



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 10.03.2022

CORAM

WEB COPY

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)No.308 of 2010

A.John Robert ... Appellant/1st Respondent/Plaintiff

Vs.

1.Ambrose Nadar

2.Roselet

... 1st & 2nd Respondents/2nd & 3rd Respondents/
1st & 2nd Defendants

3.A.Jeyasingh

4.A.Sasikumar

5.A.Robinson

... 3rd to 5th Respondents/Appellants/
3rd to 5th Defendants

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 30.06.2009 passed in A.S.No.85 of 2005 on the file of the learned Subordinate Judge, Kuzhithurai setting aside the judgment and decree dated 08.02.2005 passed by the learned II Additional District Munsif Court, Kuzhithurai in O.S.No.266 of 1999.

For Appellant : Mr.B.Christopher

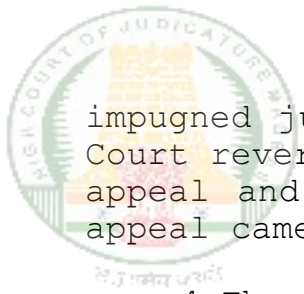
For Respondents : No appearance for R3 to R5

JUDGEMENT

The plaintiff in O.S.No.266 of 1999 on the file of the II Additional District Munsif Court, Kuzhithurai is the appellant in this second appeal. The plaintiff filed the said suit for demarcation of the property set out in plaint 'A' schedule. The defendants 3 to 5 filed written statement controverting the plaint averments. Based on the rival pleadings, the trial Court framed the necessary issues.

2.The plaintiff examined himself as P.W.1 and Exs.A1 to A5 were marked. The fourth defendant examined himself as D.W.1 and one Rajamony was examined as D.W.2 and Exs.B1 to B13 were marked.

3.After consideration of the evidence on record, by judgment and decree dated 08.02.2005, the trial Court decreed the suit as prayed for. Aggrieved by the same, the contesting defendants 3 to 5 filed A.S.No.85 of 2005 before the Sub Court, Kuzhithurai. By the



impugned judgment and decree dated 30.06.2009, the first appellate Court reversed the decision of the trial Court and allowed the first appeal and dismissed the suit. Challenging the same, this second appeal came to be filed.

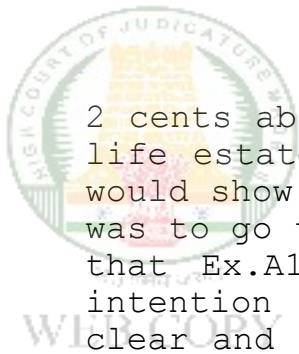
4.The second appeal was admitted on the following substantial question of law:-

"Whether the lower appellate Court is justified in interpreting Ex.A1 gift deed as that of will in the absence of any such recitals found in Ex.A1?"

5.The contesting respondents had entered appearance through counsel but the learned counsel filed a memo dated 08.03.2022 reporting no instructions. The learned counsel for the appellant reiterated all the contentions set out in the memorandum of grounds and called upon this Court to answer the substantial question of law in favour of the appellant and set aside the impugned judgment and decree and restore the decision of the trial Court.

6.The first respondent as well as the second respondent remained ex-parte even before the Courts below. The defendants 1 and 2 did not file any appeal challenging the decision of the trial Court. The contesting respondents in the second appeal are only the defendants 3 to 5. Since there is no representation on their behalf, I undertook an independent examination of the pleadings as well as the evidence.

7.The plaintiff is the son of D.Ambrose Nadar. He was born to him through his first wife. When the plaintiff was minor, Ambrose Nadar (first defendant) married the second defendant/Roselet. Through the said second marriage, the defendants 3 to 5 were born. Since the father had contracted a second marriage following the demise of the first wife, he wanted to make a provision to safeguard the interest of the minor child born through the first wife. That is why, Ex.A1 dated 06.09.1969 was executed. It is in Malayam. Tamil version was marked as Ex.A2. A reading of Ex.A1 clearly indicates that he had already settled 10 cents of land in favour of the second wife/Roselet. 10 cents of land was gifted in favour of the plaintiff. Ex.A1 reads that 2 cents of land was settled absolutely while life estate was retained in respect of the remaining 8 cents in favour of the settlor. Since the settle/donee is none other than the minor son and since he was a minor, the settler/donor father was entitled to accept the donation on behalf of the minor son. On this there can be no dispute or doubt. The only question that arises for consideration is whether Ex.A1 should be treated as will in respect of the remaining 8 cents. Ambrose Nadar owned 20 cents of land. 10 cents of land was gifted in favour of his second wife/Roselet. The remaining 10 cents was gifted in favour of his son born through the first wife. While in respect of



2 cents absolute gift was made, in respect of the remaining 8 cents life estate was retained. A careful reading of the terms of Ex.A1 would show that after demise of Ambrose Nadar, the remaining 8 cents was to go to the plaintiff absolutely. There is nothing to indicate that Ex.A1 is a will in respect of 8 cents. If that was the intention of the settlor, he would have definitely indicated so in clear and categorical terms and he would have retained the power to revoke the settlement during his life time. No such reservation or recital can be found in Ex.A1. More than anything else, the circumstances in which Ex.A1 came into existence will have to be taken note of. The settlor was entering into a second marriage; he had a five year old child born through the first wife. The settlor was anxious to make provision for the said minor child. He was fair enough to settle 10 cents for second wife and 10 cents for the son. In the absence of any reservation clause providing for revocation, one can come to the conclusion that Ex.A1 can only be treated as gift deed. The property settled in favour of Roselet has been shown as northern boundary. Since on account of subsequent alienations by Ambrose Nadar in favour of the children born through the second wife, there has arisen a dispute, the plaintiff rightly filed a suit for demarcation. The Hon'ble Supreme Court in the decision reported in **[AIR 1987 SC 2137 (E. Achuthan Nair v. P. Narayanan Nair and Another)]** had held that suit for fixation of boundary is very much maintainable. This decision was followed in the decision reported in **[(1999) 3 MLJ 778 (Gnanaprakasam vs. Smitha and Others)]**. The first appellate Court did not correctly construe Ex.A1. Misconstruction of a document can very much be a substantial question of law. I answer the same in favour of the appellant. The impugned judgment and decree passed by the first appellate Court is set aside and the decision of the trial Court is restored and the second appeal is allowed. No costs.

Sd/-

Assistant Registrar(CS-II)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

ias

To:

1.The Subordinate Judge,
Kuzhithurai.

2.The II Additional District Munsif Court,
Kuzhithurai.



Copy to:

The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai. (2 copies)

S.A. (MD) No.308 of 2010
10.03.2022

kmk (CO)
TR (13.04.2022) 4P 5C