



SA.(MD)Nos.510 and 511 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 18/07/2024

CORAM

The Hon'ble Mr.Justice **G.ILANGO VAN**

SA (MD) Nos.510 and 511 of 2021

and

CMP (MD) No.6732 of 2021

(1) SA (MD) No.510 of 2021:-

Alosiya : Appellant/Appellant/
Plaintiff

Vs.

Ganesan : Respondent/Respondent/
Defendant

PRAYER:- Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree, dated 29/03/2019 passed in AS No.47 of 2016 on the file of the Sub Court, Thuraiyur, A.S No.199 of 2014 on the file of the Sub Court (Camp), Thuraiyur, confirming the judgment and decree, dated 20/10/2014 passed in OS No.59 of 2003 on the file of the District Munsif Court, Thuraiyur.

For Appellant : Mr.S.Sankar

For Respondent : Mr.H.Lakshmishankar

(2) SA (MD) No.511 of 2021:-

Alosiya : Appellant/Appellant/
3rd Defendant

Vs.

1.Ganesan : 1st Respondent/
1st Respondent/
1st plaintiff



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2.Mookaye

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

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PRAYER:-Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree, dated 29/03/2019 passed in AS No.48 of 2016 on the file of the Sub Court, Thuraiyur, A.S No.200 of 2014 on the file of the Sub Court (Camp), Thuraiyur, confirming the judgment and decree, dated 20/10/2014 passed in OS No.178 of 2004 on the file of the District Munsif Court, Thuraiyur.

For Appellant : Mr.S.Sankar

For 1st Respondent : Mr.H.Lakshmishankar

For 2nd Respondent : No appearance

COMMON JUDGMENT

SA(MD)No.510 of 2021 is filed against the judgment and decree, dated 29/03/2019 passed in AS No.47 of 2016 on the file of the Sub Court, Thuraiyur, A.S No.199 of 2014 on the file of the Sub Court (Camp), Thuraiyur, confirming the judgment and decree, dated 20/10/2014 passed in OS No.59 of 2003 on the file of the District Munsif Court, Thuraiyur, whereas SA(MD)No.511 of 2021 has been filed against the judgment and decree, dated 29/03/2019 passed in AS No.48 of 2016 on the file of the Sub Court, Thuraiyur, A.S No.200 of 2014 on the file of the Sub Court (Camp), Thuraiyur, confirming the judgment and decree, dated 20/10/2014 passed in OS No.178 of 2004 on the file of the District Munsif Court, Thuraiyur.



2. Plaint pleadings in the suit OS No.59 of 2003:-

The suit properties originally belong to one Mottaiyan. From him, the plaintiff namely Alosiya purchased the properties on 01/07/1999. The plaint 'A' schedule property is the house and 'B' schedule is a vacant site lying adjacent to 'A' schedule property. The defendant had no right over the properties. The plaintiff is paying the taxes, house taxes, etc. The defendant without any right over the properties making trouble to the possession and enjoyment. So, the suit is laid for permanent injunction and for costs.

3. The defendant filed written statement, which contains the following averments:-

The properties originally belonged to the defendant's namely Ganesan's paternal junior Uncle Mottaiyan by way of assignment by the Government in Assignment No.7531/1960. With the assistance and aid of the Government funds, Mottaiyan constructed a tiled house on the eastern portion and kept the western portion vacant. Mottaiyan married one Mariyayee as first wife. Mottaiyan performed second marriage with one Nallangal. But no children was born to Nallangal. Later another Nallangal became concubine of Mottaiyan. Nallangal also died without any issues.



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4.Mottaiyan adopted Ganesan and brought him as his own son. Mottaiyan performed the marriage of his daughter namely Mookayee. Later, Mariyayee moved to Namakkal along with daughter namely Mookayee. Mottaiyan executed a Will conferring his share upon the second wife namely Nallangal and vested remainder to Ganesan on 20/06/1991. The original deed was in the custody of Mariyayee. Mottaiyan died on 10/06/1995, the Will came into effect. The defendant namely Ganesan is in possession and enjoyment. But later Mariyayee expressed her willingness come to Thuraiyur and wanted to live in that village. So, the defendant and Nallangal permitted Mariyayee to put up a thatched shed in that property. In the tiled house, the plaintiff's husband namely Sebastin was a tenant. Later problem arose between them. Nallangal and the defendant issued legal notice to Sebastin on 17/07/1999. So, Sebastin vacated the 'A' schedule property.

5.Because of the ill motive, they created a sale deed, dated 01/07/1999 and occupied the properties by making encroachment. To establish the title over the properties and for recovery of possession, the suit in O.S No.463 of 2002 was filed by Ganesan and Nallangal before the Sub Court, Trichy. During the pendency of the proceedings, the present is filed suppressing the facts.



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6.Since the suit in OS No.463 of 2002 was filed before the Sub Court, Trichy in respect of the very same subject matter, after the Civil Court Amendment Act enhancing the jurisdiction of the Munsif court, it appears that that suit was transferred to the file of the District Munsif Court, Thuraiyur, renumbered as OS No.178 of 2004. Since the pleadings are one and the same need not be repeated. Both the suits were tried together and common judgement was pronounced by the trial court, dismissing the suit in OS No.59 of 2003 and decreed the suit in OS No.178 of 2004 as prayed for and the third defendant in OS No.178 of 2004 was directed to hand over the possession on or before 21/01/2015.

7.Against the judgment and decree, the appellant herein filed AS No.47 of 2016 (A.S No.199 of 2014) and AS No.48 of 2014 (AS No.200 of 2014) before the Sub Court, Thuraiyur. Concurring with the decree and judgment of the trial court, those two appeals were dismissed.

8.Against which, these two second appeals were preferred.

9.Heard both sides.



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10. At the time of admission, the following questions of law were framed, which are common in nature.

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(1) Whether the Courts below have erred in coming to the conclusion that Ex.B3 is a genuine Will?

(2) Whether the sale deed dated 01/07/1999 executed by Mookayee in favour of Alosiya is a valid sale deed and whether the appellant is a bonafide purchaser for valuable sale consideration?

(3) Whether the Courts below have erred in appreciating Exs.B5, A23 and A24 in consonance with Sections 6, 39 and 100 of the Transfer of Property Act, 1882?

11. The original ownership over the property is not denied and disputed. It is admitted by both sides that the properties originally belonged to Mottaiyan by way of Assignment by the Government on 21/03/1961. Mottaiyan's



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enjoyment. The construction of the house is not disputed.

The documents produced also shows that Mottaiyan was in enjoyment and put up construction and paying the house taxes under Exs.A3 to A8.

12.Now the main issue is with regard to the Will dated 20/06/1991. Mottaiyan created life interest in favour of the second wife namely Nallangal, vested remainder to the defendant namely Ganesan. The execution of the Will was disputed by the appellant herein. But later it was admitted. But she took a plea that Ganesan released his right over the property by making endorsement in favour of Mookayee. This document is marked as Ex.B4. The signatures of Ganesan are marked as Exs.B1 and B2.

13.To avoid confusion, we will call the parties by their name instead of ranking in the suit.

14.By virtue of this document, Mookayee claimed right over the properties and sold the same to the appellant herein namely Alosiya on 01/07/1999. When the Will was disputed by Alosiya, Ganesan examined the attesting witnesses to the document was examined as PW2 on the side of the Ganesan and he has testified that due



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attestation was made by him in the Will executed by Mottaiyan in favour of Ganesan. Nothing was brought on record to discard the evidence. In fact, as mentioned above, the execution of the Will is admitted, but what is pleaded by Alosiya is that Ganesan released his right in the property. So, we can take that the Will dated 20/06/1991 marked as Ex.A1 was proved on the side of Ganesan.

15. So in the light of the above said, let us go further as to whether the alleged release or abandonment of the property by Ganesan stands established. One thing must be kept in mind. Alosiya is only a purchaser. She may not know or be aware what happened between Ganesan and Mookayee. Only based upon the document, Alosiya can make any claim.

16. In the light of the above, now we will come to the alleged release or abandonment of right by Ganesan. The appellant relies upon Ex.B1 alleged to have been executed by Ganesan. The endorsement reads that neither Ganesan, nor his legal heirs are entitled to the property mentioned in the Will. He alleged to have received Rs.60,000/- towards relinquishment.



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17. Whether this endorsement can be construed as release deed? Ganesan admits that he signed in the endorsement. On the side of the appellant, XW1 was examined to prove the execution of the Ex.B4. In his evidence, he has stated that in respect of the issue between Ganesan and Mookayee, panchayat was arranged in the village. In the panchayat, Mookayee agreed to pay money to Ganesan. He signed as a witness in the document. But it is not the case of the appellant that only Ganesan received the money from Mookayee for releasing his right in the property.

18. Further, it is seen that during the cross examination, he has given a complete contra evidence stating that he was not present when Ex.B4 was written. At the request made by the villagers, he signed in the document. Ex.B4 is the cancellation deed of Will, wherein it is stated that Ganesan received Rs.60,000/- towards expenses made by him in the funeral ceremony and released his right in the property by cancelling the Will. XW1 has given half hearted evidence with regard to this document namely the endorsement under Ex.B4. Other witness is XW2 and he has stated that the issue between them namely Ganesan and Mookayee was settled between them in a panchayat. But the terms of panchayat was not known



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to him. He was not able to remember whether he signed as a witness in the document. He has also stated that he does not know the contents of the document under Ex.B4. So, his evidence also did not fully support the case of the appellant. XW2 has also given a half hearted evidence. He says that a panchayat was arranged in the village over the issue and in that document, he signed as a witness. Even if we say that Ex.B4 was executed in pursuance of the panchayat held in the village over the issue between Ganesan and Mookayee, it is not valid under law as correctly held by the appellate court.

19.First of all, a Will can be cancelled only by the executor and not by a third party. Similarly, a release can be made in respect of the property worth above Rs.100/- only by way of registered release deed. Absolutely, these things were not properly appreciated by the appellant herein. So, the finding of the trial court as well as the appellate court that Ex.B4 is not valid under law is absolutely legal and I find no illegality.

20.With these in mind, now let us go further as to the challenge made by the appellate to the disputed Will.



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21. According to the appellant, the Will was executed by Mottaiyan to delay or defraud or evade the maintenance decree passed against him in OS No.289 of 1991. According to the learned counsel appearing for the appellant, when the Will is executed by the executor with an motive to delay the legal process, then it will amount to invalid document. He is referring to sections 61 and 127 of the Indian Succession Act.

22. Section 61 deals about the Will obtained by fraud and coercion. But here absolutely, there is no evidence on record to show that the Will was obtained by force and coercion, etc. There is no such plea, as mentioned above, such a plea can be taken only by Mookayee and certainly not by any third party.

23. As mentioned above, it is the specific case of the appellant that a compromise was entered, by which Ganesan released his right over the properties. So, this argument runs contra to the appellant's own case.

24. Regarding section 127 of the Indian Succession Act, it does not apply at all. It details about bequeathing, which is contrary to law or morality.



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25. Here, the point of the appellant is that soon after passing of the decree of maintenance, the property of Mottaiyan is saddled with the liability or charge as the case may be; So, naturally the bequeathing made by Mottaiyan is not valid under law. This argument is not correct, because whenever a charge is created over a property, then that charge will go along with the property. Had Mookayee wanted to proceed against the property, then absolutely Ganesan would be liable to pay the maintenance amount out of the property devolved upon him by virtue of the Will. But here, Mookayee died without making any enforcement of maintenance. After the death of Mariyayee, according to the trial court and the appellate court, the claim also dies. On that account, the learned counsel appearing for the appellant would rely upon the following judgments:-

(1) V. Tulasamma and others Vs. V. Sesha Reddi (Dead) by Lrs (CDJ 1977 SC 176); and

(2) Raghavan Vs. Nagammal (CDJ 1978 MHC 179) .

26. As mentioned above, the right to claim maintenance goes along with the property. There can be no second opinion on that. Whether arrears of maintenance is



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a heritable one does not arise in this matter at all.

Now, I am not going into that aspect in detail. As mentioned above, it is nothing, but encumbrance in the property, which cannot be enforced against Mariyayee. But she has not done anything in that direction. This argument is also not available to the third party namely the purchaser.

27.Now coming to the main issue of bona-fide purchaser without notice, whether it will lie against the true owner is the point to be considered.

28.According to the learned counsel appearing for the appellant, the appellant was a tenant. Later, she developed the property and purchased the same, on coming to know that Ganesan released his right in favour of his vendor namely Mookayee. So, his right must be protected and the possession.

29.Per contra, the learned counsel appearing for the respondent would submit that the appellant Alosiya was aware of the Will. He was relied upon the evidence of PW3 over the tenancy of one Sebastin, who is the husband of the appellant. But, there is no such recital in the sale deed of the appellant. Unless the appellant is able



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to establish the fact that she prescribed title over the property by long possession, she cannot maintain the suit for permanent injunction against the true owner. But, there is no such pleading in the written statement to the effect also.

30.Regarding the evidence of PW3, it is seen that he supported the case of Ganesan that the original tenant was the appellant's husband namely Sebastin. Now it is admitted that the appellant is in possession of the property.

31.In the light of the above said discussion, it is clear on record that trouble has arisen over the Will between Ganesan and Mookayee. Some village panchayat was held, in which Ganesan appears to have received money for releasing the right in the property. But no registered document was entered between the parties. Unless there is a registered document releasing the right, then Mookayee cannot claim any legal right over the property. So, this is the major defect in the case of the appellant herein. Since it is a legal defect, it cannot be cured by way of possession.



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32.More-over, in the sale deed effected in favour of the appellant by Mookayee, we find no reference with regard to the execution of the Will by Mottaiyan in favour of Nallangal and vested remainder to Ganesan was cancelled on 17/04/1996. But why that important recital was not made is not clear on record. On any event, the right claimed by the appellant is not legally sustainable. So, the possession also cannot cloth her with any right. She has to necessarily surrender the possession to the true owner namely Ganesan. On that account, the judgment and decree passed by the trial court as well as the appellate court are perfectly legal and call for no interference by this court. Accordingly, the substantial questions of law framed are answered.

33.In the result, both second appeals are **dismissed**. No costs. Consequently, connected Miscellaneous Petition is closed.

18/07/2024

Index:Yes/No
Internet:Yes/No
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To,

- 1.The Sub Court,
Thuraiyur.
- 2.The District Munsif Court,
Thuraiyur.
- 3.The Section Officer,
VR/ER Section,
Madurai Bench of Madras High Court,
Madurai.



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