

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 13-11-2018

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

Second Appeal No.997 of 2006

And

C.M.P.No.9674 of 2006

Nainamalai (Died)

1.Vasantha

2.Sidheswari

[Cause title accepted vide order of
Court dated 23.8.2006 made in
CMP No.9089 of 2006]

..Appellants /
LRs of the deceased defendant

..Vs..

1.S.Ramasamy

..1st Respondent /
1st Plaintiff

2.Varadharajan (Died)

3.Sidheswaran

4.V.Jothi

5.V.Viswanathan

6.A.Saraswathi

[Respondents 4 to 6 brought on record
as Legal Representatives of the deceased
second respondent vide order of Court dated
17.4.2007 in M.P.Nos.1 to 3 of 2007]

.. Respondents 3 to 6/
LRs of the deceased
2nd Plaintiff

{Notice to the 3rd Respondent not
necessary in this Appeal}

The Second Appeal is preferred under Section 100 of the Code of Civil Procedure, against the judgment and decree dated 31.7.2003 made in A.S.No.10 of 1995 on the file of the Sub Court, Namakkal, confirming the judgment and decree dated 25.7.1994 made in O.S.No.387 of 1991 on the file of the District Munsif Court, Rasipuram.

For Appellants

: Mr.N.Manokaran

For Respondents 1, 4to 6

: Mr.K.Vasu Venkat

Respondent-2

: Died

Respondent-3

: Given up

J U D G M E N T

The Second Appeal on hand is preferred against the judgment and decree passed by the Trial Court in O.S.No.387 of 1991 dated 25.7.1994, confirming the same by the First Appellate Court in A.S.No.10 of 1995 dated 31.7.2003.

2. The ranking of the parties are referred as per the ranking assigned before the Trial Court.

3. The plaintiffs are none other than the brother of the defendant. Originally the defendant Shri.Nainamalai passed away and subsequently his legal heirs were impleaded as parties in the Second Appeal. The plaintiffs filed the suit in O.S.No.387 of 1991 on the file of the District Munsif Court, Rasipuram, claiming 2/3 share in the suit schedule property from the defendant.

4. It is contended that the properties in question were purchased in the name of Smt.Pothammal, who is the mother of the plaintiffs as well as the defendant. Two properties were purchased in the name of Smt.Pothammal on 19.12.1968 and on 21.4.1969, which were marked as Ex.B-1 and Ex.B-2 respectively in the civil suit.

5. It is an admitted fact that the said two properties were purchased in the name of Smt.Pothammal and the said Smt.Pothammal is the mother of the plaintiffs as well as the defendant. The case of the plaintiffs was that their mother purchased the property in her name from and out of the earnings of their father and therefore, the plaintiffs are entitled for 2/3 share in the entire property belongs to their mother late.Smt.Pothammal. However, the properties were in the possession of the defendant and therefore, the plaintiffs were constrained to file the civil suit, seeking partition of the said properties.

6. The defendant before the Trial Court contended that undoubtedly, the properties were purchased in the name of his mother Smt.Pothammal. However, the said properties were purchased from and out of the earnings of the defendant as well as by pledging/selling the jeweleries belonged to the wife of the defendant.

7. At the outset, the defendant pleaded before the Trial Court that he purchased the property by investing his own money in the name of his mother. In other words, the mother of the plaintiffs and the defendant was a benami of the defendant and therefore, the plaintiffs are not entitled for any share in respect of the properties stand in the name of their mother late Smt.Pothammal.

8. It is further contended that the original owner of the property late Smt.Pothammal executed the Will in favour of the defendant, which was marked as Ex.B-38. The said Will was unregistered and the same was marked as a document.

9. Relying on the fact that the mother of the plaintiffs and the defendant executed the 'Will' in favour of the defendant and relying on the pleadings that the said properties were purchased in the name of the mother from and out of the earnings of the defendant, the defendant pleaded that the plaintiffs are not entitled for any relief, as such, sought for in the suit.

10. The Trial Court had formulated the issues in respect of the validity of the Will said to have been executed by the mother of the plaintiffs and the defendant Smt.Pothammal on 10.11.1972. Whether the plaintiffs are entitled to claim shares in the suit schedule property, which stands in the name of their mother Smt.Pothammal. Whether the suit was properly valued or not with reference to the Tamil Nadu Court Fees and Suit Valuation Act. In respect of the said issues, the Trial Court examined the witnesses and based on the documents and the depositions, came to the conclusion that the properties admittedly stand in the name of the mother of the plaintiffs and the defendant late Smt.Pothammal. Admittedly, the Will dated 10.11.1972 was an unregistered document (Ex.B-38).

11. In respect of an unregistered Will, the Trial Court found that the burden of proof lies on the person, who marked the Will as a document. In the present Second Appeal on hand, the Will was marked by the defendant, claiming that the deceased Smt.Pothammal executed the Will in favour of the defendant. However, none of the witnesses of the execution of the Will were examined as witnesses in the civil suit.

12. This apart, the defendant had miserably failed to establish that the properties were purchased from and out of his own income. The pleadings set out in the written statement were that the defendant is the beneficiary of the Will said to have been executed by late Smt.Pothammal and the properties were purchased in the name of Smt.Pothammal from and out of the earnings of the defendant.

13. The Trial Court, on examination, found that the witnesses to the Will were not examined by the defendant nor the defendant had produced any document and established that the properties were purchased from and out of his own income. In the absence of establishing these two contentions, the Trial Court came to the conclusion that the plaintiffs are entitled for the relief of partition in respect of the suit schedule properties, more specifically, 2/3 shares.

14. The First Appellate Court also independently considered the issues framed by the Trial Court and came to the conclusion that in the absence of establishing the genuinity of the Will, marked as Ex.B-38 by the defendant, the Court cannot come to the conclusion that the properties were executed by way of Will by the original owner, namely, the mother of the plaintiffs and the defendant. The First Appellate Court further came to the conclusion that the properties were purchased in the name of Smt.Pothammal through documents Ex.B-1 and Ex.B-2.

15. Though the defendant deposed before the Trial Court that he was a Government Servant and therefore, he purchased the properties in the name of his mother from and out of his own income, he failed to establish that the properties were purchased through his own income. No documents were submitted before the Trial Court to show that the defendant had contributed his own earnings for the purpose of purchase of the said properties in the name of Smt.Pothammal.

16. The First Appellate Court came to the conclusion that the defendant had miserably failed to establish that he contributed his own earnings for the purpose of purchase of the properties in the name of his mother Smt.Pothammal. In the absence of establishing these factors, the Court cannot come to the conclusion that the benefit of the Will is to be extended in favour of the defendant. Accordingly, the First Appellate Court confirmed the judgment and decree passed by the Trial Court in O.S.No.387 of 1991 dated 25.7.1994.

17. At the time of admission of the present Second Appeal, this Court formulated the following substantial questions of law:-

"a) Whether the Courts below are right in holding that the suit properties are the absolute properties of the mother of the respective parties in the absence of any source for her to purchase the property in her individual name in the year 1968 and 1969 more particularly when the Courts below have disbelieved the plea of acquisition from the nucleus of the joint family property ?

b) Whether the Courts below erred in law and misdirected themselves in granting the relief of partition merely on the basis of oral evidence of PW-1 in the absence of any other oral and documentary evidence, or in the absence of any proof to establish the alleged acquisition of the suit property with the help of the joint family nucleus ?

c) Whether the Courts below have properly appreciated and applied the principles to find out whether the transaction under Ex.B-1 and Ex.B-2 is a sham and nominal one to the facts of the present case as pleaded by the defendant especially when there is no contra evidence adduced by the plaintiff ?”

18. With reference to the first question of law, this Court is of the opinion that the facts established before the Trial Court as well as before the First Appellate Court, it was concluded that the properties originally stand in the name of the mother of the plaintiffs and the defendant, more specifically, the suit schedule properties were purchased in the name of late Smt.Pothammal in her individual name on 19.12.1968 in Ex.B-1 and on 21.4.1969 in Ex.B-2. Both the properties were purchased in the individual name of late Smt.Pothammal.

19. This apart, the properties will not fall under the concept of joint family property in view of the fact that the same were purchased in the individual name of Smt.Pothammal, a female member of the family, in her individual name. Therefore, the first question of law deserves no further consideration. Accordingly, the same is to be rejected.

20. The second question of law raised is also akin to that of the first question of law. It is only consequential and this Court is of an opinion that when the defendant had failed to establish that the property purchased in the name of Smt.Pothammal, a member of the family, as joint family property, then the defendant is not entitled for any relief in the suit.

21. In the present case on hand, it is a suit for partition. Admittedly, the plaintiffs and the defendant are the brothers. The properties were stand in the name of the mother of the plaintiffs and the defendant. When the defendant had marked the Will as a document, then it is duty mandatory on the part of

the defendant to establish the sanctity and the genuinity of the Will. However, the defendant had not even examined the witnesses to the Will and further not established that the properties were purchased in the name of the mother from and out of his own income and by pledging/selling the jeweleries belonged to his wife.

22. In the absence of establishing these basic factors, the Court cannot come to the conclusion that the benefit of the Will produced by the defendant in Ex.B-38 is to be extended in favour of the defendant. Thus, the Trial Court as well as the First Appellate Court rightly concluded that the defendant is not entitled for any relief and therefore, consequently, the plaintiffs are entitled for 2/3 shares in the properties stand in the name of their mother, namely, late Smt.Pothammal.

23. The third question of law raised is in relation to the validity of the documents marked as Ex.B-1 and Ex.-B2. Ex.B-1 and Ex.B-2 are the registered Sale Deeds of purchase of the property in the name of Smt.Pothammal. However, these two documents marked are execution of Sale Deeds and the defendant had not disputed the same. Contrarily, the defendant admitted the Sale Deeds dated 19.12.1968 and 21.4.1969, which were marked as Ex.-B-1 and Ex.B-2. Thus, the question of law, in this regard, cannot be considered at all.

24. When the registered Sale Deed marked as document was admitted by the defendant, no further examination may be required in respect of the genuinity of the said document. The claim of the defendant in the suit was that admittedly, the properties stand in the name of Smt.Pothammal. However, the defendant claimed that the said Smt.Pothammal executed a Will and further the properties were purchased from and out of his own income. These two factors were not established by the defendant before the Trial Court as well as before the First Appellate Court. Such concluded facts cannot be reopened by the High Court in the Second Appeal.

25. It is an established legal principle that the concluded facts, which were established before the Trial Court and the First Appellate Court, cannot be re-adjudicated in the absence of establishing any perversity in the Second Appeal. Such disputed facts can be reopened in the Second Appeal only in the event of establishing the perversity or in factual circumstances or otherwise. In all other circumstances, the established facts concurrently agreed by the Trial Court as well as by the Appellate Court, can never be interfered in the Second Appeal, more specifically under Section 100 of the Code of Civil Procedure.

26. In respect of establishing the Will, the Hon'ble Supreme Court of India in the case of Janki Narayan Bhoir vs. Narayan Namdeo Kadam [(2003) 2 SCC 91] in paragraphs 7 to 10, held as under:-

"7. We think it appropriate to look at the relevant provisions, namely, Section 63 of the Indian Succession Act, 1925 and Sections 68 and 71 of the Indian Evidence Act, 1872 which read:

Section 63 of the Succession Act

"63. Execution of unprivileged wills. - Every testator, not being a soldier employed in an expedition nor engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules-

(a) - (b) * * *

(c) 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 acknowledgement 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."

Section 68 of the Evidence Act

"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 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..."

Section 71 of the Evidence Act

"71. Proof when attesting witness denies the execution.—If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."

8. To say a will has been duly executed the requirements mentioned in clauses (a), (b) and (c) of Section 63 of the Succession Act are to be complied with i.e. (a) the testator has to sign or affix his mark to the will, or it has got to be signed by some other person in his presence and by his direction; (b) that the signature or mark of the testator, or the signature of the person signing at his direction, has to appear at a place from which it could appear that by that mark or signature the document is intended to have effect as a will; (c) the most important point with which we are presently concerned in this appeal, is that the will has to be attested by two or more witnesses and each of these witnesses must have seen the testator sign or affix his mark to the will, or must have seen some other person sign the will in the presence and by the direction of the testator, or must have received from the testator a personal acknowledgement of signature or mark, or of the signature of such other person, and each of the witnesses has to sign the will in the presence of the testator.

9. It is thus clear that one of the requirements of due execution of a will is its attestation by two or more witnesses, which is mandatory.

10. Section 68 of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to the said section, a document required by law to be attested shall not be used as 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. It flows from this section that if there be an attesting witness alive capable of giving evidence and subject to the process of the court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as required by clause (c) of Section 63 of the Succession Act. It is true that Section 68 of the Evidence Act does not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the will as envisaged in Section 63. Although Section 63 of the Succession Act requires that a will has to be attested at least by two witnesses, Section 68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the court. In a way, Section 68 gives a concession to those who want to prove and establish a will in a court of law by examining at least one attesting witness even though the will has to be attested at least by two witnesses mandatorily under Section 63 of the Succession Act. But what is significant and to be noted is that one attesting witness examined should be in a position to prove the execution of a will. To put in other words, if one attesting witness can prove execution of the will in terms of clause (c) of Section 63 viz. attestation by two attesting witnesses in the manner contemplated therein, the

examination of the other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attestation of a will by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the will by the other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under Section 63 of the Succession Act. Where one attesting witness examined to prove the will under Section 68 of the Evidence Act fails to prove the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act.

27. The Apex Court with reference to Section 68 of the Evidence Act, held that the Will marked by any of the parties to the civil suit must be established in the manner prescribed and therefore, in the absence of any such proof, the Court cannot accept the sanctity or the validity of the Will.

28. In the present case on hand, the defendant had miserably failed to establish the genuinity of the Will. Even the witnesses to the Will were not examined as witnesses in the civil suit. The defendant had not produced or established that the properties were purchased in the name of Smt.Pothammal only from and out of the income of the defendant.

29. Since these basic pleadings set out in the written statement were not established before the Trial Court by producing documents and by adducing the evidences, this Court is of an opinion that there is no error in respect of the judgment and decree passed by the Trial Court, which is confirmed by the First Appellate Court. Thus, this Court has no hesitation in

coming to the conclusion that there is no perversity or infirmity in respect of the judgment and decree passed both by the Trial Court as well as by the First Appellate Court.

30. Accordingly, the judgment and decree passed by the Trial Court in O.S.No.387 of 1991 dated 25.7.1994 and the judgment and decree passed by the First Appellate Court in A.S.No.10 of 1995 dated 31.7.2003, are confirmed and the Second Appeal stands dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

Svn

To

1. The Sub Court,
Namakkal,
 2. The District Munsif Court,
Rasipuram.
 3. The Section Officer,
VR Section,
High Court, Madras. (2 copies)
- +1 cc to Mr.N.Manokaran, Advocate, S.R.No.77516

GP(CO)
SSM(11/12/2018)

S.A.No.997 of 2006

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