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SA(MD)No.597 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 02/08/2024

CORAM

The Hon'ble Mr.Justice **G.ILANGOVAN**

SA(MD)No.597 of 2022
and
CMP(MD)No.8218 of 2022

1.Viji
2.Tamilarasan

: Appellants/
Respondents 1 and 3/
Defendants 1 and 3

Vs.

1.M.Periyaperumal

: 1st Respondent/Appellant/
Plaintiff

2.Valarmathi

: 2nd Respondent/2nd Respondent/
2nd Defendant

PRAYER: Second Appeal is filed under Section 100 of the Civil Procedure Code, to set aside the judgment and decree passed by the VI Additional District Judge, Madurai, dated 19/02/2020 made in AS No.55 of 2019, reserving the judgment and decree made in OS No.363 of 2008, dated 28/03/2019 by the III Additional Sub Court, Madurai (Camp at Usilampatti).

For Appellants : Mrs.A.S.Sangeetha

For 1st Respondent : Mr.Babu Rajendran



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J U D G M E N T

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This second appeal is filed against the judgment and decree passed by the VI Additional District Judge, Madurai, dated 19/02/2020 made in AS No.55 of 2019, reserving the judgment and decree passed in OS No.363 of 2008, dated 28/03/2019 by the III Additional Sub Court, Madurai (Camp at Usilampatti).

2.The plaint averments in brief:-

The suit properties originally belonged to the plaintiff's father by name P.Muthu Perumal. He married one Ponnammal. Through her two sons by name Thangaraj, Periya Perumal and five daughters namely Perumayee, Kasammal, Muthulakshmi, Alagammal and Dhanalakshmi were born. Thangaraj died in the year 1988 leaving his only daughter Viji, who is the first defendant. P.Muthu Perumal was in possession and enjoyment of the suit property. He executed a Will, dated 17/04/1977, while he was in sound disposing state of mind, bequeathing the suit properties to the plaintiff. One of the attesting witnesses was Ponnammal, the mother of the plaintiff. P.Muthu Perumal died on 23/04/1990. After his death, the Will came into effect and the plaintiff became the owner of the property and in possession.



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3. Apart from the suit properties, P.Muthu Perumal owned some other properties also. After his death, the legal heirs including the plaintiff are in joint possession without effecting any partition. Ponnammal died on 10/11/2006. The defendants 1 and 2 attempted to trespass into the suit properties. That was prevented. The defendants were telling the plaintiff that the mother Ponnammal gifted the suit properties to the first defendant by settlement deed, dated 01/08/2005. But the settlement deed is not valid, since Ponnammal had no right in the property and in view of the Will executed by her father.

4. The first defendant later executed a gift deed in favour of the third defendant, who is her husband, dated 22/01/2008. The third defendant is impleaded to avoid unnecessary complications. So, the suit is laid for declaration that he is the owner of the property and for consequential permanent injunction or in the alternative for delivery of possession.

5. The first defendant filed a written statement stating that it is admitted that the suit property originally belongs to P.Muthu Perumal. But after the death of P.Muthu Perumal, the plaintiff and Ponnammal



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divided the properties equally. Muthu Perumal was allotted half share and the deceased Thangaraj and Ponnammal were in possession and enjoyment of his half share. She executed a settlement deed, dated 01/08/2005 in favour of the first defendant for an extent of 2 Acres and 71 cents in Re-Survey No.150/3 and 85 cents in Re-Survey No.156/2 and 27 cents in Re-Survey No.154/13 and 1.5 cents house site in Natham Survey No.15/1. By virtue of the settlement, the first defendant became the absolute owner of the property. Later, she executed a gift deed in favour of the third defendant Tamilarasan. Tamilarasan was put in possession and enjoyment of the property. The Will, dated 17/04/1977 is denied as false. It is also disputed that it is a fraudulent document. Muthu Perumal never executed any Will.

6.The second defendant filed written statement stating that she is not necessary party in the suit, since the first defendant executed a mortgage in her favour in respect of 2 Acres and 71 cents in RS No.150/3 and later, it was discharged, on 19/09/2008.

7.On the basis of the above said pleadings on both sides, the trial Court has formulated the following issues as narrated below:-



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(1)Whether the plaintiff is the absolute owner of the suit property?

(2)Whether the plaintiff is in possession of the suit property?

(3)Whether the plaintiff is entitled for declaration and injunction as prayed for?

(4)Whether the plaintiff is entitled for recovery of possession?

(5)To what other reliefs?

8.Before the Trial court, on the side of the plaintiff, 2 witnesses were examined and 22 documents were marked. On the side of the defendants 4 witnesses were examined and 7 documents were marked. Apart from that, Exs.X1 to X5 were marked.

9.Before the trial court, three suits were tried jointly and a common judgment was pronounced. So far as this suit is concerned, it was partly decreed.

10.Against which, appeal was preferred before the appellate court namely IV Additional District Judge, Madurai, in AS No.55 of 2019. It was heard along with the other appeals as AS Nos.56, 57 and 58 of 2019 by the VI



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Additional District Judge, Madurai. The Appeal Suit in No.55 of 2019 filed by the plaintiff was allowed by judgment and decree, dated, 19/02/2020 setting aside the judgment and decree of the trial court declaring that the plaintiff is the owner of the suit property and the defendants are directed to hand over the possession within a three months from the date of the judgment. Regarding the permanent injunction, the suit was dismissed.

11.Against which, this second appeal is preferred by the defendants 1 and 3 as appellants.

12.At the time of admitting the second appeal, the following substantial questions of law were framed:-

(1)Whether the suit framed as such is maintainable in view of the alternative prayers?

(2)Whether the finding of the trial court as well as the appellate court that the Will, dated 17/04/1977 was proved by the plaintiff, is in accordance with law?



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**(3)Whether the prayer sought for in the
plaint is barred by limitation?**

13.Heard both sides.

14.The disputed document of Will is marked as Ex.A23. But in the annexure, it has been wrongly stated as Ex.A19. It is, dated 17/04/1977. It is an unregistered Will, wherein Muthu Perumal has stated that Periya Perumal, who is the plaintiff, is the second son. The plaintiff is taking care of him and the mother; Out of love and affection to secure his future interest, he bequeathed the properties purchased by him, on 20/03/1959 and 02/04/1963, absolutely. The scheduled property is mentioned as Survey No.150/3 land measuring 64 cents situated in Sempatti Village, pymash No.228, Item No.2 measuring about 1 Acre 2-1/3 cents out of two Acres and 70 cents situated in the very same village in survey No.150/3. Two schedule of the properties were bequeathed in favour of the plaintiff.

15.It is the case of the plaintiff that the mother Ponnammal also signed as a witness in the document and her signature is available.



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16. But it is denied by the appellants herein stating that it is not her signature. To prove the Will, the plaintiff examined PW2 one of the attesting witnesses to the document. He was also a Scribe. He was aged about 19 at the time of examination before the trial court. He has stated in his evidence that Muthu Perumal was known to him. At his instruction, he wrote the Will, on 17/04/1977 in the house of Muthu Perumal. He signed in the document as Scribe and Witness. He has further stated that Muthu Perumal signed in the document in his presence and he saw his signature. Similarly, Muthu Perusal saw his signature in the document. After reduced into writing, the original document was handed over to Muthu Perumal.

17. During the course of the cross examination, nothing is brought on record to discard his evidence. He has stated that a draft was prepared by Muthu Perumal, that was copied by him in the stamp paper. At that time, the plaintiff was not available in that place. Ponnammal also signed in his presence as a witness.

18. It is the case of the appellants that the present Will was prepared or drafted after the death of Muthu Perumal with his connivance. But absolutely, no direct or indirect evidence is available to show that the document



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was a created one subsequent to the death of Muthu Perumal.

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19.From his evidence, it is further seen that Muthu Perumal was also working in Madura Coats, Madurai where PW2 is working. This also shows that the document was genuinenessly written at the instruction given by Muthu perumal.

20.Doubt was created by the appellants with regard to the genuineness of the document by pointing out that stamp paper was purchased in the name of one Mani, Madurai on 15/04/1977. But who is that Mani is not clear on record. There is no explanation from any one. But PW2 is aged 19 at the time of the execution as mentioned above. Absolutely, there is no motive for him to create this document at the instance of the plaintiff. So rightly the genuineness of the document was believed by the appellate court.

21.It is the contention on the part of the appellants that in the document, the signature of the Muthu Perumal differs, so also the signature of Ponnammal. So, according to the appellants, till the life time of the mother, namely Ponnammal, no claim was made



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by the plaintiff. This itself shows that the Will is not a genuine one. PW2 was not summoned by the plaintiff. On his own, he appeared; No document is produced by the plaintiff to show that Othi was discharged by him. These are the main contents raised by the appellants with regard to the genuineness of the document.

22.But, as stated above, the evidence of PW2 cannot be ignored on any ground. The signature of Muthu Perumal and Ponnammal may differ. Because they are not educated persons.

23.Regarding the genuineness of the document, a specific question was put to PW1 that on the date of the document namely 15/04/1977, the father was in full possession of mind and body, when that was so, if it was the real intention to execute the Will in favour of the plaintiff, he would have gone to the Sub Registrar Office, get the document registered.

24.According to the appellants, non-registration of the document creates doubt. But when the appellants themselves admit that the father was well in his mind and body, there is no necessity for registration of the Will. No explanation is offered in the document with regard to



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the non registration aspect also. But from this non-registration only, we cannot presume that the document is a created one after the death of Periya Perumal. The evidence of PW2 as mentioned above is convincing and reliable.

25.We will go into other aspects. As argued by the learned counsel appearing for the appellants that created genuine doubt over the genuineness of the Will. Two othi deeds are available. One under Ex.A2, another under Ex.A18 and another one under Ex.A1. Muthu Perumal mortgaged the property in favour of one Veerammal. Ex.A2 is the made over by the mortgagee namely Veerammal in favour of Meenal. Ex.A3 was another made over executed by Meenal in favour of Muthukoma Thevar.

26.As mentioned above, it is the case of the appellants that no document was produced that those Othi documents were discharged. Ex.A18 is another Othi created by Muthukoma Thevar in favour of Periya Perumal, S/o.Karuppaiya Thevar. But here, the original document itself is produced by the appellants. It can be presumed that the Othi was discharged. Unless the Othi is discharged, the original document would not have been handed over to the custody of the plaintiff. There is no



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endorsement in the document. But we can compare the signature of Muthu Perumal in Ex.A6 with that of the Will Ex.A19. Because those two documents came into existence within four years. But, I find that there is no big difference. To discharge Ex.A18, Ex.A1 would have been come into existence. The contention on the part of the appellants that there is no evidence on record to show that Othi created by Muthu Perumal was discharged is not acceptable.

27.So, from the evidence on record, I find that no case has been made out by the appellants to discard the disputed Will and the evidence of PW2. The finding of the appellate court in this regard is confirmed. So, the substantial question of law No.2 is answered that no interference is called for.

28.Now coming to the first substantial question of law, it is the case of the appellants that alternative prayer will not lie. But such a prayer is always available to a party. When the title is proved on the basis of Ex.A23 Will, there is no difficulty in declaring that the plaintiff is entitled for decree of declaration.



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29.Claiming title over the property stating that there was a partition after the death of Muthu Perumal between the plaintiff and the mother Ponnammal. Ponnammal was allotted with the suit property. She executed a settlement deed in favour of the first defendant, on 01/08/2005 is the contention. Reading of the gift deed does indicate anything with reference to the oral partition between the plaintiff and Ponnammal. But she has stated that she executed the settlement deed in respect of her undivided 1/8th share. So, the contention on the part of the appellants that there was oral partition is not correct on record. There is wrong finding by the first appellate court that the settlement deed is not produced by the appellants herein before the trial court.

30.Reading of the Ex.A21 settlement deed, as mentioned above shows that Ponnammal settled the property in favour of five persons namely Perumayee, Kasammal, Algammal, Dhanalakshmi and Viji. When that is being so, how the first respondent namely Viji claimed absolute title over the suit property is not explained by her also.



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31.Now we will see the description of the property.

Survey Nos.183/3 and 189/4 and the Well situated in Survey No.189/4. But this is not pertaining to the suit property. The suit property is situated in survey No.150/3 measuring about 64 cents, out of 2 Acres 70 cents and Survey No.150/3 measuring about 1 Acre 2-1/3 cents out of 2 Acres and 70 cents.

32.A suggestion was made to PW1 by the appellants that on 02/06/2000, the entire property belongs to the family was mutually partitioned. In that partition, the property situated in Survey No.150/3 was allotted to the mother. The property in Survey Nos.156/2 and 154/13 were allotted to the first defendant. The property in survey Nos.148/8A, 147/10, 151/8 and 128/3A was allotted to the plaintiff's share. Other properties situated in Survey Nos.189/4 and 183/3 were allotted to the Sister. There is no specific plea in the written statement with regard to the oral partition and allotment of properties. In the absence of pleadings, it cannot be relied and accepted. On that account, the entire case of the appellants is not acceptable. So, the contention on the part of the appellants that the property in Survey No.150/3 was allotted to the share of the mother is also not correct on record. So, any document executed without any title



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will not extinguish right of the plaintiff. When the right is established on the basis of the Will, then he is entitled to recover the property, since there is no documentary evidence available to show the possession. So, it was rightly decided by the first appellate court that the plaintiff is entitled for recovery of possession. Accordingly, the second question of law was answered in favour of the respondents.

33.The third substantial question of law may not arise in view of the above said factual circumstances. The Will is dated 15/04/1977. Muthu Perumal died on 23/04/1990. The cause of action for the suit arose when Ponnammal executed the settlement deed in favour of Viji and then Ponnammal died, on 10/11/2006. The suit was filed on 23/06/2008. So no third substantial question of law arises here.

34.It is not the case of the appellants that they prescribed title over the property by adverse possession. In the absence of any specific plea, the limitation point may not arise.

35.For all the reasons stated above, the second appeal is liable to be **dismissed** and accordingly



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dismissed without costs, confirming the judgment and
decree of the first appellate court. Consequently,
connected Miscellaneous Petition is closed.

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To,

- 1.The VI Additional District Judge,
Madurai.
- 2.The II Additional Sub Judge,
Madurai (Camp at Usilampatti)
- 3.The Section Officer,
VR/ER Section,
Madurai Bench of Madras High Court,
Madurai.



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G.ILANGOVAN, J

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