

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.03.2016

CORAM :

THE HONOURABLE MR.JUSTICE T.MATHIVANAN

S.A.No.1018 of 2004
&
C.M.P.No.7473 of 2004

Gopal ... Appellant/Plaintiff

Vs.

1.Natarajan
2.Minor Raja
3.Minor Chandrababu
(Minors 2 & 3 are represented by
natural guardian, father M.Natarajan).
4.Dharmalingam
5.Ramalingam
6.D.Rajeswari@ Vennila
7.D.Parameswari
8.D.Sivakumar
9.D.Kanakalingam ... Respondents/Defendants 1
to 3 & 6 to 11

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 05.09.2003 and made in the appeal in A.S.No.17 of 2003 on the file of the learned Additional District Judge, (Fast Track Court No.2) Cuddalore, confirming the judgment and decree dated 24.06.2002 and made in the suit in O.S.No.73 of 97 on the file of the learned Additional Subordinate Judge, Cuddalore.

For Appellant : Mr.Gopal, Party in Person.

For Respondents : Mr.T.P.Prabhakaran for R1
(No Appearance)

: Mr.K.Manikandan for R2 & 3.

R4 - No Appearance

R5 to R9 - Given up

J U D G M E N T

The judgment and decree dated 05.09.2003 and made in the appeal in A.S.No.17 of 2003 on the file of the learned Additional District Judge(FTC.2), Cuddalore, confirming the judgment and decree dated 24.06.2002 and made in the suit in O.S.No.73 of 1997 on the file of the learned Additional Subordinate Judge, Cuddalore are under challenge in this memorandum of Second Appeal.

2. The plaintiff, who has lost his case before the Courts below, stands before this Court with this Second Appeal.

3. For the sake of convenience and for easy reference, the appellant may herein after be referred to as the plaintiff and the respondents be referred to as the defendants where ever the context so require.

4. Heard Mr.M.Gopal, who is party-in-person and Mr.K.Manikandan, learned counsel appearing for the respondents 2 & 3.

5. The plaintiff had filed the suit in O.S.No.73 of 1997 as against the defendants seeking the relief of declaration of his title over 'A' schedule property as well as the consequential relief of permanent injunction. Alternatively, he had also sought the relief of preliminary decree for partition in respect of his $\frac{1}{2}$ share over the suit 'B' schedule property.

6. As per the case of the plaintiff, the suit 'B' schedule property is a house bearing Door No.2, Appavu Padayachi Street, Cuddalore. The suit 'A' schedule property is a portion of 'B' schedule property.

7. The fourth defendant M.Amirdhammal(since deceased) is the wife of one P.Munusami Nattar. The plaintiff and the defendants 1 and 5 are their son and daughter. The defendants 2 and 3 are the children of the first defendant. The plaint 'A' and 'B' schedule properties are the self acquired properties of P.Munusamy Nattar, under a registered Sale Deed dated 27.11.1948. Originally, P.Munusamy Nattar had executed a registered Will dated 27.02.1993, bequeathing the schedule mentioned property in favour of the plaintiff and the first defendant. Thereafter, he had passed away on 24.10.1996. As per the recitals of the Will, the plaint 'A' schedule property therein was allotted to the plaintiff, which is described in plaint 'A' schedule. The said Will was executed and registered by their father P.Munusamy Nattar, when he was in sound and disposing state of mind. According to

the plaintiff, the said Will dated 27.02.1993, was his last Will and hence the plaintiff is entitled to 'A' schedule property.

8. After the death of P.Munusamy Nattar, the first defendant had propounded a Will dated 11.05.1993, which is said to have been executed by their father P.Munusamy Nattar, bequeathing his entire property in favour of the defendants 2 and 3, who are the minor children of the first defendant, appointing the first defendant as their guardian. The said Will, according to the plaintiff, is not a true and valid document and equally in any event it could not have been executed by their father. The said Will might have been concocted by the first defendant with the forged signature of their father P.Munusamy Nattar.

9. Since, the first defendant had propounded the above said Will dated 11.05.1993, a village Panchayat was convened on 24.10.1996, wherein, the first defendant had accepted that the Will dated 11.05.1993, was not a true and valid document and he had also given an undertaking to divide and allot $\frac{1}{2}$ share to the plaintiff in 'B' schedule property. However, the first defendant had not complied with the said undertaking and therefore, the plaintiff was constrained to file the above suit.

10. The defendants 1 to 3, alone had contested the suit. The defendants 4 and 5 were dead. The defendants 6 to 11, remained ex-parte. According to the contesting defendants 1 to 3, the suit property is the absolute property of the defendants 2 and 3, as per the Will dated 11.05.1993, executed in favour of the defendants 2 and 3 by P.Munusamy Nattar.

11. P.Munusamy Nattar, had originally executed a Will on 26.09.1991 and thereafter, he had executed an another Will on 27.02.1993, cancelling his earlier Will dated 26.09.1991. Then, he had executed an another registered Will on 11.05.1993 in favour of the defendants 2 and 3, after revoking the earlier Will dated 27.02.1993. It was his last Will and Testament and it was also executed by him in a sound and disposing state of mind. It was validly executed and attested. Under the said Will dated 11.05.1993, P.Munusamy Nattar had bequeathed the suit property (house to the defendants 2 and 3). The first defendant did not take part in any manner regarding the execution of decree. Since, the Will dated 11.05.1993 is true, valid, executed and attested as per law, the plaintiff is not entitled to the reliefs claimed by him in the suit. In fact, the plaintiff, Gopal, is one of the attestors of all the Wills executed by P.Munusamy Nattar on 26.09.1991, 27.02.1993 and 11.05.1993. The first defendant had not given any undertaking to divide the property.

12. It is the specific contention of the first defendant that since defendants 2 and 3 have become the absolute owners of the suit property, the plaintiff cannot maintain the suit for declaration as well as for permanent injunction much less for the relief of partition.

13. Based on the pleadings of the suit, the trial Court had formulated as nearly as 4 issues. The plaintiff Gopal had examined himself as PW1 and during the course of his examination, the Sale Deed dated 27.12.1948, said to have been executed by one Anjalai Ammal in favour of P.Munusamy Nattar, was marked as Ex.A1. On the other hand, the first defendant Mr.Natarajan and one Mr.Gopalswamy, were examined as DW1 & 2 respectively and during the course of their examination, the Wills dated 11.05.1993, 26.09.1991 and 27.02.1993 were marked as Ex.B1 to B3.

14. On scrutinization of the evidences both oral and documentary, the trial Court had proceeded to dismiss the suit with the cost of the defendants.

15. The plaintiff, questing the correctness of the judgment and decree dated 24.06.2002, had preferred an appeal in A.S.No.17 of 2003 on the file of the Additional District Judge(FTC.2), Cuddalore. That appeal was dismissed, after confirming the judgment and decree of the trial court. Hence, the plaintiff stands before this Court with this Second Appeal.

16. This Second Appeal came to be admitted based on the following solitary substantial question of law:

''whether it is not necessary for the defendants to prove that Ex.B1, does not suffer from fraud, mis-representation, coercion, undue influence and unnaturalness?

17.It is an admitted fact that suit ''B'' schedule property was purchased by P.Munusamy Nattar under a registered Sale Deed dated 27.12.1948. Ex.A1, is the certified copy of the registered original Sale Deed. As afore stated P.Munusamy Nattar, is none other than the father of the plaintiff as well as the first defendant. While the plaintiff is claiming that their father P.Munusamy Nattar had executed a registered Will dated 27.02.1993 bequeathing the ''B'' schedule property in his favour as well as in favour of his brother, the first defendant has claimed that his father had executed an another registered Will, revoking the earlier Will dated 27.02.1993.

18. Ex.B3 is the registered Will dated 27.02.1993, which according to the first defendant was revoked by his father by

executing an another Will dated 11.05.1993(Ex.B1). The first defendant has contended that the defendants 2 & 3 being his sons, are the absolute owners of the property, as his father P.Munusamy Nattar, under Ex.B1, had bequeathed the housing property morefully described in plaint ''B'' schedule in favour of the defendants 2 & 3. The Plaint ''A'' schedule property is a portion of ''B'' schedule property in respect of which, the plaintiff has claimed a declaratory decree as well as the consequential relief of permanent injunction.

19. Both the Courts below have concurrently found that the plaintiff is not entitled to get the prime relief of declaratory decree as well as the permanent injunction. The Courts below have also found that even the plaintiff is not at all entitled to the alternative relief of preliminary decree for partition in respect of ½ share from the suit property.

20. It is obvious to note here that the plaintiff has not evinced any interest to substantiate his case. On the other hand, the first defendant, who is the propounder of the Will dated 11.05.1993 has examined as DW2, one Gopalswamy, who is one of the attestors of the Will dated 11.05.1993(Ex.B1). It is also relevant to note here that he is also one of the attestors of the earlier Will dated 27.02.1993.

21. It is the specific contention of the first defendant that the plaintiff was well aware of the fact of execution of the Will in dispute dated 11.05.1993(Ex.B1), as he had been living in the same house. Further, the plaintiff has also failed to prove his contention saying that he had convened a Village Panchayat on 27.04.1996, wherein the first defendant had accepted that the Will dated 11.05.1993 was not true or valid one and that he had also given an undertaking to divide and allot ½ share to him in ''B'' schedule property. When the plaintiff himself had failed to establish as well as substantiate his case, he cannot take advantage of the loophole which may be available in the case of the defendants.

22. This Court has carefully gone through the available materials on record alongwith the judgment and decree of the Courts below and having regard to all the relevant facts and circumstances, this Court is of a considered view that the concurrent findings given by the Courts below, need not be interfered with.

23. Section 68 of the Indian Evidence Act 1872, enacts as under:

Section 68: Proof of execution of document required by law to be attested.-

''If a document is required by law to be attested, it shall not be used as

<https://hcservices.ecourts.gov.in/hcservices/>

evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

24. Sections 68, 69 & 71 of the Evidence Act deal with the proof of documents required by law to be attested. The law is very strict in regard to documents required by law to be attested. "The general notion of preference which insists that a particular witness shall be called before another can be called rests on the supposed excellent position of that particular witness to obtain knowledge of the matter more accurately than any other person. His opportunities of knowledge, it must be supposed, have been not only better than those of others, but so much better that it would be a palpable risking of injustice to proceed in the trial without endeavouring to obtain him".

As afore stated the Section lays down that documents required by law to be attested shall not be used as evidence unless at least one attesting witness is called to prove its execution, if he is alive and subject to the process of the Court".

25. On coming to the instant case on hand DW2, one of the attestors of the Will dated 11.05.1993(Ex.B1) has deposed that he had attested the Will dated 11.05.1993(Ex.B1) alongwith one Sadayandi. The said Sadayandi had passed away. DW2 being one of the attesting witnesses alone is alive. Therefore, he was called upon to give the evidence with reference to the genuineness of Ex.B3. DW2, has also stated that he had not only attested the disputed Will dated 11.05.1993, but also attested the previous Will dated 27.02.1993 along with one Subramanian, said to have been executed by the father of the plaintiff and the first defendant.

26. It is more significant to note here that the Will dated 27.02.1993, which was marked under Ex.B3, was revoked by P.Munusamy Nattar, by the execution of an another Will dated 11.05.1993(Ex.B1), bequeathing the suit property in favour of the defendants 2 & 3, who are the sons of the first defendant.

The chief examination of DW2, with stood the test of cross examination done on behalf of plaintiff.

27. This Court would also like to make reference to Section 63(c) of the Indian Succession Act 1925:

Section 63, Sub Clause (c) envisages:

'that the Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary'.

28. DW2 in his evidence says that he alongwith one Sadayandi had signed as witness in the Will dated 11.05.1993 (Ex.B1). He would further state that he and the another witness Sadayandi had seen the testator sign the Will and that they had signed in the presence of the testator.

29. As observed by Karnataka High Court in S.A.Quddus Vs.S.Varappa, AIR 1994 Kar 20, what is to be proved is that two witnesses have seen the testator sign the Will and that they signed in the presence of the testator. Even if a person sees the testator sign and signs in the Will after seeing the testator sign and in the presence of the testator he would not be a attesting witness unless he puts his signature on the Will animus attestandi. In so far as the attesting witnesses are concerned, the only statutory requisite is that they should have the necessary animus attestandi or intent on to attest the document.

30. This principle is laid down by this Court in Andal Ammal In re, (1988) (1) MLJ 35: 81, Mad LW 88:1998 Lab LC 1328 and also Govindarajan Vs.N.Leelavathy, 2011 (5) CTC 287 (Mad). In paragraph Nos.16 and 17 of the decision cited second supra, a Division Bench of this Court has observed as under:

Para 16: 'the law is well settled that the mode of proving a Will does not ordinarily differ from that of proving any other document except as to the special requirement prescribed in the case of a Will by Section 63 of the Indian Succession Act. The law requires that the proof of execution of a

Will has to be attested at least by two witnesses. At least one attesting witness has to be examined to prove the execution and attestation of the Will. Further, it is to be proved that the executant had signed and / or given his thumb impression in the presence of at least two attesting witnesses and the attesting witnesses had put their signatures in the presence of executant. (See (2007) 5 MLJ 159(SC), Benga Behera and another Vs. Braja Kishore Nanda and Others, Madhukar D.Shende Vs.Tarabai Aba Shedage, AIR 2002 SC 637:(2002) 2 SCC 85, Janki Narayan Bhoir Vs Narayan Namdeo Kadam, AIR 2003 SC 761, Bhagatram Vs. Suresh and others, AIR 2004 SC 436:(2003) 12 SCC35).

Para 17: The burden of proof that the Will has been validly executed and is a genuine document, is on the propounder. The propounder is also required to prove that the testator has signed the Will and that he had put his signature out of his own free Will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. Court granting Letters of Administration/Probate must satisfy itself not only about the genuineness of the Will, but also satisfy itself that it is not fraught with any suspicious circumstance. But the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. (See AIR 2007 SC 614:2007(2) CTC 172, Niranjana Umesh Chandra Joshi Vs. Mridula Jyoti Rao and Others., 2002(1) CTC 244: (2002) 2 SCC 85:(2002) 1 MLJ 181., Madhukar D.Shende Vs.Tarabai Shedage and 2005 (1) CTC 443:(2005) 8 SCC 784, Sridevi and Others Vs.Jayaraja Shetty and Others.

31. As observed in the above cited decisions, the first defendant being the propounder of Ex.B1, Will dated 11.05.1993 has proved the Will beyond the shadows of doubt. Therefore, it cannot be heard to say that it does suffer from fraud, misrepresentation, coercion, undue influence and unnaturalness.

31a. Accordingly, the substantial question of law is answered as against the plaintiff/appellant.

32. It is pertinent to note here that the plaintiff himself has failed to substantiate his case. This court, after going through the evidences both oral and documentary, as well as the judgment of the Courts below is of the considered view that the concurrent findings rendered by the Courts below does not warrant the interference of this Court.

33. Further, it is the settled principle of law that once, the Courts below have given concurrent findings, this Court being the second Appellant Court must be very slow in exercising it's jurisdiction to interfere with it, unless it is warranted by special circumstances. In so far as this Second Appeal is concerned, no such circumstance arises to exercise the jurisdiction of this Court to interfere with the judgment and decree passed by the Courts below.

34. In the result, the second Appeal filed by the appellant/plaintiff is dismissed, confirming the concurrent findings of the Courts below. Consequently, connected miscellaneous petition is closed. However no order as to costs, considering the relationship of the parties to the appeal.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

dn

To

1. The learned Additional District Judge,
(Fast Track Court No.2) Cuddalore.
2. The learned Additional Subordinate Judge,
Cuddalore.

Copy To

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

+lcc to Mr.K.Manikandan, Advocate, S.R.No.15679

S.A.No.1018 of 2004

&

C.M.P.No.7473 of 2004

AK(CO)

CA(23/06/2016)

<https://hcservices.ecourts.gov.in/hcservices/>