

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.01.2016

CORAM

THE HON'BLE MR.JUSTICE S.NAGAMUTHU

Second Appeal No.254 of 2013
and
M.P.No.1 of 2013

D.Venkatapathy

... Appellant/Defendant.

-Versus-

D.Jegapathy

... Respondent/Plaintiff

This second appeal is filed against the judgment and decree dated 21.09.2012 in A.S.No.115 of 2011 passed by the learned Subordinate Judge, Vellore, reversing the decree and judgment dated 26.07.2010 passed in O.S.No.650 of 2004 by the learned Additional District Munsif, Vellore.

For Appellant : Mr.PL.Narayanan

For Respondent : Ms.R.T.Sundaraj for
Mr.R.Margabandhu

JUDGMENT

The suit in O.S.No.409 of 1999 was originally filed before the learned Subordinate Judge, Vellore, by the sole respondent herein. The appellant is the 1st defendant. On transfer to the file of the learned Additional District Munsif, Vellore, the said suit was renumbered as O.S.No.650 of 2004. The respondent herein filed the above said suit for partition of the suit properties and for allotment of 1/3rd share to him. By decree and judgment dated 26.07.2010, the trial court dismissed the suit. As against the same, the plaintiff/respondent herein filed an appeal in A.S.No.115 of 2011 before the learned Subordinate Judge, Vellore, as against the 1st defendant alone and he had given up his claim as against the defendants 2 to 4. By decree and judgment dated 21.09.2012, the first appellate court allowed the appeal, set aside the decree and judgment of the trial court and passed a preliminary decree allotting 1/3rd share to the plaintiff/respondent herein. Challenging the same, the 1st defendant is now before this court with the present second appeal.

2. The case of the plaintiff in brief is as follows:- The suit properties were originally owned by one Sri.Duraisamy Naidu. Sri.Duraisamy Naidu is none else than the father of the plaintiff, 1st defendant and one Sri.Sripathi. The defendants 2 and 3 are the children of Sri.Sripathi, who is no more. During his life time, Sri.Duraisamy Naidu had executed a settlement deed dated 27.11.1957 (Ex.A.1) in favour of his wife Mrs.Sarojini Ammal. As per the terms of settlement deed Mrs.Sarojini Ammal was given only life estate and after her demise, the properties should be equally inherited by the plaintiff, the 1st defendant and Sripathy. The said settlement deed was acted upon and Mrs.Sarojini Ammal was in possession and enjoyment of the suit property till her demise on 11.04.1983. After the demise, as per the terms of the settlement deed, the plaintiff and the 1st defendant are entitled for 1/3rd share each and the defendants 2 and 3 are entitled for 1/3rd share together. Since the defendants did not come forward to partition the suit property, the plaintiff filed the present suit for partition.

3. The 1st defendant /appellant herein contested the suit claiming absolute title for the suit property. According to him, the settlement deed dated 27.11.1957 was subsequently cancelled by Sri.Duraisamy Naidu by means of a registered cancellation deed dated 27.01.1979. It is further case that the settlement deed under Ex.A.1 was never acted upon. Thus, according to the 1st defendant Sri.Duraisamy Naidu continued to be the owner of the suit property. In such capacity, on 21.08.1983, he had executed a Will which was registered on the same day on the file of the Sub Registrar at Vellore. Sri.Duraisamy Naidu, thereafter, died on 20.12.1984. As per the terms of the Will, the entire suit property should go to the 1st defendant. Accordingly, by means of testamentary succession, the 1st defendant has become the absolute owner of the suit property over which neither the plaintiff nor the other defendants have got any right whatsoever. Thus, the 1st defendant claimed that the suit property is not liable for partition at all.

4. Based on the above pleadings, the trial court framed appropriate issues. During trial, on the side of the plaintiff, he was examined as P.W.1 and as many as 2 documents were exhibited on his side. Ex.A.1 is a copy of the settlement deed dated 27.11.1957 and Ex.A.2 is the death certificate of Mrs.Sarojini Ammal. On the side of the defendants, the appellant/1st defendant was examined as D.W.1 and one Sri.Thulasimani, an Assistant working at the Office of the Sub Registrar, Vellore, was examined as D.W.2 and as many as 4 documents were exhibited. Ex.B.1 is the registered Will dated 21.08.1983 executed by Sri.Duraisamy Naidu; Ex.B.2 is the order passed by the local panchayat transferring the house tax

assessment in the name of the 1st defendant; Exs.B.3 and B.4 are the property tax receipts for the suit property; and Ex.B.5 is the death certificate of one Sri.Radha Krishnan. D.W.2 was examined to prove the Will.

5. Having considered all the above, the trial court dismissed the suit which was subsequently reversed by the first appellate court. That is how, the 1st defendant is now before this court with the present second appeal.

6. This second appeal has come up today for admission. On notice of motion, the sole respondent has entered appearance through his counsel.

7. I have heard the learned counsel for the appellant and the learned counsel for the respondent and also perused the records carefully.

8. Having gone through the records and upon hearing the learned counsel on either side, I find the following substantial questions of law in this second appeal for consideration :-

(1) Whether the oral evidence of D.W.2 would go to prove the execution of the Will [Ex.B.1] by satisfying the requirements of Section 69 of the Evidence Act?

(2) Whether the first appellate court was right in holding that the settlement deed under Ex.A.1 was acted upon?

9. The learned counsel appearing for the appellant would submit that in order to prove that from 27.11.1957 till 11.04.1983 Mrs.Sarojini Ammal was in possession and enjoyment of the suit property and that the settlement deed dated 27.11.1957 was acted upon, absolutely there is no evidence, either documentary or oral, except the oral evidence of P.W.1. The learned counsel would further submit that once if it is so held that the settlement deed under Ex.A.1 was not acted upon as on the date of execution of the Will dated 21.08.1983 Sri.Duraisamy Naidu had no title to convey. The learned counsel would further submit that the evidence of D.W.2 would be sufficient to prove the execution of the Will by Sri.Duraisamy Naidu and the same would satisfy the requirements of Section 69 of the Evidence Act.

10. The learned counsel for the respondent would vehemently oppose this second appeal. According to her, there is oral admission by the appellant/1st defendant during cross examination that Mrs.Sarojini Ammal was in possession and enjoyment of the suit property till her demise and thus,

according to her, there is sufficient evidence to prove that the settlement deed under Ex.A.1 was acted upon.

11. The learned counsel for the respondent would further submit that since as on 21.08.1983 Sri.Duraisamy Naidu had no title , the Will said to have been executed by him cannot confer any title on the appellant. The learned counsel would further add that the Will under Ex.B.1 has not been proved by following the special procedure contemplated in the Evidence Act. It is her contention that D.W.1 is not competent to speak about the execution of the Will and he is competent only to speak about the registration of the document. The learned counsel would, therefore, submit that the Will has not been proved and thus, under Ex.A.1 Will , at any rate, the appellant/1st defendant cannot claim absolute title for the suit property.

12. I have considered the above submissions carefully

13. There is no controversy before this court that originally Sri.Duraisamy Naidu had title for the suit property. Though not it is in pleadings of either party, it is in evidence that the joint family properties were partitioned between Sri.Duraisamy Naidu and his 3 sons by name (1) Jagapathy (plaintiff), Venkatapathi (1st defendant) and Sripathy (the father of the defendants 2 and 3). It is also in evidence that the suit property was not included in the said partition. But, unfortunately, the partition deed has not been proved in evidence at all. However, the first appellate court has extensively gone into such a partition deed and has held that because the suit property had been settled in favour of Mrs.Sarojini Ammal, the same was not included in the partition which was effected between Sri.Duraisamy Naidu and his 3 sons. In my considered view, in the absence of primary evidence, namely, the production of the partition deed, the first appellate court ought not to have considered the secondary evidence namely, the oral evidence of the parties in this regard. In order to know whether the suit property was included in the partition and if not, why the same has not been included , one can only refer to the partition deed which is after all a registered partition deed. Therefore, it is for the parties to produce the partition deed and then to make reliance on the same.

14. Admittedly, according to the parties, the suit property was independently owned by Sri.Duraisamy Naidu after the family partition which took place in the year 1968. Sri.Duraisamy Naidu had admittedly executed the settlement deed dated 27.11.1957. It is the law that mere execution of the settlement deed would not automatically convey title. All that is required under the Transfer of Property Act is that the settlement deed should have been acted upon by the parties to the document. Though it is

alleged by the plaintiff that the settlement deed was acted upon, during the course of cross examination, he has admitted that he had not produced any document to prove the same. It is not as though Mrs.Sarojini Ammal was allegedly in possession of the suit property either for few months or for few years. It is the case of the plaintiff that he was enjoying the suit property by acting upon Ex.A.1 for 26 years. Had it been true , it is not explained to the court as to what prevented the plaintiff from producing some documents such as, property tax receipts, patta transfer order, or some other documents to show that he was in possession as the absolute owner of the suit property by virtue of Ex.A.1 Absolutely, there is no explanation for the same. Therefore, in my considered view, the appellate court ought not to have held that the settlement deed was acted upon by simply acting upon the oral evidence of P.W.1. This issue requires further evidence from the parties. In the plaint, the plaintiff had not pleaded about the cancellation of settlement deed dated 27.01.1979 executed by Sri.Duraisamy Naidu cancelling the settlement deed dated 27.11.1957.

15. The learned counsel for the respondent would submit that the said cancellation was not to the knowledge of the plaintiff. But, the fact remains that there is a registered cancellation deed. There is a pleading to the said effect in the written statement of the 1st defendant. But, unfortunately, the 1st defendant also did not prove the said cancellation deed. Had it been produced before the court that would have given an indication as to why Sri.Duraisamy Naidu cancelled the settlement deed. It may even go to indicate whether the settlement deed under Ex.A.1 was acted upon or not. In my considered view, this document is a crucial one which may be helpful for the court to come to the conclusion as to whether the settlement deed was acted upon or not. Then comes the registered Will dated executed by Sri.Duraisamy Naidu. The first appellate court has held that the Will has been duly proved. The said Sri.Duraisamy Naidu died on 20.12.1984. In respect of this Will, two questions crop up. The first one is whether Sri.Duraisamy Naidu himself had title to convey under the Will. The answer to this question depends upon the answer to the earlier question as to whether the settlement deed was acted upon or not. The second question is as to whether the Will has been duly proved as required in law. The 1st defendant who is the beneficiary under the Will has, of course, spoken about the execution of the Will, but, he cannot prove the execution of the Will as he was not an attester to the document. Admittedly, there were two attestors to the document. It is claimed by the 1st defendant / appellant herein that one of the testators was no more and the other was not found. If that is true, then, as per Section 69 of the Evidence Act, there is a special procedure contemplated as to how the Will is to be proved. Section 69 of the Evidence Act reads as follows:-

"69. Proof where no attesting witness found.- If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attesor of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person."

16. Referring to the above provision, the learned counsel for the appellant/1st defendant would submit that in the instant case, D.W.2 a clerk from the Sub Registrar's Office, where the Will was registered, has been examined. By referring to the endorsements made by the Sub Registrar, who registered the document, he has deposed that Sri.Duraisamy Naidu had admitted before the Sub Registrar that the Will was executed by him. From this oral evidence of D.W.2, according to the learned counsel for the appellant, the Will has been proved. But, I find it very difficult to get persuaded by the said argument inasmuch as the sound legal provision contained in Section 69 of the Evidence Act which is mandatory. It is not the case of the appellant that D.W.2 was an attesor to the document. It is also not his case that he was at least present at the time when the document was presented for registration before the Sub Registrar. He had no role to play either in the execution of the document or in its registration. The document was registered by some other officer. That officer namely, the Sub Registrar has not been examined. D.W.2 speaks of the facts contained in the document itself which is found by way of endorsements made by the Sub Registrar. The question is whether his oral evidence would satisfy the requirement of Section 69 of the Evidence Act.

17. In this regard, the learned counsel for the appellant would make reliance on the judgement of the Hon'ble Supreme Court in Pentakota Satyanarayana and others v. Pentakota Seetharatnam and others, 2006-2-L.W. 658 wherein the Hon'ble Supreme Court has held as follows:-

"It is true that registration of the Will does not dispense with the need of proving, execution and attestation of a document which is required by law to be proved in the manner as provided in Section 68 of the Evidence Act. The Registrar has made the following particulars on Ex.B9 which was admitted to registration, namely, the date, hour and place of presentation of document for registration, the signature of the person admitting the execution of the Will and the signature of the identifying witnesses. The document also contains the signatures of the attesting witnesses and the scribe. Such

particulars are required to be endorsed by the Registrar along with his signature and date of document. A presumption by a reference to Section 114 of the Evidence Act shall arise to the effect that particulars contained in the endorsement of registration were regularly and duly performed and are correctly recorded. In our opinion, the burden of proof to prove the Will has been duly and satisfactorily discharged by the appellants. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the Will in the manner contemplated by law. In such circumstances, the onus shift to the contestant opposing the Will to bring material on record meeting such prima facie case in which event the onus shift back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the Will and in sound disposing capacity executed the same."

18. The above judgment was rendered by a bench of two-Hon'ble Judges of the Supreme Court. But, I find an earlier judgment of the Hon'ble Supreme Court rendered by three-Hon'ble Judges in M. L. Abdul Jabbar Sahib v. H. V. Venkata Sastri & Sons and others, 1969 (1) SCC 573. Though it was not a case relating to a Will, the Hon'ble Supreme Court has declared the essential conditions of the valid attestation under Section 3 of the Transfer of Property Act which are as follows:-

"(1) that the attesting witnesses have seen the executant signing the instrument or have received from him a personal acknowledgment of his signature.

(2) that they have put their signatures on the instrument with a view to attest or to bear witness to this fact each of them has. signed the instrument in the presence of the executant?

19. It was further held that it is essential that a witness should have put his signature animo attestandi, that is, for the purpose of attesting that he has seen the executant signing or he has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, e.g., to certify that he is a scribe or an identifier or a registering officer, then, he is not an attesting witness.

20. From the above judgment, it is crystal clear that the Registrar who made endorsement shall be competent to speak about the attestation or the signature of the attesor and the execution of the Will, provided he had animo attestandi for the purpose of attesting that he has seen the executant signing or he has received from him a personal acknowledgment of his signature.

21. In *Girja Datt Singh vs Gangotri Datt Singh*, AIR 1955 SC 346, a Bench of three-Hon'ble Judges of the Supreme Court held that two witnesses, who had identified the testator at the time of registration of the Will and had appended their signatures on the foot of the endorsement by the Sub Registrar, were not attesting witness as their signatures were not put animo attestandi. It was further held that after examining the provisions of the Registration Act, prima facie the registering officer put his signature on the document in discharge of his statutory duty and not for the purpose of attesting it or certifying that he has received from the executant a personal acknowledgment of his signature and therefore, he cannot be regarded as an attesting witness. The said view was reaffirmed subsequently, in *Dharam Singh v. Aso and another*, AIR 1990 SC 1888 : 1990 Supp (1) SCC 684 and in *Bhagat Ram v. Suresh*, 2003 Supp (6) SCR 216.

22. The Hon'ble Supreme Court has further held that the registrar may fulfill the character of an attesting witness as required by law and if, on entering into witness box as required under Section 68 of the Evidence Act, he proves by his testimony the execution of document by deposing to having witnessed himself the proceedings as contemplated by Section 63 of the Succession Act, then, he can be an attesting witness. It was further held that the certificate of registration under Section 60 of the Registration Act, 1908 raises a presumption under Section 114 illustration (e) of the Evidence Act that he had regularly performed his duty and, therefore, the facts spelled out by the endorsements made under Sections 58 and 59 of the Registration Act may be presumed to be correct without formal proof thereof. It was further held that Registrar of Deeds who has registered a document in discharge of his statutory duty, does not become an attesting witness to the deed solely on account of his having discharged the statutory duties relating to the registration of a document. Registration of any will, and the endorsements made by the Registrar of Deeds in discharge of his statutory duties, do not elevate him to the status of a 'statutory/ attesting witness'. However, a registrar can be treated as having attested to a will if his signature or mark appears on the document akin to the one placed by an attesting witness and he has seen the testator signing or affixing his mark to the will or codicil or has received from the testator a personal acknowledgment of his signature or mark and he has also

signed in the presence of the testator. It was also held that to be an attesting witness, the registrar should have attested the signature of the testator in the manner contemplated by clause (c) of Section 63 of the Succession Act.

23. If the present case is considered applying the above well settled position of law, here, the Registrar who has made endorsement in discharge of his statutory duty has not been examined at all. For any reason, if he gets into the box and gives evidence that he had animus attestandi and having taken into account all other circumstances, the court may assess whether he is competent to speak about the execution as required under Section 68 of the Evidence Act.

24. In view of the settled position, in my considered view, the argument of the learned counsel for the appellant that by the examination of D.W.2 the Will has been proved cannot be accepted. It is also noticed that the judgments, which I have referred to hereinabove, were not taken note of by the Division Bench of the Hon'ble Supreme Court in Pentakota Satyanarayana case, cited supra. As has been consistently held by a larger bench of the Hon'ble Supreme Court in the cases referred to above, the Registrar, who discharged his statutory duty cannot be termed as an attesting witness in terms of Section 68 of the Evidence Act, unless he had animus attestandi. Here in the instant case, the learned counsel for the appellant would submit that Section 69 of the Evidence Act has been satisfied. In my considered view, Section 69 of the Evidence Act has not been satisfied. Similarly, Section 68 of the evidence Act has also not been satisfied. Thus, I hold that the Will under Ex.B.1 has not been proved at all in accordance with law.

25. The learned counsel for the appellant would submit that since three vital documents namely, registered partition deed, registered cancellation deed of settlement and the registered Will in questions have not been properly proved in accordance with law, the appellant/1st defendant has been put into disadvantageous position. He would submit that an opportunity may be afforded to the appellant to prove these documents by letting in addition evidence.

26. I find force in the said argument. Apart from the above, as I have already pointed out, the respondent/plaintiff should also be afforded an opportunity to prove that the settlement deed under Ex.A.1 was acted upon. In order to do justice between the parties, in my considered view, the matter requires reconsideration by the trial court. For that purpose, I am inclined to set aside the preliminary decree and judgment of both the courts below and remit back the matter to the trial court for fresh disposal. Accordingly, I answer both the questions of law.

27. In the result, the second appeal is allowed. The decree and judgment of the trial court and that of the first appellate court are set aside and the suit in O.S.No.650 of 2004 is remitted back to the file of the learned Additional District Munsif, Vellore, who shall issue summons to the defendants 2 to 4 in the suit also and permit both the parties to adduce additional evidence, if any, and then dispose of the suit afresh within a period of four months from the date of receipt of a copy of this judgment and decree. However, considering the facts and circumstances of the case, there shall be no costs throughout. Consequently, connected MP is closed.

kmk

-s/d-

Assistant Registrar(CS-I)

True Copy

Sub-Assistant Registrar

To

1.The Subordinate Judge, Vellore, Vellore District.

2.The Addl. District Munsif, Vellore, Vellore District.

+ 2 cc to M/s.r.Margabandhu, Advocate, SR 3207

+ 1 cc to M/s.P.L.Narayanan, Advocate, SR 2937

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