counsel for the appellant would submit that the Courts below have erred in coming to the conclusion that Pathamuthu Beevi has no title to the suit property. Even assuming that the sale was executed by Abdul Majeed Rowther, it may not bind the other co-owners as it is still valid with reference to his share. Learned counsel would further submit that the alienation in favour of Pathamuthu Beevi by Abdul Majeed Rowther under Ex.A1 is perfectly valid and possession of Pathamuthu Beevi under Ex.A1 is legal and that the said Pathamuthu Beevi and those who claim under her can maintain an action against third parties who interfere with the possession of the property. He would further submit Pathamuthu Beevi's possession of the property purchased under Ex.A1 cannot be disputed in view of the overwhelming documentary evidence produced by her under Exs.A2 to A19. Further, the said Pathamuthu Beevi being an alienee under a co-sharer, has perfect title by adverse possession to the property purchased by her under Ex.A1 and the co-sharers having not taken any steps by way of final decree in O.S.No.301/1960 on the file of District Munsif Court, Tiruvarur, the final decree in the suit can be



taken as barred by limitation. He would further submit that Pathamuthu Beevi alone had been impleaded as a defendant in O.S.No.301/1960 for partition and the respondent/defendant herein and the respective defendants in the other suits were not impleaded only because they were not let into possession of the suit property in 1960 when the suit for partition was instituted. After the sale deed executed in her favour under Ex.A1, Pathamuthu Beevi got the patta transferred in her name and also got the assessment of the house changed and was paying property tax and house tax. He would further submit that the Will in question is true and genuine and having had the patta transferred in his name, he is entitled to recover possession of the suit property from the defendants who had no title to the property. Further, Pathamuthu Beevi after having purchased the property under Ex.A1, had put up thatched houses, leased the same to the defendants in respect of the suits and bequeathed the same under the Will to the appellant. Further, it is not open to the defendants to plead res-judicata as the defendant is not claiming any right under any of the parties in O.S.No.301/1960 on the file of District Munsif Court, Tiruvarur.

9. Learned counsel for the appellant would further submit that



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under Section 284 of Indian Succession Act, the execution of the Will can be questioned only by persons having caveatable interest. Caveatable interest means the persons must have some right or interest in the property but for the Will, they would be entitled to a share. In the instant case, the respondents are tenants according to the appellant and according to the respondents, they have been in possession of the property. Therefore, there is no right, title or interest and on their objections, the Will cannot be said to be not proved. Learned counsel would further submit that as per Mohammeden Law, the owner of the property cannot execute a Will in respect of more than $1/3^{\text{rd}}$ of the property. Article 118 prescribes limit of testamentary power, a Mohammeden by Will cannot dispose more than $1/3^{\text{rd}}$ of the surplus of his estate after payment of funeral expenses and debts unless the heirs consent thereto after the death of the testator. Therefore, in respect of $1/3^{\text{rd}}$ share, the Will is valid. Further, the plaintiff has filed Ex.A89, a letter dated 04.08.1989 in which the testator's son Abdul Rahim has accepted the will of his mother. Therefore, the consent was given by the legal heir and hence, the Will is valid. Further, though preliminary decree in O.S.No.301 of 1960 (Ex.B1 and B2) was passed, there was no final decree proceedings and none of the parties in the suit took any further proceedings for working



out their rights by filing an application for final decree. Therefore, the Will and the sale deed have not been questioned by any of the sharers. Therefore, he prays for appropriate orders in the Second Appeals and in the CRPs.

10. On the contrary, the learned counsel for the respondents would submit that the alienation said to have been made in favour of Pathamuthu Beevi by Abdul Majeed Rowther itself is not a valid one, since Abdul Majeed Rowther himself has not perfected title over the property in question. Moreover, Abdul Majeed Rowther was not the owner of the entire suit property and he suffered a preliminary decree for partition in O.S.No.301 of 1960 and no final decree was passed. In the absence of any final decree in O.S.No.301 of 1960, there cannot be any alienation of a specific portion of the property by Abdul Majeed Rowther and consequently, the sale made by Abdul Majeed Rowther in favour of Pathamuthu Beevi cannot said to be valid in the eye of law. Learned counsel would further submit that mere payment of tax in the name of the appellant in respect of the property will not entitle the appellant as the owner of the property or that he has title over the property in question. He would further submit that when the Will is not valid in the eye of law, even execution, attestation is said to be proved,



no title will flow under the said Will on account of its invalidity. The respondents had been in possession and enjoyment of the respective properties for several years and therefore, they had perfected title by adverse possession. Learned counsel would further submit that as a Mohamedan lady she cannot bequeath her properties under a Will more than 1/3 of her estate. Moreover, the plaintiff failed to prove that the said Will contains only 1/3rd of her estate. Further, the landlord-tenant relationship between the appellant and the respondents was also not proved by the appellant by producing any document.

11. Learned counsel for the respondents would further submit that as far as the Civil Revision Petitions are concerned, the CRPs arise from the suits filed by the appellant seeking declaration and recovery of possession which were dismissed for default. On application, the suits were restored twice. On the third time, the trial Court refused to restore the suit on the ground that the appellant/plaintiff therein had deliberately allowed the suits to be dismissed for default and there was no sufficient cause for restoration of those suits and the orders of the trial Court were confirmed by the Appellate Court. Therefore, the Civil Revision Petitions are also liable to be dismissed.



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12. Heard the learned counsel for the appellant and the learned counsel appearing for the respondents.

13. It is not in dispute that Abdul Majeed Rowther sold the suit property to Pathamuthu Beevi under Ex.A1 dated 17.10.1955. In a suit in O.S.No.301/1960 filed by one Mohammed Beevi for partition, as per the preliminary decree, Abdul Majeed Rowther was entitled to a share in the property. But neither of the parties in the said suit have taken steps for final decree proceedings. Therefore, as on the date of execution of the Sale Deed, Abdul Majeed Rowther was entitled to a share in the property and therefore, the sale made by Abdul Majeed Rowther in favour of Pathamuthu Beevi was valid. After purchase of the property, Pathamuthu Beevi was paying the property tax in respect of the property in question. After the death of Pathamuthu Beevi, the revenue records have also been mutated in the name of the appellant and he has been paying the property tax to the said property. This is evident from the documentary evidence Exs.A2 to A19. The landlord-tenant relationship between the appellant and the respondents was not proved by the appellant through any witness or by producing any documents. Both the Courts below have concurrently found on the basis of oral and documentary evidence that since the appellant did



not prove the landlord tenant relationship between him and the respondents, he is not entitled for mesne profits. Further, as the appellant is paying the tax in his name in respect of the property, it will not entitle that the appellant has title over the property in question. Pathamuthu Beevi had been impleaded as a defendant in O.S.No.301/1960 filed for partition in which only preliminary decree was passed and therefore, it is the finding of both the Courts below that Abdul Majeed Rowther, the vendor of Pathamuthu Beevi, was not the owner of the entire suit property and he is only a co-sharer of the property. Therefore, he has not perfected title over the property in dispute. In the instant case, according to the appellant, the respondents are tenants and according to the respondents, they have been in possession of the property and they claim ownership right over the property by adverse possession. The trial Court found that the landlord-tenant relationship has not been proved and that the appellant has also not proved the Will alleged to have been executed by Pathamuthu Beevi in his favour beyond reasonable doubt. The lower Appellate Court found that the Will is not a valid document and there is no landlord tenant relationship between the parties and confirmed the order of the trial Court.



14. It is trite law that in a suit for declaration, the burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case of the defendants would not be a ground to grant relief to the plaintiff. The Second Appeal cannot be decided merely on equitable grounds. It is well settled law that the concurrent findings of fact based on evidence, which was accepted by the trial Court as well as the first appellate Court, cannot be disturbed, more particularly, when the first appellate court has given satisfactory reasons for accepting the same evidence which was accepted by the trial Court.

15. In the case on hand, it is stated that the appellant claims title over the property on the basis of the Will executed by Pathamuthu Beevi. It is the case of the respondents that the appellant has not proved beyond suspicion that Pathamuthu Beevi was having properties of more than $2/3^{\text{rd}}$ share other than the property bequeathed under the Will. It is also the finding of the trial Court that though the plaintiff had filed proof for paying the property tax and kist receipt in respect of the suit property, it cannot be taken that Pathamuthu Beevi is the owner of the property. The appellant has not proved as per law that Pathamuthu Beevi has bequeathed only $1/3^{\text{rd}}$ share of her estate under



the Will Ex.A66. Further, only on the next day of the execution of the Will, the same was registered at the residence of Pathamuthu Beevi.

There is no explanation for registration of the Will at the residence of Pathamuthu Beevi. The trial Court had come to the conclusion that the Will said to have been executed by Pathamuthu Beevi is not proved beyond suspicion as per the Mohammedan Law. The averments of the respondents that they are tenants neither under Pathamuthu Beevi nor under the appellant were not rebutted by the appellant by any proof. Abdul Majeed Rowther, the vendor of Pathamuthu Beevi, was not the owner of the entire suit property and he is only a co-sharer of the property and only on partition, he could acquire perfect title over his share in the property. Further, the landlord-tenant relationship between the appellant and the respondents was also not proved by the appellant through any witness or by producing any document. The trial Court found that since the appellant did not prove the landlord tenant relationship between him and the respondents, he is not entitled for mesne profits as prayed for. This court concurs with the findings of the Courts below that there is no landlord-tenant relationship between the parties and thus, the appellant is not entitled to mesne profits. Thus, the substantial questions of law raised in these Second Appeals are answered against the appellant.



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16. Under such circumstances, this Court does not find any infirmity or illegality in the concurrent findings rendered by the Courts below and therefore, the Second Appeals fail and the same are dismissed. The order passed by the Courts below are confirmed. Consequently, the Civil Revision Petitions are also dismissed. However, the appellant is at liberty to file a separate suit for partition in respect of his claim in the manner known to law. No costs.

10.06.2022

Speaking/ Non speaking order
Index:Yes/No
vsi

To

1. The District Judge,
East Tanjore,
Nagapattinam.
2. The District Munsif,
Tiruvarur.



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S.A.Nos.643 to 651 of 1993 &
CRP Nos.2164 to 2168 of 1993

J.NISHA BANU,J.

vsi

Pre-delivery judgment made in

S.A.Nos.643 to 651 of 1993 &
CRP Nos.2164 to 2168 of 1993

10.06.2022