



S.A.No.1069 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : **20.03.2024**

CORAM

THE HONOURABLE Ms. JUSTICE **P.T.ASHA**

S.A.No.1069 of 2021
and
C.M.P.No.20190 of 2021

Pushpa @ Pushpavathy

... Appellant

-Vs-

1.Kaveriammal

2.Special Thasildar (Land Acquisition),
National Highways No.7,
Krishnagiri.

3.The State of Tamil Nadu,
Represented by District Collector,
Krishnagiri.

... Respondents

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure Code, 1908, to set aside the judgement and decree dated 30.01.2021 made in A.S.No.71 of 2017 on the file of the Principal District Court, Krishnagiri, by confirming the judgement and decree dated 26.07.2017 made in O.S.No.10 of 2011 on the file of the Principal Sub Judge, Krishnagiri.



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For appellant : Mr.T.S.Baskaran

For R1 : Mrs.Narmada Sampath
for Mr.I.Sathish

For R2 and R3 : Mr.C.Selvaraj
Additional Government Pleader

JUDGMENT

The plaintiff who has unsuccessfully contested the suit for declaration, injunction and mandatory injunction is the appellant before this Court.

2. The facts which have given rise to this second appeal are narrated hereinbelow and the parties are referred to in the same ranking as before the Trial Court.

PLAINTIFF'S CASE:

2.1. The plaintiff has filed a suit in O.S.No.10 of 2011 on the file of the Principal Sub Court, Krishnagiri, for the reliefs as set



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out *supra*. It is the case of the plaintiff that the first defendant is none else than her sister and the suit properties and other properties belonged to the parents of the plaintiff and the first defendant who are in possession and enjoyment of the same. During their lifetime, the father and mother had executed a Will dated 16.09.1988, dividing their properties into two shares and allotting one share each to the plaintiff and the first defendant while they were in sound and disposing state of mind.

2.2. The plaintiff's father Muniyan died on 30.10.1989 and his wife who is the mother of the plaintiff and the first defendant Oosili @ Lakshmi died on 12.08.1993 and with the death of the mother, the Will had come into force. As per the Will, the plaintiff has to succeed to the properties which have been described as 'B' schedule properties and the first defendant has to succeed to the properties which have been described as 'A' schedule properties. It is the case of the plaintiff that even during the lifetime of the



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parents, the sisters have been enjoying their respective shares.

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2.3. The first defendant, recognizing the right conferred upon her under the Will, had executed a sale deed in favour of her daughter-in-law, Vanaja on 12.07.2004 and in the recitals therein she has stated that the properties had fallen to her share on the basis of the Will.

2.4. While so, the defendants 2 and 3 had acquired an extent of 1600 sq.m. for widening the four lane road of National Highways No.7. The defendants 2 and 3 had also arrived at the compensation for the lands acquired since the revenue records stands in the name of the plaintiff as well as the first defendant. They had decided to pay the compensation amount to the plaintiff and the first defendant. Therefore, the plaintiff had made a representation to the second defendant stating that she is only entitled to the entire compensation on the basis of the Will and also applied for the compensation amount on 28.03.2007. An enquiry was also initiated



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on 30.03.2007. However, proper enquiry was not conducted and therefore, the plaintiff had made an appeal on 07.01.2008 to the third defendant requesting him to pay the compensation amount to her.

2.5. The first defendant, concealing the Will, issued a notice dated 20.12.2007 demanding partition. This demand was absolutely illegal and vexatious since the first defendant had already acted upon the Will. However, her act had cast a cloud on the title of the plaintiff and therefore, the plaintiff had come forward with the suit in question for the reliefs as stated *supra*.

DEFENDANT'S CASE:

(i) CASE OF THE FIRST DEFENDANT:

2.6. The first defendant had denied the allegations contained in the plaint except for accepting the relationship between the parties and the fact that the properties are ancestral in character.



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The first defendant had denied the Will dated 16.09.1988 executed by her parents by contending that **the parents were not in a fit state of health and mind to execute such a Will.** The first defendant had, therefore, questioned the genuineness of the Will and gone on to state that the plaintiff had fabricated the Will and was bound to prove the genuineness of the same.

2.7. The first defendant would go on to state that **she is an illiterate woman and any recitals which have been clandestinely and mischievously introduced by some unscrupulous scribes will not and cannot bind this defendant.** Therefore, the first defendant would submit that the plaintiff alone is not entitled to the compensation amount and the same has to be divided between the plaintiff and the first defendant. She would contend that the plaintiff did not have the exclusive title to the suit properties and was not in exclusive possession and enjoyment of the same. She, therefore, sought to have the suit dismissed.



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(ii)CASE OF THE SECOND DEFENDANT:

2.8. The second defendant had filed a written statement which was adopted by the third defendant. The second defendant would deny the allegations contained in the plaint and would admit the fact that both the first defendant and the plaintiff are daughters of Muniyan and Oosili @ Lakshmi. They would submit that after observing the procedure contained in the National Highways Act, 1956, the competent authority viz., Special District Revenue Officer (LA) NH7 had passed an award.

2.9. The defendants would submit that at the time of verification of the village accounts, the patta stands in the names of the plaintiff and the first defendant and two others. They would also submit that the compensation amount will be paid to all the four persons, including the plaintiff in respect of the land in



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S.No.729/2. They would, therefore, submit that the suit be dismissed against them.

TRIAL COURT:

3. The learned Principal Sub Judge, Krishnagiri, has framed the following issues.

1)Whether the plaintiff is entitled for the relief of declaration as prayed for?

2)Whether the plaintiff is entitled for the relief of permanent injunction as prayed for?

3)Whether the plaintiff is entitled for the mandatory injunction as prayed for?

4)To what relief the plaintiff is entitled?

4. The plaintiff had examined herself as P.W.1 and the attesting witness to the Will, one Mudali Gounder, as P.W.2 and marked Exs.A1 to A9. On the side of the defendants, the first defendant had examined herself as D.W.1 and marked Exs.B1 to



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5. The Trial Court proceeded on the presumption that the Will was an unregistered one and the plaintiff had not examined the attestors of the Will to prove its genuineness. The learned Judge has placed a great deal of emphasis on the fact that the Will in question was an unregistered one. The learned Judge had also observed that the non-examination of the Village Munsif who was claimed to be the scribe of the Will was also detrimental to the case of the plaintiff.

6. The learned Judge also held that the plaintiff had not produced any revenue records and any other document to prove possession of the suit properties and therefore, the learned Judge also went on to observe that there was a suspicious circumstance surrounding the will and consequently, dismissed the suit.



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LOWER APPELLATE COURT:
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7. Challenging the same, the plaintiff has preferred an appeal in A.S.No.71 of 2017 on the file of the Principal District Court, Krishnagiri.

8. The Lower Appellate Court had framed the following points for consideration.

“1)Whether the Trial Court was incorrect in dismissing the suit against the plaintiff in respect of the relief of declaration of title to the suit properties?

2)Whether the Trial Court was incorrect in dismissing the suit in respect of relief of permanent injunction?

3)Whether the Trial Court was incorrect in dismissing the suit pertaining relief of mandatory injunction as against the 2nd and 3rd defendants?

4)Whether the appeal is to be allowed or not?”



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9. The learned Judge had disagreed with the observation of the Trial Court that the Will has not been proved by examining the attesting witness. However, the learned Judge dismissed the appeal by holding that the plaintiff who claims that the properties had been partitioned during the lifetime of their father and mother, has filed the present suit on the basis of the Will and held that the very framing of the suit is totally incorrect and therefore, the learned Judge proceeded to observe that there was no necessity to even consider the validity of the Will – Ex.A1.

10. Challenging the same, the plaintiff is now before this Court.

11. Heard the learned counsel on either side and perused the materials available on record.



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12. After the submissions of the learned counsel on either side which have been extracted hereinbelow, the following substantial questions of law arise for the consideration of this Court.

“i)Whether the Lower Appellate Court is correct in law in observing that the suit was not framed properly as the right claimed by the plaintiff was on the basis of the partition but the suit has been filed on the basis of the Will?

ii)Whether the Courts below are correct in holding that the Will – Ex.A1 has not been proved as per the provisions of Section 63(c) of the Indian Succession Act, 1925, and Section 68 of the Indian Evidence Act, 1872?”

SUBMISSIONS:

13. Mr.T.S.Baskaran, learned counsel appearing on behalf



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of the plaintiff would submit that the suit properties admittedly belonged to Munniyan and his wife, Oosili @ Lakshmi. The plaintiff and the first defendant are their children. The plaintiff has come to the Court stating that the parents had executed the Will dated 16.09.1988, bequeathing the properties equally upon the first defendant and the plaintiff. The 'A' schedule properties were allotted to the share of the first defendant and the 'B' schedule properties were allotted to the share of the plaintiff. Even during the lifetime of the parents, they have been enjoying their respective shares which continued after the death of the parents. The first defendant had also given effect to the terms of the Will by selling a portion of the property allotted to her under the Will in favour of her daughter-in-law under the registered sale deed dated 12.07.2004.

14. The learned counsel would submit that a portion of the property which fell to the share of the plaintiff had been acquired



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by the Government and when the compensation was to be released, the first defendant had issued a notice claiming partition, totally suppressing the Will and since the defendants 2 and 3 were proceeding to disburse the compensation to both the plaintiff as well as the first defendant as the patta stood in the name of the plaintiff as well as the first defendant, the plaintiff has come forward with the suit in question.

15. The learned counsel would refer to paragraph no.6 of the plaint where the plaintiff has averred about the execution of the Will by the parents. Further, in paragraph no.8 of the plaint, the plaintiff has given details of the execution of the sale by the first defendant in favour of her daughter-in-law, Vanaja on the basis of the Will. He would draw the attention of the Court to Ex.A3 which is the sale deed executed by the first defendant in favour of her daughter-in-law, Vanaja. In the description of the properties, the plaintiff has stated as follows:-



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“கிரையச் சொத்தின் விவரம் கிருஷ்ணகிரி ரிடி

காவேரிப்பட்டினம் சப் ரிடி கிருஷ்ணகிரி தாலுக்கா பையூர்

கிராமத்தில் எனக்கு பிது ராஜ்ஜிதாமாயம் உயில் மூலமாயும்

பாத்தியப்பட்டு சர்வே எண் 524/1 புஞ்சை ஷெறக்டேர்

0.23.5 தீர்வை 2.88 இதில் புஷ்பா பாகத்திற்கு வடக்கு”

16. He would submit that not only has the defendant stated that she has right to the property on the basis of it being ancestral but also by virtue of the Will. She has also admitted to the fact that the property south of the property conveyed belongs to the plaintiff. He would draw the attention of the Court to the following finding given by the learned Principal Sub Judge, Krishnagiri.

“The plaintiff has not examined the attestors of the Will to prove its genuineness and moreover, the Will dated 16.09.1988 – Ex.A1 is seen to be an unregistered Will and no reliance can be placed on



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the Will dated 16.09.1988.”

This statement is *per se* erroneous and shows the non application of mind on the part of the learned Judge, since the plaintiff has examined P.W.2 who is the attesting witness to the Will – Ex.A1 and it is only based on this erroneous assumption that the suit has been dismissed.

17. He would further submit that the Lower Appellate Court, though had acknowledged the fact that the attesting witness has been examined, has dismissed the appeal on the ground that the plaintiff has pleaded partition of the family properties during the lifetime of the father and mother, but, filed the suit based on the Will – Ex.A1. He would further submit that this is a fallacious statement inasmuch as the plaintiff has, in his plaint, clearly stated that the father and the mother had divided the properties into two shares and given the same to the plaintiff and the defendant under the unregistered Will. The further pleading is that both of them are



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in enjoyment of their respective shares. Therefore, nowhere has the plaintiff pleaded partition and has only claimed a right to the properties through the Will.

18. He would further submit that the Lower Appellate Court has also committed an error and has not fully comprehended the facts of the case. He would also draw the attention of the Court to the evidence of P.W.2 who has clearly and cogently narrated the execution of the Will and its execution by the testators and the attesting witnesses. This evidence has also not been rebutted in cross-examination. The witness is a relative of both the plaintiff as well as the first defendant. D.W.1 has herself admitted that the persons who have attested the Will are their relatives. D.W.1, when confronted with Ex.A2- sale deed executed by her in favour of her daughter-in-law, would submit that she has not executed any sale deed in favour of her daughter-in-law. She had only signed documents for obtaining a tractor loan. She admits that she has not



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filed any suit to declare the Will as null and void or the sale deed executed by her in favour of her daughter-in-law as null and void. In the light of the Will having been proved, the Courts below have erred in dismissing the suit.

19. Per contra, Mrs.Narmada Sampath, learned counsel appearing for the counsel appearing on behalf of the first defendant, at the outset, would submit that the first defendant is an illiterate lady and all the persons have ganged up to cheat her. She would submit that the Will is an unregistered document and no reliance can be placed on this unregistered Will. That apart, the evidence of P.W.2 is ambiguous and full of contradictions. Further, she would submit that adverse inference should be drawn for the non-examination of the Scribe of Ex.A1, Will, particularly, when the plaintiff, as P.W.1 has, in her cross-examination, stated that the Will had been prepared by a retired Munsif of Paiyur.



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20. She would further submit that the fact the revenue records continue to remain joint proves that there is no partition. Further, her contention with reference to Ex.A3 – sale deed is that her illiteracy has been taken advantage of. She would draw the attention of the Court to the deposition of D.W.1, where, in her chief-examination, she has stated as follows:-

“வாதி எனது மகன் அருள் என்பவரை தன்வயப்படுத்தி எனக்கு எழுத படிக்க தெரியாத காரணத்தினால் நான் அருள் மனைவி வனஜாவுக்கு 12.07.2004-ம் தேதியில் வழக்கிடை சொத்தில் விற்பதாக கிரயம் பத்திரம் தாயார் செய்து டிராக்டர் லோன் வாங்க வேண்டுமென்று காவேரிப்பட்டினம் சார் பதிவாளர் அலுவலகத்திற்கு என்னை அழைத்து சென்று என்னிடம் ஏமாற்றி கையெழுத்து பெற்றுக்கொண்டார்கள்.”

21. She has also pleaded that the first defendant, in her cross-examination, deposed that she is not in talking terms with her son for over 15 years. Therefore, she would submit that since



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the Will has not been proved and there are suspicious circumstances surrounding the Will, the judgment and decree of both the Courts below are in order.

DISCUSSION:

22. The plaintiff has come forward with the case that the parents of both the plaintiff and the first defendant have executed the Will which has been marked as Ex.A1. P.W.2 has been examined to prove the Will. P.W.2 is one of the attesting witnesses of Ex.A1 – Will. He is the 5th signatory therein. He has clearly and cogently deposed that the Will had been executed by both testators (husband and wife) and thereafter, the witnesses had affixed their signatures one after the other and he had affixed his signature at the end. He has also deposed that other witnesses are no more. The attesting witness is a relative to both the plaintiff as well as the first defendant. His evidence has not been shaken in the cross-examination. In the cross-examination, he has reiterated the fact



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that all persons had signed and he has affixed his signature at the end.

23. Further, after execution of the Will, under Ex.A3, the first defendant has alienated a portion of the properties to her daughter-in-law and in the recitals in the schedule to the property, she has clearly and categorically stated that the property which she is conveying, belongs to her as her ancestral property and also bequeathed to her by way of the Will. This document has been executed by her in the year 2004. Therefore, the first defendant was very much aware about the execution of the Will and the parties have also been enjoying the properties that have been allotted to them independently.

24. The Lower Appellate Court has proceeded to nonsuit the plaintiff by dismissing the appeal on the ground that the plaintiff had pleaded the partition and has filed the suit on the basis



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of the Will. With due respect to the learned Judge, the plaintiff has not come forward with such a case. In paragraph no.6 of the plaint, the plaintiff has stated as follows:

“6. During their life time, both the father and mother of the plaintiff and defendant have divided the properties into two shares and bequeathed them to the plaintiff and 1st defendant through an unregistered Will dated 16.09.1988, when both of them have in good health and testamentary capacity.”

25. Thereafter, in paragraph no.7, the plaintiff has narrated how she and the first defendant had right to the property. Reading of the above paragraphs would clearly show that the plaintiff has claimed right only on the basis of the Will and not on the basis of the partition as stated by the Lower Appellate Court.

26. The first defendant has been developing her case at



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each point in time. To overcome the recitals in Ex.A3, the first defendant would submit that the plaintiff and her son had colluded to create the documents and with ulterior motives, the recital about the Will has been introduced. Thereafter, she would submit that her son and she are not in talking terms for the last 15 years. If this is true, then, there is no explanation as to how she sold her property to her daughter-in-law. The first defendant would submit that she was given to understand that she was executing the document for obtaining a tractor loan. If this statement is also taken to be true, in 2007, when the first defendant came to know that the plaintiff had pleaded about her having right under the Will, steps should have been taken immediately to set aside the decree. However, no steps have been taken to question the Will and the sale deed.

27. It is informed that in the year 2018, the suit has been filed questioning the sale of her property in favour of her daughter-in-law. This suit has been filed nearly 18 years after the execution



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of the sale. It appears that the first defendant has decided to give a go by to the Will when the Government had announced the compensation in respect of 1,600 sq.m. to the property allotted to the share of the plaintiff having acquired.

28. Both the Courts below have not examined this issue from the correct stand point. The Trial Court has observed that the Will has not been proved by examining its attestors, totally overlooking the examination of P.W.2 who is the attesting witness of the Will. The Lower Appellate Court accepted the fact that the attesting witness has been examined, however, rejected the appeal without accepting the validity of the Will on the ground that the suit has been filed only on the basis of the partition when the pleadings are with reference to the Will, which observation is also absolutely erroneous. Therefore, both the substantial questions of law are answered in favour of the plaintiff.



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Accordingly, this second appeal stands allowed with costs.

Consequently, connected C.M.P. stands closed.

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Internet : Yes

Index : Yes/No

Speaking order/Non-speaking order

ssa

To

- 1.The Principal District Judge, Krishnagiri.
- 2.The Principal Sub Judge, Krishnagiri.
- 3.The Section Officer, V.R.Section, High Court, Madras.



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