



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : **25.01.2022**

CORAM

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

S.A(MD)No.541 of 2021

and

C.M.P(MD)No.7181 of 2021

Backia Lakshmi

... Appellant/Appellant/Plaintiff

Vs.

1.Sunmugasundaram

2.Munialakshmi

3.Selvi

4.Amutha

... Respondents/Respondents/Defendants

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree, dated 06.02.2019 passed in A.S.No.74 of 2016 on the file of the Principal District Court, Tirunelveli, partly allowing the judgment and decree dated 26.07.2016 passed in O.S.No.80 of 2010 on the file of the Principal Sub Court, Sankarankovil.

For Appellant : Mr.F.X.Eugene

For Respondents : Mr.A.Srinivasan

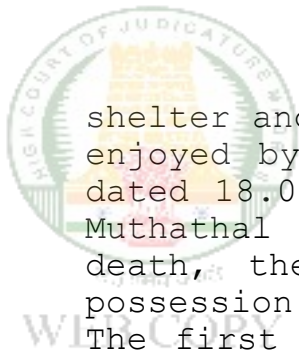
JUDGMENT

The Judgment and Decree, dated 06.02.2019 passed in A.S.No.74 of 2016 by the Principal District Court, Tirunelveli, partly allowing the Judgment and Decree, dated 26.07.2016 passed in O.S.No.80 of 2010 by the Principal Sub Court, Sankarankovil, are being challenged in the present Second Appeal.

2. For the sake of convenience, the parties are referred to as, as described before the trial Court.

3. The appellant/plaintiff has instituted a suit in O.S.No.80 of 2010, on the file of the trial Court, for the relief of declaration and permanent injunction, wherein, the present respondents have been shown as defendants.

4. The case of the plaintiff was that the first item of the suit schedule property belonged to the plaintiff's sister namely, Muthathal, who has purchased the same by way of a registered sale deed, dated 26.12.2001, through her earnings and she was in possession and enjoyment of the same. The second item of the suit property ancestrally belonged to the husband of Muthathal, namely, Govindan and they have no issues and he pre-deceased Muthathal. The plaintiff was taking care of Muthathal by providing her food,



shelter and medical expenses. Both the properties were possessed and enjoyed by Muthathal during her lifetime and she executed a Will, dated 18.03.2009, in favour of the plaintiff, who is the sister of Muthathal and on 25.03.2010, the said Muthathal died. After her death, the Will came into existence and the plaintiff was in possession and enjoyment of the suit properties, as per the Will. The first defendant is the sister of the plaintiff and the second defendant is the son of the first defendant. In the month of June, 2010, the defendants tried to interfere with the plaintiff's possession and the enjoyment of the suit properties and the same was prevented by the plaintiff. Since the defendants have tried to disturb the plaintiff's peaceful possession and enjoyment of the suit property, the plaintiff has filed the suit with the above prayer.

5. The second defendant had filed a written statement denying all the averments made in the plaint and submitted that the first item of the suit property belonged to Muthathal and her husband's name is Sundariah Thevar and it is false to state that Govindan is her husband. Since Muthathal's husband died long back and she had no issues, she has treated the second defendant as her son. The defendants have maintained Muthathal and they have helped her for the treatment during her death bed. On 13.04.2009, Western half portion of the first item of the suit property and on 08.02.2010, remaining eastern half of the first item of the suit property was gifted in favour of the second defendant, by registered document and possession was also handed over to him. The second item of the suit property belongs to Sundariah Thevar, who is the father of the plaintiff, first defendant and Muthathal and it does not belong to Govindan. After the death of Sundariah Thevar, the property was inherited by his daughters viz., the plaintiff, first defendant and Muthathal. The Will, dated 18.03.2009, is a fabricated document and Muthathal has not executed any Will. Muthathal has also gifted some more properties situated in Sivagiri Taluk and the suit properties have been under valued. Hence, the plaintiff was not entitled to any claim in the suit properties and prayed for dismissal of the suit.

6. Before the trial Court, on the side of the plaintiff, P.W.1 to P.W.3 were examined and Exs.A1 to A15 were marked. On the side of the defendants, D.W.1 and D.W.2 were examined and Ex.B.1 to Ex.B.5 was marked and also Ex.X.1 was also marked.

7. On the basis of the rival pleadings made on either side, the trial Court, after framing necessary issues and after evaluating both the oral and documentary evidence, has dismissed the suit.

8. Aggrieved by the Judgment and decree passed by the trial Court, the plaintiff, as appellant, had filed an Appeal Suit in A.S.No.74 of 2016. The plaintiff has also filed I.A.No.69 of 2017 to record additional evidence and to mark the mortgage deed, dated 18.03.2009, in this appeal to show that the plaintiff has mortgaged



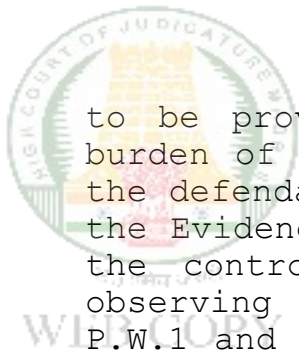
the suit properties in the year 2010 itself. The first appellate Court, after hearing both sides and upon reappraising the evidence available on record, has partly allowed the appeal and the Judgment and Decree of the trial Court is set aside in respect of dismissal of the relief of declaration of title of the plaintiff over the second item of the suit schedule property and confirmed in respect of dismissal of declaration in respect of the first item of the suit schedule property and in respect of permanent injunction and the suit is partly decreed and the plaintiff is entitled for declaration that the plaintiff is having $\frac{1}{2}$ share in the second item of the suit schedule property and dismissed the petition in I.A.No.69 of 2017.

9. Challenging the disallowed portion of the Judgment and decree passed by the first Appellate Court, the present Second Appeal has been preferred at the instance of the plaintiff, as appellant.

10. The learned counsel appearing for the appellant/plaintiff would submit that the first Appellate Court ought to have allowed the appeal by appreciating the evidences both oral and documentary evidence and ought to have allowed the Interlocutory Application and to take the document. The trial Court wrongly interpreted the deposition of P.W.2 as the Will is written by the Lawyer which means that the draft of the Will is alone made by the Lawyer and is in own handwriting not scribed and handwritten by the Lawyer. The depositions made by P.W.1 to P.W.3 need not be taken as vital, which is nature's consequence and due to the time gap, there are small deviations made in the depositions. Both the Courts below have omitted to appreciate that the first item of the suit schedule property is covered in Ex.A.1-sale deed and the purchaser Muthathal enjoyed the property as a single person. Hence, the legal position as possession follows the title, could not be invoked for arraying at a finding in favour of D.W.2 and the points for determination made by the first Appellate Court are not correct as contemplated under Order 41 Rule 26 of C.P.C.

11. The learned counsel appearing for the appellant/plaintiff further submitted that the first Appellate Court ought to have allowed I.A.No.69 of 2017 as the documents perused in the first Appellate Court that the mortgage deed, dated 01.06.2010 is an important document as P.W.3, who was examined in the trial Court is the concerned mortgagee, which document would show that Ex.A.5-Will has come into force and mutated. Both the Courts below have not discussed about the schedule in the plaint, as the first item of the schedule is having a vacant site alone and without a house building. Hence, as far as the first item of the suit property is concerned, it is only a vacant site coming within Sankarankovil Municipality limits. The parent document of the property is a registered sale deed-Ex.A.1, dated 26.12.2001 and the original is produced along with the plaint by the plaintiff. Therefore, Ex.B.1 and Ex.B.2-deeds are not related to the properties and it varies in their

<https://hccs.cse.courts.gov.in/hccservices/> hence, both have not come into force and they have



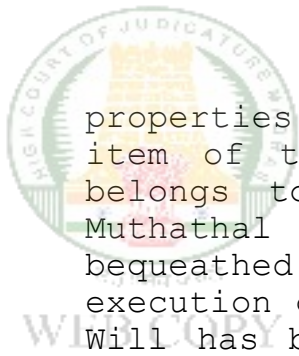
to be proved as per the Evidence Act by the defendant, but the burden of proving the facts have not been discussed as vested with the defendants as per the Evidence Act under Sections 103 and 104 of the Evidence Act. Both the Courts below have failed to take note of the controversial deposition of D.W.1 and D.W.2, but very much observing the minor deviations of the deposition of P.W.1 and P.W.2, the matter of proof of Will-Ex.A.5 and prayed for allowing the Second Appeal.

12. Heard the learned counsel for the appellant and the learned counsel for the respondents and also perused the records carefully.

13. On a perusal of the materials available on record, it is seen that to prove the title of Muthathal over the suit properties, the plaintiff has marked Ex.A.1-sale deed, dated 26.12.2001, executed in favour of Muthathal. On a perusal of the same, it is seen that Muthathal, D/o.Sundariah Thevar, has purchased a vacant site measuring an extent of 3150 square feet situated in Sankarankovil Municipality, Ward No.7 Sangupuram 3rd Street in Survey No.149/6 with proper boundaries and this property has been scheduled as the first item of the suit property.

14. The second item of the suit property is the house property in Door No.81/1-23L, Pillaiyar Kovil Mela Theru, Irumankulam, Vadakkuputhur Village and there was no title deed produced by the plaintiff to show that the second item originally belonged to the husband of Muthathal viz., Govindan. Ex.A.4 and Ex.A.15 are the house tax receipts issued in the name of Muthathal for the second item of the suit property, which shows that the house property was assessed in the name of Muthathal. Except these documents, no other documents have been produced by the plaintiff to show that Muthathal is having title over the property and she was in possession of the house property.

15. It is the case of the defendants that the second item of the suit property belonged to the father of Muthathal, namely Sundariah Thevar, but no document whatsoever have been produced to prove the same. During cross-examination, P.W.1 has stated that the second item of the suit property was purchased by Muthathal and her husband Govindan and thereafter, she has admitted that the second item of the suit property was not an ancestral property of the husband of Muthathal and it is a self-acquired property of Muthathal. The defendants have not produced any materials to show that the second item of the suit property belonged to Sundariah Thevar, father of the plaintiff, first defendant and Muthathal. The defendants have also marked Ex.B.1 and Ex.B.2-Settlement deeds, dated 13.04.2009 and 08.02.2010, to prove that Muthathal has gifted her first item of the suit property by dividing it as two portions in favour of the second defendant. In both the documents, it is recorded that Muthathal was residing in the second item of the suit property. <https://hcservices.mca.gov.in/Hcservices/>, the plaintiff has stated that both the suit

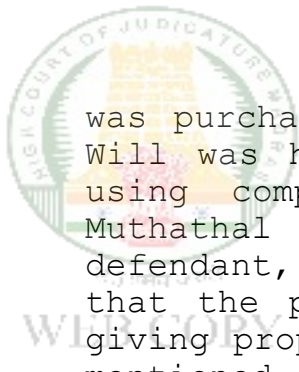


properties were exclusively belonged to Muthathal and the second item of the suit property was not an ancestral property or it belongs to the father of Muthathal. The plaintiff claims that Muthathal has executed a Will, dated 18.03.2009, whereby she has bequeathed the suit properties in favour of the plaintiff. The execution of the Will has been denied by the defendants, as no such Will has been executed and the same is a fabricated document. To prove the Will-Ex.A.5, the plaintiff examined the attestor of the Will as P.W.2 and he deposed that as per the request of Muthathal, Will was prepared and read over the Will to Muthathal, she affixed her thumb impression and thereafter, he subscribed his signature and other witnesses and scribe were subscribed their signatures.

16. During the cross-examination, P.W.2 deposed that two days prior to execution of the Will, Muthathal requested him to come to her house, hence on the date of execution, at about 09.45 a.m., P.W.2 went to the house of Muthathal and an Advocate, who has prepared the Will was present and the Will was prepared at 10.00 a.m. Originally, Advocate, who was present there, has written the draft Will and thereafter, the Will was prepared by using two numbers of Rs.10/- stamp papers and one additional paper and he has prepared the Will on his own handwriting and Muthathal affixed her thumb impression.

17. On a perusal of Ex.A.5-Will, it is seen that the Will is a typed document and it is recited in the Will that Muthathal was married to one Govindan, S/o.Ramasamy in the year 1969 and they got separated, as they have no children. She was aged about 64 years and she was suffering from cancer, undergoing treatment at various places. She has been supported by her sister Backialakshmi. Hence out of love and affection, she has come forward to execute the Will, thereby bequeathed the suit properties in favour of the plaintiff and the Will is dated 18.03.2009. The defendants have marked Ex.B.1 and Ex.B.2-the registered settlement deeds executed by Muthathal and D.W.2-Attestor of Ex.B.2 was examined and he stated that on 08.02.2010, Muthathal had executed a registered gift deed, whereby gifted the eastern side of the house. He had witnessed Muthathal affixing the thumb impression on each page of Ex.B.2 and it was presented before the Sub-Registrar's Office and he has also subscribed his signature as an identifying witness. Ex.B.2-settlement deed came into existence subsequent to the execution of Ex.A.5-Will, but there was no reference regarding the Will in Ex.B.2.

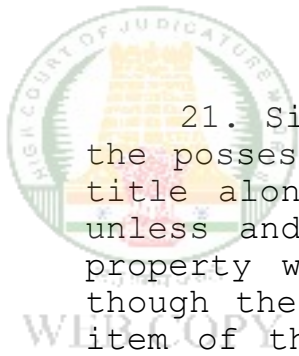
18. The Will has not been proved by the plaintiff as there was no reason given by the plaintiff that why Ex.A.5-Will was not registered; in Ex.B.2-settlement deed as well as in Ex.B.4-Voter Identity Card, Muthathal referred her name along with Sundariah Thevar, whereas, in Ex.A.5-Muthathal referred her name along with her husband name as Govindaraj @ Chelladurai Thevar; stamp papers were purchased at Srivilliputhur, even though the testator is the



was purchased at Srivilliputhur; the attesor has deposed that the Will was handwritten by the Advocate, but it has been printed by using computer and subsequent to the execution of the Will, Muthathal has also gifted the property in favour of the second defendant, by way of registered settlement deed. Hence, it is clear that the plaintiff has not proved the genuineness of the Will by giving proper evidence. When the execution of the Will has not been mentioned in the subsequent document which has been executed by the said Muthathal in favour of the second defendant, both the trial Court as well as the first Appellate Court have come to the conclusion that the entire first item of the property was gifted in favour of the second defendant. The evidence of D.W.2-Attestor of Ex.B.2 show that it was registered on 08.10.2010 before the Sub-Registrar, Sankarankovil and he has stated that he has seen the Muthathal affixing her thumb impression in Ex.B.2 and thereafter, he has also subscribed his signature and got it registered.

19. It is seen that in the cross-examination of D.W.2 also no question of suspicious circumstance has been raised in executing the settlement deed. There was no contra evidence produced by the plaintiff to deny the execution of Ex.B.1 and Ex.B.2-settlement deeds and she has simply denied the same. In the cross-examination, the plaintiff has admitted that the said Muthathal had executed the settlement deeds executed in favour of the second defendant and those documents are fabricated and further claimed that she explained that since her sister Muthathal used to have some mental disorder, at that time, Ex.B.1 and Ex.B.2 might have been registered. The evidence of P.W.1 clearly shows that, according to her, execution of Ex.B.1 and Ex.B.2 have not been specifically denied, but it could have been executed while Muthathal was not having a fit state of mind. This denial is not a specific denial and the non-examination of Attestor or Scribe to prove Ex.B.1 is not sufficient to hold that Ex.B.1 has not been proved. Ex.B.1 is a registered document, thereby she has gifted the western side of the first item of the suit property in favour of the second defendant. Hence, both the Courts below have accepted Ex.B.1 and Ex.B.2 as valid document and rejected Ex.A.5-Will.

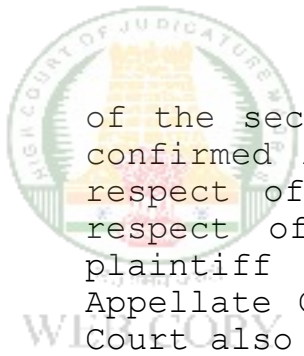
20. The plaintiff has filed I.A.No.69 of 2017 to mark mortgage deed, dated 01.06.2010 to show that the plaintiff has already mortgaged the first item of the suit property, which was admitted by P.W.3, the person whom the property was mortgaged and he deposed that the property was mortgaged to him on 01.06.2010 for a sum of Rs.1,00,000/- and the same has already been accepted by the trial Court. Since the plaintiff has no manner of title over the first item of the suit property, the first Appellate Court has held that there was a mortgage of the first item of the suit schedule property by the plaintiff shall not improve her case and it will not also confer any title over the suit first item of the suit property. Hence, marking of the additional document is not necessary.



21. Since the first item of the suit property is a vacant site, the possession follows title, hence the person who is having clear title alone, can claim that he is in possession of the property, unless and otherwise, there is a clear evidence to show that the property was used effectively by the parties. In this case, even though the plaintiff claims that she is in possession of the first item of the suit property, she has not produced any documents to support her contention except Ex.A.3. Considering the evidenciary value of Ex.A.3, which is the Town Survey Field Register, which shows that the name of the plaintiff and her husband has been incorporated in the register for the land in Survey No.169/1 measuring an extent of 2920 sq.feet. There was no evidence placed on record, as to how this entry has been made in the land survey register issued on 30.07.2010. Since the plaintiff is not able to prove any title over the suit properties, the entry in the revenue records will not confer any title to claim the relief of declaration as prayed for by her. Per contra, the second defendant has proved his case that the first item of the suit property has been gifted in her favour by Muthathal. Hence, as far as the first item of the suit property is concerned, the second defendant is having exclusive right over the same and the plaintiff is not entitled for declaration of title over the suit first schedule property.

22. Regarding the second item of the suit property ie., house property, the house tax receipts as well as in Ex.B.1 and Ex.B.2, Muthathal is in possession and enjoyment of the same. It is the case of the defendants that this property belonged to the father of Muthathal, plaintiff and first defendant. It is the case of the plaintiff that this property belonged to Muthathal. In the absence of any testamentary documents executed by Muthathal, the second item of the suit property, after her death, shall be inherited by her sisters, who are the plaintiff and the first defendant herein. Hence, this Court is of the view that the plaintiff is also having half share in the second item of the suit property and this aspect has been considered by the trial Court and the first Appellate Court has held that the plaintiff is having half share in the second item of the suit property. The remaining half portion belongs to the first defendant and since she had died during the pendency of the suit, the same devolves on her decendants. Hence, the plaintiff is not entitled to seek for permanent injunction as against the defendants, who are co-owners regarding the second item of the suit property.

23. Considering the facts and circumstances of the case, the plaintiff is not entitled for declaration as prayed for by her in respect of the first item of the suit property and also not entitled for injunction as prayed by her in respect of both the suit properties, but the plaintiff is entitled for declaration as prayed by her in respect of half share in respect of the second item of the suit schedule property. Hence, the Judgment of the trial Court is



of the second item of the suit schedule property and liable to be confirmed in respect of dismissal of declaration as prayed for in respect of the first item of the suit schedule property and in respect of permanent injunction. Except the above reliefs, the plaintiff is not entitled for any other reliefs and the first Appellate Court has rightly allowed the appeal in part, which this Court also confirms the same.

24. For the reasons aforesaid, this Court is of the considered view that no questions of law much less substantial questions of law has been made out by the appellant/plaintiff to interfere with the well considered judgment and decree rendered by the first Appellate Court and accordingly, the Second Appeal fails and the same is liable to be dismissed.

25. In fine, the Second Appeal is dismissed. The Judgment and Decree, dated 06.02.2019 passed in A.S.No.74 of 2016 by the Principal District Court, Tirunelveli, is confirmed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS-III)

/TRUE COPY/

/ /2022
Sub Assistant Registrar(CS)

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Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.

To

1.The Principal District Judge, Tirunelveli.

2.The Principal Sub Judge,
Sankarankovil.

3.Copy To
The Section Officer,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.A.SRINIVASAN, Advocate
(SR-2300[F] dated 25/01/2022)

+1 CC to M/s.F.X.EUGENE, Advocate (SR-2303[F] dated 25/01/2022)

Judgment made in
S.A(MD)No.541 of 2021
25.01.2022

MK/28.02.2022/8P/7C

<https://hcservices.ecourts.gov.in/hcservices/>