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C.M.S.A.No.21 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.08.2023

CORAM :

THE HON'BLE MR. JUSTICE P.VELMURUGAN

C.M.S.A. No. 21 of 2021

S.Loganathan

... Appellant

Vs.

1.R.Venkatesan

2.Sornagandhi

3.S.Kannan

4.Kiruthika

... Respondents

Civil Miscellaneous Second Appeal filed under Order 43 Rule 1 read with Section 100 of Civil Procedure Code against the fair and final order dated 18.07.2014 in C.M.A.No.9 of 2012 on the file of the Principal Subordinate Judge and Civil Miscellaneous Appellate Authority, Coimbatore confirming the fair and decreetal order dated 13.10.2011 in E.A.No.35 of 2011 in E.P.No.68 of 2009 in O.S.No.689 of 2006 on the file of the Principal District Munsif Court, Coimbatore.

For Appellant	: Mr.C.R.Prasanan
For Respondents	: Mr.V.Venkatasamy for R1
	R2 and R3 – Notice served –
	No appearance
	R4 – Tapal unclaimed



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J U D G M E N T

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The present appeal has been filed against the judgment dated 18.07.2014 passed in C.M.A.No.9 of 2012 by the learned Principal Subordinate Judge and Civil Miscellaneous Appellate Authority, Coimbatore, confirming the order dated 13.10.2011 made in E.A.No.35 of 2011 in E.P.No.68 of 2009 in O.S.No.689 of 2006 by the learned Principal District Munsif, Coimbatore.

2. The appellant herein is the decree holder, the respondents 2 to 4 are the judgment debtors and the first respondent is the third party to the proceedings.

3. According to the appellant, originally, the petition mentioned property measuring 10.5 cents belongs to one Ponnusamy Naidu and his wife Ranganayakiammal, vide registered Sale deed dated 12.12.1958. During his life time, the said Ponnusamy Naidu sold his half share of his property to one Jayalakshmi and the balance half share of the property belonging to Ranganayakiammal. After the death of Ranganayakiammal and



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Ponnusamy Naidu, their only son one Selvaraj was entitled to the property left behind his mother. After his death, respondents 2 to 4 herein, who are the legal heirs of Selvaraj, are the absolute owners of the property and they have been in possession and enjoyment of the same. The appellant herein had entered into a registered sale agreement in respect of petition mentioned property with respondents 2 to 4 on 14.6.1995. Since respondents 2 to 4 did not come forward to execute the sale deed in favour of the appellant, he filed a suit in O.S.No.689 of 2006 for specific performance for the petition mentioned property and the same was dismissed. Then, he filed A.S.No.32 of 2007 and obtained *ex-parte* decree. Subsequently, he filed E.P.No.68 of 2009 for taking delivery of possession of the petition mentioned property. However, the first respondent herein, who is the third party to the suit proceedings, has filed E.A.No.35 of 2011 to record his obstruction for delivery of possession to the appellant herein and the same was allowed. Challenging the said order, the appellant herein filed C.M.A.No.9 of 2012, which came to be dismissed on 18.07.2014. Aggrieved by the said judgment, the appellant herein has come forward with the present second appeal.



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4. At the time of admission of the appeal on 09.02.2021, the

following substantial questions of law were formulated by this Court :

(i) Whether in law, the Courts below erred in relying upon the will marked as Ex.P4 to hold that the vendor, namely Saraswathi got title to convey a portion of the petition mentioned property to the first respondent herein in the absence of Original Will being marked and upon failure to prove the same in the manner known to law ? and

(ii) Whether in law, the Lower Appellate Court erred in dismissing the application to receive the suit register as additional evidence in the appeal overlooking that the same would show that the petition mentioned property measuring 10.5 cents was declared by a decree to be belonging to the deceased Ponnusamy Naidu and his son Selvaraj in the suit in O.S.No.1838 of 1980, thus amounting to acknowledgement of title of Selvaraj by Ponnusamy and that if that be so, there is no property left with Ponnusamy to bequeath to the said Saraswathi after sale of his half share ?".

5. The learned counsel for the appellant submitted that the vendor of the first respondent, namely Saraswathi, claiming to be the wife of



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Ponnusamy Naidu, does not have any right with respect to the petition mentioned property. The sale in favour of the first respondent is not a valid sale and he cannot claim any right over the property. The appellant herein obtained a decree in his favour in the petition mentioned property and the sale certificate has also been issued in favour of the appellant. He further submitted that the appellant had entered into a registered sale agreement with respondents 2 to 4 in respect of the petition mentioned property on 14.6.1995. Having knowledge about the same, the first respondent has purchased the property on 22.6.1995 from Saraswathi. He further submitted that the first respondent claimed that he purchased the said property from Saraswathi, who got title through a Will, which was executed by her husband Ponnusamy Naidu. The copy of the Will had been produced and marked as Ex.P4, however, the original Will has not been produced and the same was not proved in the manner known to law. Further, attestors of the said Will, as contemplated under Section 68 of Indian Evidence Act, 1872 [hereinafter referred to as 'the Act' for convenience] were not examined. Neither the first respondent nor his vendor Saraswathi were examined, to prove the case of the first respondent. Though the first respondent contended



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that the said Saraswathi got the property through a registered sale deed, but he has not produced the sale deed and subsequently, he has mentioned that she got title through a Will, and the original Will has not been produced. Once the title of the vendor has not been proved, the first respondent has to prove his better title. However, the first respondent has not proved neither his right to be in possession, nor his vendor has got better title to convey the property. Both the Courts below failed to consider the fact that the first respondent is tracing the parent document as a Will, but the same has not been produced and it was not proved in the manner known to law. The first respondent has not produced any sufficient document to show that he was in possession, except the electricity bill and demand of tax. Further, there was no oral evidence to prove the title of the first respondent. Therefore, the first respondent has no right or title to obstruct the delivery of possession of the petition mentioned property.

6. The learned counsel for the first respondent submitted that originally, the petition mentioned property belongs to one Ponnusamy Naidu and his wife Ranganayakiammal as per the registered Will dated



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12.12.1958. Subsequently, Ponnusamy Naidu executed Ex.P4/Will dated 27.02.1992 in favour of his second wife Saraswathi. Thereafter, Saraswathi, became the owner had sold the property to the first respondent through a registered sale deed dated 22.06.1995, and then he is in possession and enjoyment of the said property. He further submitted that the appellant herein has no right or title over the petition mentioned property and he is not entitled to get any decree and his vendor has also no right or title to sell the property to the appellant.

7. The learned counsel for the first respondent further submitted that Ranganayakiammal, who is wife of Ponnusamy, predeceased him, therefore, the said Saraswathi would get the property succeeded by Ponnusamy Naidu from his wife Ranganayakiammal in pursuance of the Will executed by him and the remaining property would go to Selvaraj and subsequently, they are tracing the title by inter state succession. He further submitted that the sale agreement entered into between the appellant and respondents 2 to 4, is a unregistered agreement. Even prior to the agreement, the appellant's vendors lost their title and he has no right to convey the



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property. Based on the registered Will, the said Saraswathi got the title of the petition mentioned property and she has rightly conveyed the property to the first respondent and he is in possession of the property. Therefore, the first respondent filed an application under Order XXI Rule 97 of Code of Civil Procedure, to record his obstruction and the same was allowed. Challenging the same, the appellant has not approached the Court for removal of obstruction under Order XXI Rule 97 C.P.C. The right, title and interest of the parties have not been decided by both the Courts below. Therefore, the appellant has no right or title over the petition mentioned property and hence, the appeal is not maintainable.

8. Heard the learned counsel for the appellant and the learned counsel for the first respondent and perused the materials available on record. Despite service of notice, there is no representation for the respondents 2 and 3. The notice sent to R4 was returned with endorsement "unclaimed".

9. Admittedly, the appellant filed the suit in O.S.No.689 of



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2006 for specific performance against respondents 2 to 4 and he lost his case before the trial Court and by way of appeal, he got the *ex-parte* decree in A.S.No.32 of 2007 and also got the sale deed executed through Court. Subsequently, he filed E.P.No.68 of 2009 in O.S.No.689 of 2006 for taking delivery of possession of the said property. The first respondent filed E.A.No.35 of 2011 for recording his obstruction, in which, the appellant also filed his counter. The Executing Court dealt with the application under Order XXI Rule 101 CPC and also recorded the evidence and though the first respondent has not let in oral evidence, they marked certain documents as Ex.P1 to Ex.P8. Considering the materials available on record, the Executing Court allowed the application filed by the first respondent and recorded his obstruction. Challenging the same, the appellant filed C.M.A.No.9 of 2012 and the same was dismissed, against which, the appellant is before this Court.

10. The only question that arises for consideration is that when the first respondent filed the application under Order XXI Rule 97 C.P.C.,



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to record his obstruction, the Executing Court recorded his obstruction, and the first appellate Court is justified in not allowing the appeal by setting aside the order of the Executing Court in E.A.No.35 of 2011.

11. Rule 101 C.P.C is very clear that any application filed either under Rule 97 of Order XXI or Rule 99 of Order XXI C.P.C has to be dealt as a suit and the right, title and possession of the party has to be decided in accordance with law. Therefore, when the first respondent has filed the application and in the affidavit, he has clearly stated that he purchased the property from Saraswathi under Ex.P5 dated 22.06.1995 and he has also stated that the said Saraswathi got the property through Ex.P4/Copy of the Will dated 27.02.1992, however, the original Will was not produced. Neither the original Will nor the certified copy of the Will was produced as per Section 65 of Indian Evidence Act, 1872. While the secondary evidence is taken, he has not proved the ingredients of Section 65 of Indian Evidence Act, 1872, to show as to why he is producing the certified copy of the Will.

12. It is settled proposition of law that Will has to be executed



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in the manner known to law under Section 63 of Indian Succession Act, but the same has to be proved under Section 68 of Indian Evidence Act, 1872, or if any of the attestors are not alive, they have to prove the Will under Section 69 of the Act.

13. In the case on hand, the first respondent has not come to the witness box and spoken about anything and neither he appeared before the Court and subjected to cross examination, nor his vendor was examined. Further, he has not proved as to how his vendor traced title through Will. If at all his vendor has got title through the Will, it is settled proposition of law that even under Section 68 of the Act, if any other document is produced, the Will has to be proved at least by examining one of the attestors, whereas in the present case, neither the original Will was produced, nor any one of the attestors to the Will was examined. Therefore, the Will was not proved in the manner known to law. As per Order XXI Rule 101 C.P.C, it is very clear that if any application filed under Rule 97 or Rule 99 C.P.C it has to be dealt with as a Suit. The first respondent filed the application under order XXI Rule 97 C.P.C and he can be treated as a plaintiff and as a plaintiff, he has



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to prove his case on his own strength and he cannot take advantage of the weakness of the case of the defendant. Therefore, when the first respondent has come with the specific case that he has got title by sale deed and his vendor also got title through Will and when the alleged Will was challenged, it is the duty of the first respondent to prove the Will in the manner known to law.

14. Since the first respondent has not proved the Will, he has not proved that his vendor has got the title through the Will. Once the vendor of the first respondent has not proved her title, he cannot get a better title than his vendor. Unless the title of the vendor is proved, the vendor has no right or title to convey the property to first respondent. He cannot get any better title than his vendor, and therefore, both the Courts failed to consider the fact that when the first respondent filed the application under Order XXI Rule 97 C.P.C with a specific stand he has to prove his right to be in possession and right to retain his possession. Once the appellant has got the valid decree that had entered finality and got the sale deed through Court and filed the petition for execution and when the Court Amin went for taking



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delivery, the first respondent had obstructed and he also filed the application for recording his obstruction and that was dealt with by the Court below, the Court below failed to consider the fact that the first respondent has not proved his case pleaded by him by oral and documentary evidence. Originally, the appellant has got decree and got title over the petition mentioned property, but the same was not challenged and that the first respondent has not proved his right to be in possession and right to obstruct the delivery.

15. Therefore, the substantial questions of law formulated by this Court are answered accordingly. Since the Will was not proved in the manner known to law, the first respondent has not proved his right, title and interest over the petition mentioned property he is not entitled to obstruct from taking delivery of the property.

16. Considering the facts and circumstances, this Civil Miscellaneous Second Appeal is allowed by setting aside order passed in C.M.A.No.9 of 2012 in E.A.No.35 of 2011 in E.P.No.68 of 2009 in



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O.S.No.689 of 2006 on the file of the Principal Subordinate Judge and Civil Miscellaneous Appellate Authority, Coimbatore. The Executing Court is directed to remove the obstruction and effect delivery within a period of one month from the date of receipt of a copy of this order. There shall be no order as to costs.

22.08.2023

Index: Yes/No
Speaking Order/Non-Speaking Order
Neutral Citation Case : Yes/No
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To

- 1.The Principal Subordinate Judge and
Civil Miscellaneous Appellate Authority,
Coimbatore.
- 2.The Principal District Munsif,
Coimbatore.
- 3.The Section Officer,
V.R.Section,
High Court, Madras.



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P.VELMURUGAN, J.,

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