



S.A.(MD)No.776 of 2014

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 25.10.2024

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A.(MD)No.776 of 2014

and

M.P.(MD)No.1 of 2014

and

C.M.P.(MD)No.1316 of 2016

1.R.Sakthivel (Died)

2.Mallika

3.Thangaraja

4.Balamani

5.Kathigairaja

... Appellants

(Appellants 2 to 5 are brought on record as LRs of the deceased sole appellant vide order dated 10.01.2023 made in C.M.P.(MD)No.8539 of 2021 in S.A.(MD)No.776 of 2014 by SSJ)

Vs.

1.Sekar @ Arunasekar

2.Pappammal

K.Shenbagam Pillai (Died)

3.Meenammal

4.Ghandiammal

5.Santhana Krishnan

6.Revathi

7.Mahendran



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8.Ganeshkumar

... Respondents

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Prayer : Second Appeal filed under Section 100 of Civil Procedure Code, to set aside the judgment and decree dated 10.01.2011 made in A.S.No.28 of 2009 on the file of the Sub Court, Periyakulam confirming the judgement and decree dated 19.06.2009 made in O.S.No.234 of 2004 on the file of the District Munsif Court, Periyakulam.

For Appellants : Mr.R.Murugappan

For Respondents : Mr.N.Dilipkumar for R1

JUDGEMENT

Heard the learned counsel for the appellants and the learned counsel for the first respondent.

2.The third defendant in O.S.No.234 of 2004 on the file of the District Munsif Court, Periyakulam filed this second appeal. During the pendency of the second appeal, he passed away and his legal heirs came on record. The first respondent herein namely, Sekar @ Arunasekar filed the said suit seeking the



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relief of declaration that the suit property belongs to him and the fourth defendant / Meenammal and for consequential relief of permanent injunction against the defendants 1 to 3. The suit was decreed as prayed for vide judgment and decree dated 19.06.2009. Aggrieved by the same, the third defendant filed A.S.No.28 of 2009 before the Sub Court, Periyakulam. The first appellate Court dismissed the appeal vide judgment and decree 10.01.2011. Challenging the same this second came to be filed.

3.The second appeal was admitted on 23.01.2015 on the following substantial questions of law:-

“1) Whether the Courts below erred in decreeing the suit even though the plaintiff failed to prove the death of Kameshwari?

2) Whether the Courts below ought to have held that the plaintiff has failed to prove the death of Kameshwari and the due execution of the Will / Ex.A3?

3) Whether the plaintiff ought to have been non suited for having approached the Court with unclean hands by fraudulently claiming that Kameshwari is dead?”

4.The learned counsel for the appellants filed C.M.P.(MD)No.1316 of 2016 for reception of three documents as additional evidence under Order XLI



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Rule 27 of Civil Procedure Code. The learned counsel for the appellants reiterated all the contentions set out in the grounds of the second appeal and called upon this Court to admit additional evidence and set aside the impugned judgments and decrees passed by the Courts below and allow the second appeal as prayed for.

5.Per contra, learned counsel appearing for the first respondent / plaintiff submitted that the impugned judgments and decrees do not call for interference.

6.I carefully considered the rival contentions and went through the evidence on record. The case of the plaintiff is that the suit property belonged to one Kameshwari. She purchased the property vide sale deed dated 08.08.1975. The said Kameshwari was the second wife of one Rajendran, who is none other than the paternal uncle of the plaintiff. Kameshwari passed away and property devolved on her husband / Rajendran. Rajendran also subsequently passed away and the property devolved on Rajendran's mother / Thayammal. Thayammal executed an unregistered Will dated 05.01.1998 in favour of the plaintiff. Since the third defendant set out a rival title, the plaintiff was constrained to institute O.S.No.234 of 2004.



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7. According to the third defendant, Kameshwari was not dead when the suit was instituted. She has an alias name known as Pappammal. Pappammal was shown as first defendant. Pappammal had executed power of attorney dated 13.04.1998 in favour of her brother namely, the second defendant. The second defendant on the strength of the said power attorney executed registered sale deed 12.08.1998 in favour of the third defendant. The case of the third defendant was that since the plaint has been filed with false averments, the suit deserves to be dismissed.

8. The fourth defendant is admittedly the first wife of Rajendran. She conceded the tracing of title made by the plaintiff. She however challenged the execution of Will dated 05.01.1998 by Thayammal.

9. The plaintiff examined himself as P.W.1. One of the attesting witnesses of the Will namely, Subbupillai was examined as P.W.2. Yet another witness namely, Soma Sundaram, S/o.K.Paramasivam was examined as P.W.3. Both these attesting witnesses not only spoke about the execution of Will by Thayammal but also about the factum of death of Kameshwari. The learned counsel for the plaintiff points out that none of the contesting defendants



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entered the witness box. The defendant who had set up the rival title also chose to keep away. If according to him, Pappammal was the actual owner of the property and that her alias name was Kameshwari, then he must have examined the first defendant as witness in support of his contention. The learned counsel for the plaintiff strongly contended that after keeping quiet both during trial as well as appeal, certain documents are sought to be introduced. There is nothing on record to show that Pappammal was Kameshwari. He also pointed out that the defendants have conceded that they are not in possession of the suit property and that the plaintiff is in possession of the suit property. The contesting defendant namely, the third defendant did not file any counter claim. He also added that Somasundaram / D.W.1 had conceded that Pappammal was receiving pension in her capacity as wife of one Kandasamy.

10.I must endorse that the third defendant has miserably failed to substantiate his defence. The moot question that calls for consideration is whether the plaintiff can succeed on the strength of the weakness in the defence. It is well settled that the plaintiff has to succeed on the strength of his own case and he cannot succeed by picking hole in the defence.



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11. It is admitted that Kameshwari originally owned the property. I must endorse the stand of the learned counsel for the plaintiff that the first defendant / Pappammal had not proved that she was the actual Kameshwari who purchased the suit property. It is conceded that Meenammal, the fourth defendant was the first wife of Rajendran. Rajendran had entered into relationship with Kameshwari during the subsistence of marriage of Meenammal. There is nothing on record to show that Kameshwari was the legally wedded wife of Rajendran. Even if I assume that there was some kind of marriage between them, it had taken place during subsistence of the marriage between Rajendran and Meenammal. On account of the death of Kameshwari, I fail to understand as to how the property devolved on Rajendran. Therefore, the very foundation of the plaintiff's case goes. In any event, Kameshwari's death also has not been proved in the manner known to law. The death certificate ought to have been marked. Therefore, I answer the first two substantial questions of law in favour of the appellants. But then, this is not the end of the matter. Admittedly, the suit property is in possession of the plaintiff. The contesting defendant had conceded the same. Therefore, while I set aside the decree of declaration granted in favour of the plaintiff, I decline to interfere with the decree of permanent injunction granted in favour of the plaintiff.



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12.The impugned judgments and decrees are partly modified and the second appeal is partly allowed. No costs. C.M.P.(MD)No.1316 of 2016 is dismissed. Consequently, connected miscellaneous petition is closed.

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NCC : Yes / No
Index : Yes / No
Internet : Yes/ No
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Note:

The Registry is directed to return the original documents filed along with C.M.P.(MD)No.1316 of 2016 after the appellants substitute the same with xerox copy.

To:

1.The Sub Court,
Periyakulam.

2.The District Munsif Court,
Periyakulam.

Copy to:

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



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G.R.SWAMINATHAN, J.

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