

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 30-09-2016
Pronounced on: 26-10-2016

Coram:

The Hon'ble Mr.Justice A.SELVAM
and
The Hon'ble Mr. Justice P.KALAIYARASAN

O.S.A.Nos.145 and 146 of 2016

K. Ramalingam ... Appellant in both OSAs.

Vs.

Anjalai ... Respondent in both OSAs.

Original Side Appeal preferred under Order XXXVI Rule 1 of Original Side Rules against the order of this Court dated 24-11-2015 made in T.O.S.Nos.22 and 25 of 2005.

For Appellant : Mr. J.R.V. Bhavanandam
for Mr.P.B. Ramanujam

For Respondent : Mr. S. Suresh Kumar

JUDGMENT

(JUDGMENT OF THE COURT WAS DELIVERED BY A.SELVAM, J.)

These Original Side Appeals are directed against the common judgment dated 24-11-2015 passed by the learned Single Judge of this Court in T.O.S.Nos.22 and 25 of 2005.

2. The appellant herein in O.S.A.Nos.145 of 2016, as plaintiff, has instituted T.O.S.No.22 of 2005 on the file of this Court praying to probate the Will dated 16-03-1998. Likewise, the respondent in O.S.A.No.146 of 2016, as plaintiff has instituted T.O.S.No.22 of 2005 on the file of this Court praying to probate the Will dated 18-05-1994.

3. The material averments made in the plaint filed in T.O.S.No.22 of 2005 may be summarised as follows:

The respondents 1 and 2 and the petitioner are the children of Kandasamy Naicker and his wife by name Dhanabakkiam. The said Kandasamy Naicker has predeceased his wife. The property mentioned in the Schedule is the absolute property of Dhanabakkiam. The said Dhanabakkiam has voluntarily executed the Will dated 16-03-1998 in favour of the plaintiff. Under the

said circumstances, the present suit has been instituted praying to issue letter of administration.

4. In the written statement filed on the side of the defendants it is averred that the Will dated 16-03-1998 has not been executed by the deceased Dhanabakkiam and the same is nothing but a concoction. The relationship mentioned in the plaint is correct. The second respondent has already filed O.P.No.385 of 2000 for getting letter of administration in respect of the Will dated 18-05-1994 executed by her mother viz., deceased Dhanabakkiam and the same has been converted into T.O.S.No.25 of 2005. There is no merit in the suit and the same deserves to be dismissed.

5. The material averments made in the plaint filed in T.O.S.No.25 of 2005 may be summarised as follows:

The petitioner and the respondents are the children of deceased Kandasamy Naicker and his wife Dhanabakkiam. The property mentioned in the Will is the absolute property of Dhanabakkiam and she voluntarily executed the Will dated 18-05-1994 in favour of the petitioner and the said Will has been duly attested. Under the said circumstances, the present suit has been instituted for the relief sought therein.

6. In the written statement filed on the side of the second respondent, it is averred that the Will alleged to have been executed by the deceased Dhanabakkiam on 18-05-1994 in favour of the plaintiff has already been revoked by way of executing her last Will dated 16-03-1998. The testator has lived along with the second respondent. The plaintiff has been married to one Jagannathan and subsequently, deserted her. The plaintiff has been permitted to live in the house mentioned in the Schedule. The testator Dhanabakkiam has mortgaged the property mentioned in the Schedule in favour of one Ramanathaiah and he instituted O.S.No.6151 of 1984 on the file of XII Assistant City Civil Court for getting preliminary decree and the same has been decreed as prayed for on 05-09-1986 and after his demise, his son by name R. Subramaniam has been brought on record and he filed I.A.No.16066 of 1989 for passing a final decree. The second respondent has settled the entire amount and there is no merit in the suit and the same deserves to be dismissed.

7. On the basis of the rival pleadings raised on either side, the learned Single Judge has framed necessary issues and after contemplating both the oral and documentary evidence adduced on either side has dismissed T.O.S.No.22 of 2005 and decreed T.O.S.No.25 of 2005 by way of passing a common judgment and the same is being challenged in the present Original Side Appeals.

8. The consistent case put forth on the side of the plaintiff in T.O.S.No.22 of 2005 is that the property mentioned in the Schedule is the absolute property of one Dhanabakkiam who is none other than the mother of the plaintiff and defendants and she voluntarily executed the Will, dated 16-03-1998 in favour of the plaintiff. Under the said circumstances, T.O.S.No.22 of 2005 has been instituted for getting the relief sought therein.

9. The consistent case put forth on the side of the plaintiff in T.O.S.No.25 of 2005 is that the original owner of the property mentioned in the Schedule has voluntarily executed the Will dated 18-05-1994 in favour of the plaintiff therein and after execution, she passed away. Under the said circumstances, T.O.S.No.25 of 2005 has been instituted for the relief sought therein.

10. It is an admitted fact that the plaintiff and defendants in T.O.S.No.22 of 2005 are the children of the said Dhanabakkiam. It is also equally an admitted fact that the property mentioned in the Schedule is her absolute property.

11. In the present lis, two Wills have been introduced by both parties. The first Will has been executed on 18-05-1994 in favour of the plaintiff in T.O.S.No.25 of 2005. The second Will is alleged to have been executed by the deceased Dhanabakkiam on 16-03-1998 in favour of the plaintiff in T.O.S.No.22 of 2005.

12. The only point that arises for consideration in both the Original Side Appeals is as to whether the Will dated 16-03-1998 is the last Will of the testator viz. Dhanabakkiam.

13. In the written statement filed on the side of the defendant in T.O.S.No.25 of 2005, it has been clearly averred to the effect that the Will dated 18-05-1994 executed by the testator Dhanabakkiam has been revoked by way of executing the subsequent Will dated 16-03-1998. Therefore, execution of the Will dated 18-05-1994 has been clearly admitted by the plaintiff in T.O.S.No.22 of 2005.

14. The learned counsel appearing for the appellant in both the Original Side Appeals has contended with great vehemence to the effect that the property in question is the absolute property of Dhanabakkiam and during her last days, she resided along with the plaintiff in T.O.S.No.22 of 2005 and in fact, the plaintiff in T.O.S.No.22 of 2005 has settled the debt incurred by the testator by way of mortgaging the property in question.

Under the said circumstances, she has voluntarily executed the Will dated 16-03-1998 in favour of the plaintiff in T.O.S.No.22 of 2005 and for the purpose of proving its due execution as well as attestation, P.Ws.2 and 3 have been examined and the learned Single Judge without considering the evidence given by P.Ws.2 and 3 has erroneously dismissed T.O.S.No.22 of 2005. Since the testator has subsequently, executed the Will dated 16-03-1998, the earlier Will dated 18-05-1994 executed by her has been revoked and therefore, the common judgment passed by the learned Single Judge is liable to be set aside.

15. To rebut the contentions put forth on the side of the appellant, the learned counsel appearing for the respondent in both the Original Side Appeals has befittingly contended that till the demise of the testator viz., Dhanabakkiam, no concordial relationship has been in existence between her and the plaintiff in T.O.S.No.22 of 2005 and in fact, the plaintiff in T.O.S.No.22 of 2005 has not settled the mortgage debt incurred by the testator and the testator has voluntarily executed the Will dated 18-05-1994 in favour of the plaintiff in T.O.S.No.25 of 2005 and the learned Single Judge after considering the overall evidence available on either side has rightly found that the Will dated 16-03-1998 has not been executed by the testator and also rightly dismissed T.O.S.No.22 of 2005 and rightly decreed T.O.S.No.25 of 2005. Under the said circumstances, the common judgment passed by the learned Single Judge need not be set aside.

16. The Will dated 16-03-1998 has been marked as Ex-P12 and the Will dated 18-05-1994 has been marked as Ex-D1. As mentioned supra, the only point that has to be decided in the present lis is as to whether Ex-P12 is a genuine Will and the same has been executed by the testator.

17. The plaintiff in T.O.S.No.22 of 2005 has been examined as P.W.1. During the course of cross-examination, he candidly admitted to the effect that he instituted a suit against his mother/testator for getting a relief of perpetual injunction. Therefore, it is quite clear that he has not maintained a concordial relationship with the testator.

18. In the plaint filed in T.O.S.No.22 of 2005, it is averred that the testator has incurred a mortgage debt and the mortgagee has instituted a suit and obtained a preliminary decree and subsequently an application has been filed for getting a final decree and at that time, the plaintiff in T.O.S.No.22 of 2005 has settled the entire due. Even though on the side of the plaintiff in T.O.S.No.22 of 2005, certain documents have been filed for the purpose of institution of O.S.No.6151 of 1984, no document has been filed for the purpose

of showing that he settled the entire decretal amount. Therefore, the said contention put forth on the side of the plaintiff in T.O.S.No.22 of 2005 is nothing but a make belief affair and the same cannot be accepted.

19. It is the case of the plaintiff in T.O.S.No.22 of 2005 that Ex-P12, a Will dated 16-03-1998 is the last Will of the testator. For the purpose of proving its due execution as well as attestation one Amirthavalli has been examined as P.W.2. During the course of cross-examination, she would say that she put her signature in the Will in Registered Office and she has not seen any Advocate or anybody else in the Registered Office. The other attesting witness by name Anandan has been examined as P.W.3. During the course of cross-examination, he would say that he put his signature in the Will in the Registered Office whereas in the sworn affidavits of P.Ws.2 and 3 it has been mentioned that the Will in question has been prepared in the office of an Advocate, the testator has put her signature and subsequently, the attestors have put their signatures. Therefore, it is quite clear that the evidence given by P.Ws.2 and 3 in cross-examination is totally contradictory to the averments made in the sworn affidavits filed by them and that itself would clearly go to show that the due execution as well as attestation of Ex-P12 have not been legally proved on the side of the plaintiff in T.O.S.No.22 of 2005.

20. Apart from the evidence given by P.Ws.2 and 3, the Court has compared the alleged signatures of Dhanabakkiam found in Ex-P12 with her admitted signatures found in Ex-D1. In fact, this Court has collated both disputed as well as admitted signatures and ultimately found that the signatures found in Ex-P12 are not at all the signatures of the deceased Dhanabakkiam. Therefore, it is very clear that Ex-P12 is nothing but a concocted Will and the same has been created only to defeat the right of the plaintiff found in T.O.S.No.25 of 2005.

21. Now the Court has to look into the contentions put forth on the side of the plaintiff in T.O.S.No.25 of 2005. As mentioned supra, the Will dated 18-05-1994 has been marked as Ex-D1. Even in the written statement filed on the side of the defendant in T.O.S.No.25 of 2005, it is clearly averred that the Will dated 18-05-1994 has been revoked by execution of the subsequent Will dated 16-03-1998. Therefore, it is very clear that the execution of Ex-D1 in favour of the plaintiff in T.O.S.No.22 of 2005 has been clearly admitted on the side of the defendant therein.

22. Barring the admission given in the statement filed in T.O.S.No.25 of 2005 on the side of the plaintiff, she has been examined as D.W.1 and one of the attestors has been examined as

D.W.2. The specific evidence given by D.W.2 is that the testator viz., Dhanabakkiam has voluntarily executed the Will dated 18-05-1994 in favour of the plaintiff in T.O.S.No.25 of 2005.

23. Considering the admission given in the written statement filed in T.O.S.No.25 of 2005 coupled with the evidence given by D.W.2, the Court can easily come to a conclusion that Ex-D1 is a genuine Will and on that basis, the plaintiff in T.O.S.No.25 of 2005 is entitled to get the relief sought therein.

24. The learned Single Judge after considering the divergent evidence available on record has rightly dismissed T.O.S.No.22 of 2005 and rightly decreed T.O.S.No.25 of 2005. In view of the discussion made earlier, this Court has not found any acceptable force in the contentions put forth on the side of the appellant and altogether, these Original Side Appeals are liable to be dismissed.

In fine, these appeals are dismissed with costs. The common judgment passed in T.O.S.Nos.22 and 25 of 2005 by the learned Single Judge of this Court is confirmed.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

glp

TO

The Sub Assistant Registrar, (OS)
High Court, Madras

+ 2 ccs to Mr.S. Suresh Kumar, Advocate Sr.61186
+ 2 ccs to Mr.P.B. Ramanujam, Advocate Sr.61130, 61131

O.S.A.Nos.145 and 146 of 2016

CTR(CO)
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