



WEB COPY

S.A(MD)No.157 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 09.03.2022

DELIVERED ON : 14.03.2022

CORAM:

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

S.A(MD)No.157 of 2022

Kuttysamy ... Appellant/1st Appellant/2nd Plaintiff
Vs.
1.K.Nagaraj ...1st Respondent/1st Respondent/Defendant
2.Marimuthu
3.Sundar ... Respondents 2 & 3/
Respondents 2 & 3/Plaintiffs 4 & 6
4.Rengasamy
5.Ganagaraj @ Durai
6.Ammu
7.Sivakami ... Respondents 4 to 7/
Appellants 2 to 5/Plaintiffs 3,5,7 & 8

PRAYER : Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated, 09.09.2020, made in A.S.No.84 of 2014 on the file of the learned Additional Sub Court, Pudukkottai confirming the judgment and decree, dated, 11.07.2014 made in O.S.No.29 of 2007 on the file of the learned District Munsif, Pudukkottai.

For Appellant : M/s.S.Prabha
for Mr.D.Rameshkumar

JUDGMENT

The 2nd plaintiff is the appellant.

2. The plaintiffs filed a suit for declaration of title and permanent injunction for the 1st item of the suit schedule properties. The plaintiffs further prayed for recovery of possession with regard to the 2nd item of the suit schedule properties. The suit was dismissed by the trial Court. The plaintiffs filed A.S.No.84 of 2014 before Additional Sub-Court, Pudukkottai. The appeal was dismissed by the learned Subordinate Judge. As against the concurrent findings, the 2nd plaintiff has filed the above second appeal.

3. The plaintiffs have contended that the suit schedule properties originally belonged to their paternal grand-father, namely, kaipayal and after his death, it devolved upon his only son, by name, Ammasi @ Palani. The said Ammasi @ Palani got married to the said Kaliammal. The said Kaliammal had died issueless. Thereafter,



Ammasi @ Palani married one Silambayi as a 2nd wife. There were no issues even through the 2nd wife. Hence, the said Ammasi @ Palani was maintained only by the plaintiffs' father, namely, Arumugam. Thereafter, the said Ammasi @ Palani had executed a registered Will in favour of plaintiffs' father, Arumugam on 16.03.1991 under Exhibit A.4. The said Ammasi @ Palani had passed away on 16.02.1994. Thereafter, the suit schedule properties devolved upon the plaintiffs' father. The defendant is none other than the sister's son of Silambayi. The said Silambayi had permitted the defendant to reside in the suit schedule properties for a period of 5 years temporarily. The defendant is attempting to create a certain documents with the help of Silambayi and he has encroached upon the 2nd item of the suit schedule properties, which is found as part of the 1st schedule property. Hence, the plaintiffs prayed for declaration of title and permanent injunction over 1st schedule property and recovery of 2nd schedule property.

4. The defendant filed a written statement disputing the Genealogy pleaded by the plaintiffs. In para 2 of the written statement, the defendants have specifically disputed Exhibit A.4-Will said to have been executed by Ammasi @ Palani in favour of the plaintiffs' father. According to the defendant, the said document would have been forged by the plaintiffs' father. On the other hand, the defendant claimed that the wife of Ammasi @ Palani, namely, Silambayi has executed a Will in favour of the defendant on 21.09.1988. According to the defendant, they have put up a construction and they are in possession and enjoyment of the suit schedule properties. The defendant further contended that Silambayi has adopted the defendant under a registered adoption deed, dated, 22.11.1995. Hence, he prayed for dismissal of the suit.

5. The trial Court after consideration of the oral and documentary evidence, arrived at a finding that the plaintiffs are claiming title to the suit scheudle properties based upon Exhibit A.4-Will. Though the original Will has been marked as Exhibit A.4, none of the attestors of Exhibit A.4-Will have been examined in order to prove the Will. According to the trial Court, since the Will has not been proved in accordance with Section 68 of the Indian Evidence Act, the plaintiff is not entitled to a declaration of title over the 1st schedule property. Since the 2nd schedule property is found a part of the 1st schedule property, the plaintiff is also not entitled to any decree with regard to the 2nd schedule property. However, the trial Court had held that the defendant has also not proved their title to the suit schedule properties. In fact the Will and the adoption deed alleged in the written statement have not been produced on the side of the defendant. Based upon the said findings, the trial Court dismissed the suit.

6. The First Appellate Court also concurred with the findings of the trial Court with regard to the non-examination of the attestors of Exhibit A.4-Will. Pending first appeal, the plaintiffs

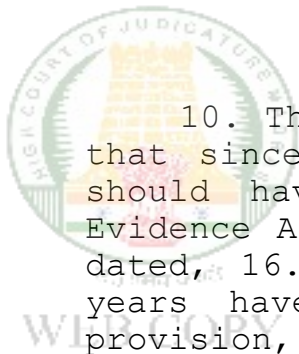


filed I.A.No.40 of 2019 to examine one Sai Ram as their witness. In the said application, the plaintiffs have contended that since the trial Court has held that the Will has not been proved, they want to prove the Will by examining the said Sai Ram. The said application was dismissed by the First Appellate Court on the ground that the application has not satisfied the ingredients as contemplated under Order 41 Rule 27 of the Civil Procedure Code. The First Appellate Court has held that the said Sai Ram is not an attester of Exhibit A.4-Will. The plaintiffs have not explained in what way the examination of the said Sai Ram would be in compliance with Section 68 of the Indian Evidence Act. The First Appellate Court relied upon Section 63 (c) of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act to dismiss the appeal. After arriving at a finding that the plaintiff has not chosen to examine the attester, the First Appellate Court further found that when the 2nd schedule property is forming a part of the 1st schedule property, the plaintiff cannot seek a bare injunction for the 1st schedule property when admittedly the defendant is in possession of the 2nd schedule property. Based upon the said findings, the First Appellate Court dismissed the appeal. As against the same, the present second appeal has been filed.

7. The learned counsel for the appellant contended that the First Appellate Court have erred in dismissing the application for reception of additional evidence I.A.No.40 of 2019. The learned counsel for the appellant further contended that the Will projected by the plaintiffs is dated, 16.03.1991 and the Courts below have erred in not invoking Section 90 of the Indian Evidence Act. The learned counsel for the appellant further contended that when the defendant has not established his title or possession over the suit schedule properties, the plaintiffs ought to have been granted a decree for declaration of title and permanent injunction over the 1st schedule property. Hence, the appellant prayed for admission of the above second appeal.

8. I have carefully considered the submissions made by the learned counsel for the appellant.

9. The plaintiffs have claimed title to the suit schedule properties based upon Exhibit A.4-Will, dated, 16.03.1991. The defendants have disputed the Will in para 2 of the written statement. The defendants have also contended that it is a forged document. But the plaintiffs have not chosen to examine any one of the attestors as contemplated under Section 68 of the Indian Evidence Act. During the pendency of first appeal, the plaintiffs have filed I.A.No.40 of 2019 to examine one Sai Ram to prove the Will. In fact, the said Sai Ram is not one of the attestors to the Will. The plaintiffs have not explained in what manner the said Sai Ram is connected with Exhibit A.4-Will. Hence, the First Appellate Court was right in rejecting I.A.40 of 2019, seeking to examine one Sai Ram as a witness before the First Appellate Court.



10. The learned counsel for the appellant had further contended that since the Will is more than 30 years old, the Courts below should have drawn presumption under Section 90 of the Indian Evidence Act. It is seen from the records that Exhibit A.4-Will is dated, 16.03.1991. When the Will was presented through P.W.1, 30 years have not expired. That apart, Section 90 is a general provision, where presumption can be drawn for the execution and attestation of an ancient document. However, the said provision cannot supercede. Section 68 of the Indian Evidence Act meant for documents requiring attestation. Hence, the contention of the learned counsel for the appellant that Section 90 presumption ought to have been invoked by the Courts below is not legally sustainable.

11. The plaintiff in his deposition as P.W.1 has admitted that the defendant has put up a thatched house in the suit schedule properties and he is residing there. Hence, the Courts below were right in non-suiting the plaintiff with regard to the prayer for permanent injunction also. The plaintiff has to succeed on the strength of the oral and documentary evidence let in by their side. Even assuming that the defendants have not established their pleading, the said weakness will not enure to the benefits of the plaintiffs. A decree cannot be granted in favour of the plaintiffs just because the defendants have not established their case. Hence, the Courts below were right in dismissing the suit filed by the plaintiffs.

12. In view of the above said discussion, the Courts below have rightly non suited the plaintiff. There is no question of law much less a substantial question of law warranting interference by this Court under Section 100 of the Civil Procedure Code. The Second Appeal is dismissed in the admission stage. No costs.

Sd/-

Assistant Registrar (CS-II)

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/ /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 Additional Sub Judge,
Pudukkottai.

2.The District Munsif,
Pudukkottai.

Judgment made in
S.A(MD)No.157 of 2022
14.03.2022

SE (CO)
GC (28.03.2022) 5P 3C