

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.12.2022

CORAM:

THE HON'BLE MRS.JUSTICE T.V.THAMILSELVI

S.A No.400 of 2018

Chinnamal

... Appellant

Vs.

Sellammal

...Respondent

PRAYER: This Second appeal filed under Section 100 of the Code of Civil Procedure prayed to set aside the judgement and decree dated 25.07.2014 made in A.S No. 29/2013 on the file of the Subordinate Judge's Court, Namakkal reversing the judgement and decree dated 06.12.2012 made in O.S No. 459 of 2008 on the file of Principal District Munsif Court, Namakkal.

For Appellant : Mr.Krishna Prasad for
M/s. Sarabhauman Assoicats
For Respondent : Mr.C.Jagadish

JUDGMENT

The appellant herein is the defendant in suit O.S No. 459 of 2008 filed by the plaintiff/respondent herein for the relief of declaration to declare that she is entitled to have half share in the suit property and also for permanent injunction restraining the defendant from interfering with the peaceful possession. The contention of the plaintiff before the Trial Court is that half share in the suit property is belongs to her Maternal Grand Mother Nallamal and remaining half share belongs to the said Nallamal's brother Sellappa Gounder, defendant herein is the step mother of the plaintiff's father and remaining half share enjoyed by the son of the Sellapa Gounder but the defendant claimed title over the entire property and caused interference. Hence she filed the suit stating that her grand mother Nallamal executed a gift settlement deed to the plaintiff on 26.11.1993 in respect of half share in the suit property from that day she is in possession enjoyment of the suit porperty. Chinnamal(defendant) denied the plaintiffs right over the property as Nallammal has no right in the property therefore settlement deed would not bind her.

2. In fact, all the properties were belongs to Sellappa Gounder's father and his wife, both were died in the year of 1950. Thereafter Sellappa Gounder alone enjoyed the property. Besides, Sellappa Gounder purchased certain item of the property in the year 1966 thereafter partition was held between the Sellappa Gounder and his son Kuppusamy on 15.04.1966 thereby share allotted to Sellappa Gounder's son alone. At any point of time Nallamal was not enjoyed the property and she was ousted from the suit property even before 1950 thereby totally denied the plaintiff right over the property. Further, the defendant contended that on 28.04.1998 she purchased property from the Sellappa Gounder for valid consideration and the patta also transferred in her favour and her husband Kuppusamy have no cordial relationship with plaintiff's mother Kalliamal after the separation from her said Kuppusamy married the defendant and begotten children and the suit property is in her possession, prayed to dismiss the suit. Before the Trial Court issues were framed both the parties were adduced their evidence and documents, on considering oral and documentary evidence the Trial Court finally held that the plaintiff failed to prove on which way the Nallamal (Maternal Grand Mother of the plaintiff) entitled for the suit property and also failed to prove Ex.A1 beyond reasonable doubt hence the

Trial Judge Court dismissed the suit.

3. Aggrieved over the same, the plaintiff preferred an appeal in A.S No.29 of 2019 on the file of the Sub Court, Namakkal contending that the Trial Court not properly appreciated the gift deed as well as the joint patta stands in the name of the both the parties marked as Ex.B4 and dismissed the said suit as such is erroneous one prayed to set aside the findings of the Trial Court. Further, the plaintiff sought permission before the Court to produce additional documents sale deeds stands in the name of Ponniayee mother of the Chellamal related to the year of 1933 to prove her donors title hence to prove the fact he sought permission of the Court to produce sale deed and the same was produce before the lower appellate Court in I.A No. 74/2010 those documents were marked as Ex. A8 and A9. Based upon those two Exhibits the lower appeallte Court held that Ponnaayee was died in the year 1966. Thereafter, partition was held in respect of properties belongs to this Ponnayee and his husband Ponniya Gounder between Kuppusamy and his father Sellappa Gournder dated 15.04.1996 Ex.B2 wherein heirs of Ponniya Gounder and Ponnayee was not included however the defendant raised plea of ouster against the said

nallamal but it was not proved, the lower appellate judge held that no issues were framed with regard to ouster and concluded that the defendant was not proved her case and as per the document Ex.A8 and A9 the mother of the Nallamal is entitled to half share in the property and also plaintiff proved the gift deed/Ex.A1 and her possession through Ex.A5 Accordingly suit was decreed as prayed for by set aside findings of the Trial Court.

4. Challenging the said findings the defendant preferred appeal before this Court contended that the lower appellate court should not have marked the additional documents Ex.A8 and Ex.A9 and on the other hand opportunity must be given to this defendant to adduce rebuttal evidence. Besides, the plaintiff not offered any explanation for not production of those documents Ex.A8 an Ex.A9 at the time of Trial itself because it was in her custody on the time of Trial itself. Hence, prayed to set aside the findings of the lower appellate Court. This Court admitted the appeal with the following questions of law:

1. Whether the lower Appellate Court was correct in allowing the respondent herein to mark Exs.A8 and A9 in the Appellate stage?

2. whether the respondent herein has proved Ex.A1 Settlement deed in her favour in the manner known to law?

5.Heard, Mr.krishna Prasad learned counsel for the petitioner, and Mr.C.Jagadish learned counsel for the respondent.

6. At that time of arguments the learned counsel for the appellant Submitted that lower appellate Court while accepting the additional evidence adduced on the side of the plaintiff by producing sale deed which made as Ex.A8 and A9 not given ample opportunity to adduce rebuttal evidence with regard to those documents, instead of that by relying those documents allowed the appeal in favour of the plaintiff as such is erroneous one prayed to remand the matter to the Trial Court to adduce the rebuttal evidence in respect of additional documents Ex.A8 and A9. To support his contention he relied the Judgement of the Supreme Court in the case of *Akhilesh Singh Alias Akhileshwar Singh Vs Lal Babu Singh and others reported in (2018) 4 SCC (659)*.

7. By way of reply the learned counsel for the respondent submitted that at the time of marking additional documents the defendant not raised any plea on adducing rebuttal evidence and also not denied the execution of the sale deeds. Therefore, she is not entitled to prayed to adduce rebuttal evidence. Hence he prayed to dismiss the same.

8. Considering the rival submissions and also on perusal of records and evidence, it reveals that before the Trial Court the plaintiff claiming right over the suit property based on the gift deed dated 26.11.1993 said to be executed by her maternal grand mother Nallamal, in the said gift deed it was mentioned two sale deeds from that she derived her title which are pertaining to year of 1933. On the other side defendant denied the Nallamal's right over the suit property and also raised plea of ouster against her. Further, the plaintiff not produced those two sale deeds before the Trial Court which stands in the name of the Nallamal. Hence the Trial Court held that due to non production of those sale deeds plaintiff failed to establish that Nallamal is entitled to convey the suit property in favour of the plaintiff and dismissed the suit. Thereafter, before the first appellate Court plaintiff produced the said two sale deeds which was accepted as additional documents marked as Ex.A8 and A9. By relying said two sale deeds it was concluded that mother of the Nallamal purchased those properties in the year of 1933 thereby the daughter of the Nallamal donor of the plaintiff got half share in those properties hence gift deed stands in the name of the plaintiff as such is valid one. Admittedly, the defendant not sought

permission of the Court to adduce rebuttal evidence in respect of those additional documents before the lower appellate Court. But, now before this Court she prayed to remand the matter to Trial Court to adduce rebuttal evidence in respect of Ex.A8 and 9. The ratio laid down in the referred case is support the appellant's case for the reason that those sale deeds were not been produced before the Trial Court but the documents are related in the year of 1933 and the same was produced by the plaintiff before the first appellate Judge. The defendant also pleaded that the donor Nallamal was already ousted and she has no right over the suit property thereby they are not accepting sale deeds and want to produce rebuttal evidence in respect of those sale deed Ex.A8 and A9. Therefore, this Court is of the view that if the defendant not given opportunity to lead the rebuttal evidence then her right to defend the case would be affected and would cause great prejudice to her. Therefore, before going to the merits of the appeal this Court is inclined to remit the matter to the Trial Court, by giving opportunity to the defendant to adduce rebuttal evidence with respect to sale deeds Ex.A8 and Ex.A9. Further, the Trial Court is directed to frame the issue with regard to ouster Nallamal as an additional issue and both the parties are directed to adduce their evidence in respect of additional documents as well as additional issue

before the Trial Court. Further the Trial Court is directed to permit the plaintiff to mark the additional document viz., the sale deeds Ex.A8 and A9 as additional evidence and the defendant shall be given an opportunity to cross examine the witness through whom the said documents are marked. The Trial Court shall ensure that both the parties will confine the examination of witness only to the sale deed Ex.A8 and Ex.A9 and under no circumstances, the scope of examination of witness can be enlarged on issues which have already been decided and findings have already been rendered by both courts below. The Trial Court shall render its findings on the additional issue with regard to ouster of Nallamal based on the additional evidence recorded after remand. The Trial Court shall return the evidence together with its findings on the additional issue to this court on or before 02.03.2023.

9. Post the matter on 02.03.2023.

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Note : Issue order copy on 09.01.2023.

To

1. The Subordinate Judge's Court, Namakkal.
2. The Principal District Munsif Court, Namakkal.
3. The Section Officer,
V.R. Section.

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T.V.THAMILSELVI,J.

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