



S.A(MD)No.627 of 2007

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 08.02.2023

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A(MD)No.627 of 2007

1.Raman (Died)

2.Irrulayee

...Appellants 1 & 2/Appellants 1& 2/
Plaintiffs 1 & 2

3.Dhanalakshmi

4.Manivannan

5.Poomalardal

...Appellants 4 to 6/Appellants 4 to 6/
Plaintiffs 4 to 6

6.Lakshmi

7.Lekkammal

8.Rajasekaran

... Appellants

*(Appellants 6 to 8 are brought on record as LRs of deceased
1st Appellant vide order dated 24.09.2020 made in C.M.P(MD)No.
373 to 375 of 2019 in S.A.(MD)No.627 of 2007 by JNBJ)*

-Vs-

1.Ramu

2.Lakshmi Ammal



S.A(MD)No.627 of 2007

WEB CORAM

3.Perumal

4.Punnaivanam

5.Paramasivam

6.Raman (Died)

7.Karuppasamy (Died)

8.Periyasamy

9.Punnaivanam

10.Arumugam

11.Ganesan

12.Raman

13.Lakshmi

14.Punnaiammal

15.Muthu

16.Gopal

...Respondents /Respondents/
Defendants

17.Murugayee

18.R.Perumal

19.K.Pappammal

20.K.Ramasamy

21.K.Rasu

22.K.Ramar

23.Ramalakshmi

24.Muthumuruki

25.Vellaichamy



S.A(MD)No.627 of 2007

26.Mayazhagan

27.Pethammal

28.Valavanhal

... Respondents

(Respondents 17 & 18 are brought on record as LR's of deceased 6th Respondent vide order dated 10.11.2009 made in M.P(MD)Nos.1 & 2 of 2008 in S.A(MD)No.627 of 2019 by GMAJ)

(Respondents 19 to 23 are brought on record as LR's of the deceased R7 vide Court order dated 08.01.2021 made in M.P(MD)No.1 of 2009 in S.A(MD)No.627 of 2007 by NSKJ)

(Respondents 24 to 26 are brought on record as LR's of deceased R8 vide Court order dated 24.09.2020 made in C.M.P(MD)No. 5020 of 2019 in S.A.(MD)No.627 of 2007 by JNBK)

(Respondents 27 and 28 are brought on record as LR's of deceased 8th Respondent vide Court order dated 25.02.2022 made in C.M.P(MD)Nos.2492 to 2494 of 2021 in S.A(MD)No.627 of 2007 by BPJ)

(Memo dated 21.12.2022 in USR.No.36869 is recorded as 25th respondent died and the respondents 24 and 26 to 28, who are already on record are recorded as LR's of the deceased 25th respondent vide Court order dated 22.12.2022 made in S.A(MD)No.627 of 2007 by SSJ)

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, against the judgment and decree, dated 11.07.2005 in A.S.No.50 of 2002 on the file of the Sub Court, Aruppukottai, confirming the judgment and decree, dated 09.04.2002 passed in O.S.No.317 of 1993 on the file of the District Munsif, Aruppukottai.



S.A(MD)No.627 of 2007

WEB COPY

For Appellants : Mr.S.Natarajan

For Respondents : Mr.V.Meenakshi Sundaram
for Mr.I.Velpradeep

JUDGMENT

The plaintiff in the suit is the appellant herein. The suit for bare injunction was dismissed by the trial Court and confirmed by the First Appellate Court.

2.According to the appellants/plaintiffs, the suit property originally belonged to one Lekkammal and she got the property from her husband Periyasamy Mooper in a partition in his family. The respondents 1 to 3 and 14 to 16/defendants 1 to 3 and 14 to 16 filed a suit in O.S.No.73 of 1989 against the said Lekkammal in respect of the suit properties claiming partition. According to the appellants in the earlier suit, the respondents 1 to 3 had categorically admitted that Lekkammal alone was in possession of the suit properties and also admitted transfer of patta in her name. The appellants also averred in the plaint that the above said Lekkammal executed a settlement deed, dated 28.01.1975 in favour of the second appellant settling item 6 and 7 of suit properties in her favour. It was



S.A(MD)No.627 of 2007

WEB COPY

also claimed by the appellants that in respect of items 1 to 5, Lekkammal executed a Will, dated 19.06.1989 bequeathing her right over the suit items 1 to 5 in favour of the appellants. Thus claiming title and possession over the suit properties, the suit for bare injunction was laid by the appellants.

3.The respondents filed the written statement and denied the title of Lekkammal to execute a Will and settlement as claimed by the appellants. It was also claimed by the respondents that the suit properties were not self acquired properties of Lekkammal's husband, Periyasamy Mooper. It was averred in the written statement that the suit properties belonged to Periyasamy Mooper and his siblings and all of them enjoyed the suit properties without any partition by needs and bounds. The claim of the appellants that Lekkammal exclusively enjoyed the suit properties, was specifically denied by the respondents. As far as the contention of the appellants with regard to the plea raised by the respondents in the earlier suit, it was clarified by the respondents that in the earlier suit, respondents claimed that the suit property was enjoyed by Lekkammal on behalf of other co-owners also. The Will and settlement deed allegedly executed by Lekkammal was specifically denied in the written statement. Thus, the



S.A(MD)No.627 of 2007

respondents, by claiming themselves in joint possession of the suit properties, sought for dismissal of the suit.

4.Before the trial Court, the first appellant was examined as PW1. On behalf of appellants, three other witnesses were examined as PW2 to PW4 and Forty nine documents were marked as Ex.A1 to Ex.A49. On behalf of respondents, four witnesses were examined as DW1 to DW4 and fifteen documents were marked as Ex.B1 to Ex.B15. The Revenue Records relating to suit properties were marked as Ex.X1 to Ex.X5.

5.The trial Court, on consideration of oral and documentary evidence available on record, came to the conclusion that the appellants failed to prove the Will as well as settlement allegedly executed by Lekkammal. The trial Court also had given a factual finding that the appellants failed to prove their exclusive possession over the suit properties and consequently dismissed the suit for bare injunction. Aggrieved by the same, the appellants filed the first appeal in A.S.No. 50 of 2002 on the file of the Sub Court, Aruppukkottai. The First Appellate Court concurred with the findings of the trial Court and dismissed the first appeal. Aggrieved by the same, the appellants are before this Court.



S.A(MD)No.627 of 2007

WEB COPY

6. At the time of admission of the second appeal, the following substantial questions of law were framed:

“1. Whether the Judgment and Decree of the Lower Appellate Court are liable to be set aside for not following the procedure contemplated under Order 41 Rule 31 and as held in 1997 (1) CTC 559 (Division Bench), in deciding the appeal?

2. Whether the Court below are right in deciding the case as a title suit, when the suit is one for bare injunction where lawful possession alone is the criteria in deciding the issue?

3. Whether the defendants are entitled to take a stand contrary to their own stand in the earlier suits admitting the plaintiffs title, possession and patta?

4. When the Will which is a registered one and which has also been proved by examining the attesting witness, whether the Court below are right in rejecting the same?

5. When the alleged forgery of the Will and settlement are not proved as claimed by the defendants, whether the Court below are right in ignoring the Will and settlement?.

7. Heard the arguments of the learned Senior Counsel for the appellants and the learned counsel for the respondents and perused the typed set of papers and other records.



S.A(MD)No.627 of 2007

WEB COPY

8. The learned Senior counsel for the appellants tried to assail the findings of the Courts below on the ground that the first Appellate Court failed to follow the mandatory provisions under Order 41 Rule 31 of CPC, by framing points for determination, while disposing the appeal. In support of the his contentions, he placed reliance upon the following Judgments:

1. *B.V.Nagesh & Anr. Vs. H.V.Sreenivasa Murthy* reported in 2010 (5) CTC 719.

2. *U.Manjunath Rao Vs. U.Chandrashekar & anr.* reported in 2017 (6) CTC 764.

3. *K.Karuppuraj Vs. M. Ganesan* reported in 2022 (1) CTC 674

9. The learned Senior Counsel further submitted that the Will executed by Lekkammal was proved by the appellants by calling one of the attested witnesses and the Courts below rejected the Will on the basis of expert opinion that the thumb impression found in the Will was not that of testatrix, Lekkammal. The learned Senior Counsel submitted that the appellants proved the Will by examining the attester to document as per Section 68 of the Indian Evidence Act,



S.A(MD)No.627 of 2007

1872. The Courts below ought not to have relied on expert opinion for rejecting the Will. The learned Senior Counsel further submitted that the possession of the appellants' predecessor namely Lekkammal was admitted by the respondents in the earlier litigation and hence, they cannot take a different stand and deny the possession of the appellants, who claim under Lekkammal in the present case. The learned Senior Counsel also submitted that the question of title need not be gone into in a suit for injunction simpliciter and the Courts below negated the findings of question of title and committed a grave error of law.

10. Per contra, the learned counsel appearing for the respondents submitted that even as per the case of the appellants in their plaint, the suit properties were originally allotted to the share of Periyasamy Mooper and after his death, it devolved on his wife namely, Lekkammal. In the absence of any evidence to show that there was partition in the family of Periyasamy Mooper and the suit properties were allotted exclusively to the share of Periyasamy Mooper, the appellants are not entitled to claim any exclusive possession over the suit properties and maintain a suit for injunction. The learned counsel further submitted that in view of the pleadings of the respective parties, a cloud was



S.A(MD)No.627 of 2007

WEB COURT

created over the exclusive title of appellants and their predecessor namely, Lekkammal. In such circumstances, the suit for bare injunction filed by the appellants is not maintainable. The learned counsel further submitted that if the settlement and Will pleaded by the appellants are not proved, as per their own version, the suit properties being ancestral properties of Periyasamy Mooper, the respondents have to be treated as co-owners of the properties along with cloud, which was created over the exclusive title of appellants. In such circumstances, suit for bare injunction filed by the appellants as against the respondents is not at all maintainable. The learned counsel, by taking this Court to the evidence of PW2, the attester to the Will, submitted that his evidence is not at all sufficient to prove the Will. The learned counsel further submitted that in view of the expert opinion, which was marked as Ex.B1 and Ex.B2, the thumb impression of the testatrix found in the registration certificate portion of the Will is proved to be not at all her. In such circumstances, serious suspicion is created in respect of Will and the same is not dispelled by the propounder of the Will.

11. The appellants in the plaint clearly pleaded that the suit properties originally belonged to Lekkammal and she got it from her husband, Periyasamy



S.A(MD)No.627 of 2007

WEB COPY

Mooper, who in turn got it in a partition between himself and his brothers. It was further averred in the plaint that some of the suit properties are self acquired properties of Periyasamy Mooper. However, the appellants failed to lead any evidence to prove the partition in the family of Periyasamy Mooper. When there is no evidence to prove the partition allotting the exclusive share to the Periyasamy Mooper, we cannot presume that Lekkammal enjoyed exclusive possession over the suit properties. In fact, a perusal of the pleadings of the respective parties, earlier suit in O.S.No.73 of 1989, which were marked as Ex.A12 and Ex.A13 would make it clear that the respondents in that suit pleaded that Lekkammal enjoyed the property not only for herself and also on behalf of other co-owners. Therefore, the contention of the learned Senior counsel for the appellants that there was an admission by the respondents with regard to the exclusive possession of the appellants with regard to the suit properties in the earlier suit cannot be accepted. Therefore, it is incumbent upon the appellants, as plaintiffs in the suit for bare injunction to prove their exclusive possession over the suit properties.



S.A(MD)No.627 of 2007

WEB COPY

12. The appellants have not produced any revenue documents prior to the suit to prove their exclusive possession over the suit properties. The only tax receipt produced in the name of Irulayee, which was marked as Ex.A36 has not shown any relevance to the suit properties. The tax receipt produced by the appellants in the name of Lekkammal would not advance their case of exclusive possession, as even according to the case of the respondents, Lekkammal was in possession of the suit properties on behalf of co-owners. The appellants claimed exclusive right over the suit items 6 and 7 under settlement deed allegedly executed by Lekkammal. The settlement deed was specifically denied by the respondents in the written statement. However, the appellants have not taken any steps to prove the said settlement by examining the attestor to the gift deed in the manner known to law. Therefore, the settlement deed relied on by the appellants dated 28.01.1975, which was marked as Ex.A3 was not proved in the manner to law and consequently any mutation in the name of the second appellant, Irulayee under Ex.A29 and Ex.A30 would not be useful to the appellants to prove their exclusive right and possession over the suit properties.



S.A(MD)No.627 of 2007

WEB COPY

13. In respect of items 1 to 5 of the suit properties, the appellants claimed right under Will allegedly executed by the Lekkammal. In order to prove the Will, one of the attestors of the document was examined as PW2. It is stated that the other attestor to the document is not alive. The attestor to the document in his chief examination deposed that the testatrix, Lekkammal subscribed her thumb impression in all related pages and at the time of registration, when the Sub Registrar asked about the execution of Will, Lekkammal answered in affirmative. During the cross examination, he deposed that he did not know in how many pages Lekkammal put her signature. He also stated that he is not aware of the name of the scribe of the Will and the answers to the question of the cross examination go against his evidence in the chief examination. Further, though he deposed that Lekkammal subscribed her thumb impression in the presence of Sub Registrar, the Thumb Impression Expert examined as DW1 in his reports, Ex.B1 and Ex.B2 had given an opinion that the thumb impression found in the registration certificate of the Sub Registrar is not having with the admitted thumb impression of Lekkammal. When the thumb impression of the testatrix found in



S.A(MD)No.627 of 2007

WEB COPY

the registration certificate portion of the Will is found to be not that of the testatrix by the competent expert, it creates a serious suspicion with regard to the genuineness of the Will. If the evidence of attesor PW2 is taken as a whole, it is not sufficient to dispel the doubt created by opinion of the thumb impression expert. In these circumstances, the findings rendered by the Courts below that the appellants failed to prove Ex.A48 - Will requires no interference by this Court, when the Will and Settlement pleaded by the appellants are rejected. On death of Lekkamal, the suit properties being the ancestral properties of Periyasamy Mooper stood go to the heirs of Periyasamy Mooper and the appellants, who are the children of Lekkamal's brother are not entitled to claim any right over the suit properties. In such circumstances, the pleadings cannot claim any title or possession over the suit properties especially in the absence of any clinching evidence on the side of the appellants to prove their possession on the date of filing of suit.

14. As far as legal contentions made by the learned Senior counsel for the appellants are concerned, the First Appellate Court framed a point for determination in paragraph No.7 of its Judgment. The point for determination



S.A(MD)No.627 of 2007

WEB CAPTURED by the Appellate Court is as follows:-

*" Whether the appeal is liable to be allowed
and the judgment and decree of the trial Court is
sustainable".*

15. Though the point for determination framed by the First Appellate Court is not specifically with regard to issues arising for consideration, in the subsequent paragraphs, all the issues like validity of the Will, validity of the settlement, title of the appellants and exclusive possession of the appellant setc., were discussed by the First Appellate Court, based on the evidence available on record. Therefore, the provisions of Order 41 Rule 31 of CPC., are substantially applied with this case. Therefore, the judgment of the First Appellate Court need not be interfered with on that ground.

16. In the light of the above discussions all the questions of law framed at the time of admission are answered against the appellants and the Second Appeal is dismissed.



S.A(MD)No.627 of 2007

WEB COPY

17. In fine,

a) the Second Appeal stands dismissed by confirming the judgment and decree passed by the Courts below;

b) In the facts and circumstances of the case, there would be no order as to costs.

08.02.2023

NCC : Yes/No
Index : Yes/No

vsd

To

1.The Sub Court,
Aruppukottai.

2.The District Munsif,
Aruppukottai.

3.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.

16 / 17



WEB COPY



S.A(MD)No.627 of 2007

S.SOUNTHAR, J.

vsd

S.A(MD)No.627 of 2007

08.02.2023