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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.01.2022
DELIVERED ON : 31.01.2022

CORAM:

THE HONOURABLE MR.JUSTICE R. PONGIAPPAN

S.A.No.1031 of 2010
and
M.P.No.1 of 2010

Minor Premraj
Rep. by Natural Guardian/Father Sakthivel,
Pinnalur Village,
Chidambaram Taluk. .. Appellant/Plaintiff

Vs

Gopalsami .. Respondent/3rd Defendant

Prayer: The Second Appeal is filed under Section 100 of C.P.C. against the Judgment and Decree dated 30.03.2010 made in A.S.No.12 of 2008 on the file of the Subordinate Judge, Chidambaram, reversing the judgment and decree dated 30.10.2007 made in O.S.No.164 of 2005 on the file of the Additional District Munsif at Chidambaram.

For Appellant : Mr.T.Girish
for Mr.Srinath Sridevan

For Respondent : Mr.J.Antony Jesus

JUDGMENT

The second appeal is focused as against the Judgment and Decree dated 30.03.2010 passed in A.S.No.12 of 2008 by the learned Subordinate Judge, Chidambaram, reversing the Judgment and Decree dated 30.10.2007 passed in O.S.No.164 of 2005 by the learned Additional District Munsif, Chidambaram.

2. The suit is for declaration and consequential injunction.

3. For the sake of convenience, hereinafter the parties are referred to as per their respective litigative status before



the trial Court.

4. The laconic averments made in the plaint are as follows:

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4.1. The suit property originally belonged to one Adhimoola Padayachi. Through the Will dated 06.03.1972 registered as Document No.5/1972, he bequeathed the suit property to the first defendant by name Ramachandran. The property contained in 'B' schedule in the Will had been bequeathed to Pattayee Ammal, the wife of the testator for life and after her life time, the first defendant Ramachandran is entitled to receive the same. The Will had taken effect on the death of Adhimoola Padayachi in the year, 1972. Now, Pattayee Ammal, who is the wife of Adhimoola Padayachi is also no more. The first defendant Ramachandran even during the life time of Adhimoola Padayachi was in possession and enjoyment of the suit property as he was assisting Adhimoola Padayachi in the cultivating activities. After the death of Adhimoola Padayachi and Pattayee Ammal, the suit property was in the possession of the first defendant and accordingly, he becomes the title holder to the said property.

4.2. Later, on 20.02.2003, the first defendant Ramachandran sold the suit property to the plaintiff and the same was registered as Doc.No.100 of 2003 in the office of the Sub Registrar, Sethiathope. Ever since from the date of purchase, the plaintiff is in the possession and enjoyment of the suit schedule property. Before made purchase, due to the execution of usufructuary mortgage by the first defendant, the mother of the plaintiff was in the possession of the suit schedule property. Accordingly, from August, 2002 the suit property is in the possession of the plaintiff through his father Sakthivel. The third defendant Gopalsamy is the paternal cousin of the first defendant. The second defendant, Murugesan is a third party and he do not have any interest in the property. The defendants without having any manner of right, title, interest in the suit schedule property, at the instigation of the third defendant Gopalsamy, attempted to interfere with the plaintiff's possession. Further due to the instigation of the third defendant, the second defendant Murugesan pressurised the plaintiff's father Sakthivel, to execute the lease deed in his favour.

4.3. On 10.08.2005, the defendants made an attempt to dispossess the plaintiff's father Sakthivel from the suit property forcibly and harvested the crops. The plaintiff's



father managed the same with great difficulty. The third defendant Gopalsamy, who is a paternal cousin of the first defendant Ramachandran colluded with other defendants claimed that he has got right in the suit property. Hence, it would be necessary to grant the relief of declaration and injunction in favour of the plaintiff. Hence, the suit.

5. The averments found in the written statement filed by the third defendant are as follows:

5.1. The allegations levelled by the plaintiff in the plaint are all false. The description and the extent of the suit property stated in the plaint are incorrect. The plaintiff or his vendors never enjoyed the suit property at any point of time. Adhimoola Padayachi was not the owner of the suit property. The alleged Will dated 06.03.1972 is a fabricated document. The said Adhimoola Padayachi did not execute the alleged Will. Pattayee Ammal died prior to the death of Adhimoola Padayachi. Before four years from the date of death, the said Adhimoola Padayachi continuously is in the stage of unconscious, in fact, he was in a stage of coma. The suit property and other properties originally belonged to one Krishnasamy Padayachi. He was in the possession and enjoyment of the suit property. In respect of the suit schedule property, he has executed a settlement deed dated 24.08.1981 in favour of the third defendant.

5.2. The settlement deed was duly executed and validly attested. Pursuant to the settlement deed the third defendant has been in possession and enjoyment of the suit property. After the settlement, the third defendant alone paying the kist to the suit property. Further, he sold few properties to Deivani Ammal and others. The said Krishnasamy filed a suit in O.S.No.64 of 1982 on the file of the Sub Court, Chidambaram as against the third defendant and others for the relief of declaration of title and for recovery of possession in respect of the suit properties and other properties. After elaborate trial, the said suit was dismissed with cost. In the said judgment it was observed that the settlement deed dated 24.08.1981 executed by Krishnasamy Padayachi is valid and binding. In the appeal, the said findings were confirmed. In respect of the suit property, the first defendant filed a suit in O.S.No.733 of 1988 against the third defendant on the file of the District Munsif Court, Chidambaram for the relief of declaration of title and for consequential injunction. The said suit was dismissed with cost. Knowing fully well that the first defendant has no title, right or interest in respect of the suit property, he executed a sale



deed in favour of the plaintiff with an intention to give trouble to the third defendant. The third defendant had filed a suit for permanent injunction in O.S.No.217 of 1997 on the file of the District Munsif Court, Chidambaram. In the said suit, a decree has been granted in favour of the third defendant. Hence, the suit filed by the plaintiff is not having any merits and liable to be dismissed.

6. Based on the above averments, the trial Court framed necessary issues and tried the suit. On the side of the plaintiff, P.W.1 to P.W.5 examined and nine documents were marked as Exs.A1 to A9. On the side of the defendants, the third defendant himself gave evidence as D.W.1 and marked fifteen documents as Exs.B1 to B15. Apart from those documents, the copy of the sale deed dated 20.02.2003, Form-VI pertains to Co-operative Agricultural Bank and the Account sheet dated 15.03.2006 were marked as Exs.C1 to C3, respectively.

7. Having considered the materials placed before him, the learned Additional District Munsif, Chidambaram came to the conclusion that the plaintiff had proved his case and accordingly declared that the plaintiff is the absolute owner of the suit schedule property. Further, granted the relief of injunction in favour of the plaintiff. In the appeal preferred by the third defendant, the learned Subordinate Judge, Chidambaram reversed the findings arrived at by the trial Court and set aside the decree passed by the trial Court. Feeling aggrieved over the same, the plaintiff is before this Court with the present second appeal.

8. At the time of admission, this Court had formulated the following Substantial Question of Law:

(i) Whether the findings of the First Appellate Court with respect to the proof of Ex.A1 is vitiated as the Will is an ancient document which attracts presumption under Section 90 of the Evidence Act?

(ii) Whether the judgment of the First Appellate Court is vitiated for failure to consider the four boundaries referred to in the settlement deed Ex.B2.

9. Heard the learned counsel appearing on either side and perused the materials available on record.

10. It is the case of the plaintiff that the suit schedule property originally belonged to one Adhimoola



Padayachi. During his life time, the said Adhimoola Padayachi vide Ex.A1 executed a Will dated 06.03.1972, wherein he bequeathed the suit schedule property in favour of the first defendant subject to the condition that he is entitled to the suit property only after the life time of his wife Pattayee Ammal. After the death of Adhimoola Padayachi and Pattayee Ammal, the first defendant became the owner of the suit schedule property. Later on 20.02.2003 vide Ex.A3-Sale Deed, he sold the suit property to the plaintiff and afterwards the plaintiff is in the possession and enjoyment of the suit schedule property.

11. Per contra, it is the case of the defendants that the suit Survey No.54/1A3 measuring an extent of 0.54 cents is originally belonged to one Krishnasamy Padayachi. The said Krishnasamy Padayachi executed a settlement deed dated 24.08.1981, through which he settled the suit property in favour of the third defendant and afterwards the third defendant became the owner of the suit schedule property.

12. Now, on going through the entire pleadings set out in the plaint as well as in the written statement, it would appear that both the plaintiff and the third defendant claim the right and title over the suit schedule property. Therefore, in the said circumstances since the present suit has been filed for the relief of declaration and injunction, it is for the plaintiff to prove his case.

13. In this regard, the learned counsel appearing for the appellant/plaintiff would contend that before the trial Court by producing the copy of the Will executed by the said Adhimoola Padayachi as Ex.A1 and copy of the sale deed dated 20.02.2003 executed by the first defendant as Ex.A3, the plaintiff has proved his case.

14. The learned counsel appearing for the respondent/defendant would contend that though the plaintiff has produced the copy of the Will as Ex.A1, the same has not been proved in terms of Section 68 of Indian Evidence Act. Therefore, it cannot be said that through the said Will the title was passed on to the first defendant. In this regard, it is the submission made by the counsel appearing for the appellant that being the reason that the Will pertains to the year, 1972, as per Section 90 of the Indian Evidence Act, though the attestors of the Will has not been examined, it should be presumed that the said Will is a genuine one.

15. Now on considering the said submissions with the



facts of the present case, in general, under Section 90 of the Indian Evidence Act, where any document proved to be thirty years old, is produced, the Court may presume that the signature and every other part of such document duly executed and attested. However, the provisions of Section 90 of the Indian Evidence Act, 1872 keeping in view the nature of proof required for proving a Will have no application as a Will must be executed as provided under Section 63(c) of the Indian Succession Act, 1975 and should be proved under Section 68 of the Indian Evidence Act and if there is no such attesting witnesses, the provision under Section 68 of the Indian Evidence Act and if there is no such attesting witnesses, the provision under Section 69 of the Indian Evidence Act has to be pressed into service. In other words, there cannot be a presumption for the Will simply because it is thirty years old. It is more necessary to prove the Will, when there is a suspicious circumstances in execution of such Will.

16. In a similar situation, this Court in a case of R. Suburathinam vs. T. Govindaraj reported in 2009 (7) MLJ 476, held as follows:

"56. A bare perusal of it would make the point clear that the defendants cannot place reliance on Section 90 of the Indian Evidence Act and claim that they are absolved from the responsibility from proving the due execution of the Will by the testator as though it is an ancient document. The Hon'ble Apex Court clearly and categorically mandated that Section 90 of the Indian Evidence Act cannot be taken as a shelter by the propounder of the Will, but he has to prove strictly in accordance with Section 63 (c) of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act coupled with Sections 69 and 70 of it, as the case may be."

17. Further, in a case of M.B.Ramesh (D) by LRs. vs. K.M.Veeraje Urs (D) by LRs. and others (Civil Appeal No.1071 of 2006 dated 03.05.2013), our Hon'ble Apex Court held as follows:

"15. At the same time we cannot accept the submission on behalf of the respondents as well that merely because the Will was more than 30 years old, a presumption under Section 90 of the Indian Evidence Act, 1872 (Evidence Act for short) ought to be drawn that the document has been duly executed and attested by the persons by whom it purports to have been



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executed and attested. As held by this Court in *Bharpur Singh vs. Shamsher Singh* reported in 2009 (3) SCC 687, a presumption regarding documents 30 years old does not apply to a Will. A Will has to be proved in terms of Section 63(c) of the Succession Act read with Section 68 of the Evidence Act."

18. Now applying the principle set out in the above referred Judgments, the submission made by the learned counsel appearing for the appellant that the Will alleged to be executed by Adhimoola Padayachi is proved under Section 90 of the Indian Evidence Act, cannot be accepted.

19. Here, it is a case, in view of the evidence given by D.W.1, the above referred Adhimoola Padayachi and Krishnasamy Padayachi, who executed a settlement deed in favour of the third defendant are brothers and they are the sons of one Kanjamalai and they had partitioned the suit property and other property through oral partition. Though D.W.1 gave evidence as above, in order to substantiate the same he has not produced any relevant document to show that Adhimoola Padayachi and Krishnasamy Padayachi are the sons of Kanjamalai and they had partitioned the suit property through oral partition. Therefore, without any iota of evidence to show that the testator of the Will succeeded the suit property in oral partition, this Court cannot hold that the said Adhimoola Padayachi is the absolute owner of the suit schedule property.

20. Thus the circumstances that the Will alleged to be executed by Adhimoola Padayachi is not proved in terms of Section 68 of the Indian Evidence Act, it is not necessary to decide as to whether the sale deed executed by the first defendant in favour of the plaintiff is valid under law. Herein it is a case, on the side of the third defendant in order to prove his case, he produced the copy of the Chitta dated 22.08.2005 pertains to the suit property as Ex.B1, he produced the settlement deed executed by one Krishnasamy dated 24.08.1981 stands in the name of the third defendant as Ex.B2, also, he produced the copy of the Kist receipts pertains to the suit property as Exs.B3 to B10. The said documents are very clear and proved the fact that as per the Revenue records the suit schedule property is in the name of the third defendant. Accordingly, the third defendant has proved his title by producing the relevant records. Though the Revenue records relied on by the third defendant is not a document for title, considering the fact that the present suit has been filed by the plaintiff/appellant, it is for him to prove his title and



possession. Only upon the situation that the plaintiff has proved his title and possession, he is entitled for the relief of declaration and injunction.

21. In the present case, as rightly pointed out by the learned counsel appearing for the third defendant, the plaintiff has not proved his title by proving the Will alleged to be executed by Adhimoola Padayachi. In view of the above, the sale deed executed by the first defendant in favour of the plaintiff is not having any value and therefore, we cannot come to the conclusion that the title to the suit property is passed on to the plaintiff through Ex.A3-Sale Deed. Hence, the Lower Appellate Court before set aside the findings arrived at by the trial Court, considered the documents relied on by the defendants and came to the conclusion that the plaintiff has not proved his case. In fact, such a consideration is not necessary for deciding the issue raised in this appeal. Under Section 101 of the Indian Evidence Act, being the reason that the plaintiff alone had claimed title over the suit property, he is having the duty to prove his case. As already observed, the document relied on by the plaintiff is not sufficient to hold that the title had been passed on to the plaintiff through Ex.A1-Will and Ex.A3-Sale deed. Accordingly, it is not necessary to find out the validity of the documents relied on by the defendants.

22. In the light of the above discussions stated supra, I am of the considered view that the plaintiff has not proved his case. The First Appellate court has also traversed on the same line and set aside the decree passed by the trial Court in favour of the plaintiff. The said findings arrived at by the First Appellate Court is within the four corners of law. Accordingly, the Substantial Questions of Law are answered as above.

23. In the result, this second appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(I)

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Sub Assistant Registrar

Rsi



1.The Subordinate Judge,
Chidambaram.

2.The Additional District Munsif,
Chidambaram.

S.A.No.1031 of 2010

NK(CO)
GN(09/03/2022)