

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 30.01.2017

Coram:

The Honourable Mr.Justice M.M.SUNDRESH

S.A.No.337 of 2016
& C.M.P.No.9657 of 2016

A.Sugumar

...Appellant/Appellant/Plaintiff

Vs.

1.Vanaja
2.Sindhuja
3.Nagarajan

...Respondents/Respondents/Defendants

Second Appeal is filed under Section 100 C.P.C., as against the judgment and decree dated 12.02.2013 made in A.S.No.43 of 2011 on the file of Subordinate Judge, Gingee, confirming the judgment and decree dated 28.09.2010 made in O.S.No.121 of 2004 on the file of Additional District Munsif, Gingee.

For appellant : Mr.V.Raghavachari for
Mr.K.Premkumar

For respondent : Mr.A.K.Kumarasamy for
Mr.B.Jawahar

JUDGMENT

The plaintiff, who suffered a decree before the Courts below, is the appellant herein. Seeking to reverse the same, he has filed the above second appeal, raising the following substantial questions of law.

1. Whether the judgments and decrees of the Courts below are right in dismissing the suit of the plaintiff when the plaintiff proved the due execution of last Will of deceased Kannammal by examining one of the attesting witness and scribe of the will as per Sec.68 of the Evidence Act, 1872?

2. Whether the judgments and decrees of the Courts below are sustainable in law and on facts when the plaintiff proved the due execution of the Last Will/Ex.A3 and the

defendants filed to discharge their burden as per Sections 101 to 103 of the Indian Evidence Act, 1872?

3. Whether the findings of the Courts below are sustainable in law on the registration and non registration of the last Will of the Testatrix Kannammal?

2. The suit property originally belonged to one Selvaraj Nainar. He executed a settlement deed qua the suit properties in favour of his wife Kannammal. Selvaraj Nainar and Kannammal had five children. Kannammal originally executed a Will dated 07.10.1974 governing the suit properties under Ex.B46. It was cancelled under Ex.B47 dated 09.11.1975. Thereafter, she executed a Will under Ex.B1 dated 07.06.1976. All the three documents are registered.

3. Kannammal died on 25.04.1990. After her death, there arose a dispute between the plaintiff on the one hand and the defendants on the other hand. A criminal complaint was also given. Thereafter, in the year 2004, the suit in O.S.No.121 of 2004 has been laid for declaration and for permanent injunction. It has been filed on the premise that the Will governed under Ex.B1 has been cancelled under Ex.A2 dated 03.03.1990 and thereafter, the deceased Kannammal executed another Will on 21.03.1990 under Ex.A3. Exs.A2 and A3 are the unregistered documents relied upon by the plaintiff to show the factum of proving the Will. The plaintiff examined himself as P.W.1. The testator-P.W.2 also is the attester of the earlier Will. The trial Court found discrepancy in the statement of P.W.2. The trial Court further found that the contention of the plaintiff that Kannammal was living with him is not correct as evidenced. To the contrary, the fact is that she is, in fact, living with her daughters. One of the daughters Chinnammal died in the year 2000. The plaintiff has filed certain documents to show his possession, which also indicate the name of Chinnammal in the Revenue documents. The lower Appellate Court has

also concurred with the findings of the trial Court by holding that the suspicious circumstance has not been dispelled and there is no explanation as to why the cancellation and registration documents are not registered though P.W.2 has stated that Ex.A3 was executed in the registered office. Challenging the same, the present second appeal has been filed.

4. Mr.V.Raghavachari, learned counsel for the appellant, submits that a testamentary has to sit in the arm chair of the testator. A doubt would be inferred as a matter of course.

Even under Exs.B1 and B46, only life interest has been given. Therefore, the intention of the testator is not to give properties in favour of her daughters and her descendants. P.W.2 was a witness to the earlier documents and therefore, her witness cannot be doubted. Therefore, non registration cannot be a sole basis to declare a Will as not genuine.

5. Mr.A.K.Kumarasamy, learned Senior Counsel appearing for the respondents, submits that both the Courts found serious discrepancies in the evidence let in on behalf of the appellant/plaintiff. In the cross examination, P.W.2 has stated that he has signed in the document ExA3

before the registration office. Even though P.W.2 stated that the registration has been done within few days, it was not done thereafter. Once Ex.B1 is accepted, then the onus is on the plaintiff to prove the subsequent document Ex.A3. The registration being a factor to be considered, the Courts below rightly taken them and thus, non-suited the plaintiff. In view of the findings rendered by the Courts below that there is no animosity between Kannammal and others coupled with the fact that she was living with them, the findings rendered cannot be assailed.

6. The registration per se is not a sole factor for dealing with the circumstances surrounding the execution of the Will, but an attending factor to be seen. Admittedly, in the case on hand, all the admitted documents Exs.B46 and B47 and B1 are registered. Under Ex.B1, the testator has stated that she was 75 years old suffering from illness and therefore, not confident of living for longer time. Exs.A2 and A3 are said to have been executed about 1 ½ months prior to the death of Kannammal. Only these two documents are not registered as against others. P.W.2, who is the attester, as rightly found by the Courts below, has given contradictory statements. In the cross-examination, he says that the documents have been executed at the Registrar office. The Courts below have taken into consideration the contradiction in the evidence of the plaintiff. After all it is for the plaintiff to establish the execution of the unregistered Will in tune with the parameters laid down under Section 63 of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act, 1872. The lower appellate Court has also factually found that the deceased Kannammal was living with her daughters. The documents relied upon by the plaintiffs were also discussed by the Courts below as Chinnammal was living till the year 2000. If one goes by Ex.B1, the testator was 75 years old at the time of execution. If Exs.A2 and A3 are true, then she must have been 95 years old with all her ailments. Even the attester has not stated

anything about the condition of the testator with respect to the disposing state of mind. When the Courts below on a proper analysis of the evidence available, have come to the conclusion that the plaintiff has not proved a unregistered Will said to have been executed by the testator just before her death due to old age, the same cannot be re-appreciated by this Court in exercise of power under Section 100 of Code of Civil Procedure.

7. In such view of the matter, this Court does not find any substantial question of law warranting interference. Accordingly, the second appeal stands dismissed. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

raa

To

1.The Subordinate Judge,
Sub Court, Gingee.

2.The Additional District Munsif,
Additional District Munsif Court,
Gingee.

+1cc to Mr.Jawahar, Advocate, S.R.No.5589

VGJ(CO)
RS(27/02/2017)

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