

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.11.2016

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.284 of 1989

Dr.Ramasubramanian

...Appellant

Vs

1.Kanthimathi Ammal
2.Arumugha Mudaliar (died)
3.A.Subbulakshmi
4.A.Pitchammal
5.A.Murugan
6.A.Kandamani
7.A.Gnanambikai
8.A.Vijayakumar

... Respondents

(R1 recorded and RR3 to 8
brought in record as the
LR of deceased 2nd Respondent
vide order dated 05/9/90 in
CMP.8413,8419/90)

Prayer:- Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree dated 04.08.1988 made in A.S.No.14 of 1987 on the file of the Subordinate Court, Tirunelveli in confirming the judgment and decree dated 07.01.1987 made in O.S.No.1477 of 1983 on the file of the District Munsif Court, Tirunelveli.

For Appellants : Mr.G.Ethirajulu

For Respondents : No Appearance

JUDGMENT

The appellant herein is the plaintiff in the suit filed for declaration and injunction, in respect of the suit properties. The admitted fact of the case is that, the plaintiff and the first defendant are brother and sister. Originally, the suit properties belong to Mrs.Valliammal who is none other than the maternal aunt of the plaintiff and the first defendant.

2.The short point involved in this case is that the said Mrs.Valliammal, who executed a registered Will on 04.09.1969 in favour of the plaintiff in respect of the suit properties later revoked it and executed an another Will on 22.01.1979, in favour of the first defendant and got it registered. Based on these two Wills, the parties stake claim over the suit properties against each other.

3.Both the Courts below have found that Mrs.Valliammal has canceled the earlier Will dated 04.06.1969 executed in favour of the plaintiff and executed another Will in favour of the first defendant on 22.01.1979, in a sound disposing state of mind and the first defendant through witnesses has proved the valid execution of the Will dated 22.01.1979 and also through the other evidence has proved her possession over the suit properties. Aggrieved by the said finding of the trial Court and the First Appellate Court, the present second appeal has been filed by the plaintiff before this Court.

4.This Court, at the time of admitting this second appeal, has formulated the following substantial questions of law :-

"1.Whether the Sub Registrar who registered the second Will and who had no personal knowledge of the Testator could be an attesting witness to prove the same ?

2.Whether the Courts below erred in law in upholding the second Will, which has been brought about under vitiating circumstances and which had no independent attestors?"

5.The first defendant to prove the second Will executed by Mrs.Valliammal in her favour on 22.01.1979, has marked the document - Ex.B.2. It has been duly registered and to prove the execution of the Will, she has examined D.W.2 -Mr.Ramaiah Mudaliar, who is one of the attesting witness to the said Will (Ex.B.2). He has deposed about the fact that Mrs.Valliammal, approached him to cancel the first Will executed by her in the year 1969 in favour of the plaintiff; he advised Mrs.Valliammal, to write a fresh Will and he participated in the execution of the Will. The factum of due execution of the Will Ex.B.2 is spoken by him. He has identified his signature found of the Will dated 22.01.1979 and he has also spoken about the fact that Mrs.Valliammal signed the said Will in his presence and he has signed the Will as an attesting witness. To prove the factum of registration of the Will, first defendant has examined D.W.3 who is the concerned Sub registrar.

6.One of the point for consideration in this Second Appeal, as a substantial question of law is, "Whether the Sub Registrar

can be an attesting witness ?”

7.In the instant case, it is not the Sub Registrar (D.W.3) examined as an attesting witness to prove the Will. D.W.2 is the attesting witness to the Will (Ex.B.2) and he has spoken about the attestation of the Will. D.W.3 viz., the Sub Registrar has spoken about the factum of registration of the Will (Ex.B.2) and collaterally, he has also spoken about the execution of the Will.

8.The Courts below have rightly understood the difference and have accepted the evidence of the attesting witness - D.W.2 and the Sub registrar - D.W.3, to establish two different facts, one for execution of Will (Ex.B.2) and another (D.W.3) for registration of the Will which was marked as Ex.B.2. The fact that while Mrs.Valliammal executing the Will Ex.B.2, she was in good and disposing state of mind, both D.W.2 & D.W.3 had deposed. Therefore, there is no error in accepting Ex.B.2 - Will in favour of the first defendant as a genuine one based on the depositions of D.W.2 & D.W.3.

9.In so far as the second limb of argument put forth by the learned counsel for the appellant/plaintiff that the second Will (Ex.B.2) was brought out under vitiated circumstances, this Court finds no force in the said argument. The first Will executed in the year 1969 and the second Will executed in the year 1979 i.e., after the lapse of 10 years. There is no reason to say that the subsequent Will (Ex.B.2) was executed in a vitiated circumstances. The recital of Ex.B.2 - Will, clearly reveals the subsequent conduct of the plaintiff as to why Mrs.Lt.Valliammal want to cancel the earlier Will executed in faovur of the plaintiff. He has not participated in the funeral ceremony of Mrs.Lt.Valliammal even after intimation, which has been proved by the first defendant, by way of evidence. This gives enough insight about the fact that Mrs.Valliammal was not happy with the conduct of the plaintiff and she has felt that her last wish could not be fulfilled by the plaintiff. Without saying that in too many words, the testatrix/Mrs.Valliammal, has candid expressed her mind that in the present circumstances, she was forced to re-write her earlier Will and taking note of the fact that she has been taken care by the first defendant who is her sister's daughter, she bequeath her properties in her favour.

(Emphasis applied)

10.While attacking the subsequent Will (Ex.B.2), the yet another factor which the plaintiff has failed to prove is that if the earlier Will executed in his favour is the last Will of Mrs.Valliammal then, he on Mrs.Valliammal's death should have acted upon the Will by carrying out certain religious obligations set out in the Will marked as Ex.A.1. There is no

evidence let in by him to that effect. This clearly shows that the appellant herein is aware of the subsequent Will (Ex.B.2) and he had no right over the suit properties, based on the earlier Will - Ex.A.1, dated 14.09.1969.

11.In respect of the possession of the suit properties, the Courts below have accepted the evidence let in by the first defendant to show that she is in constructive possession of the suit properties and had taken steps to evict the tenants by initiating rent control proceedings in respect of first item of the suit schedule property. In so far as the second item of the suit schedule property, the Courts below have disbelieved the case of the plaintiff regarding his possession over the same because, P.W.3, who claims to be a tenant under the plaintiff in respect of the second item of the suit schedule property has produced certain documents as kist receipts which have no relevance to the suit properties and further, his evidence has not inspired the fullest confidence of the Courts below. This Court has got no second opinion regarding the said decision taken by the Courts below. Hence, the second appeal is liable to be dismissed.

12.In the result the second appeal is dismissed. There shall be no order as to costs.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

jbm

To

1.The Subordinate Court,
Tirunelveli.

2.The District Munsif Court,
Tirunelveli.

copy to
The Section Officer
VR Section
High Court Madras

Second Appeal No.284 of 1989

aa03/01/2017