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S.A.No.1225 of 2002

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.11.2022

CORAM

THE HONOURABLE MR. JUSTICE KRISHNAN RAMASAMY

S.A.No.1225 of 2002

and

C.M.P.Nos.354 of 2004 and 16851 of 2005

1.Velayudham
2.Dhanasekaran @ Dhanusu
3.Munusamy

.. Appellants

Versus

1.Manivannan
2.Kamalakannan

.. Respondents

This Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree dated 13.02.2002 made in A.S.No.4 of 2001 on the file of the Additional Subordinate Judge, Chengalpattu in reversing the well considered judgment and decree dated 12.12.2000 made in O.S.No.269 of 1992 on the file of the District Munsiff Court, Chengalpattu.

For Appellants : Mrs.R.Gowri

For Respondent 1 : Mr.G.V.Sridharan

Respondent 2 Given up



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JUDGMENT

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This Second Appeal has been filed against the judgment and decree passed by the first Appellate Court in A.S. No. 4 of 2001 dated 13.02.2002 reversing the judgment and decree passed by the trial Court in O.S. No. 269 of 1992 dated 12.12.2000.

2. The defendants 2 to 4 in O.S. No. 269 of 1992 on the file of the District Munsiff Court, Chengalpattu, are the appellants in this appeal. The said suit in O.S.No.269 of 1992 was filed by the first respondent herein for declaration and permanent injunction.

3. For convenience, the status of the parties are referred to in this appeal as in the suit before the trial Court.

4. The case of plaintiff is that the suit property originally owned by Gopal Naicker, who said to have acquired the same by virtue of an Oral Partition among their family members. Gopal Naicker had two wives, his first wife was Chinnakulandai and his second wife was Amirthammal. The second wife Amirthammal executed a Will under Ex.5 bequeathing the property to and in favour of her daughter Pushpa Ammal on 28.12.1978. Thereafter, on



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05.09.1991, Pushpa Ammal along with the legal heirs of Chinnakulandai, the first wife of Gopal Naicker, in turn executed Sale Deed under Ex.A1 to and in favour of the plaintiff. Therefore, the plaintiff was the absolute owner of the suit property. The defendants, who are strangers to the property, attempted to interfere with the suit property. Therefore, the plaintiff filed the suit for declaration and permanent injunction.

5. The defendants filed their written statement stating that the suit property originally belonged to one Devaraj Naicker, elder brother of Raghava Naicker, who is the father of the Defendants 2 to 4. Devaraj Naicker had no issues. After the demise of Devaraj Naicker, the properties were given to the Defendants 2 to 4 as legal heirs of Devaraj Naicker. The said Gopal Naicker is a stranger to the suit property. The said Raghava Naicker and the Defendants 2 to 4 are the absolute owners in possession and enjoyment of the suit property. There is a well in the suit property with stone pillars and it is in enjoyment of the defendants. It was further stated that before filing the suit, the plaintiff interfered with the defendants' enjoyment in the suit property and there was a quarrel between the parties in the village. Amirthammal, who is admittedly the second wife of Gopal Naicker, has no title to execute any document in respect of the suit property. The date of death of Amirthammal was not correct. The allegation that Amirthammal got the property as legal



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heir of Gopal Naicker in her capacity as second wife is untenable, against law and put to strict proof of the same. The said Amirthammal and the plaintiff never enjoyed the suit property nor in possession of the same. The house tax receipts filed in the suit is not related to the suit property. Also, the schedule boundary and plan annexed with the plaint are all wrong. The plaintiff has never traced the alleged right over the suit property nor filed any parent document to show that the said Gopal Naicker is the owner of the property. Therefore, the suit filed by the plaintiff is vexatious and is liable to be dismissed.

6. During trial, the plaintiff/first respondent herein examined himself as P.W.1 along with Natarajan, Pushpavathi and Govindaraj, as P.W.2 to P.W-4 respectively and marked documents Exs.A-1 to A-6. On behalf of the defendants, the first defendant examined himself as D.W-1 along with one Dhasarathan as D.W-2 and marked Exs.B-1 to B-12 on their side.

7. The trial court, on appreciation of the oral and documentary evidence, dismissed the suit holding that the plaintiff has failed to prove the valid title and possession satisfactorily. The trial court also observed that Amirthammal admittedly being the second wife of Gopal Naicker, has no valid right to



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execute a Will because she has no valid document to prove that she had succeeded to the property legally. The plaintiff has failed to prove his title and possession whereas the defendants have disproved the case of the plaintiff and shown that they are in long and continued possession and enjoyment over the schedule property.

8. Aggrieved by the dismissal of the suit, the plaintiff preferred an appeal in A.S.No.4 of 2001 on the file of the Additional Subordinate Court, Chengalpattu. The appellate Court reversed the judgment and decree of the trial court on the ground that no material evidence was adduced by the defendants to prove that Devaraj Naicker was the absolute owner of the suit property. The Appellate Court observed that the defendants cannot question the validity of the execution of the Will, when the suit property devolves on the legal heir of Gopal Naicker since the defendants are stranger to Amirthammal family. Further, the Advocate Commissioner report is beyond the scope in finding that the defendants are in possession. When the defendants did not establish their defence, the trial court ought not to have dismissed the suit filed by the plaintiff. Accordingly, the first appellate Court allowed the appeal preferred by the plaintiff. Aggrieved over the same, this Second Appeal has been filed.



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9. Mrs. Gowri, learned Counsel for the appellants submitted that the trial Court had rightly dismissed the suit, however, the Appellate Court wrongly came to the conclusion as if no evidence was adduced by the defendants to prove that Devaraj Naicker was the absolute owner of the suit property. She further submitted that before filing the suit, the suit property was in possession and enjoyment of the appellants and first respondent/plaintiff was not at all in possession of the property. Further, she would submit that even the Advocate Commissioner was appointed to note down the physical features and about the availability of the building which was in a dilapidated condition and he has also confirmed about the possession of the building by the appellants. To substantiate the contention of the appellants, they have marked Ex.B-1 to Ex.B-12 and also filed various house tax receipts and other documents and those documents pertaining to the year 1970 to 1995. All those documents filed by the defendants/appellants have not been considered by the first appellate Court and simply proceeded to hold that those documents are not sufficient to prove the possession of the property. On the other hand, the Appellate Court relied on Ex.A-1 and Ex.A-6, sale deeds and also Ex.A-5-Will filed by the plaintiff. Further, she submitted that the said Amirthammal, who is said to have executed the Will, was not in possession of



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the property and she has no right to execute the Will in respect of the entire share of the property, as she is the second wife of the said Gopal Naicker when the said Gopal Naicker had first wife. Under those circumstances, the Will executed by Amirthammal was not accepted by the trial Court. However, the first Appellate Court completely ignored this vital fact and rejected the contentions of the appellants herein and reversed the judgment and decree passed by the trial Court. Therefore, she would contend that the judgment and decree of the first Appellate Court is to be set aside on the aspect of perversity.

10. Mr. G.V. Sridharan, learned Counsel appearing for the first respondent/plaintiff would submit that Ex.A5 is the registered Will executed by Amirthammal in favour of Pushpa Ammal. The said Will was executed as early as on 28.12.1978. Since Amirthammal was in possession of the property and as the property is grama natham property, the said Amirthammal executed the registered Will in favour of her daughter Pushpa Ammal. Admittedly, there was no patta issued to any other persons. According to the first respondent/plaintiff, originally the property was in the possession of Gopal Naicker and after his death, Amirthammal was in possession. Therefore, she executed the Will and after execution of the Will the property was sold by Pushpa Ammal along with the legal representatives of Gopal Naicker through



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first wife to and in favour of the first respondent/plaintiff by Ex.A-1 dated 05.09.1991. He also relied on Ex.A-2 and Ex.A-3 viz., demand notice seeking house tax and house tax receipt respectively. Further, he would submit that the Will was proved by examining the witnesses. However, the trial Court rejected the Will on the ground that the Will was not proved as one of the attesting witnesses is the relative of the said Amirthammal. However, the Appellate Court rightly negatived the approach of the trial Court and decreed the suit. Therefore, there is no error in the judgment and decree passed by the Appellate Court. He prayed that the judgment and decree of the first Appellate Court may be confirmed.

11. This Court heard the learned Counsel for the appellants as well as the first respondent and perused the materials placed on record.

12. At the time when the second appeal was taken up for admission, this Court framed the following substantial question of law:-

“Whether the Lower Appellate Court is right in holding that the plaintiffs are entitled to the reliefs sought for in the plaint?”

13. Admittedly, for the suit scheduled properties no one has been issued with any patta by the revenue authorities based on their possession and



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enjoyment. Both the parties admitted that the property is classified as *grama natham* property in the revenue records. The appellants/defendants 2 to 4 and first respondent/plaintiff produced house tax receipts. Upon perusal of the house tax receipts produced by both parties, it appears that both the appellants and the first respondent paid house tax. When the house was in dilapidated condition, it is not known how the house tax was paid. When there is no house/building in the suit property, this Court is unable to understand how both the parties have paid tax and marked tax receipts as if the same is belonging to the disputed suit property. Therefore, rightly the trial Court rejected those house tax receipts and the appellate Court has not taken into consideration the same. The only document available is Ex.A-5 dated 28.12.1978 which is a registered Will and though the defendants opposed it strenuously and challenged the manner in which the Will was executed, it was not substantiated by the defendants. By virtue of the execution of the Will, it shows that the said Amirthammal was in possession of the property and thereby she has executed the registered Will to and in favour of her daughter Pushpa Ammal and subsequently, the said Pushpa Ammal joining with the other three sisters, who are the legal representatives of the first wife of Gopal Naicker, executed the sale deed in favour of the plaintiff. The extent mentioned in the property was 20 ft. – East-West and 404 ft. - North-South.



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Further, by virtue of Ex.A-1 the plaintiff transferred about 10,320 sq. ft. i.e., 30 ft. East-West and 344 ft. - North to South by virtue of Ex.A6, and sold an extent of 1240 sq. ft. ie., 20 ft. and North-South by 62 ft. Therefore, totally by virtue of both the documents, the extent of land available is 11,560 sq. ft.

14. When the first respondent/plaintiff obtained the property by virtue of Will to an extent of 8080 sq. ft. ie., 20 ft. East-West x 404 ft. North-South, this Court is unable to accept how he acquired the right to transfer of about 11,560 sq. ft. by stating that the said Amairthammal was in possession of the property. As per the Will, if at all Amirthammal can transfer only 8080 sq. ft and not 11,560 sq. ft. In this regard, the lower Court also not applied its mind and blindly accepted and decreed the suit to the extent of 11,560 sq. ft.

15. With regard to the submission of the attesting witness who was the relative of Manivannan is concerned, merely because the attesting witnesses is one of the relatives of the executor, it will not be a ground to reject the validity of the Will. The sale deed was executed in favour of the plaintiff in the year 1991 viz., 13 years before the Will was executed. Therefore, the Court below cannot go into the relationship of Manivannan, attesting witness as well as the executor. When the Will was executed, the



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attesting witness could not have been aware of the fact whether the property is going to be sold to the plaintiff or not. Under those circumstances, this Court is unable to accept the contention of the learned Counsel for the appellants with regard to registration of the Will on the basis of the relationship of the attesting witness of the plaintiff. For all these reasons, while this Court confirms the judgment and decree of the lower Court to the extent of 8080 sq.ft. since as per the Will the plaintiff's vendor is entitled only to the extent of 8080 sq. ft. and the plaintiff's vendor supposed to execute the sale deed only to that extent. On the other hand, she has executed the sale deed beyond the measurement mentioned in the Will. The execution of the sale deed beyond 8080 ought not to have been approved by the courts below.

16. This Court is of the view that the first respondent/plaintiff is entitled only to an extent of 8080 sq. ft. in the suit schedule property as per Ex.A-5 and subsequent execution of the sale deed under Ex.A-1, as the plaintiff's vendor is not entitled to the possession of the property beyond 8080 sq. ft. of land. Therefore, the plaintiff is not entitled for any relief as sought in the suit anything more than 8080 sq. ft.

17. In the light of what is stated above, the substantial question of law



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framed in this appeal is answered in favour of the first respondent/plaintiff and against the defendants to the extent indicated above. Accordingly, the Second Appeal is partly allowed. The Judgment and Decree dated 13.02.2002 made in A.S. No.4 of 2001 on the file of the Additional Subordinate Court, Chengalpattu, reversing the judgment and decree dated 12.12.2000 made in O.S. No.269 of 1992 on the file of the District Munsiff Court, Chengalpattu stands modified by granting a decree in favour of the first respondent/plaintiff by holding that the first respondent/plaintiff is entitled only to an extent 8080 sq. ft. and not more than that. However, there shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

srm

10.11.2022



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To

- 1.The Additional Subordinate Court,
Chengalpattu.
- 2.The District Munsiff Court,
Chengalpattu.



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KRISHNAN RAMASAMY, J.,

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