

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.01.2017

PRONOUNCED ON : 13.02.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.659 of 2011

Shanthi

..Appellant/Plaintiff

Vs.

1.Krishnamoorthy

2.Kannammal

..Respondents/Defendants

Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and decree dated 28.01.2011 made in A.S.No.73 of 2007 on the file of the Additional District Judge (Fast Track Court No.2), Gobichettipalayam, reversing the Judgment and Decree dated 29.08.2007 made in O.S.No.94 of 2003 on the file of the I Additional Sub Court, Gobichettipalayam.

For Appellant : Mr.A.K.Kumarasamy

For Respondents : Mr.M.Narayanasamy

JUDGMENT

Challenge in this second appeal is made by the plaintiff against the Judgment and decree dated 28.01.2011 made in A.S.No.73 of 2007 on the file of the Additional District Judge (Fast Track Court No.2), Gobichettipalayam, reversing the Judgment and Decree dated 29.08.2007 made in O.S.No.94 of 2003 on the file of the I Additional Sub Court, Gobichettipalayam.

2.The Second Appeal has been admitted and the following substantial question of law is formulated for consideration in this Second Appeal:

(a)Whether the judgment and decree of the Courts below are based upon the perverse findings and misdirected against the evidence on record?

3.The suit has been laid by the plaintiff for partition.

4.The plaintiff is the daughter of the second defendant and the first defendant is the son of the second defendant. The plaintiff and the first defendant are the children of Kumarasamy and the second defendant is the wife of Kumarasamy. Claiming

that the suit properties belonged to her father Kumarasamy, the plaintiff was laid the suit seeking 1/3rd share in the suit properties. Inter alia, the defendants have resisted the case of the plaintiff by contending that Kumarasamy in respect of his properties had executed a Will dated 22.12.1989, bequeathing the same in favour of the second defendant as life estate and after her death, to the first defendant absolutely.

5. On the basis of the evidence adduced by the parties concerned both the courts have found that the plaintiff has established that only some of the properties described in Item No.1 of the plaint schedule belonged to Kumarasamy. Accordingly, the trial court disbelieving the Will projected by the defendants, granted a preliminary decree in favour of the plaintiff in respect of the said items of the properties established to be belonging to Kumarasamy. On appeal, the first appellate court accepted the genuineness of the Will projected by the defendants and accordingly dismissed the plaintiff's suit in its entirety. Aggrieved over the same, the present second appeal has been preferred.

6. In the above said position, the only point that has to be considered in this second appeal is whether the Will projected by the defendants has been established to be a genuine document by the defendants. The Will has been marked as Ex.B7. It is found that Kumarasamy had died on 16.01.1990. It could therefore be seen that prior to his death, i.e., nearly one month before his death, Ex.B7, Will had come to be executed by him. The trial court has given some reasons for not accepting the Will. However, as rightly put forth by the defendants counsel, the reasonings of the trial court for rejecting the Will cannot be accepted.

7. According to the trial court, the Will has not been written on a stamp paper. However, as rightly put forth by the defendants' counsel the Will need not be engrossed on a stamp paper. Therefore, the above reason given by the trial court for disbelieving the Will as such, cannot be accepted.

8. The next reason given by the trial court is that one of the attestors to the Will is the brother of the second defendant. As rightly put forth by the defendants counsel, normally for the attestation of the documents in the nature of the Will, only close relations would be summoned and therefore, there is nothing unnatural in asking PW2 to attest the Will by the attesor. Merely because, DW2 happens to be the brother of the second defendant, on that score alone we cannot disbelieve the genuineness of the Will in question. The next point given by the trial court for disbelieving the Will is that the other attesor by name Selvaraj is stated to be a minor at the time of the execution of the Will, Ex.B7. However, apart from alleging that the attesor Selvaraj was a minor at that point of time, no material as such has been produced by the plaintiff to prove the

said fact. In such circumstances, the contention that the attesor Selvaraj was a minor at the time of the execution of Ex.B7, Will cannot be taken for granted sans proof and therefore the above reason cannot be the basis for disbelieving the Will in question.

9.The trial court has disbelieved Ex.B7, Will on the further footing that the scribe of the Will namely DW3 is a documentary writer of Sathyamangalam and therefore, he could not have been summoned to write the Will, Ex.B7 by the attesor. However, as rightly found by the first appellate court, it is not necessary for summoning the scribe of a particular locality, where the properties are located in respect of which the Will is executed. It could be seen that as seen by the first Appellate court only the parties known to the testator or the party on whom the testator reposed confidence would be summoned by him to assist in the execution of the Will. Therefore, merely because DW3 happens to be the scribe belonging to Sathyamangalam village, it cannot be construed that Ex.B7, Will as such would not be a genuine document and the testator would not have executed his Will in question with the assistance of DW3. Apart from the above said reasons, the trial court has not given any other reason for disbelieving the evidence of DW2 and 3 while rejecting the Will in question. It has not been held by the trial court that the evidence of DW2 and 3 are not acceptable or cogent or convincing.

10.On the other hand, as rightly found by the first appellate court when the evidence of DW2 and 3 are found inspiring, acceptable and convincing, merely because DW2 happens to be the brother of the second defendant and for the matter, DW3 is a scribe writer of Sathyamangalam Village, we cannot discard their evidence when their evidence are found to be otherwise in order. The trial court has also given a reason that in the reply notice the Will in question has come to be interpolated therefore, the Will would have been concocted. However, it is not the case of the plaintiff that the Will Ex.B7, has been suppressed in the reply notice only, the date of the Will has been mentioned by interlineation in the legal notice marked as Ex.A6. In such view of the matter, the reasonings of the trial court on the above ground to disbelieve the Will as such, cannot be accepted.

11.It is argued that the testator namely Kumarasamy would not have neglected his daughter, the plaintiff, while executing the Will with reference to his properties. However, it is seen that the relationship between the parties are not cordial. It is found that the plaintiff has not wholeheartedly attended the funeral ceremonies of her father along with her family. Therefore, when the relationship between the plaintiff and her parents are found to be estranged and not smooth, it is not unnatural for the testator namely Kumarasamy to bequeath his entire properties in favour of his wife for her long time and

thereafter to his only son, the first defendant absolutely. It is further argued that the defendants being the propounders of the Will have not taken steps to establish the authenticity of the Will Ex.B7 by subjecting the signature of Kumarasamy for expert opinion. However, as rightly argued by the defendant's counsel when the law enjoins that for the proof of the Will the evidence of one of the attestors is sufficient and insofar as this case is concerned, when the defendants have examined the attestor DW2 for establishing the proof of the Will and further had also examined the scribe of the Will namely DW3 and when their evidence are found to be wholly acceptable and not shown to be unreliable, it is found that there is no need for the defendants to subject the will for the scrutiny of the expert for proving the authenticity of the signature of Kumarasamy in the Will in question. If at all the plaintiff still entertains any doubt in the genuineness of the Will, nothing prevented the plaintiff from taking appropriate steps in that regard. As rightly found by the first appellate court, the plaintiff has not endeavoured to proceed on that aspect further. Barring the above aspects, nothing has been pointed out to disbelieve the genuineness of the Will, Ex.B7. No other aspect has been pointed out to reject Ex.B7, Will.

12.In the light of the above discussions, the courts below on appreciation of the evidence on record have rightly found that Kumarasamy had owned only certain portions of the suit properties described in item No.1 of the plaint schedule. No exception could be taken to the same. I further hold that the first appellate court has rightly on proper reasonings and appreciation of the evidence on record accepted the genuineness of the Will, Ex.B7 and thereby rejected the plaintiff's case in its entirety. No infirmity is noticed in the above findings of the first appellate court for dismissing the plaintiff's suit. Accordingly, the substantial question of law is answered.

13.In fine, the second appeal fails and is dismissed. No costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

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To

1.The Additional District Judge
(Fast Track Court No.2),
Gobichettipalayam.

2. I Additional Sub Court,
Gobichettipalayam.

3. The Section Officer, VR Section, High Court, Madras.

+ 1 cc to Mr.A.K. Kumarasamy, Advocate 9229

+ 1 cc to Mr.M. Narayanaswamy, Advocate Sr.9187

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