

IN THE HIGH COURT OF JUDICATURE OF MADRAS

Judgment Reserved on : 21.08.2017

Judgment Pronounced on : 12.06.2018

CORAM:

THE HONOURABLE MR. JUSTICE S.BASKARAN

S.A.Nos.1404 and 1405 of 2008

and

MP.No.1 & 1 of 2008

SECOND APPEAL NO.1404 OF 2008

K.Chandrasekharan ...Appellant/Plaintiff

Vs.

1 .M.Sasikala

2. Mariayammal @ Maragadammal

3. The Secretary,

Ammamet Urban Co-operative Bank Ltd.,

No.1243,

Cuddalore Main Road,

Salem.

...Respondents/Defendants

SECOND APPEAL NO.1405 OF 2008

K.Chandrasekharan

...Appellant//Plaintiff

Vs.

1.M.Sasikala

2.Mariayammal @ Maragadammal

...Respondents/Defendants

PRAYER IN S.A.NO.1404 OF 2008

This second appeal has been filed under Section 100 of CPC, against the judgment and decree dated 25.06.2008 made in A.S.No.27 of 2008 passed by the learned Principal Sub Judge, Salem, confirming the Judgment and decree dated 29.11.2007 passed by the learned Principal District Munsiff Court, Salem in O.S.No.1045 of 2006

PRAYER IN S.A.NO.1405 OF 2008

This second appeal has been filed under Section 100 of CPC, against the judgment and decree dated 25.06.2008 made in A.S.No.25 of 2008 passed by the learned Principal Sub Judge, Salem, confirming the Judgment and decree dated 29.11.2007 passed by the learned Principal District Munsiff Court, Salem in O.S.No.1217 of 2006.

For Appellant : Mr.T.Murugamanickam S.C.
For M/s.V.Rajesh (Both appeals)

For Respondents: Mr.S.Kalyanaraman
(Both appeals)

COMMON JUDGMENT

The second appeals arises out of the Judgment and Decree dated 25.06.2008 made in A.S.No.25 and 27 of 2008 passed by the learned Principal Sub Judge, Salem, confirming the Judgment and decree dated 29.11.2007 passed by the learned Principal District Munsiff Court, Salem in O.S.Nos.1045 and 1217 of 2006.

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

The suit properties originally belonged to one S.M.Govindasamy, who got two brothers, namely, S.M.Krishnasamy, who is the father of the plaintiff in O.S.No.1045 of 2006 and one S.M.Mohanavel who is the father of the first defendant and the husband of the second defendant. The suit property was allotted in partition effected on 22.05.1927 to S.M.Govindasamy. The said S.M.Govindasamy's wife was not living with him and his daughter got married long back. The plaintiff and the defendants alone were looking after the said S.M.Govindasamy. As such, the said S.M.Govindasamy executed a Will on 15.07.1977. As per the Will, Door No.153 was bequeathed to the defendants 1 and 2 and Door No.154 was to the plaintiff. The said S.M.Govindasamy died on 29.07.1977. The plaintiff and his father residing in the suit property in pursuance of the Will. On 10.05.1988, the father of the plaintiff died. The plaintiff came to know that the defendants secretly transferred the tax assessment in respect of the suit property and attempted to disturb the possession of the plaintiff. Hence, the plaintiff filed a suit in O.S.No.335 of 2000 and the said suit was dismissed and against which he preferred an appeal in A.S.No.174 of 2005 and therein the plaintiff filed a petition under Order 23 Rule 1 of CPC seeking permission to withdraw the suit with liberty to file a fresh suit on the same cause of action and it was allowed. Hence, the plaintiff filed this suit in O.S.No.1045 of 2006 for declaration and permanent injunction.

3. The defendants 1 and 2 filed a written statement stating that the defendants 1 and 2 and one Mohanavel alone looking after Govindasamy out of love and affection. The said Govindasamy executed a registered Will on 22.05.1977 bequeathing his property to Mohanavel and his wife the second defendant. As per the Will, the said Mohanavel along with the defendants 1 and 2 are having right to live in the suit property. After attaining majority, the first defendant got absolute right over the suit property. The said Mohanavel died on 24.08.1983 and Govindasamy died on 29.07.1977. Hence, the defendants filed a separate suit for declaration and delivery of possession and for injunction in O.S.No.1217 of 2006.

4. After contest of both the suits, by a common judgment, the trial Court dismissed the suit in O.S.No.1045 of 2006 and decreed the suit in O.S.No.1217 of 2006. Aggrieved upon that, the plaintiff in O.S.No.1045 of 2006 preferred the first appeal. After contest, the first appellate Court dismissed both the appeals in A.S.No.25 of 2008 and 27 of 2008. Aggrieved upon that, the plaintiff Chandrasekaran preferred these second appeals in S.A.Nos.1404 and 1405 of 2008.

5. At the time of admission, the learned counsel appearing for the appellant has raised the following substantial question of law in this appeal:-

a) Whether the judgments of the Courts below are vitiated in that they have held that, the latter Will Ex.A1 will not prevail over the earlier Will Ex.B5, merely because Ex.A1 Will was not registered?

6. The learned counsel appearing for the appellant would submit that Ex.A1 Will was proved by one of the attestors. Merely because, P.W.2 attestor is known to the plaintiff, it does not necessarily lead to the inference that the Will was created by these persons. Even though the beneficiary of the Will, namely, the brothers of P.W.1, have not signed as attestors in Ex.A1 Will, it will not infer that Ex.B.14-Will is the later Will and that Ex.A.1-Will is not proved. Ex.A1 is the last Will of the testator who died two weeks thereafter due to illness. But, the Courts below have not taken into account the facts as stated above. Ex.A1 is genuine since the testator has given equal disposition of his properties to the parties to the suit. But, in Ex.B14 Will, the defendants 1 and 2 as well as the Plaintiff got exclusive right of the properties. When the defendants made mortgage, it was not known to the plaintiff and for the said reason, he could not object the same. Ex.B.14 was attested by D.W.3 who at that time attained majority i.e., at the time of registration. The said grounds are sufficient to

interfere with the findings of the Courts below. In support of his argument, the learned counsel appearing for the appellant cited two citations, namely, (i) 1997 (3) LAW WEEKLY 491 IN BHUVANESWARI Vs. MURAHARI(Died) AND (ii) 2004 (1) SCC 551 in RAJESHWARI(SMT) Vs. T.C.SARAVANABAVA.

7 The learned counsel appearing for the respondents would submit that the findings of the Courts below are based on oral and documentary evidence relied on by both parties. There is no infirmity in the findings of the Courts below. Therefore, both the appeals are not maintainable and devoid of merits. Hence, the second appeals have to be dismissed.

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

9. A perusal of the materials available on record would go to show that the suit property originally belonged to Govindasamy. He was under the care and custody of his brothers family. The plaintiff has stated that Govindasamy executed a Will in favour of the defendants and bequeathed his property to both plaintiff and defendants. Hence, the plaintiff relied on Ex.A1-Will. According to the defendants, Ex.B14 was executed by the said Govindasamy which is registered one. For the purpose of defeating the rights of the defendants, the plaintiff created Ex.A1. These are specific contentions of the parties. Both the Courts below accepted Ex.B14 Will and rejected Ex.A1 Will on the ground that it was not proved according to law. Both the plaintiff and defendants 1 and 2 put forth their submissions, to prove the Will, which they relied on. To prove Ex.A1, the plaintiff examined P.W.2 one of the attestors. On the side of the defendants 1 and 2, to prove the Will Ex.B14 dated 22.05.1977, two attestors were examined.

10. On the side of the Appellant/Plaintiff, the learned counsel has raised two limbs of argument. The first one is whether the registered Will cancelled only by means of another registered Will and whether the deposition of witnesses taken in suit which has been withdrawn can be taken into consideration as evidence in latter suit. In support of his argument, the learned counsel appearing for the appellant/plaintiff relied on two citations. The first one is 2004 (1) SCC 551 in RAJESHWARI (SMT) Vs. T.C.SARAVANABAVA, wherein it is held as follows.

"Not only the plea has to be taken, it has to be substantiated by producing the copies of the pleadings, issues and judgment in the previous case. May be, in a given case only copy of judgment in previous suit is filed in proof of plea of re judicata and the judgment contains exhaustive or in requisite

details the statement of pleadings and the issues which may be taken as enough proof. But, as pointed out in Syed Mohd, Salie Labbai v. Mohd. Hanifa the basis method to decide the question of res judicate is first to determine the case of the parties as put forward in their respective pleadings of their previous suit and then to find out a to what had been decided by the judgment which operates as res judicata. It is risky to speculate about the pleadings merely by a summary of recitals of the allegations made in the pleadings mentioned in the judgment.

As per the above Ruling of the Apex Court, summary of recitals of the allegation made in the pleadings mentioned in the judgment is not sufficient. The above said Ruling and the facts of the case is not applicable to the facts of the case in hand. In the case on hand, both the Courts below relied on the deposition of one of the attestors, Jayavel. The certified copy of the deposition of the said attestor is marked as Ex.B4. The deposition is not summary in nature. The entire chief examination and cross examination statement and its certified copy was produced. P.W.2 in O.S.No.335 of 2000 is the crucial and important witness as he is one of the attestors to Ex.A1-Will. During trial, the said witness was not called by the plaintiff, but took summons, handed over the same to the said witness, however it is stated that summons was returned "as not known". In such circumstances, the deposition of the said witness is relevant to the case on hand is concerned. In such circumstances, the Ruling of the Apex Court referred above on the side of the appellant is not applicable to this case. The deposition of P.W.2 in O.S.No.335 of 2005, one of the attestors to Ex.A.1-Will, Jayavel is a statutory witness as per Section 68 of the Indian Evidence Act. So without examining the attestor, the plaintiff relied evidence of another attestor. When the evidence of both the attestors are contradictory, the suspicious circumstances of Ex.A.1-Will is not dispelled by the propounder. The evidence of D.W.2 was treated as interested witness. In such circumstances, the plaintiff ought to have taken steps to examine an independent witness to prove the genuineness of the case. In this aspect, the Honourable Supreme Court has laid down the law with regard to proving the genuineness of the Will, which is reported in AIR 1990 SC 396 in KALYAN SINGH Vs. SMT. CHHOTI AND OTHERS, wherein it is held as follows:-

"A Will is one of the most solemn document 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."

11. A Division Bench of this Court, in the decision reported in 2009 (6) MLJ 560 in PREMAVATHI AND OTHERS Vs. SUNDARARJAN AND OTHERS, also held as follows:-

"When the Will was attested by more than five persons, all from out of the village of Devanur, through legal requirement is atleast 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."

11. Following the above two Rulings, it is seen that the plaintiff miserably failed to prove the trustworthy and credibility of the witness. Hence, the trial Court as well as the first appellate Court came to the conclusion that Ex.A1 was not proved. Mere examination of one of the attestors alone is not sufficient as per the above referred Apex Court verdict. The evidence of attestor must be trustworthy. In the case on hand, P.W.2 has clearly and categorically admitted that he is a close friend of P.W.1. But, P.W.1 has stated that he is not the friend of P.W.2. It is the vital contradiction between the evidence of P.Ws.1 and 2. Further more, another attestor is available and the plaintiff himself examined him in the previous suit. On the side of the appellant, the learned counsel simply argued to ignore the evidence of P.W.2 in O.S.No.335 of 2000, since it was withdrawn. Actually, the above said suit was not withdrawn. O.S.No.335 of 2000 was contested and the suit was dismissed. Then, the Plaintiff therein preferred an appeal in A.S.No.174 of 2005 and that appeal was withdrawn. So, the decree passed in O.S.No.335 of 2000 is not set aside. As such, the contention that merely because, the plaintiff filed another suit for the very same cause of action, is not acceptable. The statement/evidence made by P.W.2 in O.S.No.335 of 2000, is one of the attestors who spoke about the execution of Ex.A1 Will in this case. As such, just because P.W.2 Jayavel in O.S.No.335 of 2000 was not called upon by the plaintiff in the present suit, but his evidence was taken into consideration by the Courts below and findings rendered thereupon, is concerned, this court finds no error or infirmity. As per the law laid down in the Apex Court verdict (cited supra), the author of the document namely, Ex.A1 is no more and he cannot be called; it is essential that trustworthy and unimpeachable evidence should be

produced before the Court to establish genuineness and authenticity of the Will. The evidence of P.W.2 Jayavel recorded in O.S.No.335 of 2000, is very much essential in this case. Hence, the reliance placed on Ex.B4 by both the Courts below, is absolutely correct. Hence, the findings of the both the Courts below are absolutely correct. As such, the second substantial question of law raised by the appellant is answered against him.

12. As far as the first substantial question of law is concerned, on the side of the appellant, the learned counsel relied on a decision reported in 1993 (3) LAW WEEKLY 491 in BHUVANESWARI Vs. MURAHARI(Died) AND ANOTHER , wherein it is held as follows:-

"Both the Courts below have relied on Section 90 of the Evidence Act to come to the conclusion that the document must be genuine and must have been executed in accordance with law. Section 90 deals with ancient documents, i.e., documents which came into existence 30 years prior to the institution of the suit. If reliance is placed on Sec.90, then the original must be before Court. If the party has only a registration copy, there is no presumption of execution or attestation. Therefore, it cannot be said that Ex.A1 was proved to have been executed by the original owner.

In the above referred citation, Section 90 of the Evidence Act was relied. In that case, the original was not produced, but registered copy alone produced, for which, no presumption of execution of attestation is available. Hence, the Court came to the conclusion that Ex.A1-Will was not proved as it was executed by the original owner. The learned counsel has relied on the Judgment of this Court reported in 1993 (3) LAW WEEKLY 491 in BHUVANESWARI Vs. MURAHARI(Died) AND ANOTHER to contend that Ex.B.14 relied on by the defendants 1 and 2, is the certified copy of the Will and the original Will is with Bank. In addition to that, the defendants 1 and 2 proved Ex.B-14 through the attestors. The evidence of attestors were not shattered by the plaintiff. In such circumstances, both the Courts below have accepted the evidence of attestors and came to the conclusion that the Ex.B14 Will is a genuine one. A careful perusal of the evidence and findings of the both the Court below, would go to show that there is no infirmity in the said findings. As such, the Rulings referred on the side of the appellant with regard to Section 90 of the Evidence Act, is not applicable to the facts of this case.

13. As far as the second argument raised by the learned counsel for the appellant that as to whether the Will can be cancelled by another registered Will, is concerned, following

the various Rulings of this court and the Supreme Court, it is well settled that the Will shall not be a compulsory registered document. In the usual course, if the testator executed a Will and later if he wants to execute another Will, it is the usual practice of the document writer to mention about the earlier Will and what are the circumstances constrained him to execute another Will etc. In circumstances such as if the person executed a Will in his own hand writing, who does not have legal knowledge about the execution of the Will, it is not possible to mention about the earlier Will etc., In such circumstances, the only question to be answered is, as to whether execution of the document is genuine or not and as such, not mentioning the details of previous Will, is not vital. Likewise, Registration of the Will is also not mandatory. Accordingly, the second limb of argument raised by the learned counsel for the appellant/Plaintiff, does not in any way, supported his case, but only answered against him. Hence, looking from any angle, the plaintiff has miserably failed to prove the execution of Ex.A1 Will. In such circumstances, for the reasons stated above, this court finds no error or infirmity in the findings and reasonings of the Courts below.

14. From the above discussion, it is clear that the trial Court as well as the first appellate Court after analysing both oral and documentary evidence came to the correct conclusion and there is no ground made out for interference of the same. Further more, the substantial question of law raised by the Appellant is already considered and answered in detail by the court below itself. Thus, for the reasons stated above, the substantial question of law raised in the appeal is answered against the appellant/Plaintiff and the appeal has to fail. The Point is answered accordingly.

15. SECOND APPEAL NO.1404 OF 2008:

In the result, the second appeal is dismissed. The Judgment and decree dated 25.06.2008 made in A.S.No.27 of 2008 passed by the learned Principal Sub Judge, Salem is hereby confirmed. No costs.

16. SECOND APPEAL NO.1405 OF 2008:

In the result, the second appeal is dismissed. The Judgment and decree dated 25.06.2008 made in A.S.No.25 of 2008 passed by the learned Principal Sub Judge, Salem is hereby confirmed. No costs. Connected M.Ps' are closed.

rrg

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To

1.The Principal Subordinate Judge,
Salem.

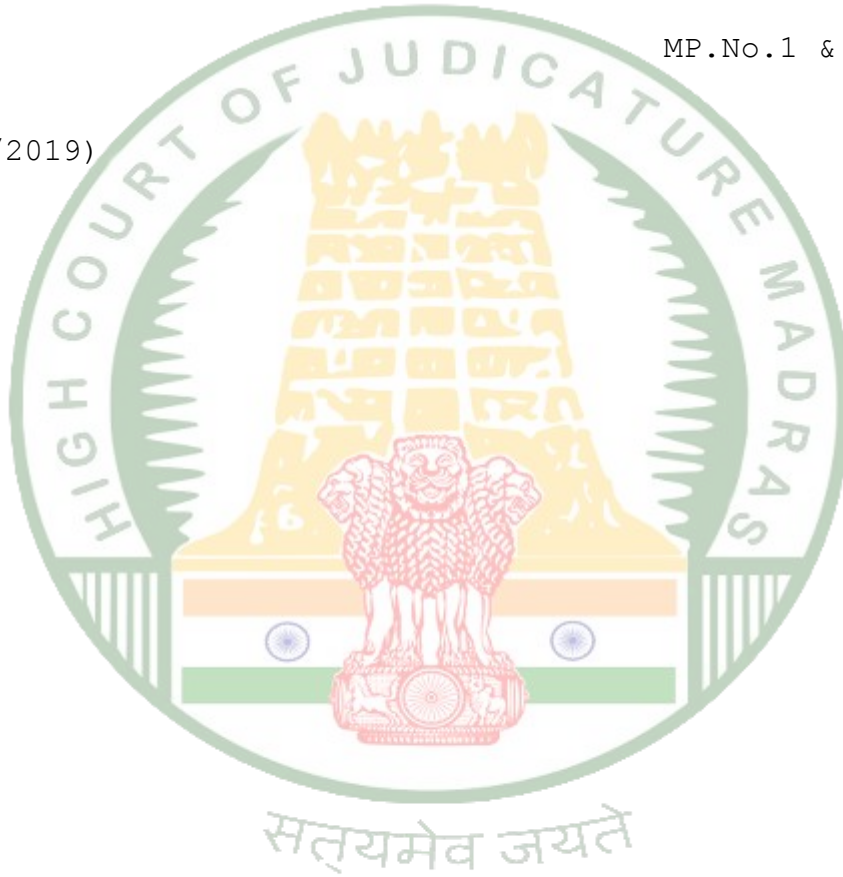
2.The Principal District Munsif,
Salem.

+lcc to Mr.S.Kalyanaraman, Advocate, S.R.No.36533.

S.A.Nos.1404 & 1405 of 2008
and

MP.No.1 & 1 of 2008

SVI (CO)
KAK (04/01/2019)



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