

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.03.2015

CORAM

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

Second Appeal No.172 of 2015 and
M.P.No.1 of 2015

1.Rukkumaniammal
2.R.Krishnamurthi

... Appellants/ Defendants 1 & 3

Vs.

1.R.Ganganaidu
2.R.Duraisamy
3.R.Narayanasamy
4.R.Balasundaram
5.R.Selvaraj

... Respondents/ Plaintiffs &
2nd Defendants

Prayer:- This second appeal has been filed under Section 100 C.P.C., against the judgement and decree dated 31.10.2014 made in A.S.No.117 of 2013 on the file of the learned V Additional District and Sessions Judge, Coimbatore in reversing the judgement and decree dated 05.09.2013 made in O.S.No.223 of 2009 on the file of the learned Principal Subordinate Judge, Coimbatore.

For Appellants : Mr.J.Pothiraj

For Respondents : Mr.K.S.Kaviarasu

JUDGEMENT

The defendants 1 & 3 in O.S.No.223 of 2009 on the file of the learned Principal Subordinate Judge, Coimbatore are the appellants herein. The respondents 1 to 4 are the plaintiffs and the fifth respondent is the second defendant in the suit. The plaintiffs had filed the said suit for partition and for separate possession. By decree and judgement dated 05.09.2013, the trial Court dismissed the suit. As against the same, the plaintiffs filed an appeal in A.S.No.117 of 2013 on the file of the learned V Additional District and Sessions Judge, Coimbatore. By decree and judgement dated 31.10.2014, the First Appellate Court allowed the appeal thereby setting aside the decree and judgement of the trial Court and passed a preliminary decree declaring that the plaintiffs are entitled for 1/7th share each in the suit properties. As against the same, the defendants 1 and 3 are before this Court with this second appeal.

2. This second appeal has come up today for admission. I have heard the learned counsel for the appellants and the learned counsel for the respondents and I have also perused the records carefully.

3.The case of the plaintiffs in brief is as follows:-

The plaintiffs and the defendants 2 and 3 are the sons of one Mr.Ramakrishna. The first defendant is their mother and wife of Mr.Ramakrishna. The suit properties were owned by Mr.Ramakrishna as his self acquired properties. Mr.Ramakrishna had purchased the suit properties by means of a registered sale deed dated 01.02.1971 (Ex.A.1). Mr.Ramakrishna died intestate. Thus, the plaintiffs, being the children of Mr.Ramakrishna, are entitled for share in the suit properties.

4.The defendants in the written statement, admitted the relationship between the parties. But, according to the defendants, the defendants 2 and 3 were maintaining Mr.Ramakrishna and Mrs.Rukkumaniammal, the first defendant. Therefore, out of love and affection, Mr.Ramakrishna had executed a Will on 07.05.2003 in favour of the defendants 1 and 3. Mr.Ramakrishna died in the year 2007. After the demise of Mr.Ramakrishna, Ex.B.5 Will dated 07.05.2003 has taken force and according to the same, the defendants 1 and 3 have become the absolute owners of the suit properties, it is contended. Therefore, according to the defendants, the plaintiffs are not entitled for any share in the suit properties. In essence, according to the defendants 1 and 3, Mr.Ramakrishna did not die intestate.

5.Based on the above pleadings, the trial Court framed appropriate issues. On the side of the plaintiffs, the first plaintiff was examined as P.W.1 and as many as 14 documents were exhibited. On the side of the defendants, the first defendant was examined as D.W.1 and one Mr.Duraisamy was examined as D.W.2, who claims to be the Attestor of the Will (Ex.B.5) dated 07.05.2003.

6.Having considered all the above, the trial Court found that the Will has been duly proved and the same has been executed by Mr.Ramakrishna and accordingly, dismissed the suit by holding that the plaintiffs have got no share over the suit properties. But, the First Appellate Court found that the Will has not been proved in accordance with law and accordingly, it rejected the case of the defendants to hold that the plaintiffs are entitled for partition. That is how the appellants are before this Court with this second appeal.

7.In this second appeal, it is contended by the learned counsel for the appellants that the first plaintiff who has been examined as P.W.1 during cross examination has categorically admitted his signature in Exs.B.1 to B.4 vardamam receipts alleged to have been executed by the plaintiffs in favour of the deceased Mr.Ramakrishna on 12.01.1992. Under these documents, they have relinquished all their rights over the suit properties in favour of Mr.Ramakrishna. Thus, on or after 12.01.1992, the plaintiffs have got no right whatsoever over the suit properties.

8.The learned counsel for the appellants would further submit that the signature found in Ex.B.5 Will has also been admitted by P.W.1 during cross examination as required under the Indian Evidence Act. During evidence, the defendants have examined two witnesses to prove the execution of the Will (Ex.B.5). D.W.1 is the mother who was present at the time when the Will was executed by Mr.Ramakrishna and D.W.2 is the Attestor to the said document. From these two witnesses, according to the learned counsel, the execution of the Will (Ex.B.5) has been clearly proved.

9.The learned counsel for the appellants would point out that the trial Court had properly appreciated the evidences of D.Ws.1 and 2 and had held that the Will (Ex.B.5) stood proved, whereas, the First Appellate Court, without appreciating the said evidences in their proper perspective and by going by the uncommon minor contradictions between these two witnesses, has reversed the decree and judgement of the trial Court.

10.At the outset, I should say that in this second appeal, there is no substantial question of law at all involved warranting admission of the same. The arguments advanced by the learned counsel for the appellants are based only on disputed questions on fact. All the disputed questions on fact have been properly appreciated by the First Appellate Court in which, I do not find any perversity.

11.Admittedly, the plaintiffs and the defendants 2 and 3 are the sons of Mr.Ramakrishna. It is also not in dispute that the suit properties are the self acquired properties of Mr.Ramakrishna. The crucial question to be decided is as to whether Mr.Ramakrishna died intestate, or, he had executed Ex.B.5, Will, out of his own volition. Ex.B.5 reads as though Mr.Ramakrishna had bequeathed the suit properties to the defendants 2 and 3. Therefore, whether the defendants should succeed or fail depends upon the proof of Ex.B.5 Will.

12.It is true that D.W.2 has been examined as one of the Attestors of the document (Ex.B.5). It is also admitted that the other Attestor is no more. Now, the trial Court has found from the evidences of D.Ws.1 and 2 that the Ex.B.5 Will has been duly proved. But, the First Appellate Court has reversed it. The First Appellate Court in my considered opinion, has given sound reasons for disbelieving the evidences of D.Ws.1 and 2 to hold that Ex.B.5 has not been proved in accordance with law.

13.Admittedly, D.Ws.1 and 2 have been examined by appointing Advocate Commissioner. The trial Court has stated that due to old age, these two witnesses have given certain contradictory answers. But, in my considered opinion and as rightly held by the First Appellate Court, it is not so. At the time when the Will was executed, it is the admission of D.W.1 that the defendants 2 and 3 were very much present. Thus, the presence of the beneficiaries of the Will at the time of its execution creates initial suspicion. At the time of execution of Ex.B.5 Will, Mr.Ramakrishna was very old. It is not in evidence as to whether the said Mr.Ramakrishna was in a sound state of mind, at the time execution of Ex.B.5 Will, or not.

14.Nextly, the document is not a registered one, but, it is only an un-registered document. D.W.1, the mother of the defendants 2 and 3 would say that the entire Will was written in his own hand writing by Mr.Ramakrishna. But, D.W.2, who is one of the Attestors to the said document states that, it was written only by a Scribe from Kallipatti Village. When this contradiction is there, in my considered opinion, to clear the doubt which has arisen out of the same, the plaintiffs would have let in some more evidence. I do not say that, in law, the Scribe of the document should be examined in all cases. In this particular case, since there is contradiction, as to who wrote the Will, to clarify the doubt which has arisen out of the said contradiction, the plaintiffs should have examined the Scribe of the document. The plaintiffs have failed to do so.

15.The First Appellate Court also recorded that even in Ex.B.5 Will, there is no admission regarding the fact that whether it was written by the Scribe or by the deceased Mr.Ramakrishna. The First Appellate Court has further stated that it is the usual practice that the Scribe of the document should make endorsement in the document that he only wrote the document in his own hand writing. But, in this document, there is no indication as to who drafted the same and who signed the document. D.W.2 who claims to be one of the Attestor of the document, during cross examination, has stated that he went to the place where the document was drafted and at that time, the document had been executed already and it was kept ready and already, Mr.Ramakrishna also had signed the document. During cross examination, he has not reiterated that he saw Mr.Ramakrishna signing the document. This contradiction, in my considered opinion, cannot be treated as a minor contradiction. The First Appellate Court has correctly appreciated these contradictions.

16.Nextly, the plaintiffs issued legal notice demanding partition. Had it been true that the defendants 2 and 3 were armed with Ex.B.5 Will, certainly, they would have sent a reply notice stating that as per the said document (Ex.B.5), they are the absolute owners of the suit properties and the plaintiffs have got no right whatsoever over the suit properties. But, they did not do so. For the first time, Ex.B.5 Will came to light only by way of written statement. Even along with the written statement, Ex.B.5 Will was not filed into Court. These are all suspicious circumstances surrounding the Will (Ex.B.5). The First Appellate Court has considered all these facts and then, come to the right conclusion that Ex.B.5 Will has not been proved in accordance with law. It is a settled position of law that mere admission of the signature of the deceased by the plaintiffs would not amount to proof of due execution of the document (Ex.B.5) itself.

17.The learned counsel for the appellants would submit that the Attestor has been examined and therefore, the Will (Ex.B.5) stands proved. This argument does not persuade me at all because, the question is whether the evidence of Attestor would be believed or not. Here, in this case, the evidences of D.Ws 1 and 2 would not go to conclusively prove that Ex.B.5 Will was duly executed by

Mr.Ramakrishna in a sound and disposing state of mind. Even the evidence of D.W.1 is also suspicious because, she was under the clutches of defendants 2 and 3, all through. This was also in evidence. For these reasons only, the First Appellate Court reversed the decree and judgement of the trial Court holding that Ex.B.5 Will has not been proved. If once, it is held that Ex.B.5 Will has not been proved, then, there is no difficulty for this Court in confirming the decree and judgement of the First Appellate Court. In such view of the matter, I do not find any infirmity in the factual findings recorded by the First Appellate Court. Though, the judgement of the First Appellate Court is a reversing the judgement of the trial Court, on that score, the second appeal cannot be admitted. I hold that there is no substantial question of law involved in this second appeal so as to admit the same.

18.In the result, second appeal fails and accordingly, the same is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Asst.Registrar (CS III)

/true copy/

Sub Asst. Registrar

jbm

To

1.The V Additional District and Sessions Judge,
Coimbatore.

2.The Principal Subordinate Judge,
Coimbatore.

1 cc to mr.J. Pothiraj, Advocate, Sr. 17066

1 cc to M/s. Karuppiah, Advocate, Sr. 16696

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SR (CO)
kk 21/5