



Second Appeal No.141 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.06.2024

CORAM :

THE HONOURABLE MR.JUSTICE V.LAKSHMINARAYANAN

Second Appeal No.141 of 2019

D.Rajendiran Appellant

-Vs-

D.Kumararaj Respondent

Prayer : Second Appeal under Section 100 of C.P.C., against the judgment and decree dated 19.12.2018 passed in A.S.No.2 of 2016 on the file of Additional Subordinate Judge, Puducherry confirming the judgment and decree in O.S.No.587 of 2005 dated 02.03.2016 on the file of Principal District Munsif, Puducherry.

For Appellant	: Mr.K.Krishnan for Mrs.P.Veena Suresh
For Respondent	: Mrs.A.L.Gandhimathi Senior Counsel for Mr.L.Palanimuthu

J U D G M E N T

The present Second Appeal arises against the judgment and decree of the Court of the Additional Subordinate Judge at Puducherry in A.S.No.2 of 2016 dated 19.12.2018 in confirming the judgment and decree of the Court of the Principal District Munsif at Puducherry in O.S.No.587 of 2015 dated 02.03.2016.



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For the sake of convenience, the parties are referred to as per their rank in the suit.

2. The defendant who lost before the Courts below is the appellant. The plaintiff sought for the relief of prohibitory injunction restraining the defendants, their men, agents and subordinates from interfering with the peaceful possession of the plaintiff over the suit schedule mentioned property and for declaration to declare the Will dated 28.04.2000 executed by his mother Krishnaveni Ammal as null and void.

3. The relationship between the parties is not in dispute. The plaintiff and the defendant are the sons of one Dhandapanisamy Chettiar. Dhandapanisamy Chettiar had purchased several properties during his life time and the suit schedule property is one such property. Dhandapanisamy Chettiar and his wife Krishnaveni Ammal executed a registered Will on 30.09.1988 in Document No.20 of 1988, whereby they allotted a property each to all their four sons to the exclusion of their only daughter. Dhandapanisamy Chettiar passed away on 09.09.1996. Under the Will, his wife Krishnaveni Ammal was granted life estate. On the basis of the Will, Krishnaveni Ammal took possession of the suit property and was residing therein till 28.09.2003.



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4. The plaintiff concedes that the property is a dilapidated house which was a subject matter of litigation between Dhandapanisamy Chettiar and the tenant Lourdu Maria David. This suit in O.S.No.172 of 1991 was compromised by the plaintiff as Power of Attorney for Dhandapanisamy Chettiar and he alleged that he took possession of the property thereafter. He would plead that when he attempted to spruce up the property and make it habitable, he was obstructed by the defendant, who pleaded that Krishnaveni Ammal, their mother had executed a Will on 28.04.2000 with respect to the suit property granting eastern portion of the property to the defendant and the remaining portion to the plaintiff. As a cloud had been created over his title, the plaintiff came forward with the suit in O.S.No.587 of 2005 for the aforesaid reliefs.

5. The defendant entered appearance and filed a detailed written statement. In Para 2 of the written statement, he denied that Dhandapanisamy Chettiar and Krishnaveni Ammal had executed a Will on 30.09.1988. The date of death of their parents was accepted. He would also deny that upon the conclusion of proceedings in O.S.No.172 of 1991, the plaintiff took possession of the property. After having denied the Will, he would plead that it is true that his father and mother had executed a Will on 30.09.1988 and had it registered on 05.10.1988. He would state that Krishnaveni Ammal, by a Will dated 28.04.2000



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had bequeathed half share of the property in his favour. He would further add that on 15.11.2004, he had let out his share of the property to one Rajavelu for a monthly rent of Rs.500/- and therefore would claim that for the eastern share of the property, he is the owner thereof.

6. On these pleadings, the learned District Munsif framed the following issues:

1. Whether the plaintiff is in possession and enjoyment of the suit property as on date of presentation of plaint or not?
2. Whether the plaintiff is entitled to prohibitory injunction as prayed for or not?
3. As per the Will dated 30.09.1988 in Doc.No.2013/1988 suit schedule mentioned A Schedule property was bequeathed by plaintiff's father to the plaintiff absolutely nor not?
4. Whether the description as well as boundaries in respect of suit property correct or not?
5. To what relief?

7. On the side of the plaintiff, he examined himself as P.W.1. He marked Exs.A1 to A8, of which Exs.A7 and A8 are photographs and Compact Disc showing that the suit schedule mentioned property is a dilapidated structure. He did not examine the attesting witnesses to the Will dated 30.09.1988.



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8. The defendant examined himself as D.W.1 and also examined the attesting witnesses to the Will of the mother dated 28.04.2000 in order to prove the same. He examined one Sundararaj as D.W.3 by filing a proof affidavit. The said Sundararaj had not subjected himself to cross examination. On his side, he marked Exs.B1 to B4; Ex.B1 being the Will dated 28.04.2000, Ex.B2 being the Will dated 30.09.1988, Ex.B3 being the rental agreement between the defendant and Rajavelu dated 15.1.2004 and Ex.B4 being the house tax receipt which stood in the name of Dhandapanisamy Chettiar.

9. Learned District Munsif, on the basis of the oral and documentary evidence came to the following conclusions:

- a) That the Will of Dhandapanisamy Chettiar dated 30.09.1988 had not been proved by way of examining the attesting witnesses, but is deemed to have been proved by virtue of the fact that the defendant had admitted the Will in his written statement and also since the Will executed by Krishnaveni Ammal refers to the Will dated 28.04.2000 executed by her and Dhandapanisamy Chettiar, her husband.



b) That the plaintiff has not proved his possession over the suit property as in Ex.A3 viz., the certified copy of the judgment and decree in O.S.No.172 of 1991, the suit between Dhandapanisamy Chettiar and Lourdu Maria David, it had not been recorded that possession had been handed over to the plaintiff, but that the suit had been dismissed as settled out of court.

c) Since the plaintiff, by virtue of the Will dated 30.09.1988 having been **proved** , he became the owner of the property and possession following title, the court decreed the suit as prayed for.

d) That Krishnaveni Ammal did not have any right, title or interest over the property in order to execute a Will dated 28.04.2000 and therefore even though that Will having been proved, since she did not have any right over the property, the Court refused to recognise any right in favour of the defendant.

10. This matter was taken on appeal before the Subordinate Judge at Puducherry. The appeal was received in A.S.No.2 of 2016. The learned Subordinate Judge came to the conclusion that,



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- a) That the Will of the mother had been proved.
- b) The mother did not have a right to execute the Will.
- c) The plaintiff is not in possession of the property, but has better title to the suit property, hence it dismissed the appeal.

11. Against the concurrent findings of the Courts below, the present Second Appeal has come up before this Court. This Court ordered notice regarding admission on 01.09.2019.

12. On service of summons, Mr.L.Palanimuthu entered appearance for the respondents.

13. After hearing both sides, I admitted the Second Appeal on the following substantial questions of law.

- (a) Whether the Courts below were right in holding that the Will of Dhandapanisamy Chettiar and Krishnaveni Ammal dated 30.09.1988 was proved by admission ?
- (b) Whether the suit for declaration that the Will executed by the mother as null and void and for permanent injunction can be maintained without the plaintiff seeking for the relief of declaration of title ?



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14. I heard Mr.K.Krishnan for Mrs.Veena Suresh, learned counsel for the appellant and Mrs.A.L.Gandhimathi, learned Senior Counsel for Mr.L.Palanimuthu, learned counsel for the respondent.

The proof of a Will by admission is unknown to Civil Law

15. Taking up the first question of law, the Courts below came to the conclusion that since the Will of Dhandapanisamy Chettiar and Krishnaveni Ammal executed in 1988 was admitted by the defendant in his written statement and reflected so in the Will executed by Krishnaveni Ammal in 2000, it is deemed to have been proved by the plaintiff. The Courts below came to this conclusion despite the fact that plaintiff had projected the said "**Will**" and had not examined even one attesting witness to prove the same.

16. In terms of Section 68 of the Indian Evidence Act, proof of document which requires attestation can be given only when the attesting witnesses to the said document are examined. In case no such attesting witnesses are available, then the proof has to be given in terms of Section 69 and Section 70 of the Indian Evidence Act. A Will requires attestation in terms of the Indian Evidence Act. Documents like mortgage or settlement deed also require attestation. In case a mortgage or settlement deed is admitted by the contesting party, then



there is no necessity to examine the attesting witness. The proviso to Section 68 makes it clear that the necessity of examining the witnesses to prove the Will is not dispensed with even if the contesting party admits to the execution thereof. The proof of a Will by admission is unknown to civil law. An attesting witness is examined because, it is he who will enter the witness box and state that the person who executed the document was in the proper state of mind and had applied his mind while putting the pen to the paper. His testimony would not only show that he was witness to the said document, but will also prove that the testator or the person who executed the Will was in fact executing the document. These essentials are necessary before a Court accepts the proof of a Will. It is also permissible under law where two Wills are projected and the subsequent Will refers to the first Will and if the subsequent Will is proved by examining the attesting witnesses, then the execution of the first Will can be presumed. However, a Court can undertake such a presumption only when the testator of both the Wills remains the same.

17. This is not the situation in the present case. In the two Wills projected before the Court, one was the Will executed by Dhandapanisamy Chettiar and Krishnaveni Ammal and the other was a Will executed by Krishnaveni Ammal herself after the death of her husband. For the fact that the Will executed by Krishnaveni Ammal is proved, I am not in a position to draw an inference that



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Dhandapanisamy Chettiar had executed the Will dated 30.09.1988. The position of law being clear, the findings of the Courts below that the Will dated 30.09.1988 had been proved by admission cannot stand a moment's scrutiny and require interference as they are perverse.

**Declaration of title must be sought when a cloud is raised over
plaintiff's title**

18. Turning to the second question of law, a reading of the written statement would show that the plaintiff's title to the suit property had been denied by the defendant. In fact, the plaintiff's alleged possession over the suit property was also denied by the defendant. The findings of the Courts below concurrently are that the plaintiff has failed to prove he had taken possession of the property from Lourdu Maria David under Ex.A3. This is because Ex.A3 which is the judgment and decree in O.S.No.172 of 1991 does not record this fact. It only states that the suit presented by Dhandapanisamy Chettiar against Lourdu Maria David, which was prosecuted by Kumararaj as Power of Attorney, stood dismissed. It is possible that Kumararaj has settled the matter along with Lourdu Maria David. But, Lourdu Maria David had not been examined before the Court to show that she had handed over possession to Kumararaj.



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19. On this aspect again, I have to take note of the fact that the Courts below have concurrently held that the plaintiff has not proved his possession of the property. Having come to the conclusion, both the Courts have took efforts to find out whether the defendant has proved his possession and came to a conclusion that the defendant has not proved his possession over the property. They decreed the suit on the ground since the Will has been proved by admission, the plaintiff has title to the property and since he has title to the property, his possession follows title.

20. In a suit for bare injunction, where title of the plaintiff is denied, it is his duty to amend the plaint and seek for declaration of title. Though the suit was pending from 2005 till 2016, the plaintiff did not take any efforts to amend the plaint. May be, it is because the property being a dilapidated structure, he did not want to bear the additional court fee that would be necessary to seek for declaration of title. Further more, the learned District Munsif would not have jurisdiction to entertain a suit for title as the property is situated in Church Street in Villianur, which will obviously be more in value than the pecuniary jurisdiction of the learned District Munsif. The position of law that where the title of the plaintiff is denied he would have to seek for declaration of title has been settled by the Supreme Court in **"Anathula Sudhakar -vs- P.Buchi Reddy (AIR 2008 SC 2033)"**, wherein it was held as follows:



17. To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under :

(a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title Will not be directly and substantially in issue. The prayer for injunction Will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it Will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either specific, or implied as noticed in *Annaimuthu Thevar (supra)*]. Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court Will not investigate or examine or render a finding on a



question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court Will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straight-forward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title Will not be decided in suits for injunction.

The testator of a Will must have the power to dispose the properties under the testament

21. Insofar as the Will executed by Krishnaveni Ammal is concerned, the defendant has to prove the same by examining the attesting witnesses. Mr.Krishnan, learned counsel for the appellant would submit that as Will had been proved, the appeal has to be allowed and the decrees of the Court below have to be set aside.



22. I have to agree that the defendant has proved the Will executed by Krishnaveni Ammal on 28.04.2000. Krishnaveni Ammal did not have any right to execute the Will. A Will is not a document of title. It is only the last wish of the person who executed the document as to how the property must devolve instead of the natural course of succession. If Krishnaveni Ammal had the disposable power over the property, certainly the plaintiff is entitled to succeed. However, as the property was the self acquisition of Dhandapanisamy Chettiar, it was he who had the power to dispose the same by way of a testament under Section 30 of the Hindu Succession Act. Therefore, having done so, Krishnaveni Ammal obtained the property only as a life estate holder under the Will. As a life estate holder, she certainly had the right to alienate the life estate, but such alienation of a life estate would be co-terminus with her life time, that is to say, had she alienated the property after having succeeded to the estate on the death of Dhandapanisamy Chettiar on 09.09.1996, she could have enjoyed the property or sold the same in favour of any person including the defendant. Such purchase would have been valid only as long as she was alive and on her death on 29.08.2007, such alienation would have come to an end. A life estate holder cannot extend the life estate after her death by executing a Will. In fact, she has no right, title or interest over the property to execute a Will, which was received as a life estate holder. Therefore, the findings of the Courts below that Krishnaveni Ammal did not have any disposable right over the property has to



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be confirmed and it is accordingly confirmed.

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Denial of relief to the plaintiff cannot be premised on the fault or negligence of his counsel

23. The law being clear and the plaintiff having failed to prove his possession over the property, the Courts below erred in granting a decree for injunction on the basis that the plaintiff has proved his title. The generous decree for title having been granted in a suit for bare injunction necessarily would have to be interfered with. I am not in a position to extend the same generosity as extended by the learned District Munsif and the learned Subordinate Judge to the plaintiff. I am bound by law and the law states the plaintiff will have to sue for declaration of title when a cloud is created over his title.

24. At this juncture, I have to take note of the fact that a party would not be aware as regards the examination of attesting witnesses or the relief that he should ask for in a suit. He would merely state the facts to the counsel. The prayer that is sought for is entirely within the discretion of the counsel who drafts the plaint. The plaintiff has come with a clean breast to the Court setting forth all the facts necessary in order to substantiate his case. For the mere fault



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of the counsel for not seeking a proper remedy that ought to have been sought,

I am not inclined to dismiss the suit in full.

25. This Court in **G.Subashini -vs- P.Lakshmi Bai (1987 (100) LW 489)** had held that the case of the plaintiff would have to be seen from his averments made in the plaint and the prayer having been drafted by the counsel, the Court always has the power to grant relief in an appropriate case.

Decision

26. Therefore, in the light of the above discussion, the Second Appeal stands allowed. As parties are siblings, they shall bear their respective costs. The judgment and decree of the learned Subordinate Judge, Puducherry in A.S.No.2 of 2016 dated 19.12.2018 in confirming the judgment and decree of the learned District Munsif, Puducherry in O.S.No.587 of 2005 dated 02.03.2016 are set aside.

25. The suit is remanded to the file of the learned District Munsif at Puducherry to enable the plaintiff to file an application for amendment of the plaint seeking for the relief of declaration of title and for injunction. In case such an application is filed within a period of eight weeks time and the records are received by the Courts below, then the learned District Munsif shall permit



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the plaintiff to amend the prayer and upon such amendment, if he does not continue to have pecuniary jurisdiction over the suit schedule mentioned property, he shall transfer the suit to the Court having jurisdiction to deal with the same. It is open to the plaintiff to examine the attesting witness of the Will dated 30.09.1988 and prove the documents in accordance with the Indian Evidence Act. The defendant is at liberty to cross examine the attesting witness or take such steps as is necessary to disprove the Will. It is made clear that the findings given by this Court with regard to the Will of Krishnaveni Ammal and the lack of her disposable interest in the property will not be gone into by the Court on remand.

28.06.2024

Index : Yes/No
Neutral Citation : Yes/No
Speaking Order / Non-speaking order
KST
To

- 1.The Subordinate Judge
Puducherry.
- 2.The Principal District Munsif
Puducherry.



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V.LAKSHMINARAYANAN, J.

KST

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