



S.A.No.1095 of 2009

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.03.2023

CORAM

THE HON'BLE **MR.JUSTICE V.LAKSHMINARAYANAN**

S.A.No.1095 of 2009

K.Kuppuraj

... Appellant

Vs.

Rajammal

... Respondent

Prayer: Appeal filed under Section 100 of C.P.C., against the Judgment and Decree dated 14.08.2008, passed in Appeal Suit No.36 of 2007 on the file of the Court of the Subordinate Judge, at Pollachi, confirming the Judgment and Decree dated 19.07.2005 made in O.S.No.707 of 1998, on the file of the District Munsif Court, at Pollachi.

For Appellant : Mr.R.Narayanan
for Mr.Krishnan

For Respondent : No Appearance



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JUDGMENT

WEB COPY The present appeal arises against the Judgment and Decree dated 19.07.2005 in O.S.No.707 of 1998, on the file of the learned District Munsif, Pollachi, as confirmed in A.S.No.36 of 2007 dated 14.08.2008, on the file of the learned Subordinate Judge, Pollachi.

Plaintiff's Case:-

2. The case of the plaintiff is that the property originally belonged to one Kuilammal, who had purchased the same on 24.10.1950. Kuilammal is said to have two children namely Malayandisamy and Sivakami. On 23.09.1991, the said Kuilammal settled the property in favour of her son Malayandisamy. K.Kuppuraj, the appellant herein, is the son of Sivakami i.e., the nephew of Malayandisamy. He claims that on 24.01.1994, Malayandisamy executed a Will in his favour and after the death of Malayandisamy, on 19.07.1994 the said property devolved on him. The further case of the plaintiff is that Rajammal, defendant herein, wife of deceased Malayandisamy started claiming the above mentioned property as her own. Under these circumstances, the plaintiff



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was forced to file the suit for the following relief:-

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- a) declaring that the Plaintiff is the Sole and absolute and intimatee legatee of suit property under the last and latest Will dated of Malayandisamy;*
- b) granting for cost.*

Written Statement filed by the Defendant:-

3. The sole defendant on service had entered appearance and filed a detailed Written Statement. The defendant denied the alleged Will of deceased Malayandisamy and pleaded that the said Will is a forged Will created by the plaintiff to enrich himself. The defendant further pleaded that she is the owner of the said property and that she is in active enjoyment and possession of the suit property as the sole legal heir of the deceased Malayandisamy.

4. The defendant pleaded that the plaintiff has no right to title over



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the suit property. She further pleaded that her husband never executed Will in favour of the plaintiff and therefore the claim that it was propounded on the third day of the death ceremony is false. In more than one portion in the Written Statement, the defendant denied the rights of the plaintiff and that of the alleged execution of the Will also.

Trial Court:-

5. The plaintiff examined himself as P.W.1 and examined two other persons as P.W.2 and P.W.3, the attestors to the Will. He had also marked 25 documents in support of his contentions. On the side of the defendant, the defendant examined herself as D.W.1 and examined one Jayadevi as D.W.2. (Handwriting Expert) who marked Ex.X1 and Ex.X2, which are the photographs in the Expert Report. The defendant had also marked 28 documents in support of her contentions.

6. During the course of trial, the learned Trial Judge had framed the



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following issues:-

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1. *Whether the Will dated 24.01.1994 was executed by Malayandisamy?*
2. *Whether the Will has come into force and plaintiff is in possession of the property as the legatee?*
3. *Whether the valuation of plaint and court fee paid are incorrect?*
4. *Whether this Court has no pecuniary jurisdiction to try the suit?*
5. *Whether the suit is barred by resjudicata?*
6. *Whether the plaintiff is entitled to the suit property as the legatee under the Will?*
7. *Whether the plaintiff is entitled to the decree as prayed for?*
8. *To what other relief?*

7. The learned Trial Judge after detailed examination came to the conclusion that the Will is of forgery and the same cannot be relied upon. The learned Trial Judge has also took note of the fact that Malayandisamy, who was a permanent resident of Pollachi would not have travelled all the way to Madurai to buy stamp papers to write the Will, based on which the plaintiff claims right. Under these



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circumstances, the suit had been dismissed.

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Appellate Court:-

8. Aggrieved by the Judgment and Decree dated 19.07.2005 in O.S.No.707 of 1998, the plaintiff had filed A.S.No.36 of 2007 on the file of the learned Subordinate Judge, Pollachi. The learned Subordinate Judge had also proceeded to confirm the Judgment and Decree of the trial Court against which the present second appeal has been filed.

9. At the time of admission, the following substantial questions of law was framed:-

(a) Whether the courts below ought to have held that the Will – Exhibit – A1, had been proved as per Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act?



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(b) Whether the Courts below have erred in accepting the biased and flawed opinion of the private handwriting expert engaged by the Defendant (who should have arranged to have the opinion of the Forensic Science Bureau at Chennai, when the evidence of P.W.1 to 3 who were acquainted with the handwriting of the Testator was available under Section 45 of the Indian Evidence Act.”

10. The matter was called on 10.03.2023. At that time, I pointed out to the learned counsel for the appellant that the suit for declaration that the plaintiff is a legatee is not maintainable when he had not sought for Declaration of Title.

11. When the matter was taken up for hearing today, i.e., on 16.03.2023, on both the substantial questions of law, I recast the additional substantial questions of law as follows:-



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- a) *Whether the plaintiff could have sued for a declaration that the Will is true and genuine?*
- b) *Whether the appellant was right in not suing of declaration of title right and interest has been specifically denied by the defendant?.*

Discussion:-

12. Heard Mr.R.Narayanan, learned counsel appearing for Mr.Krishnan, learned counsel for the plaintiff. There has been no representation for the respondent on the last two occasions.

13. To the first additional substantial question of law framed by this Court, a perusal of Section 34 of the specific relief Act, 1963 reveals as under:-

“34. Discretion of Court as to declaration of status or right- *Any person entitled to any legal character, or to any right as to any property, may institute a*



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suit against any person denying or interested to

deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided *that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.”*

Explanation: *A trustee of property is a “person interested to deny” a title adverse to the title of someone who is not in existence, and for whom, if in existence, he would be a trustee.”*

14. Here is the case where the plaintiff, even at the time of presentation of the plaint, has admitted that the plaintiff came to know that the defendant had suppressed the Will in favour of the plaintiff and appeared to have claimed title in herself.

15. As per Section 34 of the Specific Relief Act, 1963, a suit for declaration ought to be filed where any person has entitlement to any



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legal character or to any right as to any property, may seek for declaration from the Court.

16. In the present case, the rights of the plaintiff to the property having been denied and such a position having been admitted in the plaint, the plaintiff ought to have asked for declaration of the title based on the alleged Will.

17. This not having been done, I am not inclined to exercise my discretion under Section 34 of the Specific Relief Act, 1963. Section 34 of the Specific Relief Act, 1963, is discretionary in nature. Further, it cannot make declaration sought for by the plaintiff when he or she is able to seek further relief than a mere declaration of title, omits to do so.

18. Apart from this inherent lacuna in the plaint, the further aspect to be noted is when the title of the plaintiff had been denied in the written statement, he ought to have amended the plaint and brought in the reliefs of declaration of title, injunction and could not have continued the suit merely on the ground as a declaration of legatee. The latter's declaration is



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in the legal character but the former is relatable to the property concerned.

19. The plaintiff has cleverly drafted the plaints without suing for the declaration of title but had wanted the Court to exercise its discretion and grant an order with respect to title. This is clear from the fact that he claims to be a legatee of the suit schedule property, which implies what he could do directly, he attempted to do indirectly.

20. In the case of **Anathula Sudhakar vs. P.Buchi Reddy and Others**, reported in (2008) 4 SCC 594, the Supreme Court in Paragraph No.13.3 held as follows:-

“13.3. Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from the defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of the plaintiff is under a cloud or in dispute and he is not in possession or



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not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.”

21. From the reading of the above Judgement, it is clear when the title of the plaintiff is denied, he should have brought in the relief of declaration of title or injunction and not merely sue that he is the legatee under the Will.

22. In the case of **M/s.Supreme General Films Exchange Limited vs. His Highness Maharaja Sir Brijanth Singhji Deo of Maihar and Others**, reported in (1975) 2 SCC 530, the Judgement was rendered under the Specific Relief Act, 1877, which is more or less identical to the Specific Relief Act, 1963.

23. The Supreme Court held that discretion is given to the courts whether to grant a relief of declaration or not in the circumstances of the case and Section 42 merely gives a statutory recognition and it cannot be deemed to exhaust every kind of declaratory relief or to circumscribe the powers of jurisdiction of the court to grant the relief of declaration. In other words, the Court had held the power to grant relief of declaration is



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discretionary and not mandatory, even if the case proved by the plaintiff is made out.

24. In the case of **Venkataraja and Others** vs. **Vidyane Doureradjaperumal and Others**, reported in (2014) 14 SCC 502. The Hon'ble Supreme Court in Paragraph Nos.24 to 26 held as follows:-

“24. A mere declaratory decree remains non-executable in most cases generally. However, there is no prohibition upon a party from seeking an amendment in the plaint to include the unsought relief, provided that it is saved by limitation. However, it is obligatory on the part of the defendants to raise the issue at the earliest. (Vide Parkash Chand Khurana vs. Harnam Singh and State of M.P. v. Mangilal Sharma)”.

25. In *Muni Lal v. Oriental Fire & General Insurance Co.Ltd.* this Court dealt with declaratory decree, and observed that: (SCC p.93, para 4)

“4... mere declaration without consequential relief does not provide the needed relief in the suit; it would be for the plaintiff to seek both the reliefs. The omission thereof mandates the Court to refuse the grant of declaratory relief.”



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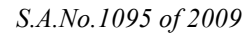
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26. In *Shakuntla Devi v. Kamla*, this Court while dealing with the issue held: (SCC p.399, para 21)

“21... a declaratory decree simpliciter does not attain finality if it has to be used for obtaining any future decree like possession. In such cases, if suit for possession based on an earlier declaratory decree is filed, it is open to the defendant to establish that the declaratory decree on which the suit is based is not a lawful decree.”

25. The Supreme Court in the above case has finally come to the conclusion that a suit for summary declaration is not maintainable. On the merits of the claim, it has to be pointed out that the Courts below have found all witnesses as tenants. They have further held it is highly unnecessary for a person who is residing at Pollachi to travel to Madurai and purchase a stamp paper only for the purpose of writing a Will. These are factual findings which cannot be interfered by this Court while sitting under Section 100 of C.P.C.

26. The evidence of P.W.2 and P.W.3 had been properly appreciated by the Trial Court as well as by the lower Appellate Court.



27. The evidence of D.W.2, a handwriting expert, who had given as many as 22 reasons for holding that the Will is a forgery has not been cross examined on vital aspects. Non-cross examination of the expert on her findings is fatal to the case of the plaintiff. Therefore, I will answer the substantial questions of law against the appellant/plaintiff and would dismiss the appeal.

16.03.2023



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Index : Yes/No

Neutral Citation : Yes/No

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V.LAKSHMINARAYANAN, J.

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To

- 1.The Subordinate Judge,
Pollachi.
- 2.The District Munsif Court,
Pollachi.

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