



A.S.No. 315 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.10.2023

CORAM:

THE HON'BLE MRS.JUSTICE T.V.THAMILSELVI

A.S.No. 315 of 2022
and
C.M.P.No. 11834 of 2023

E.S.Selambanan
S/o. A.Sennimalai gounder

... Appellant

Vs.

A. Sennimalaigounder (died)

1. E.S.Appuswamy,
S/o. A.Sennimalaigounder
2. V.Muthayammal,
W/o. Late E.S.Venkidusamy
3. K.Sellammal,
W/o. C.Komarasamy

.. Respondents

PRAYER : Appeal Suit filed under Sec.96 of Civil Procedure Code r/w
Order 41 Rule 1 of Civil Procedure Code, praying to set aside the



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judgment and decree dated 29.04.2022 passed by the learned I Addl.

District Judge, Erode in I.A.No. 7 of 2020 in O.S.No.210 of 2011.

For Appellant : Mr.R.Rajarajan

For Respondents : Mr.D.Selvaraju

JUDGMENT

Challenging the impugned order passed in I.A.No.7 of 2020 in O.S.No.210 of 2011 by the I Addl. District Judge, Erode, the 1st defendant preferred this appeal.

2. For the sake of convenience, the parties are referred as per the ranking in the suit.

3. Before the trial court, the 2nd defendant filed an application in I.A.No. 7 of 2020 under Order 20 Rule 18 and Sec.151 of C.P.C. praying to pass a supplementary preliminary decree to allot 1/5th share to the petitioner. As per the Will dated 28.11.2011 executed by his father A.Sennimalai Gounder, 1/5th share in the suit property was bequeathed in favour of him, as he died on 08.10.2020 without power of alienation and encumbrance. The



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said application was resisted by the 1st defendant stating that during the life time of his father Sennimalai Gounder, he never executed any deed in favour of petitioner and the said document should be the outcome of fraud and undue influence made by the petitioner and his father also never had a testamentary capacity during that period, thereby claimed that the said Will was fraudulent one. However, the 2nd defendant prayed to pass a supplementary preliminary decree.

4. Before the trial court, beneficiary of the Will was examined as P.W.1 and one of the attester of the Will was examined as P.W.2. The original Will Ex.P1 and the signature of P.W. 2 in the Will Ex.P1 is marked as Ex.P2. On the side of petitioner, P.W.1 and P.W.2 were examined and no evidence was adduced on the side of respondents. On considering evidence on record as well as based on Ex.P1 Will, the trial judge held that based on the evidence of P.W.2, Sennimalai Gounder executed a Will Ex.P1 on 28.11.2011 out of his own will and volition and without the instigation of anybody, when he was in sound disposing state of mind, he affixed his signature and thumb impression in all the objects of Ex.P1 Will in the



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presence of witness, thereby concludes that the Will is true one and the same was proved by the petitioner as required under Sec.68 of Evidence Act. Further, the trial judge also held that non-examination of other witnesses is not fatal to the case, however P.W.2 evidence is sufficient to declare the Will as genuine one, thereby the petition was allowed and a supplementary preliminary decree was passed. Aggrieved over the same, the 1st respondent preferred this appeal.

5. The learned counsel for appellant would submit that no reason was assigned by the testator Sennimalai Gounder for not giving share to other son and daughter and the beneficiary of the Will was a dominating person over his father at the time of alleged execution of the Will and the witnesses of the said Will also close associate of the beneficiary, thereby the execution and attestation of the alleged Will is surrounded by suspicious circumstances and the same was not removed by the beneficiary of the Will. Therefore, the court below held that the Will is valid and genuine one as such is total misconception of fact and law and liable to be set aside. Further, he would submit that even as per the terms of the Will, life interest



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was given to his wife Kuppayammal, but she was not aware of the same and it would also amount to suspicious circumstances, but it was not properly appreciated by the trial judge. Further, the trial judge failed to take note of the fact that at the time of alleged Will, the testator is more than 85 years old and he was not in sound state of mind, besides during his life time, before the courts below he has not disclosed that there was a Will executed in favour of beneficiary. Despite that the Will was declared as valid by the trial court is liable to be set aside.

6. By way of reply, the learned counsel for 1st respondent would submit that his father/testator was in sound disposing state of mind executed a Will in favour of beneficiary much earlier in the year of 2011 in respect of undivided 1/5th share in the suit property, thereafter he died on 08.01.2020. After his demise, Will came into force, thereby his 1/5th share devolves upon him and as a preliminary decree was passed, he filed the present application to pass a supplementary preliminary decree and to prove the said Will, he examined one of the testator, who clearly deposed about the sound disposing state of mind of the Testator as well as the execution of Will and



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the same was rightly appreciated by the trial judge, which needs no interference. Hence, he prayed to dismiss this appeal as no merit.

7. Heard both sides. According to the appellant/1st defendant, he disputed the Will executed by his father marked as Ex.P1 dated 28.11.2011 stating that his brother/2nd defendant fraudulently obtained signature in the said Will in his favour from his father with the help of his associate and his friend, who are scribe and attester of the Will, thereby the said Will was surrounded by suspicious circumstances, which was not removed by 1st respondent/2nd defendant beyond reasonable evidence, but the trial judge failed to appreciate those facts and circumstances around the said Will. Hence, he prayed to set aside those findings.

8. The foremost point is to be decided as follows :-

- (1) whether the Will was executed by Sennimalai gounder out of his own will and volition?
- (2) whether the said Will is surrounded by suspicious circumstances as alleged by the appellant/1st defendant herein?



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Admittedly, Sennimalai gounder, as a father filed a suit against his son and daughters/defendants 1 to 4 for partition claiming 1/5th share in the suit property. In that suit, the 1st defendant is the contesting defendant disputed the plaintiff's claim stating that some of the items of properties are exclusively belong to him and other items are the joint family properties. Furthermore, the 2nd defendant, who is an advocate by profession filed a separate written statement substantively supporting the case of plaintiff, and daughters/defendants 3 and 4 accepted the case of plaintiff and they have paid the court fee and praying to allot their 1/5th share in the suit properties. After full-fledged trial, a preliminary decree was passed allotting 1/5th share in favour of plaintiff in respect of A and B schedule and in respect of C and D properties, the relief was not granted. Aggrieved over the same, appeal suit was preferred.

9. Both plaintiff and 1st defendant preferred appeal suits before this court in A.S.Nos.534, 960 and 1005 of 2015. The first appellate court independently analysed the facts and circumstances, allowed the appeals in A.S.Nos.534 and 960 of 2015 and dismissed the appeal in A.S.No. 1005 of



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2015 and modified the decree passed by the trial court, thereby plaintiff and the defendants 1 to 4 entitled 1/5th share in respect of A, B, C and D schedule properties on 10.02.2017. Thereafter, to pass a final decree, I.A.No.167 of 2018 was filed, in which commissioner was appointed and he filed his report. In the meanwhile, on 08.01.2020, the plaintiff Sennimalai gounder died, but during his life time, he executed a Will dated 28.11.2011 in favour of one of his son, 2nd defendant as his last testament. Based on that, beneficiary/2nd defendant filed an application to pass a supplementary preliminary decree and the same was allowed by the trial judge. As the 2nd defendant claimed himself as beneficiary under the Will dated 08.01.2020, he is bound to prove the execution and attestation of the Will under Sec.68 of Evidence Act. To prove the same, he examined one of the attesor Karthikeyan as P.W.2 and the original Will was marked as Ex.P1. Based on that, the beneficiary/2nd defendant would submit that he proved the Will as required under law, but the contesting 1st defendant, who is the elder son of Sennimalai Gounder would submit that the Will was fraudulently executed by the beneficiary, who was advocate by profession by abusing his position as well as his colleague and one of the litigant, made him as scribe and



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attestor of the Will. Thereafter, without knowledge of his father, he obtained the signature in alleged Will from him fraudulently, thereby contended that the Will is surrounded by suspicious circumstances. Considering that, on perusal of record, it reveals that the alleged Will was marked as Ex.P1 dated 28.11.2011, which was registered on 28.11.2021.

10. Furthermore, the suit for partition was filed by the testator Sennimalai gounder on 30.09.2011 and after three months from the date of filing of suit, the plaintiff's father said to be executed a Will in favour of his son/2nd defendant. Admittedly, the testator Sennimalai gounder was died on 08.01.2020 nearly about 9 years later after the execution of alleged Will. Admittedly, the said Sennimalai gounder was examined as P.W.1 in the suit proceedings much earlier in the year of 2013. One Karthikeyan said to be the testator was examined as P.W.2. Admittedly, the beneficiary of the Will viz., 2nd defendant is the advocate by profession. According to the respondent/1st defendant, the said Karthikeyan is closely known to the beneficiary and as advocate, he conducted the case for the said Karthikeyan in the criminal case before the Judicial Magistrate-II, Erode. During the



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cross-examination, the witness Karthikeyan P.W.2 admits this fact that his counsel was the 2nd defendant/beneficiary.

11. Furthermore, the learned counsel for appellant would submit that a criminal case was filed against him based upon a false allegations made through his father in C.C.No. 175 of 2018, which was pending before the Judicial Magistrate-II, Bhavani. Only the said Karthikeyan, who was shown as eye-witness in the criminal proceedings was examined as P.W.2. To that effect, the judgment rendered in C.C.No.175 of 2018 produced on the side of appellant as additional document, which reveals the said fact. Furthermore, the appellant would also content that at the instigation of his brother/1st respondent without knowledge of his father, a false complaint was said to be given and in the trial proceedings, his father was not made to appear and only at the instance of appellant, advocate commissioner was appointed and he was examined through advocate commissioner, since because the alleged complaint was given by his father without knowing the contents of the said complaint at the instigation of beneficiary shows that he was not made to appear before the trial proceedings. To prove all those



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facts, he has produced 10 documents as additional evidence and all were pertaining to C.C.No.175 of 2018 and prayed to receive the same as additional evidence and to that effect, he filed a petition in C.M.P.No.11834 of 2023 before this court, since those documents are court records, as there is no possibility for manipulating the same and receiving of the said documents would not prejudice the right of respondent herein, besides those documents are necessary to prove the existing circumstances for execution of the Will. Therefore, this court is inclined to receive those documents and marked as Ex.P3 to P13 as additional evidence, thereby, the appellant able to establish that witness P.W.2 is the close associate of the beneficiary and there is no proof that he was present on that day to attest the Will at the request of Sennimalai gounder.

12. Furthermore, the affidavit submitted on the side of beneficiary/2nd defendant was preferred by the advocate, who was appearing for the plaintiff in the partition suit. Admittedly, the counsel, who is appearing for the plaintiff is the counsel for the beneficiary in the final decree proceedings. As per the evidence of P.W.2 attestor, he was not aware how he



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was called by Sennimalai gounder. Further, he deposed that the testator directed him to appear before the Registrar along with advocate Subramaniam and accepting the same, he went there. It is pertinent to note that the said advocate Subramaniam has written the Will as scribe and as an advocate, he was close associate of beneficiary and those facts also not been denied. It is also pertinent to note that the said witness P.W.2 not able to state that the Will was drafted by the alleged scribe Subramaniam. On perusal of the Will, the said Subramaniam, officially signed stating that Will was drafted by him. Furthermore, all the recitals was typewritten, but there is no mentioning about the person, who has typewritten the said Will. Drafting of the Will was totally differed from the typewritten, however the evidence of the petitioner also not clarified through whom the said Will was typewritten. Moreover, the evidence of P.W.2 does not disclose when the Will was typewritten and whether in his presence it was typewritten, more particularly whether he was present at the time of typewritten. The entire evidence of P.W.2 also not clarified about the instructions given by the testator to execute the said Will nor it established that after completion of drafting the Will, the same was read out to the testator. Therefore, the



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evidence of P.W.2 is not sufficient to conclude that the Will was executed with the consent of Testator in sound disposing state of mind nor it is sufficient to prove the execution of Will. The evidence of P.W.2 also established that he was closely associated with the beneficiary so that only he was made to be eyewitness with the criminal case, which was forced to file by his father Sennimalai gounder against the appellant/1st defendant.

13. The learned counsel for appellant would further submit that the alleged beneficiary/2nd defendant was in a position of dominating over the testator, who was aged about more than 80 years at the time of filing the suit and he has made him as an instrument to file a suit for partition. Thereafter, a complaint was also given against the 1st defendant/appellant by using his father, who has no knowledge about the said criminal complaint. To prove the same, he relied the evidence given by the said Sennimalai gounder in C.C.No. 94 of 2019. On perusal of records, it would clearly reveals that based on the complaint given by Sennimalai gounder, F.I.R. was lodged against the 1st defendant/appellant under Sec.447, 294(b), 323 and 506(ii) of I.P.C. in Crime No.159 of 2015. During the trial, complainant Sennimalai



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gounder was not appeared. According to the appellant, he was forcibly retained by the 1st respondent, since because the alleged complaint was made to give at his instigation without the knowledge of father. Therefore, he prevented his father to appear before the court to give evidence. But, with great effort, this appellant appointed advocate commissioner to examine the said Sennimalai gounder as P.W.1. As per evidence of Sennimalai Gounder in the said criminal case, he admits the signature in the complaint but not aware what was averments made in the said complaint. During the cross-examination, he admits that at the time of trial only, he has seen the complaint first time. Moreover, after issuance of summons, his father Sennimalai gounder never turned to examine himself as P.W.1 and in the complaint, it was wrongly stated that he was residing in Ennamangalam, Anthiyur, whereas he was under the custody of 1st respondent, to that effect, the prosecution submitted a report, which would clearly reveals that he was said to be admitted in the hospital for medical treatment in order to evade the court proceedings under the care of this respondent. So, the conduct of 1st respondent clearly shows that he was not inclined to produce his father as a witness before the criminal court proceedings and it also probablise that



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his father is not aware of the complaint and as an advocate by profession, the 1st respondent abused his position and prepared the said false complaint through his father against the appellant/1st defendant. Admittedly, at the time of giving the alleged complaint, his father was aged about 93 years old and he was not aware of the said criminal proceedings, which was pending for enquiry.

14. Before the trial court, the learned counsel for appellant would also submit that even the signature found in the affidavit filed by his father in the year of 2019 in I.A.No. 94 of 2019 praying to appoint a counsel to assist him in CrI.M.P.No.729 of 2019, the signature found in that affidavit is totally differs from the alleged Will and prayed to compare the same before the trial court. Considering that, on perusal of CrI.M.P.No. 729 of 2019, it was filed on 07.12.2019, in which the affidavit contains signature of Sennimalai gounder, but comparatively, Sennimalai gounder, who was examined as P.W.1 through advocate commissioner in November 2019 affixed his signature is more shaky and not tallying with the signature found in the CrI.M.P.No. 729 of 2019 affidavit filed by Sennimalai Gounder and



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his strokes are also totally differs comparing to the signature found in the evidence recorded by the advocate commissioner. It is a settled proposition, even the court can compare the signature found on contemporary period. Accordingly, the signature found in the alleged affidavit filed in the month of December 2019 as well as the signature found in the deposition recorded by the Advocate Commissioner in the month of November 2019, the signature made by Sennimalai gounder is totally differed even on bare perusal of records. Therefore, on comparing the signature found in the affidavit as well as the signature put by Sennimalai gounder in the presence of advocate commissioner is totally differs from the signature found in the affidavit. Moreover, the said affidavit was typed in English and the same might have been prepared by his son, who is advocate by profession. Therefore, his father might not have signed in the affidavit. Within one month, his father died in the month of January, all these days before the court in both civil and criminal proceedings, his father has not disclosed that he has already written a Will in respect of share in the suit property. Furthermore, no reason was assigned by the testator for not allotting share for other sharers in the alleged Will. All these facts and circumstances



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would clearly probablise that the 1st respondent/2nd defendant in the suit, who is the second son of testator Sennimalai gounder was advocate by profession abused his position that after filing of the suit for partition, he might have obtained the document like Will from his father much earlier in the year of 2011 itself. An ordinary prudent man would disclose that he executed the Will in favour of his son in normal course of life, but the case in hand, partition suit was filed in the year of 2011 and witnesses were examined much earlier and even in the criminal proceedings in the year of 2019, at that time also, the said Sennimalai gounder has not disclosed that he executed the Will in favour of second son would clearly probablise that testator was not aware the fact that he executed a Will.

15. Furthermore, the counsel, who is appearing for plaintiff Sennimalai gounder is now appearing for the beneficiary also, it would probablise that at the instigation of beneficiary/2nd defendant, the said partition suit might have been made to be filed by his father. The beneficiary, dominating his father's will might have been used to get signature from his father. In such circumstances, it probablise that his father



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might have signed in the alleged Will without knowing the contents, so that he was not able to disclose the same all these nine years till his demise in any of the court proceedings.

16. Thus, the appellant proves that the 2nd defendant dominating over his father and obtained the alleged Will. Furthermore, the witness P.W.2 is close associate of the beneficiary, besides, Will drafted by one Subramaniam also advocate by profession and close associate of beneficiary and the counsel, who is appearing for plaintiff was known to him closely. All these facts culminated that father is not in an individual capacity signed in the alleged Will. Furthermore, even in the criminal proceedings, his father was not able to state that such a complaint was given by him so that he turned hostile and the witness of the Will is shown as eye-witness also established that the alleged case was initiated at the instance of beneficiary. Therefore, the Will is surrounded by suspicious circumstances, which was not removed by the 1st respondent/2nd defendant beyond reasonable doubt. Furthermore, as discussed above, the signature found in the deposition of Sennimalai gounder and the signature found in the affidavit filed on behalf of Sennimalai gounder also totally differs and



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therefore, signature found in the said affidavit might have prepared and signed by the beneficiary/2nd defendant, who was the advocate by profession. But the trial judge without appreciating all these facts and circumstances erroneously held that the Will is proved by the beneficiary as valid one, as such is totally unfair and erroneous one and the same is liable to be set aside. Accordingly, this Appeal Suit is allowed. The findings rendered by the trial judge in I.A.No.7 of 2020 in O.S.No.210 of 2011 is set aside, thereby, 1/5th share belong to the testator devolves upon equally to all the legal heirs of testator. No costs.

17. Consequently, the connected C.M.P. No. 11834 of 2023 is also allowed and the following additional documents are marked as Ex.R1 to Ex.R10 in the above appeal suit :-

Ex.R1 :- Judgment dated 03.09.2022 in C.C.No.175 of 2018 on the file of J.M.-II, Bhavani.

Ex.R2 :- VAO Certificate furnished by the prosecution in C.C.No.175 of 2018 on the file of JM-II, Bhavani

Ex.R3 :- 161 statement of Mr.Karthikeyan in Crime No.159 of 2015.

Ex.R4 :- Diary extract of C.M.P.No.9917 of 2019 in the court of JM-II, Erode.



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Ex.R5 :- Letter from DCB, Erode to JM-III, Erode, dated 11.10.2019

Ex.R6 :- Letter from DCB, Erode to JM-III, Erode, dated 14.10.2019

Ex.R7 :- Memo of accused in C.M.P.No.247 of 2019 before JM-III, Erode.

Ex.R8 :- Evidence of Mr.Appusamy (respondent herein) dated 24.11.2021 in C.C.No.94 of 2019 on the file of CJM, Salem.

Ex.R9 :- Evidence of Mr.Sennimalai Gounder dated 21.11.2019 in C.C.No.94 of 2019 on the file of CJM, Salem.

Ex.R10 :- CrI.M.P.No. 729 of 2019 in C.C.No.94 of 2019 on the file of CJM, Salem filed in the name of Sennimalai Gounder.

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Index : Yes / No
Internet : Yes / No
Speaking/Non-speaking order
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To

I Addl. District Judge,
Erode.



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