

Selvaraj Vs. Somasundari

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SooperKanoon Citation : sooperkanoon.com/965400

Court : Chennai

Decided On : Mar-28-2013

Judge : G. Rajasuria

Appellant : Selvaraj

Respondent : Somasundari

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED :

28. 03.2013 Coram: THE HONOURABLE MR.JUSTICE G. RAJASURIA
S.A.No.597 of 1999 and M.P.No.1 of 2011 Selvaraj ... Appellant vs.
1.Somasundari 2.Gnanasekaran 3.Kalaichelvi 4.Rajendran 5.Dhanalakshmi
Ammal 6.Chandrasekaran 7.Vanavalli(died) 8.Arumugham 9.Chellamuthu(died)
10.Chellammal ..Respondents This Second Appeal is focussed as against the
judgment and decree dated 3.11.2010 passed by the subordinate Judge,
Maduranthakam, in A.S.No.5 of 2007, confirming the judgment and decree dated
29.4.2005 passed by the District Munsif Judge, Maduranthakam, in O.S.No.82 of
1997. For appellant : Mr.S.V.Jayaraman,sr.counsel Mr.P.Gopiraja For respondents
: Mr.V.Manohar for R1 JUDGMENT This Second appeal is focussed by D3
animadverting upon the judgment and decree dated 3.11.2010 passed by the
Subordinate Judge, Maduranthakam, in A.S.No.5 of 2007, confirming the
judgment and decree dated 29.4.2005 passed by the District Munsif Judge,
Maduranthakam, in O.S.No.82 of 1997, which was one for declaration and for
delivery of possession.

2. The epitome and the long and the short of the germane facts absolutely necessary for the disposal of this second appeal would run thus: (i)The first respondent herein, namely, Somasundari, as plaintiff filed the suit seeking the following reliefs: "(a)to declare her title to the properties described in the schedule hereunder; (b)to direct the defendants to deliver possession thereof to the plaintiff; (c)to direct the defendants to pay the plaintiff future profits from the date of plaint till the date of delivery of possession; (d)to direct the defendants to pay the plaintiff her costs of suit." (extracted as such) as against the defendants in respect of the suit properties on the main ground that certain properties were owned jointly by the deceased lessors, namely, Govindaraja Mudaliar, Subramania Mudaliar and Vedachala Mudaliar, and they divided their joint family properties during the year 1941. (ii)The properties described in the schedule of the plaint were allotted to the share of the said Vedachala Mudaliar, who died on 30.12.1978 leaving behind him, his only legal heir-the plaintiff herein. (iii)After the death of Vedachala Mudaliar, his elder brother Subramania Mudaliar, was managing the suit properties of Vedachala Mudaliar for the benefit of the plaintiff. (iv)Subramania Mudaliar died during July 1989 and thereafter, his children defendants 1 to 3 were managing the suit properties. (v) The plaintiff was visiting the suit properties and she was also getting income arising out of it till the death of Subramania Mudaliar. However, defendants 1 to 3 developed hostile attitude towards the plaintiff; whereupon they executed a sham sale deed in favour of the 5th defendant-Dhanalakshmi Ammal alienating the land measuring an extent of 1.09 cents in S.No.268/3. (vi)The plaintiff issued notice, which evoked a reply with untenable claims from D2, who would contend falsely as though Vedachala Mudaliar, i.e. the father of the plaintiff executed a Will on 23.5.1978 bequeathing his properties to D3 and D4. Accordingly the plaintiff would pray for declaring her title to the suit properties and for recovery of possession of the same from the defendants. 3.Per contra D2 filed the written statement challenging and impugning the averments in the plaint. 4.D3 filed the written statement denying and refuting, the averments/allegations in the plaint. The gist and kernal, the warp and woof of it would run thus: (i)The properties in the hands of Vedachala Mudaliar happened to be his self-acquired properties and not joint family properties and in such a case, the suit properties and other properties did not belong to Govindaraja Mudaliar,

Subramania Mudaliar and Vedachala Mudaliar jointly. There were no such partition among them. The suit properties and other properties happened to be the self-acquired properties of one Ammakannu Ammal-the sister of the father of Govindaraja Mudaliar, Subramania Mudaliar and Vedachala Mudaliar. She executed a registered Will dated 10.4.1941 in favour of those three brothers to enjoy the suit properties equally, however stipulating therein that Vedachala Mudaliar shall have life estate and his children should have absolute interest in those properties. (ii) During the year 1945 all the brothers have orally divided those properties. Later, on 7.8.1946, they have reduced the same into writing as an aid to memory by way of the unregistered Koorchit-Ex.A1 and in that the 'C' scheduled property was allotted to the share of Vedachala Mudaliar. As such, the suit properties happened to be the self-acquired properties of Vedachala Mudaliar, who sold item Nos.1 to 9 in the first schedule, in Irumbebu Village, Madurandagam Taluk, to one Eluzabeth Rajakumari, 14 years ago, and those properties are not with the defendants and the plaintiff also did not question the same. (iii) The suit is bad for non-joinder of necessary parties. (iv) The said Vedachala Mudaliar during his life time, while he was in a sound state of mind, executed a Registered Will in favour of D3 and D4 on 15.3.1978 bequeathing all his properties in Vallakottai area, more specifically described as items 1 to 9, in the second schedule of the plaint. (v) After the death of Vedachala Mudaliar, the Will dated 15.3.1978 came into effect and D3 and D4 became absolute owners of the same and D1 is having no right over the suit properties. (vi) In fact, part of the properties were also sold by D3 and D4. Accordingly, the 3rd defendant would pray for the dismissal of the suit. 5.D4 filed a separate written statement, almost in line with the written statement filed by D3 claiming title under the Will dated 15.3.1978 executed by Vedachla Mudaliar. 6.Whereupon issues were framed. Up went the trial, during which, the plaintiff examined herself as P.W.1 and marked Ex.A1. The third defendant examined himself as D.W.1 and Exs.B1 to B20 were marked on the defendants' side.

7. Ultimately, the trial Court decreed the suit and as against which, D3 alone filed the appeal for nothing but to be dismissed by the first appellate Court, confirming the judgment and decree of the trial Court. D4 remained exparte in the first appeal, wherefore as agreed to by both sides the L.Rs of D4 were not added in the second

appeal consequent upon his death. 8.Challenging and impugning the judgments and decrees of both the Courts below, D3 preferred this second appeal on various grounds and also suggesting the following substantial questions of law. "a)Whether the lower appellate is correct in holding that the father of the plaintiff has no right to execute the will dated 25.3.1978 in the absence of specific pleading regarding the same by plaintiff in the plaint. b)Whether the lower appellate is correct in relying upon the Will dated 10.4.1941 executed by maternal grand mother of Vedachala Mudaliar in favour of Vedachala Mudaliar for dismissing the appeal suit when the same is not produced before the Court. c)Whether the lower appellate court is correct in confirming the judgment and decree of the trial Court when the 3rd defendant proved the will dated 25.3.1978 by the father of the plaintiff as genuine by examining the attesting witnesses as D.W.2 and D.W.3. d)Whether the lower appellate correct in holding that the plaintiff father has acquired only the life interest through the will dated 10.4.1941 executed by maternal grand mother of Vedachala Mudalia and not absolute right upon partition of the property on made on 7.8.1946? (extracted as such) 9.The learned Senior counsel for the appellant/D3 would pyramid his arguments, which could succinctly and precisely be set out thus: (i)It is not correct to state that Vedachala Mudaliar-the father of the plaintiff had no right to execute the Will dated 23.5.1978 and in fact, in order to fortify and buttress the contention of the defendants, the alleged Will dated 10.4.1941 executed by Ammakannu Ammal, was not produced by the plaintiff. (ii)The propounders of the Will of Vedahala Mudaliar owing to inadvertence did not take steps to prove the said Will dated 25.3.1978 adhering to Sections 68 and 69 of the Indian Evidence Act. Accordingly, the learned Senior counsel for the appellant/D3 would pray for setting aside the judgment of the first appellate Court and for remitting the matter back to the first appellate Court, so as to give due opportunity to the parties to adduce better additional evidence and for dealing with the appeal in accordance with law. 10.Per contra, the learned counsel for the plaintiff would pyramid his arguments, oppugning and impugning the arguments on the side of D3, which could succinctly and precisely be set out thus: (i)Both the Courts below taking into account the pros and cons of the matter appropriately gave a finding that the Will dated 25.3.1978 executed by Vedachala Mudaliar in favour of the defendants was not proved and that the plaintiff being the

only legal heir of Vedachala Mudaliar was entitled to the reliefs prayed in the suit. (ii)According to the learned counsel for the plaintiff, apparently there is no error in the judgment of the first appellate Court and the second appeal has to be dismissed. 11.Whereupon, I decided to formulate the following substantial questions of law to the knowledge of both sides: (i)Whether the Courts below were justified in not insisting for the production of the Will dated 10.4.1941 executed by Ammakannu Ammal in favour of the three persons, namely, (i)Givindara Mudaliar (ii) Subramania Mudaliar and (iii)Vedachala Mudaliar and whether the propounders of the Will were justified in not producing the same before the Court for proper adjudication, despite in Ex.A1-the Koorchit there is reference to the said Will, in which, as per the oral evidence available, Ammakannu Ammal gave only life estate in favour of Vedachala Mudaliar and absolute right in favour of his child? (ii)Whether the appellant/D3 should be given one more opportunity to prove the Will-Ex.B1 dated 25.3.1978 executed by Vedachala Mudaliar, by adhering to Sections 68 and 69 of the Indian Evidence Act? (iii)Whether there is any illegality in the judgment of the first appellate Court? 12.A mere running of the eye over the available records would reveal that indubitably and indisputably one Ammakannu Ammal was the original owner of the suit properties and other properties, who executed a Will dated 10.4.1941, but that Will was not produced; however, there is reference to that Will in Ex.A1-the Koorchit. 13.It could be seen from the records that as per the Will dated 10.4.1941, even though not produced, there is a clause in it to the effect that Vedachala Mudaliar-the father of the plaintiff was given with only life estate and the absolute interest was given in favour of the children of Vedachala Mudaliar. 14.If that be so, then that would be a ground for the plaintiff to lay claim over the suit properties on the ground that the Will dated 25.3.1978 (Ex.B1) executed by Vedachala Mudaliar in favour of the defendants, would be hit by that restrictive clause. 15.It is also the contention of the plaintiff that once the Will dated 25.3.1978-Ex.B1 executed by Vedachala Mudaliar in favour of the defendants goes away, the properties of Vedachala Mudaliar would come to her directly as the sole legal heir of Vedachala Mudaliar. According to the plaintiff, in either way her right over the suit properties has to be upheld. 16.However, the learned Senior counsel for D3/the appellant would submit that the said Will dated 10.4.1941 executed by one Ammakannu Ammal itself was not produced and

without producing a document, as per Indian Evidence Act there is no question of waxing eloquence on such a document. 17.I would like to agree with the contention of the learned Senior counsel for the appellant/D3 that no evidence could be let in relating to a document, without producing it. 18.The first appellate Court placed reliance on the Will dated 10.4.1941 executed by Ammakannu Ammal even though it was not produced and marked, for holding that Vedachala Mudaliar had only life estate and he had no right to execute Ex.B1-the Will. As per the trite law, the said Will dated 10.4.1941 should have been produced and proved before the propounder of the Will could press into service the said Will as a piece of document and mere reference to it in the unregistered Koorchit-Ex.A1 by itself would not amounting to proving the Will of Ammakannu Ammal; as such the finding of the first appellate Court based on such evidence is liable to be set aside. 19.The existence of the Will dated 10.4.1941 is beyond doubt, because that is being referred to in Ex.A1-the Koorchit, however that Will should be produced and proved by the propounder of that Will. As such, I am of the considered view that opportunity has to be given to either party to produce the said Will dated 10.4.1941 executed by Ammakannu Ammal and prove it in the way known to law. 20.It is a trite proposition of law that a Will cannot be looked into by the Court unless it is proved in accordance with Sections 68 and 69 of the Indian Evidence Act, as the case may be. But in this case, the propounder of the Will, namely, D3/the appellant herein had not taken proper steps to prove it. 21.At this juncture, I would like to refer to the famous proposition that "Every trial is voyage of discovery in which truth is the quest", as found evidenced in (i) 2012(1) MWN (Civil) 840 (S.C.) [Maria Margarida Sequeria Fernandes and others vs. Erasmo Jack de Sequeria (dead) through L.Rs.] Certain excerpts from it would run thus: "36. In Ritesh Tiwari and another vs. State of Uttar Pradesh and others, 2010(10) SCC 677. this court reproduced often quoted quotation which reads as under: "Every trial is voyage of discovery in which truth is the quest".

37. This court observed that the power is to be exercised with an object to subserve the cause of justice and public interest and for getting the evidence in aid of a just decision and to uphold the truth.

38. Lord Denning, in the case of *Jones v. National Coal Board*, 1957 (2) QB 5, has observed that: "In the system of trial that we evolved in this country, the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of the society at large, as happens, we believe, in some foreign countries." 39. Certainly, the above, is not true of the Indian Judicial System. A judge in the Indian System has to be regarded as failing to exercise its jurisdiction and thereby discharging its judicial duty, if in the guise of remaining neutral, he opts to remain passive to the proceedings before him. He has to always keep in mind that "every trial is a voyage of discovery in which truth is the quest." In order to bring on record the relevant fact, he has to play an active role; no doubt within the bounds of the statutorily defined procedural law.

51. In the administration of justice, judges and lawyers play equal roles. Like Judges, lawyers also must ensure that truth triumphs in the administration of justice.

52. Truth is the foundation of justice. It must be the endeavour of all the judicial officers and judges to ascertain truth in every matter and no stone should be left unturned in achieving this object. Courts must give greater emphasis on the veracity of pleadings and documents in order to ascertain the truth." (ii) 2010(10) SCC 67.[*Ritesh Tiwari and another vs. State of Uttar Pradesh and others*]. Certain excerpts from it would run thus: "37. Section 165 of the Evidence Act, 1872 empowers the court to ask questions relevant, irrelevant, related or unrelated to the case to the party to ascertain the true facts. The party may not answer the question but it is not permitted to tell the court that the question put to him is irrelevant or the facts the court wants to ascertain are not in issue. Exercise of such a power is necessary for the reason that the judgment of the court is to be based on relevant facts which have been duly proved. A court in any case cannot admit illegal or inadmissible evidence for basing its decision. It is an extraordinary power conferred upon the court to elicit the truth and to act in the interest of justice. A wide discretion has been conferred on the court to act as the exigencies of justice require. Thus, in order to discover or obtain proper proof of the relevant facts, the court can ask the question to the parties concerned at any time and in any form. "Every trial is voyage of discovery in which truth is the quest". Therefore,

power is to be exercised with an object to subserve the cause of justice and public interest, and for getting the evidence in aid of a just decision and to uphold the truth. The purpose being to secure justice by full discovery of truth and an accurate knowledge of facts, the court can put questions to the parties, except those which fall within exceptions contained in the said provision itself (vide *Jamatraj Kewalji Govani v. State of Maharashtra and Zahira Habibulla H. Sheikh vs. State of Gujarat*). 22.No doubt, D3 should have been diligent enough in proving the Will dated 25.3.1978 purported to have been executed by Vedachala Mudaliar, but he failed to do so. 23.Accordingly, the substantial questions of law are answered as under: Substantial Question of Law No.(i) is decided to the effect that the Courts below were not justified in not insisting for the production of the Will dated 10.4.1941 executed by Ammakannu Ammal in favour of the three persons, namely, (i)Givindara Mudaliar (ii) Subramania Mudaliar and (iii)Vedachala Mudaliar and the propounders of the Will also were not justified in not producing the same before the Courts below for proper adjudication. Substantial Question of Law No.(ii) is decided to the effect that the appellant/D3 should be given one more opportunity to prove the Will-Ex.B1 dated 25.3.1978 executed by Vedachala Mudaliar, by adhering to Sections 68 and 69 of the Indian Evidence Act.

24. On balance, in view of the discussion supra and in the facts and circumstances of this case, I am of the view that the truth has to be culled out and the matter has to be remitted back to the first appellate Court, namely, the subordinate Judge, Maduranthakam, with the following mission. Both sides shall be given due opportunity to adduce additional oral and documentary evidence on the aforesaid line and after hearing both sides, the first appellate Court shall dispose of the matter within a period of three months from the date of receipt of a copy of this order.Both sides shall appear before the first appellate Court on 29.4.2013. 25.On hearing this judgment, the learned counsel for the plaintiff would make an extempore submission that the appellant/D3 is trying to encumber, alienate and modify the properties, however, the learned Senior counsel for the appellant/D3 would deny the same. 26.In order to disambiguate the ambiguity if any, I make it clear that status-quo presenti should be maintained till the disposal of the appeal by the first appellate Court and accordingly it is ordered. 27.The second appeal is disposed of accordingly. No costs. Consequently, connected miscellaneous

petition is closed. Msk 28.3.2013 Index:Yes Internet:Yes To 1.The subordinate Judge, Maduranthakam. 2.The District Munsif Judge, Maduranthakam. G.RAJASURIA, J.

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