

IN THE HIGH COURT OF JUDICATURE OF MADRAS

Judgment Reserved on : 31.07.2017

Judgment Pronounced on : 12.06.2018

CORAM:

THE HONOURABLE MR. JUSTICE S.BASKARAN

S.A.No.1302 of 2007

Ravikumar

...

Appellant

Vs.

1.Sampoornam

2.S.Shanmughasundaram

3.M.Sulochana

...

Respondents

This second appeal has been filed under Section 100 of CPC, against the judgment and decree dated 21.04.2006 made in A.S.No.74 of 2005 passed by the learned Principal District Judge, Coimbatore, reversing the Judgment and decree dated 18.03.2005 passed by the learned II Additional Subordinate Judge, Coimbatore, in O.S.No.240 of 1999.

For Appellant : Mr.A.Thiyagarajan

For Respondents : Mr.Mukunth for
Ms/.Sarvabhauman Associates

JUDGMENT

This second appeal arises out of the Judgment and Decree dated 21.04.2006 made in A.S.No.74 of 2005 passed by the learned Principal District Judge, Coimbatore, reversing the Judgment and decree dated 18.03.2005 passed by the learned II Additional Subordinate Judge, Coimbatore, in O.S.No.240 of 1999.

2. Brief facts of the case is as follows:-

The suit properties originally belonged to one Azhagammal who is the mother of the plaintiff and the defendants herein. The father of the plaintiff and defendants Narayanasamy pre-deceased her wife, the said Azhagammal. The suit property is situated at Coimbatore. The first item of the suit property measuring 13 cents and 75 sq.ft. in Tadabad was purchased by Azhagammal on 12.07.1959 and constructed RCC building in the

said cite. The said Azhagammal was in possession and enjoyment of the property. Subsequently, she sold away 2802 sq.ft. of the suit property on 29.07.1971 and remaining portion is the first item of the present suit property. The second item of the suit property was given to the said Azhagammal by way of gift deed executed by her father on 23.09.1957. The said Azhagammal was in possession and enjoyment of the suit property till she died intestate on 17.08.1998 leaving behind the plaintiff and the defendants as her legal representatives. During the life time of Azhagammal, her daughter the plaintiff herein was residing with her in the first item of the suit property. After the demise of her mother, the plaintiff demanded 1/4th share of the suit property from the defendants. The same was refused by the defendants. The plaintiff states that the said Azhagammal mortgaged the suit property and exercised her right of ownership. The plaintiff produced the mortgage deed along with the suit plaint. Thus, the plaintiff seeks to partition of 1/4th share in the suit property. Hence, the suit.

3. On the other hand, the claim of the plaintiff, the defendants contended that it is true the suit property originally belonged to their mother Azhagammal. The claim of the plaintiff is that their mother Azhagammal died intestate on 17.08.1998 is not correct. Their mother Azhagammal executed the registered Will dated 20.08.1997. The execution of the Will is known to all the legal heirs including the plaintiff. The first item of the suit property was divided into A to C schedule and allotted to the defendants 1,2 as well as the daughter of the plaintiff and the first defendant was authorised to manage the property till the daughter of plaintiff attains majority. The claim of the plaintiff that she resided along with the deceased Azhagammal is not correct. The said Azhagammal lived only with the first defendant. The plaintiff, who came to the funeral of the mother, is occupying a portion of the property at Door No.69, Dr. Azhakappa Chettiar Road, Coimbatore. She is not permanently occupying the said house. As per the Will, the only schedule-II property, the daughter was given separate portion and the plaintiff has taken away jewels. The plaintiff is given right enjoyment in Item No.2 of 'B' schedule property and vested remainder was given in favour of her children. The plaintiff is not at all in possession of any property. The plaintiff is not entitled to seek partition. The plaintiff is not in joint possession of the suit property with the defendants. The suit is bad for non-joinder of necessary parties, namely, the daughter of plaintiff as well as the daughters of the 3rd defendant. Thus, the defendants sought for dismissal of the suit.

4. Before the trial Court, the plaintiff examined herself as P.W.1 and produced the document Ex.P1 to Ex.P14 to prove her claim. On the side of the defendants, D.W.1 and D.W.2 deposed

and documents Ex.D1 and Ex.D2 were produced. The trial Court on the basis of the available materials on record dismissed the suit. Aggrieved upon that the plaintiff preferred the first appeal in A.S.No.74 of 2005 before the Principal District Judge, Coimbatore and the first appellate Court, after contest, allowed the appeal and set aside the decree and judgment of the trial Court and decreed the suit for partition of $\frac{1}{4}$ th share to the plaintiff, while dismissing the suit, as far as the relief of permanent injunction is concerned. Hence, the first defendant is now preferred the second appeal challenging the said conclusion of the lower appellate Court.

5.At the time of admission, the following substantial question of law is framed by this Court for consideration:-

a) When the Will is admitted by P.W.1, whether the first Appellate Court is right in holding that Ex.B1 Will has not been proved in a manner known to law.

6.The learned counsel appearing for the appellant would contend that the execution of Ex.D1 Will has been proved in the manner known to law by examining the attesting witness who deposed as D.W.2, since the initial burden has been discharged by the defendants. It is contended that the burden is shifted on to the plaintiff. The plaintiff to disbelieve the execution of the Will. It is contended that the first appellate Court without considering these aspects arrived at the wrong conclusion that Ex.D1 Will is not proved. The reasoning of the first appellate Court that the signature of the executor differs in each of the Will is arrived at without considering the age of the executor. The first appellate Court also erred in concluding that the property was not equally distributed among the legal heirs of the said Azhagammal. The first appellate Court also failed to appreciate the evidence properly. Thus, the learned counsel for the appellant contends that as the execution of the Will is admitted by the plaintiff herself, the first appellate Court has not correct in concluding that Ex.D1 is not proved. The said conclusion is totally erroneous. Thus, the appellant seeks to entertain the appeal and to set aside the findings of the first appellate Court.

7.Per contra, the learned counsel appearing for the respondents contended that the execution of the Will has to be established beyond reasonable doubt and if the plaintiff failed to remove suspicious circumstances by placing satisfactory materials on record, the Will cannot be considered as genuine. In support of the same, the learned counsel for the respondents relied upon the ruling reported in AIR 1997 SUPREME COURT 396 (1). The learned counsel for the respondents also contended that only attesting witness examined by the defendants as an interested witness and he has given contradictory evidence, the

onus is on the first defendant to examine the other witnesses also to clear the doubts regarding execution of the Will. The learned counsel for the respondents relied upon the ruling reported in 2009 (6) MLJ 560 contended that the case on hand, it is not only genuineness of the attesting witness, but also the animus to adduce Ex.D1 Will has not been proved. As such the conclusion of the first appellate Court in the light of suspicious circumstances surrounded Ex.D1 Will is appropriate and he is pointed out that there is no need or necessity to interfere with the same. Thus, the respondents seeks to dismissal of the appeal.

8.I have heard the rival submissions and also perused the materials available on record.

9.On perusal, the ownership of the property was not disputed by both parties. Both parties admitted that the property originally belonged to their mother Azhagammal. The only contention raised by the plaintiff is that her mother Alagammal never executed any testamentary deed, namely, Will. Hence, the plaintiff contends that she is entitled for 1/4th share in the suit property.

10.According to the defendants, the suit property which originally belonged to Azhagammal, it is her self acquired property and she herself has bequeathed the suit property to all her legal heirs as per the Will dated 20.08.1997.

11.Now, the point for consideration is whether the execution of Will by the said Azhagammal is true and the same has been proved by acceptable evidence. The trial Court held that execution of Will has been proved and hence negated the claim of the plaintiff. On the other hand, the first appellate Court concluding that execution of Will is not proved and held that the plaintiff is entitled to partition. Thus, it is to be seen whether the defendants have proved the execution of Will according to law has to be considered. On the side of the defendants to prove the execution of Will one of the attester Suresh Babu is examined as D.W.2. The said D.W.2 Sureshbabu admitted that he is very close to the appellant Ravikumar and also knew about the family members of Ravikumar. D.W.2 also stated that the other attester one Mohan kumar is also his friend. He further stated that the document was prepared between 10.00 a.m. and 11.00 a.m., and after preparation of the contents of the document was read over to Azhagammal and thereafter only she signed the Will in the presence of witnesses and then the attestors also signed in the said document in the presence of Azhagammal. The same attestors only identified the Azhagammal before the Sub Registrar also. D.W.2 also stated that the said Azhagammal was in good physical and mental condition at the time of execution of the document. The

first attester Mohankumar was the assistant of one Venkatachalam, who was working as document writer. The said Azhagammal brought the Will to the Registrar Office and the document was prepared in that office premises by one Thangaraj. As per the evidence of D.W.2, the document was prepared between 10.00 a.m., and 11.00 a.m., on 20.08.1997. It is further admitted by D.W.2 that in the year 1997 he was not working as document writer. D.W.2 has also stated that no draft Will was prepared. During his chief examination D.W.2 has stated that the document was prepared between 10.00 a.m., and 11.00 a.m., but in his cross examination stated that Azhagammal brought the will to the document writer. Thus the evidence of D.W.2 is contradictory. However, the first appellate Court disbelieved the evidence of D.W.2. The said Ex.D2 Will consists of Nine pages being signature of Azhagammal. In the evidence of D.W.2 admitted about that the signature of Azhagammal in pages 1 to 4 of Ex.D1 differ from each other. Further, there are two plans attached to the Will and the same does contain the signature or that thump impression of Alagammal. D.W.2 has not stated anything about the plans attached with the Will. He has also not stated whether Alagammal put her signature in the plan. Analyse the same, the first appellate Court observed that the signature in the last page of Ex.D1 Will does not appear to be affixed in the normal course after completing the document. In the last page of Ex.D1 Will it appears that the signature could have been obtained first and the recitals could have been thereafter typed by adjusting the space and thereafter the witnesses could have affixed their signature in the document. Further, the first appellate Court also observed that the properties are situated at Tadabad and Singanallur and document relates to such property would normally be registered at the Registrar Office at Gandhipuram and the Singanallur property fall within the jurisdiction of separate Sub Registrar Office. As per the evidence of D.W.2 the Registrar Office situated within the Collector Office campus is common for entire area but, Ex.D1 Will is registered at the Registrar Office situated at Raja Street out side the jurisdiction of which the properties are situated and the testatrix is residing and there is no specific reason put forth on the side of the defendants to chose the Registrar Office at Raja Street. Further, the first defendant who deposed as D.W.1 admitted in his cross examination that the first attester Mohan Kumar is not known to the defendants family. It is against the evidence of D.W.2. These are the suspicious circumstances pointed out by the first appellate Court for arriving at the conclusion that Ex.D1 was not proved as genuine and truly executed by the said Azhagammal and accordingly allowed the plea of the plaintiff for partition.

12.Disputing the said finding, the learned counsel appearing for the appellant would submit that execution of Ex.D1 is clearly proved by the first defendant in the manner known to

law and In support of his contention, he relied upon the ruling reported in AIR 1959 SC 443 in H.VENKATACHALA IYENGAR Vs. B.N.THIMMAJAMMA AND OTHERS.

13.The learned counsel for the appellant further relied on the ruling in 2008(7) MLJ 238 in MARY AND OTHERS Vs. ADAIKKALASAMY AND OTHERS, in which it has been held that "Merely because there are certain discrepancies in the evidence of the witnesses, one should not try to make a mountain out of a mole hill and doubt the genuineness of the Will". Further, he relied on a judgment reported in 2001 (3) CTC 283 in CORRA VENKATACHALAM CHEETY AND ANOTHER Vs. G.JANAKIRAMAN, in which it has been held that "Caveators failed to point out circumstances to render will untrue - Will held to be genuine". The appellant also on the Apex Court verdict reported in 2005 (8) SCC 67 in PENTAKOTA SATYANARAYANA AND OTHERS Vs. PENTAKOTA SEETHARATNAM AND OTHERS, in which it has held that " On facts held, the initial onus was discharged by the propounders and then onus shifted to the contestants." In another Apex Court verdict reported in 1995 (4) SCC 459 in RABINDRA NATH MUKHERJEE AND ANOTHER Vs. PANCHANAN BANERJEE (DEAD) BY LRS AND OTHERS, it has been held that "Deprivation of natural heirs by testatrix is not by itself a suspicious circumstances". In the same Judgement page 461, the following circumstances were recorded as suspicious circumstances.

" A perusal of the two impunged judgments shows that the following were regarded as suspicious circumstances:

(1) Deprivation of the natural heirs by the testatrix.

(2) Identification of the testatrix before the Sub Registrar by an Advocate of Calcutta who had acted as a lawyer of one of the execution in some cases.

(3) The witnesses to the documents were interested in the appellants.

(4)Active part played by one Suboth, a close relation of Rabindra, one of the executors, in getting execution of the Will. He has been described as ubiquitous.

14.As per the above Apex Court verdict, there are four instances which are regarded as suspicious circumstances. Out of which, Point No.1 and 3 relates to issues involved in this case. Point No.1 with regard to deprivation of the natural heirs by the testatrix and the other point is that witness to the documents were interested persons on the appellants. The same was considered as suspicious circumstances. In the present case, on the plaintiff being legal heirs was deprived of her right to property and she was given only life estate. The

suspicious circumstances relates to witness to the documents being close and interested in the appellants.

15. In this case, the first appellate Court reversed the findings of the trial Court on the ground that the evidence of D.W.2 is that of a person who is interested in D.W.1, who is the first defendant. Hence, the first appellate Court negated the defence of the defendants. In such circumstances, what remedy is available for propounded is narrated by the Division Bench of this Court in the ruling reported in 2009 (6) MLJ 560 in PREMAVATHI AND OTHERS Vs. SUNDARARJAN AND OTHERS, in which it is held that "When the Will was attested by more than five persons, all from out of the village of Devanur, through legal requirement is at least one witness has to be examined, the plaintiff would have examined at least few more attestors so as to clear out the cloud. Apart from that, no independent witness was examined to prove the execution and attestation of Exhibit P-1 Will. Not only the attestation has not been proved but also the animus to attest the Will has not been proved." On the side of the respondents, the learned counsel relied on an Apex Court decision reported in AIR 1990 SC 396 in KALYAN SINGH Vs. SMT. CHHOTI AND OTHERS, in which it is held that "A Will is one of the most solemn documents known to law. The executant of the Will cannot be called to deny the execution or to explain the circumstances in which it was executed. It is, therefore, essential that trustworthy and unimpeachable evidence should be produced before the Court to establish genuineness and authenticity of the Will."

16. The above two rulings relied on by the respondents clearly indicate that the Will should be proved by examining the alleged witnesses and the evidence of such witnesses must be trustworthy and unimpeachable. In the present case on hand, the defendant has examined only one attesting witness as D.W.2. Admittedly, he is a close friend as well as family friend to D.W.1. Further, as pointed out by the first appellate Court his evidence is inconsistent and also against the version of the D.W.1. The suspicious circumstances about execution of Will narrated by the first appellate Court cannot be brushed aside as the same is were found. The first defendant could have very well examined the another attester, but he has not done so. Further no reason is also stated for non examination of other attester. In such circumstances, the findings of the first appellate Court is just and proper and there is no scope or need for interference, as there is no infirmity in the findings of the first appellate Court. It is apparent that the defendants have miserably failed to prove the execution of Ex.B1 Will by the said Azhagammal. In such circumstances, the plaintiff is absolutely entitled to such partition as legal heir of the said Azhagammal, which the mother of the plaintiff.

17. Therefore, from the above discussions, I am of the view that the contention of the learned counsel appearing for the appellant cannot be sustained. The lower appellate Court has rightly decreed the suit suit take into consideration the suspicious circumstances surrounded execution of Ex.D1 Will, which the trial Court has failed to consider properly. Therefore, I find that the appellant herein is not entitled to succeed. Consequently, the substantial question of law raised in this appeal is answered against the appellant. Hence, the second appeal fails and the point is answered accordingly.

18. In the result, the second appeal is dismissed. The Judgment and decree dated 21.04.2006 made in A.S.No.74 of 2005 passed by the learned Principal District Judge, Coimbatore is hereby confirmed. Considering the relationship between the parties, there shall be no order as to costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

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To

- 1.The Principal District Judge,
Coimbatore.
- 2.The II Additional Subordinate Judge, Coimbatore.
- 3.The Section Officer,
VR Section, High Court, Madras.

+lcc to Mr.A.Thiyagarajan, Advocate sr.no.36506
+lcc to Ms/.Sarvabhauman Associates, Advocate sr.no.36915

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