

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.06.2015

CORAM :

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

S.A.No.479 of 2009

and

M.P. No. 1 of 2009

Shantha Mallappa

... Appellant

Vs.

Manjunath

... Respondent

Prayer:- This Second Appeal has been filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 05.10.2007 passed in A.S.No.27 of 2006 on the file of the Subordinate Judge, Hosur, confirming the judgment and decree dated 31.03.2006 made in O.S.No.32 of 2002 on the file of District Munsif and Judicial Magistrate, Denkanikottai.

For Appellant : Mr.V.Nicholas

For Respondent : Mr.P.Mani

J U D G M E N T

The second appeal is filed by the plaintiff, who lost her case before the Courts below in a suit for declaration and permanent injunction.

2. The case of the plaintiff is that both the plaintiff and the defendant are the sons of one Basavarajappa Shetty. The suit properties were claimed to be the joint family properties. According to the plaintiff, her father Basavarajappa Shetty had executed an unregistered Will dated 15.03.1982, marked as Exhibit A-1, bequeathing his 1/3rd share in the suit properties in favour of the plaintiff. Hence, she claims title to the suit property.

3. The defendant denied the case of the plaintiff and contented that earlier he filed suit O.S. No. 58 of 1998 for partition and the same was decreed on 09.12.1998. In the said suit, the plaintiff/appellant had not entered appearance and allowed to go ex parte. The Civil Revision Petition filed against the same was also dismissed. The defendant further denied the

execution of the Will set up by the plaintiff.

4. Before the trial Court, the plaintiff was examined himself as P.W.1 and two more witnesses were examined as P.W.2 and P.W.3 and marked the documents as Exs.A1 to A.10. To nullify the evidence adduced on behalf of the plaintiff, the defendant examined himself as D.W.1 and three witnesses were examined as D.W.2, to D.W.4 and marked the documents as Exhibit B.1 to B5.

5. The trial Court, on consideration of the evidence available on record and the arguments advanced by the learned counsel for the parties, finding that the suit property is a joint family property and the plaintiff has not proved title, dismissed the suit. Aggrieved by the same, the plaintiff filed appeal in A.S. No. 27 of 2006. The Lower Appellate Court, on appreciation of the evidence and the documents produced thereon, concurred with the finding of the trial Court and dismissed the appeal. Challenging the same, the unsuccessful plaintiff is before this Court.

6. When the Second Appeal came up for admission, only notice was ordered.

7. The point to be considered before this Court is whether the concurrent finding of the Courts below suffers from any infirmity or illegality.

8. Heard Mr. V. Nicholas, learned counsel for the appellant / plaintiff and Mr. P. Mani, learned counsel for the respondent and perused the records.

9. From the materials available on record, it is seen that even according to the plaintiff, there were three witnesses for the Will among which, one is dead and of the remaining two witnesses, one person has deposed in favour of the plaintiff as PW-2 and the other witness has deposed in favour of the defendant as D.W.2. The witnesses themselves have deposed contradictory to each other regarding the execution of the Will. Therefore, the Courts below, concurrently held that the Will is not true and genuine and the witnesses themselves have deposed contradictory to the statement of each other. Curiously, the sisters of the plaintiff also denied the execution of the Will.

10. The Lower Appellate Court had elaborately discussed the validity of the Will by scrutinizing the signatures, address of the parties and attestors and found that the plaintiff has not established the due execution of the alleged Will. Even presuming that the case of the plaintiff is proved and the Will was executed by the father in her favour, it was open to the plaintiff to contest the suit filed by the defendant in O.S.No.58 of 1998,

which was filed for partition, long after the execution of the alleged Will in the year 1982. There is no convincing reason as to why the plaintiff has not contested the suit for partition. The conduct and attitude of the plaintiff clearly establishes that the Will introduced by the Plaintiff is forged one and not true and valid in the eyes of law. As the Will is found to be against the plaintiff, the Courts below had rightly held that the plaintiff has not established the execution of the Will in the manner known to law and dismissed the suit. In such circumstances, this Court finds no question of law, much less, substantial question of law for consideration in this Second appeal.

11. Accordingly, the Second Appeal is dismissed and the judgment and decree dated 31.03.2006 passed by the learned District Munsif - cum - Judicial Magistrate, Denkanikottai, O.S.No.32 of 2002 as confirmed by the judgment and decree dated 05.10.2007 passed by the learned Subordinate Judge, Hosur, in A.S. No.27 of 2006 are confirmed. However, in the circumstances of the case, there shall be no order as to costs. Consequently, Connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar

True Copy

Sub Assistant Registrar

srn
To

1.The District Munsif and Judicial Magistrate, Denkanikottai.

2.The Subordinate Judge, Hosur.

3.The Section Officer, V.R.Section, High Court, Madras.

1 cc to M/s.P.Mani , Advocate Sr.No.26305

1 cc to M/s.V.Nicholas , Advocate Sr.No.26725

S.A.No.479 of 2009

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pmk.10.7.2015