

(2010) 02 MAD CK 0127

In the Madras High Court

Case No : Second Appeal No. 398 of 2003 and C.M.P. No. 3590 of 2003

Karuppayee Ammal

APPELLANT

Vs

Ramasamy Udayar and Govindasamy Udayar

RESPONDENT

Date of Decision : 17-02-2010

Acts Referred:

Evidence Act, 1872 — Section 61, 63, 68
Hindu Succession Act, 1956 — Section 15(2)

Citation : (2010) 02 MAD CK 0127

Hon'ble Judges : M. Duraiswamy, J

Bench : Single Bench

Advocate : Nilopher, for S. Venkateswaran, for the Appellant; S.V. Jayaraman, S.C. for N. Mani Narayanan, for the Respondent

Final Decision : Allowed

Judgement

M. Duraiswamy, J.—The above Second Appeal arises against the judgment and decree in A.S. No. 46 of 2001 on the file of Principal Sub

Court, Virudhachalam reversing the Judgment and Decree in O.S. No. 58 of 1996 on the file of District Munsif cum Judicial Magistrate, Tittagudi.

2. The plaintiff in the suit is the appellant in the above second appeal and the respondents are the defendants in the suit.

3. The plaintiff filed the suit in O.S. No. 58 of 1996 on the file of District Munsif cum Judicial Magistrate, Tittagudi for declaration and injunction.

4. The brief case of the plaintiff in the suit is as follows:

(i) According to the plaintiff, the suit property originally belonged to one Solaiappa Udayar. He had two sons namely, Mariappa Udayar and

Sengan Udayar. Mariappa Udayar had two daughters viz., plaintiff and one Sengamalam. Sengam Udayar had no issue. His wife Sundari was the

first defendant in the suit and she died pending suit. The defendants 2 and 3 are the sons of Sundari's sister Alagammal. Sengan Udayar looked

after the plaintiff's mother, plaintiff and her sister. Under partition deed dated 21.9.1963, Sengan Udayar gave the properties to the plaintiff and

her sister.

(ii) According to the plaintiff, the defendants instigated Sengan Udayar to file the suit in O.S. No. 224 of 1967 against the plaintiff, her husband and

her sister. In the said suit, an ex-parte decree was passed. In 1974, Sengan Udayar executed a Will in favour of the defendants. Subsequently, out

of his love and affection towards the plaintiff, he executed his last Will on 7.8.1981 in favour of the plaintiff. The said Sengan Udayar died on

10.11.1983. After his death, the plaintiff had been in possession and enjoyment of the suit property.

(iii) According to the plaintiff, if the Will is not proved, then the properties would devolve on the plaintiff u/s 15(2)(b) of the Hindu Succession Act

as on Sengan Udayar's death, the properties devolved on his wife Sundari and on her death, on the plaintiff as the sole surviving heir. Since the

defendants tried to interfere with the possession of the property, the plaintiff filed the suit.

5. The brief case of the defendants are as follows:

According to the defendants, after the death of Solaiappa Udayar, all the family properties devolved on Sengan Udayar as the surviving co-

parcener and he had ousted the others. Further, defendants denied the partition in the year 1963. According to the defendants, Sengan Udayar

executed a registered Will in their favour and he did not execute any Will in favour of the plaintiff. Hence, defendants prayed for dismissal of the

suit.

6. Before the trial court, on the side the plaintiff, three witnesses were examined and 8 documents, Ex.A-1 to Ex.A-8 were marked and on the side

of the defendants also three witnesses were examined and 45 documents, Ex.B-1 to Ex.B-45 were marked. Document dated 1.6.1998 was

marked as court document, Ex.C-1.

7. The trial court after taking into consideration, the oral and documentary evidences of both the parties, decreed the suit.

8. Aggrieved over the judgment and decree of the trial court, the defendants 2

and 3 preferred appeal in A.S. No. 46 of 2001 on the file of

Principal Sub Court, Virudhachalam and the lower appellate court also after taking into consideration the materials available on record, reversed

the findings of the trial court and allowed the appeal.

9. Aggrieved over the judgment and decree of the lower appellate court, the plaintiff has filed the above second appeal.

10. Heard Mrs. Nilopher, learned Counsel appearing for the appellant and Mr. S.V. Jayaraman, Senior counsel for the respondents.

11. At the time of admission of the above Second Appeal, the following substantial question of law arose for consideration:

Whether in law the lower appellate court was right in concluding that Ex.B-3 Will, merely because the execution is admitted by the appellant,

overlooking that it has to be proved strictly in accordance with Section 68 of the Hindu Succession Act and Section 61 of the Indian Evidence

Act?

12. On a careful consideration of the materials available on record and the submissions made by both the counsels, it could be seen that since the

appellant did not take care of Sengan Udayar, he bequeathed the properties in favour of the respondents/defendants 2 and 3. On 7.8.1981 under

Ex.A-1 Will, the said Sengan Udayar bequeathed the properties equally to his wife and the appellant. The said will was attested by P.W.2. P.W.2

in his evidence has clearly stated about the due execution of Ex.A-1 Will and also stated that the testator executed the Will in a sound and

disposing state of mind.

13. On a perusal of evidence of P.W.2, the attesor of Ex.A-1 Will, it is clear that his evidence satisfies the provisions of Section 68 of the Indian

Evidence Act and Section 63 of the Indian Succession Act. By examining P.W.2, the attesor, the appellant/plaintiff has proved the due execution

of Ex.A-1 Will.

14. The respondents examined D.W.2, the attesor of Ex.B-3 Will dated 22.11.1974. The said will is a registered Will. The execution of Ex.B-3

Will has not been denied by the appellant/plaintiff. In fact, even in Ex.A-1 Will, the execution of Ex.B-3 has been mentioned since Ex.A-1 will is

the last Will written by Sengan Udayar. He cancelled his earlier Will namely, Ex.B-3 will dated 22.11.1974. Under Ex.A-1 Will, Sengan Udayar

bequeathed half share in his properties to the appellant/plaintiff and the remaining half share to his wife. The lower appellate court found that the appellant/plaintiff failed to prove that the attesor of Ex.A-1 Will and the Scribe are not alive and no death certificate was produced.

15. Since u/s 68 of the Indian Evidence Act, examination of one attesting witness is sufficient for proving the Will, in the case on hand P.W.2, who is the attesor of Ex.A-1 was examined and his evidence is sufficient to prove the will. When P.W.2 has clearly spoken to, about the due execution of the Will and the disposing state of mind of the testator Sengan Udayar, the lower appellate court ought not have disbelieved the evidence of P.W.2.

16. The lower appellate court also found that Sengan Udayar's entire proprieties were bequeathed in favour of the appellant/plaintiff. Factually it is incorrect. Under Ex.A-1 will dated 7.8.1981, Sengan Udayar bequeathed only half share of his properties in favour of the appellant and remaining half share was allotted to his wife. Therefore, the findings of the lower appellate court cannot be sustained with regard to Ex.A-1 will.

17. With regard to possession of the appellant/plaintiff, it could be seen that originally patta was issued in the name of the appellant/plaintiff and after the filing of the suit, the patta got transferred in respondents/defendants' name. The said fact was also admitted by D.W.1. Therefore, it is clear that respondents are paying the tax only after filing of the suit and the possession of the suit properties remained with the appellant/plaintiff before the filing of the suit.

18. Therefore, by Ex.A1 Will dated 7.8.1981 Sengan Udayar cancelled his earlier Ex.B-3 Will dated 23.11.1974. Therefore, by virtue of Ex.A-1 will dated 7.8.1981, the appellant/plaintiff is entitled to the properties as mentioned in the Will. Further, from the documents marked on the side of the appellant/plaintiff, it could be seen that she is in possession and enjoyment of the suit properties.

19. In these circumstances, I am of the view that the judgment and decree of the lower appellate court made in A.S. No. 46 of 2001 is liable to be set aside. Accordingly, the judgment and decree of the lower appellate court are set aside. The judgment and decree of the trial court made in O.S. No. 58 of 1996 are restored. The substantial question of law is decided in

favour of the appellant/plaintiff. The above second appeal is allowed. Consequently, connected miscellaneous petition is closed. However, there shall be no order as to costs.