



S.A.(MD)No.755 of 2014

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 20.09.2024

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A.(MD)No.755 of 2014

and

C.M.P.(MD)No.3638 of 2016

Moorthi

... Appellant / Appellant / Defendant

Vs.

Sevayee (Died)

1.Palaniyammal (Died)

2.Jeyageetha

3.Sivakumar

4.Gangadevi

... Respondents / Respondents / Plaintiffs

(Respondents 2 to 4 are brought on record as LR's of the deceased sole respondent vide order dated 28.02.2020 in C.M.P.(MD)Nos.215 & 216 of 2020 in S.A.(MD)No.755 of 2014 by NSKJ).

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code, to set aside the judgment and decree passed in A.S.No.25 of 2010 on the file of the Sub Court, Pudukottai dated 21.11.2011 confirming the judgment and decree passed in O.S.No.466 of 2004 on the file of the District Munsif Court, Pudukkottai dated 31.12.2009.



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For Appellant : Mr.S.Meenkashi Sundaram, Senior Counsel,
For Mr.P.Ganapathi Subramanian.

For Respondents : Mr.S.Mahadevan,
For Mr.B.S.Meltiue for R2 to R4.

JUDGEMENT

Heard the learned senior counsel for the appellant and the learned counsel for the respondents.

2.The defendant in O.S.No.466 of 2004 on the file of the District Munsif Court, Pudukkottai is the appellant in this second appeal. One Sevayee and Palaniammal (Mother and Daughter) filed the said suit seeking permanent injunction to restrain the defendant from interfering with their possession and enjoyment of the suit property. The suit was decreed as prayed for on 31.12.2009. Questioning the same, the defendant filed A.S.No.25 of 2010 and it was dismissed on 21.11.2011. Challenging the same, this second appeal has been filed.

3.The second appeal was admitted on 28.10.2014 on the following substantial questions of law:-

“i)Whether the plaintiffs can succeed the suit without seeking the relief of declaration when the defendant is seriously disputing the



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execution of sale deed on the basis of which the plaintiffs are claiming title in the suit property? and

ii) Whether the Courts below are correct in holding that Ex.A3 is 30 years old document and the same is presumed to be genuine when the defendant is pointing various discrepancies in the document which creates he probable doubt about the execution and genuineness of the document itself? ”

3.The learned senior counsel for the appellant reiterated all the contentions set out in the memorandum of grounds of second appeal and called upon this Court to answer the substantial questions of law in favour of the appellant and set aside the impugned judgments and decrees and allow the second appeal.

4.Per contra, the learned counsel for the respondents submitted that the impugned judgments and decrees do not call for interference and called upon this Court to dismiss the second appeal.

5.I carefully considered the rival contentions and went through the evidence on record. O.S.No.466 of 2004 is a suit for injunction. The suit property is comprised in old S.No.281/3, Vattapatti village corresponding to new T.S.No.8553/5. The second plaintiff (daughter of first plaintiff) examined



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herself as P.W.1 and one Chidambaram was examined as P.W.2. Exs.A1 to A9 were marked. The defendant examined himself as D.W.1 and one Palani was examined as D.W.2. Exs.B1 to B4 were marked. The case of the plaintiffs is that the suit property which belonged to the father of the defendant was mortgaged in favour of the husband of the first plaintiff vide Ex.A1 dated 28.09.1959. It was re-mortgaged under Ex.A2 dated 05.01.1961. It is the specific case of the plaintiffs that the suit property was sold in favour of the husband of the first plaintiff under Ex.A3 dated 28.09.1962. The plaintiffs also marked Exs.A7 to A9 to show their possession.

6.As rightly pointed out by the learned counsel for the respondents, the defendant had not marked any document to show his possession. Be that as it may, the defendant in his written statement controverted the genuineness of Ex.A3 sale deed dated 28.09.1962. It is however been conceded that the mortgage deeds namely, Exs.A1 and A2 are genuine.

7.The defendant questioned the signature and thumb impression attributed to his father in Ex.A3. In other words, according to the defendant, Ex.A3 is a piece of forgery.



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8.The appellate Court had compared the signature found in Ex.A3 with the signatures found in Exs.A1 and A2 and came to the conclusion that there is not much of difference.

9.Under Section 73 of the Indian Evidence Act, 1872 a Judge is entitled to use his naked eye to effect comparison. Since the second appeal had been admitted and the original records had been called for, I also undertook the very same exercise. Even to my naked eye, the signature found in Ex.A3 grossly varies with the signatures found in Exs.A1 and A2. The father of the defendant is Raman. While spelling the name Raman in Tamil, one has to employ what is known as "இடையின ர்" This alone is grammatically correct way of writing the name. In Exs.A1 and A2, "இடையின ர்" is found. In Ex.A3 what is known as "வல்லின ர்" is found. This in my view is a fundamental difference between the two signatures. Secondly, in fact, "ராமன்" has been spelt as "ரமன்". What is known as "நெடில்" is absent in Ex.A3. Even the style of other letters is at variance. Therefore, the Courts below were completely wrong in coming to the conclusion that there is no difference between the signature found in Ex.A3 and the signatures found in Exs.A1 and A2.



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10.The Courts below have invoked Section 90 of the Indian Evidence Act, 1872 for coming to the conclusion that the signature that purports to be in the handwriting of any particular person is that that of person's handwriting. But this is not a compulsive presumption. When the defendant has challenged the document as a piece of forgery and there is more than a *prima facie* basis to substantiate the said stand, the Courts below ought not have to invoked Section 90 of the Indian Evidence Act, 1872 at all.

11.There is yet another reason for me to interfere. The trial Court had misread the evidence of D.W.1. It had proceeded on the premise as if the defendant had admitted that his father had sold the suit property in favour of the husband of the first plaintiff. I went through the testimony of D.W.1. D.W.1 had taken a clear and categorical stand both in the proof affidavit as well as in the cross examination that his father never sold the suit property in favour of the husband of the first plaintiff under Ex.A3. However, to a question, he answered that he was aware that the suit property had been sold. The awareness about Ex.A3 would not lead to the conclusion that he had admitted that his father sold the property to the husband of the first plaintiff. The construction placed by the Courts below on the testimony of D.W.1 is perverse.



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12. When the defendant had challenged the title of the plaintiffs claimed under Ex.A3, the plaintiffs ought to have amended the suit prayer and included the relief of declaration. The learned senior counsel draws my attention to the decision reported in (2009) 1 MLJ 1001 (SC) [Anathula Sudhakar Vs. P.Buchi Reddy (Died)]. The Hon'ble Supreme Court had categorically held that a prayer for declaration is necessary if the denial of title by the defendant or challenge to the plaintiff's title raises cloud on the title of the plaintiff to the property. In this case, the defendant had definitely succeeded in raising cloud on the plaintiffs' title. In face of such a categorical pleading by the defendant, the suit prayer ought to have been amended. The plaintiffs' failure to do so is fatal to their case. Both the substantial questions of law answered in favour of the appellant. The defendant had not marked any document to show his possession over the suit property. I, therefore, do not give any finding as regard the defendant's possession over the suit property. That issue is left open. Since the plaintiffs failed to seek the relief of declaration of title, the impugned judgments and decrees are set aside and the second appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

20.09.2024

NCC : Yes / No
Index : Yes / No
Internet : Yes/ No
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To:

1. The Sub Court,
Pudukottai.
2. The Principal District Munsif Court,
Pudukottai.

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The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
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G.R.SWAMINATHAN, J.

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