

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.02.2015

CORAM:

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

Second Appeal No.539 of 2013
and
M.P.No.1 of 2013

P.Ramamoorthy

...Appellant/Plaintiff

- Vs -

1. M.Sadasivam

2. K.Doraisamy

...Respondents/Defendants

Prayer:- Second Appeal filed under Section 100 of C.P.C., against the Judgment and Decree dated 28.11.2012, made in A.S.No.8 of 2005 on the file of the learned Principal District Judge, Namakkal confirming the Judgment and Decree dated 07.03.2005, made in O.S.No.346 of 1996 on the file of the learned Subordinate Judge, Namakkal.

For Appellant : Mr.S.Parthasarathy
SC for Mr.C.Jagadish

For Respondent 1 : Exparte

For Respondent 2 : Mr.T.Murugamanickam

J U D G M E N T

The plaintiff in O.S.No.346 of 1996 on the file of the learned Subordinate Judge, Namakkal is the appellant herein. The respondents are the defendants in the suit. The said suit was filed for partition and for separate possession of 1/2 share in the suit property. The Trial Court dismissed the suit by decree and judgment dated 07.03.2005. As against the same an appeal was filed in A.S.No.8 of 2005 before the learned Principal District Judge, Namakkal. The lower Appellate Court by decree and judgment dated 30.04.2009, allowed the appeal and set aside the decree and judgment of the trial Court and granted decree as prayed for in the

plaint. As against the same, the second respondent herein filed a second appeal in S.A.No.944 of 2009. This Court by a decree and judgment dated 12.04.2011, allowed the appeal and set aside the decree and judgment of the lower appellate Court, but remanded the matter back to the lower appellate Court for fresh disposal of the first appeal in accordance with law. This Court also granted liberty to both the parties to let in further evidence and also gave liberty to the appellant herein to compare the signature in the disputed Will with the admitted signature of Mr.Karuppana Gounder in contemporaneous documents by an expert. But the appellant did not take any steps to compare the disputed signature with the admitted signature of Mr.Karuppana Gounder by an expert. Thereafter, after having heard both sides, the lower appellate Court dismissed the appeal by a decree and judgment dated 28.11.2012, thereby, confirming the decree and judgment of the trial Court dated 07.03.2005. Challenging the same, the appellant is now before this Court with this second appeal.

2. The first respondent Mr.M.Sadasivam remained ex parte all through. In this appeal also he remained ex parte. I have heard the learned senior counsel appearing for the appellant and the learned counsel appearing for the second respondent as well as perused the records carefully. Today, this second appeal is taken up for admission.

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

(i) One Mr.Karuppana Gounder owned the suit property and other properties as his ancestral properties. Mr.Karuppana Gounder died leaving behind his son by name Mr.K.Marappa Gounder and four daughters. The first defendant Mr.M.Sadasivam is the only son of Mr.K.Marappa Gounder. The second defendant/second respondent herein Mr.K.Doraisamy is the son of one of the daughters of Mr.Karuppana Gounder. One of the daughter's of Mr.Karuppana Gounder was one Mrs.Nellaiyammal and she had a daughter by name Mrs.Indirani. Mrs.Indirani was given in marriage to the plaintiff Mr.P.Ramamoorthy. Mr.Marappa Gounder and all the daughters of Mr.Karuppana Gounder are no more.

(ii) There was no partition effected between Mr.Karuppana Gounder and his only son Mr.Marappa Gounder. Mr.Karuppana Gounder appears to have executed an unregistered Will dated 17.01.1979 in favour of the second defendant / second respondent herein thereby bequeathing his undivided 1/2 share in the suit property to him.

(iii) Subsequently, Mr.Karuppana Gounder died. Thus, the Will dated 17.01.1979 came into effect. After the demise of Mr.Karuppana Gounder, Mr.K.Doraisamy the second defendant herein filed a suit in O.S.No.274 of 1985 before the learned Subordinate

Judge, Namakkal against Mr.K.Marrappa Gounder and Mr.M.Sadasivam (the first defendant herein) for partition and for separate possession of his 1/2 share which he derived under the Will dated 17.01.1979. The said suit was decreed on 14.12.1987. During the pendency of the above suit, Mr.K.Marappa Gounder filed a suit for injunction against Mr.K.Doraisamy in respect of the suit property (Mr.Marappa Gounder filed yet another suit against Mr.K.Doraisamy, the details of these two subsequent suits need not be elaborated as they are not necessary for disposal of this appeal).

(iv) The trial Court decreed the suit in O.S.No.274 of 1985 thereby holding that the Will dated 17.01.1979 was executed by Mr.Karuppanna Gounder. Though it was contended that the said Will was not executed by Mr.Karuppanna Gounder, the Court had held that the Will was executed by Mr.Karuppanna Gounder. The appeal filed by the first respondent before this Court in A.S.No.96 of 1988 was dismissed by this Court on 01.12.1994. As against the same Mr.Sadasivam took up the matter to the Hon'ble Supreme Court in S.L.P.Nos.2915 - 2916 of 1996 and the same was dismissed on 09.02.1996. Thus, the preliminary decree for partition and for allotment of 1/2 share in favour of Mr.K.Doraisamy (the second respondent herein) has been confirmed and the rest of the 1/2 share would go to the share of Mr.K.Marappa Gounder and Mr.M.Sadasivam together. Thereafter, it appears that Mr.K.Doraisamy the second respondent herein has filed an application for passing a final decree and the same is pending before the trial Court.

(v) Thereafter, the present suit came to be filed by Mr.P.Ramamoorthy the appellant herein. According to him Mr.Karuppanna Gounder had executed yet another unregistered will dated 29.01.1979 in his favour thereby bequeathing his undivided 1/2 share in his favour. Thus, according to the plaintiff as per the unregistered Will dated 29.01.1979, he is entitled for 1/2 share in the suit property and the other 1/2 share would go to Mr.K.Marappa Gounder and Mr.M.Sadasivam together. In other words, according to the plaintiff the second respondent Mr.K.Doraisamy has got no share in the suit property.

4. In the written statement filed by the second respondent Mr.Doraisamy, he contended that the Will dated 29.01.1979, is not true and genuine and the same is a forged one. According to him, the Will dated 17.01.1979, executed by Mr.Karuppanna Gounder was the last Will, by which he has won the litigation for partition up to the Hon'ble Supreme Court. He would further state that the present suit has been filed only with a view to unnecessarily cause disturbance to the second respondent so as to thwart the final decree.

5. Based on the above pleadings, the trial Court framed appropriate issues. On the side of the plaintiff 4 witnesses were examined as P.Ws. 1 to 4 and 14 documents were marked. On the side of the defendants 4 witnesses were examined as D.Ws. 1 to 4 and 19 documents were marked. Having considered all the above, the Trial Court dismissed the suit and the lower Appellate Court originally allowed the appeal and on second appeal this Court set aside the order of the lower Appellate Court and remanded the matter back to the lower Appellate Court. Thereafter, the lower Appellate Court dismissed the first appeal and thereby confirmed the decree and judgment of the trial Court. Aggrieved over the same, the appellant is now before this Court with this second appeal.

6. In this second appeal, it is contended that the Will dated 29.01.1979 viz., Ex.A13 is a genuine Will. The learned senior counsel appearing for the appellant would submit that the attestor to the said document has been examined, whose evidence would go to prove that the said Will is a genuine Will and it was the last Will executed by Mr.Karuppanna Gounder. The learned senior counsel appearing for the appellant reiterating the grounds of appeal would submit that though the Will was executed on 29.01.1979, for about 17 years it was in the hands of P.W.4 and P.W.4 did not disclose the custody of the Will for the last 17 years. When he was informed about the Will, he took steps to file the present suit. Thus, according to the learned senior counsel, the Courts below were not right in holding that the Will dated 29.01.1979, is not a genuine Will. It is his specific contention that the said Will dated 29.01.1979, has been duly proved in accordance with law and therefore based on the Will, the Courts below ought to have granted preliminary decree for partition as prayed for.

7. The learned senior counsel would further submit that on an earlier occasion, in the first appeal, the first Appellate Court compared the disputed signature of Mr.Karuppanna Gounder found in the Will dated 29.01.1979 with that of the admitted signature of Mr.Karuppanna Gounder using its power under Section 73 of the Evidence Act and held that the signature found in the Will dated 29.01.1979 was that of Mr.Karuppanna Gounder. The learned senior counsel would further point out that on the basis of the oral evidence of the attestor as well as P.W.4, the lower Appellate Court on the earlier occasion found that the Will was a genuine one. This Court, however, was not satisfied with the said finding and that is how this Court remanded the matter back with liberty to the plaintiff to forward the said Will to an Expert for getting opinion by comparing the disputed signature found in the Will dated 29.01.1979 with that of the admitted signature of Mr.Karuppanna Gounder in contemporaneous documents. The learned senior counsel would further submit that after the remand order was passed, though the appellant tried his level best to find contemporaneous

documents containing the admitted signature of Mr.Karuppanna Gounder, he could not succeed as no such document was available. Therefore, he could not forward the disputed document for comparison to an expert. The learned senior counsel would submit that the lower Appellate Court in these circumstances could have again compared the disputed signature with that of the admitted signature of Mr.Karuppanna Gounder and ought to have held that the Will is a genuine one. Thus, according to the learned senior counsel, both the Courts below were not right in holding that the Will is not a genuine one.

8. The learned counsel appearing for the second respondent / second defendant would stoutly oppose this appeal. According to him at the outset, there is no substantial question of law involved in this appeal warranting admission of the second appeal.

9. He would further submit that the two Courts below on appreciating the evidence concurrently held that the Will dated 29.01.1979 is not genuine and has not been executed by Mr.Karuppanna Gounder at all. This being essentially a question of fact, there is no scope to admit the second appeal, learned counsel contended.

10. The learned counsel would further submit that though it is stated that the Will viz., Ex.A13 is stated to have been in the custody of P.W.4 for 17 years, there is no explanation as to why he did not disclose the same either to the plaintiff or to the second respondent. The learned counsel would refer to Ex.B4 a letter dated 10.01.1991 written by him to the second defendant, wherein, he has tried his level best to persuade the second defendant to give up all his claims for the suit property and the Will dated 17.01.1979. The learned counsel would further submit that had it been true that the Will viz., Ex.A13 have been in existence from 29.01.1979, he would have certainly informed this defendant about the same when he tried his level best to persuade this defendant not to make any claim for share in the suit property. All these circumstances, according to the learned counsel for the second respondent, would go to show that the Will is not genuine. The learned counsel would further point out that it is not as though P.W.4 and the plaintiff are not known to each other and they are third parties. They are closely related and as a matter of fact, vide Ex.B4, P.W.4 wanted this defendant not to make any claim for share in the suit property. When the plaintiff and P.W.4 are admittedly very close relatives and when P.W.4 was aware of the earlier suit and the judgments rendered by three Courts and though the plaintiff also admitted in his evidence that he also know about the earlier proceedings, according to the learned counsel, it is highly unbelievable that P.W.4 would not have mentioned about the

Will dated 29.01.1979 to him. For all these reasons, according to the learned counsel for the second respondent, the second appeal deserves only to be dismissed.

11. I have considered the above submission.

12. As rightly contended by the learned counsel for the second respondent, I do not find any question of law much less any substantial question of law warranting admission of the second appeal, as reasons are enormous.

13. The first and foremost reason is that the question whether Ex.A13 is a genuine Will or not and whether it was executed by Mr.Karuppanna Gounder is essentially a question of fact. Two Courts below, on appreciating evidence, have held that Ex.A13 would not have been executed by Mr.Karuppanna Gounder at all. In this conclusion arrived by the Courts below, I do not find any perversity or illegality. This requires a little elaboration. Ex.A13 is an unregistered Will and the same has been pressed into service after 17 years of its alleged coming into being. This is a suspicious circumstance. Had it been true that the Will was in existence in the year 1979 itself, when the earlier litigation went up to the Hon'ble Supreme Court for several years, certainly the plaintiff, who was aware of the said proceedings, would have pressed into service Ex.A13 at the earliest point of time and made his claim. The very fact that he did not use this Will and he did not say a word about the Will for 17 years, would go to show that the Will [Ex.A.13] would not have come into existence in the year 1979 as it is projected by the plaintiff. I come to this conclusion mainly because there is no convincing explanation for the delay of 17 years. The only explanation offered by the plaintiff is that P.W.4 did not disclose to him about the existence of this Will for 17 years. In my considered opinion, it is highly unbelievable. Going by the close relationship between the plaintiff and P.W.4, it cannot be accepted that P.W.4 would have kept it secretly without disclosing the same to the plaintiff for 17 years. Apart from that, the plaintiff admits in his evidence that he was aware of the earlier litigation which went up to the Hon'ble Supreme Court. P.W.4 also admits that he was aware of the earlier litigation which went up to the Hon'ble Supreme Court. P.W.4, in Ex.B4 letter written to the second defendant, has categorically stated about the earlier suit and the proceedings that went up to the Hon'ble Supreme Court. In that letter, after quoting a number of couplets of Thiruvalluvar, he has tried his level best to persuade the second defendant not to make any claim over the suit property based on the Will dated 17.01.1979. Had it been true that Ex.A13 Will was existing from the year 1979, when he wrote Ex.B4 in the year 1991, he would have certainly disclosed about the same to

this defendant in his attempt to persuade him not to give up his any claim for the property This is yet another strong circumstance against the Will. The time when the present suit was filed is also very important. The Special Leave Petition which was filed in respect of the earlier suit was dismissed on 09.02.1996, whereas, as a last attempt to thwart the second defendant from claiming the suit property, he has chosen to file the present suit on 25.09.1996 i.e. after seven months. This would go to show, as rightly contented by the learned counsel for the second respondent that the present suit has been filed by creating a forged Will in an attempt to thwart the claim made by the second defendant.

14. Now, turning to the argument of the learned senior counsel appearing for the appellant that the lower appellate Court ought to have compared the disputed signature of Mr.Karuppanna Gounder with that of the admitted signature of Mr.Karuppanna Gounder, I am of the view that the same is not acceptable to this Court. This Court, while remanding the matter back, gave liberty to the plaintiff to forward Ex.A13 for comparison by an expert with the admitted signature of Mr.Karuppanna Gounder in the contemporaneous records. This the plaintiff did not do. The only explanation offered now is that no such contemporaneous record was available. But, the fact remains that the Will dated 17.01.1979 which was upheld by the Hon'ble Supreme Court is a contemporaneous record as the date of the disputed will was 29.01.1979. It is not known as to why the plaintiff did not take any steps to forward Ex.A13 to compare the signature found in the Will dated 17.01.1979 when the said Will dated 17.01.1979 was admittedly a contemporaneous record. The contention of the learned senior counsel for the appellant is that the Will dated 17.01.1979 itself is not a genuine Will. That argument does not survive because of the reason that up to the Hon'ble Supreme Court it has been consistently held that the Will dated 17.01.1979 is a genuine Will.

15. Apart from that, after executing the Will dated 17.01.1979, bequeathing his undivided 1/2 share to the second defendant, it is highly unbelievable that within 12 days thereafter, Mr.Karuppanna Gounder would have executed another Will in favour of the plaintiff herein. All these suspicious circumstance concerning Ex.A13 and all other circumstances of the case were duly considered by two Courts below.

16. The lower appellate Court is not an expert in comparing the handwritings and the lower appellate Court cannot have expertise to compare the disputed signature with that of the admitted signature. That is the reason why this Court remanded the matter back with liberty to the plaintiff to forward the documents for comparison by an expert.

17. Therefore, the argument that the courts below should have undertaken the task of comparison of the disputed signature in the Will deserves only to be rejected. So far as the evidence of the attesor of Ex.A13 is concerned, the learned senior counsel submitted that the Courts below ought to have accepted the evidence of the attesor and ought to have held that Ex.A13 is genuine. I am only remained of the saying that "men may lie but not the circumstances". In this case there are several circumstances, as I have enumerated herein above, to conclude that the Will under Ex.A13 is not true and genuine. Therefore, the oral evidence of the attesor is liable to be rejected.

18. For these reasons, in my considered opinion, the Courts below were right in holding that Ex.A13 Will is not genuine and therefore the claim for partition made by the plaintiff is not sustainable. As I have pointed out, this is essentially a question of fact which has been answered against the plaintiff by the Courts below on appreciating evidence, in which, I do not find any perversity.

19. In view of all the above, I do not find any question of law much less any substantial question of law involved in this second appeal warranting admission.

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

Sd/-
Assistant Registrar(CS-III)

//True Copy//

Sub Assistant Registrar

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To

1. The Principal District Judge,
Namakkal.
2. The Subordinate Judge,
Namakkal.

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1 CC to Mr.C.Jagadish, Advocate SR.No. 102

1 CC to Mr.T.Murugamanickam, Advocate SR.No. 10429

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