



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 12.12.2022

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.Nos.1420 of 1997 & 38 of 2006

&

C.M.P.No.15192 of 2018

S.A.Nos.1420 of 1997:

Ranga Pillai

...Appellants

Vs.

1.Mannar Pillai (Deceased)

2.Devaraj

3.Pachayammal

4.Govindammal

5.R.Jayaprakash (Minor)

...Respondents

(R5 brought on record as LR of the deceased R1 vide order of the Court dated 11.08.2014 made in C.M.P.Nos.500 to 502 of 2011 in S.A.No.1420 of 1997)



Prayer: Second Appeal is filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree of the Principal District Judge, Chengalpattu, in A.S.No.3 of 1996 confirming the Judgement and Decree of the Sub Judge, Tiruvallur in O.S.No.44 of 1987.

For Appellant	:	Mr.M.R.Khabali
For Respondents	:	Mr.G.S.Selvatharasu 2 & 5
For Respondent 6:		Mrs.G.Sumitra
For Respondents	:	Given up 3 & 4
For Respondent 1:		Died

S.A.Nos.38 of 2006:

Ranga Pillai ...Appellants

Vs.

1.Devaraj

2.Mannar Pillai (Deceased)

3.R.Jayaprakash (Minor)

...Respondents



(R3 brought on record as LR of the deceased R2 vide order of the Court dated 02.01.2012 made in C.M.P.Nos.545 to 547 of 2011 in S.A.No.38 of 2006)

Prayer: Second Appeal is filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree passed in A.S.No.29 of 2003 dated 30.01.2004 by the Additional District Judge, Fast Tract Court No.V, Chengalpattu at Thiruvallur confirming the Decree and Judgement passed in O.S.No.887 of 1988 dated 25.07.2002 by District Munsif Court, Tiruvallur.

For Appellant : Mr.M.R.Khabali

For Respondents : Mr.G.S.Selvatharasu
1 & 3

For Respondent 2: Died

JUDGMENT

The two appeals are filed with reference to the very same property. The plaintiff in O.S.No.44 of 1987, who is the defendant in O.S.No.887 of 1988 is the appellant before this Court.



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2. O.S.No.44 of 1987 is filed by the appellant before the Sub Court, Tiruvallur for partition of his half share in the suit schedule property and for recovery of the share of the income. The suit O.S.No.887 of 1988 on the other hand has been filed by the defendants 1, 2 and 4 in O.S.No.44 of 1987 against the plaintiff in O.S.No.44 of 1987, for bare injunction restraining the defendant, his men, servants from interfering or trespassing into the suit property, cutting and removing the trees and thatched hut thereon. The property which is the subject matter of this suit is the 5th item of the property in the suit O.S.No.44 of 1987. The parties are referred to in the same ranking as before the suit O.S.No.44 of 1987 for ease of understanding.

3. In the suit O.S.No.44 of 1987, apart from the plaintiffs in the suit O.S.No.887 of 1988, one Chenchu Pillai was impleaded as the 3rd defendant and on his death his legal representatives have been added as defendants 5 and 6. The facts in brief are as follows:-



4. The admitted case of both the parties is that the property belonged to one Desammal, who is the mother of the 1st defendant and sister of the deceased 3rd defendant, Chenchu Pillai. The 2nd defendant is the husband of the 1st defendant.

5. It is the case of the plaintiff that the said Desammal, the owner of the property had executed a Will dated 01.06.1974 bequeathing the suit property equally on her daughter, the 1st defendant and her brother the 3rd defendant. On her death, both of them became owners of the suit property and were in enjoyment of the same as co-owners.

6. It is the case of the plaintiff that the 3rd defendant was living in the suit house and paying house tax and kist in respect of the suit lands. The plaintiff had purchased the half share in the Item numbers 1 to 4 from the 3rd defendant under a sale deed dated 22.12.1986 and the half share in the house site described as Item 5 under a sale deed dated 04.03.1987. The plaintiff was therefore put in joint possession and enjoyment of the said property.



7. It is the case of the plaintiff that the 4th defendant started claiming rights in the suit property through the 1st defendant and on the instigation of the 1st and 2nd defendants he has been threatening the plaintiff's peaceful possession and enjoyment of the suit property. Hence, the plaintiff felt that it was no longer possible to continue in joint possession and therefore come forward with the suit in question.

8. The defendants 1, 2 and 4 had filed a written statement inter alia contending that the suit is not maintainable. These defendants would submit that the suit property was not the exclusive property of the said Desammal and that it belonged to the father of the 1st defendant and it is only on his death that both Desammal as well as the 1st defendant became entitled to the half share each in the suit property.

9. The defendants had denied the Will dated 01.06.1974 alleged to have been executed by the said Desammal. The defendants had also questioned the right of Desammal to execute the Will in respect of the



entire property in favour of the 3rd defendant. The defendants would further submit that even if the Will is genuine, the same would not bind them as the Will itself is invalid in law. Further, there was no necessity for Desammal to execute the Will especially when the 1st defendant would automatically inherit the entire property from her mother on the demise of her mother. It was also their contention that these properties were not inherited by the 3rd defendant since he is only the maternal uncle of the 1st defendant. Therefore, the sale in favour of the plaintiff would not convey any right, title or interest upon the plaintiff. The defendants would further submit that it is only the 1st defendant who is in exclusive possession of the suit property and the claim of adverse possession put forward by the plaintiff was absolutely false. They would also contend that the suit is barred by limitation and therefore sought for the dismissal.

10. The 3rd defendant had filed a written statement inter alia contending that the Will had been executed by the said Desammal and that he had sold his share to the plaintiff under two registered sale



deeds dated 22.12.1986 and 04.03.1987 and that he had every right to execute the sale.

11. The suit O.S.No.887 of 1988 has been filed by the defendants 1, 2 and 4 for bare injunction in respect of the 5th item of the suit property in O.S.No.44 of 1987. Though in the suit O.S.No.44 of 1987, the defendants 1, 2 and 4 had taken a plea that the property was not exclusive property of Desammal but the property of her husband, in the suit O.S.No.887 of 1988 they had taken a stand that the suit property belonged to Desammal, the mother of the 1st defendant and on her death, the 1st defendant had inherited the same and she had sold southern half share to the 4th defendant (2nd plaintiff in the suit O.S.No.887 of 1988) and put him in possession of the same.

12. After the sale, the 1st defendant was enjoying the northern share together with an hut and one Tamarind tree, one margosa tree and three palmyrah trees, whereas the 4th defendant was enjoying southern share with his thatched house therein. The defendants 1 and 2 were



paying their house tax receipts separately.

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13. The plaintiff who had no right, title or interest to the property was threatening to cut trees and trespass into the suit property on the basis of the sale deed said to have been executed by one Chenchu Pillai, the maternal uncle of the 1st defendant in favour of the plaintiff. They would submit that the plaintiff has already filed a suit in O.S.No.44 of 1987 and the same is pending, where the right of the plaintiff is yet to be fructified. They therefore sought for an injunction restraining the plaintiff from interfering or trespassing into the suit property.

14. In the suit O.S.No.44 of 1987 the learned Subordinate Judge, Tiruvallur had framed the following issues:

i. Whether the suit properties are the self acquired properties of Desammal?

ii. Whether the Will dated 01.06.1974 is true and genuine document?



iii. *Whether the sale deed dated 22.12.1986 and 06.03.1987 are true and valid? If so will they bind the 1st defendant?*

iv. *Whether the 1st defendant had prescribed title to the suit properties by adverse possession?*

v. *Whether the plaintiff is entitled to half share in the suit properties?*

vi. *To what other relief the plaintiff is entitled to?*

15. In the suit O.S.No.887 of 1988, the learned District Munsif, Tiruvallur had framed the following issues:

i. *Whether the 1st defendant is the absolute owner of the suit property?*

ii. *Whether the 1st and 2nd plaintiffs are enjoying the usufructs of the trees standing in the suit property?*

iii. *Whether the Will dated 01.06.1974 executed by Desammal is true and valid?*

iv. *Whether the sale deed dated 04.03.1987 executed*



by Chenchu Pillai is true and valid and binding upon the plaintiffs?

v. Whether the suit is barred by res judicata?

vi. Whether the plaintiffs are entitled to permanent injunction as prayed for?

Vii. What other relief the plaintiffs are entitled to?

16. The two suits were tried separately though the issues in both the suits would rest upon the question as to whether the Will executed by the said Desammal is a valid one. In the suit O.S.No.44 of 1987 the learned Subordinate Judge, Tiruvallur had examined the plaintiff as P.W.1 and one Sivagana Sambandam as P.W.2. The plaintiff had also marked Ex.A.1 to Ex.A.12. On the side of the defendants, the 2nd defendant had examined himself as D.W.1, the 4th defendant as D.W.2 and one Gangadaran as D.W.3 and Ex.B.1 to Ex.B.24 were marked.

17. As regards suit O.S.No.887 of 1988, the 2nd defendant had examined himself as P.W.1, the 4th defendant as P.W.2 and one



Kothandan as P.W.3 and marked Ex.A.1 to Ex.A.7. On the other side, the plaintiff had examined himself as D.W.1 and Sivagnana Sambadam as D.W.2 and marked Ex.B.1 and Ex.B.2. The Advocate Commissioner's report and sketch had been marked as Court exhibits, Ex.C.1 and Ex.C.2.

18. The learned Subordinate Judge, Tiruvallur, on going through the evidence on record held that the Will dated 01.06.1974 had not been proved in the manner known to law and therefore, the plaintiff had not proved the Will and ultimately the suit in O.S.No.44 of 1987 was dismissed.

19. The suit O.S.No.887 of 1988 was decreed in favour of the defendants granting permanent injunction once again holding that the Will has not been proved in the manner known to law. The learned District Munsif, Tiruvallur, observed that the property was never in possession of the plaintiff and it was only in the possession of the 1st defendant and therefore decreed the suit.



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20. Challenging the Judgement and Decree in O.S.No.44 of 1987, the plaintiff had filed A.S.No.3 of 1996 on the file of the Principal District Judge, Chengalpattu and against the Judgement and Decree in O.S.No.887 of 1988, the plaintiff had filed A.S.No.29 of 2003 on the file of the Additional District Judge, Fast Tract Court V, Chengalpattu at Tiruvallur.

21. The Lower Appellate Court in both the appeals had concurred with the findings of their respective Trial Court that the Will has not been proved in the manner known to law and since admittedly the property belonged to Desammal exclusively, in the absence of the Will, the 1st defendant being her only daughter automatically inherited the said property. Once the plaintiff had failed to prove the execution of the Will by the deceased Desammal the sale executed by the deceased 3rd defendant Chengu Pillai in favour of the plaintiff does not confer any right, title or interest in the suit property.



22. The learned Additional District Judge, Fast Tract Court V, Tiruvallur has confirmed the finding that it is only the 1st defendant who has been in possession and enjoyment of the property, thereafter the 4th defendant by virtue of the sale in his favour on 12.12.1986.

23. Challenging the same, the plaintiff is before this Court.

24. In S.A.No.1420 of 1997, the following Substantial Questions of law have been raised:

i. Whether the Courts are right in holding that the Will has not been proved though the Will is registered and the same is not disputed by the defendants?

ii. Whether the Courts below are right in holding that the sale deed in favour of the plaintiff is not supported by consideration despite the admission of the 3rd defendant that the consideration had been paid?



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25. The Substantial Questions of law that arises for consideration

in S.A.No.38 of 2006 are as follows:

i. Whether the plaintiffs are entitled to get a decree for permanent injunction against the co-owner in joint possession when the Second Appeal is pending before the High Court, subject matter of the suit for partition relating to the suit property and other properties of the same parties?

ii. Whether the permanent injunction can be granted against a co-owner in joint possession in order to made him to deprive his legal rights over his property?

26. Heard the learned counsels and perused the records.

27. The issue in both the suits rest on a single point as to whether the original owner Desammal has executed the Will which has been marked as Ex.A.3 in the suit O.S.No.44 of 1987 and Ex.B.1 in the suit O.S.No.887 of 1988. Admittedly, the plaintiff has not examined the



attesting witness. It is the case of the plaintiff that the attesting witness need not be examined since the defendants have admitted the execution of the Will. This contention has to necessarily fail in the light of the categorical statement of defendants 1, 2 and 4 in their written statement that the Will dated 01.06.1974 has not been executed by Desammal and even assuming that it is executed, the Will was invalid since Desammal did not have any right to execute the Will.

28. In the suit O.S.No.887 of 1988, the defendants 1, 2 and 4 have stated that the plaintiff was trying to assert a right on the basis of collusive and fraudulent document. In the evidence also, questions have been put to the plaintiff as P.W.1 as to why the original Will had not been produced as also the right of Desammal to execute the deed.

29. Section 68 of the Indian Evidence Act provides the manner in which the Will has to be proved. The proof of the Will is irrespective of a defense being taken against it. The Hon'ble Supreme Court in the Judgement reported in **2017 (1) SCC 257 – Ramesh Verma (Dead)**



through Legal Representatives Vs. Lajesh Saxena (Dead) by Legal Representatives and another, has observed as follows:

“A Will like any other document is to be proved in terms of the provisions of [Section 68](#) of the Indian Succession Act and the [Evidence Act](#). The propounder of the Will is called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the disposition and put his signature to the document on his own free will and the document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. This is the mandate of [Section 68](#) of the Evidence Act and the position remains the same even in a case where the opposite party does not specifically deny the execution of the document in the written statement.”



30. This Judgement has been followed by the learned Judge of this Court in the Judgement reported in **2022 (2) LW 393 – Malliga Vs. P.Kumaran**, where the learned Judge had raised a question for consideration as to *whether the proof under Section 68 could be dispensed with if the execution of the Will has been admitted by the defendant*. After referring to the Judgement of the Division Bench of the Kerala High Court reported in **AIR 1990 226 - Thayyullathil Kunhikannan and others Vs. Thayyullathil Kalliani and others** and the Judgement of **Ramesh Verma** cited supra, the learned Judge observed that the examination of the attesting witness cannot be dispensed with as Section 68 of the Evidence Act is mandatory for proving the Will.

31. In the instant case as already submitted, the plaintiff has not chosen to examine the attesting witness. Therefore, the findings of both the Courts below in both the suits have to necessarily be upheld and the Substantial Questions of law in both the Second Appeals answered against the plaintiff.



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32. In the result, the Second Appeals are dismissed.

Consequently, connected Civil Miscellaneous Petition is closed. No costs.

12.12.2022

Index : Yes/No
Internet : Yes/No
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To

1.The Principal District Judge,
Chengalpattu

2.The Sub Judge,
Tiruvallur

3.The Additional District Judge,
Fast Tract Court No.V,
Chengalpattu at Thiruvallur

4.The District Munsif Court,
Tiruvallur.



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P.T. ASHA, J,

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