

IN THE HIGH COURT OF JUDICATURE OF MADRAS

Judgment Reserved on : 07.08.2017

Judgment Pronounced on : 20.04.2018

CORAM:

THE HONOURABLE MR. JUSTICE S.BASKARAN

S.A.No.988 of 2006

1.Thangam

2.Tamil Selvi ... Appellants/Respondents/Defendants

Vs.

Kaliyaperumal

Rep. by his Power Agent Selvi

... Respondent/Appellants/Plaintiff

This second appeal has been filed under Section 100 of CPC, against the judgment and decree dated 20.01.2006 passed by the learned Principal Sub Judge, Mayiladuthurai, in A.S.No.29 of 2005, reversing the Judgment and decree dated 28.07.2004 passed by the learned District Munsif, Sirkali, in O.S.No.110 of 2001.

For Appellants : Mr.A.Muthukumar

For Respondent : Mr.S.Kalyanaraman

JUDGMENT

This second appeal arises out of the Judgment and Decree dated 20.01.2006 passed by the learned Principal Sub Judge, Mayiladuthurai, in A.S.No.29 of 2005, reversing the Judgment and decree dated 28.07.2004 passed by the learned District Munsif, Sirkalai, in O.S.No.110 of 2001.

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

According to the plaintiffs, the suit property originally belonged to one Subramaniya Nadar. He got three daughters, namely, Bakkiam who is the mother of the plaintiff and the defendants 1 and 2. The said Subramania Nadar has no male issue. Since the suit property belongs to the Subramainam Nadar, as a son of one of the predeceased daughter of the said Subramaniya Nadar, the plaintiff claimed partition by issuing legal notice to the defendants. Since the defendants were not amenable for partition and claimed that the suit property belongs to the Subramaniya Nadar and during his life time he

executed the Will in favour of her daughters, the defendants 1 and 2 herein and after the demise of the said Subramaniya Nadar, the defendants 1 and 2 became absolute owner of the suit property as per the said Will and the plaintiff is not entitled to any share in the suit properties, the plaintiff came forward with the suit for partition seeks 1/3rd share in the suit property. Hence, the suit.

3. On the other hand, opposing the claim of the Plaintiff/Appellant, the defendant contends that the averments made in the Plaint is totally false. The Plaintiff is not entitled to claim any share in the property. The father of the defendant in sound and disposing state of mind executed the Will dated 22.01.1998 bequeathing the defendants properties to the defendants. The said Will came into force after the death of Subramaniya Nadar by the end of Jan 1998. It is false to allege that the said Will dated 22.01.1998 as a forged and invalid one. The suit property itself was purchased by the joint efforts of the defendants. This suit is filed as a counter blast to the O.S.No.201 of 2000 filed by the defendants against the present plaintiff seeking damages for cutting and taking away trees from the suit property. The defendants state that they are unaware of anyone by name Bakiyam and she is not the daughter of the said Subramaniya Nadar the plaintiff himself is unknown to the defendants and he has come to the suit village only few years back. The plaintiff is having two sisters by name Krishnammal and Alamelu. The suit is bad for non-joinder of the plaintiff's sister. Thus, the defendants seek for dismissal of the suit.

4. On contest, the trial Court framed the following issues:-

(1) Whether the plaintiff is the legal heir of said Subramaniya Nadar?

(2) Whether the Will executed by the said Subramaniya Nadar in favour of the defendants dated 22.01.1998 is forgery one?

(3) Whether the suit is bad for non joinder of necessary parties?

(4) Whether the plaintiff is entitled to partition of 1/3rd share?

Before the Trial Court O.S.No.110/2001 and O.S.No.201/2000 was tagged together. On the plaintiff's side PW1 to PW3 was examined and documents Exs.A1 to A4 was produced. On the defendants side DW1 to DW3 deposed before the Court and produced Exs.B1 to B4 documents. The trial Court after considering both the oral and documentary evidence of both sides negatived the claim of the plaintiff in both the suit. Thus holding in OS.No.110/2001 that the mother of the plaintiff one Bakiyam is not the daughter of Subramaniya Nadar and

the Will dated 22.01.1998, executed by the said Subramaniya Nadar is not a forged one as alleged by the plaintiff. In the other suit in OS.No.201/2000 filed by the 2nd defendant is OS.No.110/2001 against the plaintiff in OS.No.110/2001 seeking damages for the trees cut and taken away, the Court dismissed the suit holding that claim for damages is not proved.

5. Aggrieved upon that the plaintiff in OS.No.110/2001 alone preferred the first appeal before the first appellate Court and after contest, the lower appellate Court reversed the finding of the trial Court holding that the mother of the plaintiff the said Bakiyam is daughter of Subramaniya Nadar and the Will dated 21.01.1998 is not proved according to law and decreed the suit for partition of 1/3rd share by setting aside the decree and judgment of the trial Court. Aggrieved upon the same, the defendants have preferred this second appeal.

6. At the time of admission, this Court framed the following substantial question of law for consideration.

1) When Ex.A1 Will executed by the father of the defendants was registered and the same was also proved by cogent evidence on examining both attesting witnesses, whether the lower appellate Court erred in law in reversing the finding of the trial Court with regard to Ex.A1?

2) Whether the findings of the lower appellate Court that P.W.2 and P.W.3 two attesting witnesses, had stated in their evidence that the testator was not in conscious state of mind for the past one year is one without acceptable evidence?

7. The learned counsel for the appellants/defendants submits that Ex.A1 Will was executed by Subramaniya Nadar father of the defendants and execution of the same is proved by examining by both the attesting witnesses who gave clear and cogent evidence. However, the Lower Appellate Court without considering the same properly allowed the appeal on the ground that the testator was not in fit state of mind. While executing the said Ex.A1 Will. Neither PW2 nor PW3 have stated that the testator was not in conscious state of mind. The Lower Appellate Court failed to consider the fact that the plaintiff's contention was that Ex.A1 was executed by impersonation and therefore, the burden is on him to prove the same. Further the Lower Appellate Court failed to consider that the plaintiff has not produced any document except Ex.B3 to substantiate his case and as such the Lower Appellate Court ought to have held that the plaintiff's mother Bakiyam is not the daughter of Subramaniya Nadar. The Lower Appellate Court also failed to consider the non-joinder of necessary parties properly. The

Lower Appellate Court also failed to consider that there is no convincing evidence to prove that the plaintiff's mother one Bakiyam was the daughter of Subramaniya Nadar. In the appreciation of the evidence, the Lower Appellate Court is against the settled principles of law. Hence, the appellants/defendants seek to entertain the appeal and to dismiss the suit.

8.The learned counsel appearing for the respondent/plaintiff would submit that after elaborate discussion of both the oral and documentary evidence, the first appellate Court has come to the correct conclusion. Hence, the findings of the first appellate Court is on merits and the same does not suffer from any infirmity. Hence, there is no need for interference with the finding of the trial Court. Therefore, the respondent/plaintiff pleads that appeal has to be dismissed.

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

10.On perusal of records it is clear that the first issue considered by both the Courts below is that whether the mother of the plaintiff's one Bakiyam is the daughter of Subramaniya Nadar or not. While the trial Court answered against the plaintiff on the ground that no documentary evidence was produced by the plaintiff to show that the plaintiff's mother Bakiyam is the daughter of Subramaniya Nadar, the first appellate Court reversed the said finding of the trial Court by relying on Ex.A2 and Ex.A3. In Ex.A2, which is the legal notice issued by the plaintiff, it has been specifically stated that my clients mother Tmt.Bakkiam and the defendants herein, Thangam and Tamilselvi are sisters by birth and the above said fact was not denied by the defendants in the reply notice Ex.B3. It is also pointed out that in Ex.B3 reply notice in Para 5 it is specifically stated that "after the demise of your clients mother Bakkiam only the Subramaniya Nadar purchased the said properties; the above said properties were purchased from and out of Subramaniya Nadar and my clients joint earning and joint labour". The Will was executed by the Subramaniya Nadar in favour of his two daughters. The above said fact was known to the plaintiff. So, the plaintiff has no right or title with regard to the suit property. Thus relying on the same, the first appellate Court came to the conclusion that Ex.A3 alone is sufficient to come to the conclusion that Bakkiam is the daughter of Subramaniya Nadar. Since the fact narrated in Ex.A3 is an admission by the defendant Thangam and Tamil Selvi, the Court below held that it need not be proved. Hence, the first appellate Court concluded that the plaintiff is son of Bakkiam, who is the daughter of Subramaniya Nadar and sister of the

defendants. The trial Court has not stated any thing with regard to Ex.A2 and the admission by the defendants in Ex.A3. The trial Court has not considered the available document and indeed pointed out that some other documents, namely, Ration Card, Voter list etc., ought to have produced to prove the property of Bakkiyam.

11.However, as stated above, the first appellate Court has perused the available documents which is the legal notice Ex.A2, for which the defendants replied by way of Ex.A3 Reply notice, wherein they have clearly and categorically admitted about the said Bakkiyam is their elder sister. So, the admission made by the defendants in Ex.A3 is the substantial evidence, unless the above said admission was rebutted by them and the same is clearly evidenced by the Ruling of the Apex Court reported in 1977 Supreme Court 1724 [John Subramaniya Vs. Returning Officer]. Thus, the findings of the first appellate Court with regard to the paternity of the mother of the plaintiff is appropriate and based on acceptable material available on record. As such there is no scope for interference in the said finding since no contra evidence is produced by the defendants and moreover no rebuttal evidence was adduced by them in respect of Ex.A3 reply notice. Thus the issue is answered against the appellants/defendants.

12.Regarding the second substantial question of law, with regard to the genuineness of the Will dated 22.01.1998 is concerned, the Trial Court came to the conclusion that cogent evidence by PW2 and PW3, the attesting witnesses clearly proved the genuineness of Ex.A1 Will. However, the first appellate Court reversed the findings of the trial Court with regard to genuineness of the Will is concerned, on the basis of suspicious circumstances. The first appellate Court has narrated various suspicious circumstances like P.W.2, being a professional attester for documents. The other suspicious circumstances pointed out by the first appellate Court is that if the Will is genuine one, the father Subramania Nadar would have disclosed about his elder daughter and why no property was not given to the legal heirs of his daughter Bakkiyam. The lower appellate Court held that these two suspicious circumstances were not explained properly by the defendants. Further more, the 1st defendant who deposed as PW1 has stated in her evidence for the questions put to her that she does not remember anything. Considering the same, the first appellate Court came to the conclusion that Ex.A1 Will is not proved appropriately. When the will was not proved and the plaintiff was declared as the son of deceased Bakkiyam who is the daughter of Subramaniya Nadar and the sister of the defendants.

13.On the side of the defendants, for proving the Will

three witnesses were examined. The first defendant was examined as PW.1 and attesting witnesses were examined as PW.2 and PW.3. The defendants also produced Ex.A1 to Ex.A4. Ex.A1 is the Will dated 22.01.1998 executed by Subramaniya Nadar and legal notice issued by the plaintiffs is Ex.A2 and reply notice Ex.A3 and the acknowledgement card for the same is Ex.A4. These are the documents relied on by the defendants. Since both the suits OS.No.110/2001 and OS.No.201/2000 was tried together and evidence recorded in the suit filed by the defendants as the plaintiff in O.S.No.201 of 2000 they are examined as PW.1 to PW3 and Exs.A1 to A4 was produced. Regarding the partition suit in OS.No.110/2001 is concerned, against which the appeal is preferred the plaintiff is Kaliyaperumal and he is examined as DW1 and defendants are Thangam and Tamil Selvi. Tamil Selvi deposed as PW1.

14.The second defendant Tamil Selvi was examined as P.W.1. She has stated in her evidence that at the time of execution of Will Kollidam Sub Registrar Office, one Pattu Roja was present and she has forgotten the witnesses brought by her father. According to the defendants, the witnesses were PW2-Munusamy, PW3-Dhanasamy and one Vaidhyanathan. At the time of execution of Will, the age of her father was 90 years. The Will was executed on the first day and registration took place on the next day. PW1 stated that she do not remember as to whether there is correction in the Will or not. Attesting witness to Ex.A1 who deposed as PW.2 stated in his chief examination that Subramaniya Nadar was in good state of mind and executed the Will dated 22.01.1998. The said Ex.A1 Will was written by one Pattu Roja wherein Subramaniya Nadar put his thumb impression along with PW2, PW3 Dhanasamy and one Vaithiyanathan signed as witnesses. However, in the cross examination, PW2 stated that himself along with Dhanasamy, Vaithiyanathan, testator Subramaniya Nadar and Tamzihselvi went to Sub-Registrar Office after 12 noon and therefore the document was not registered on the day. They were asked to come on the next day for registration. According to him, Subramaniya Nadar was aged 80 or 85 years at the time of execution of Will. PW2 stated that the Will written on the first day itself and he did not know in how many papers, it was written. PW2 also stated that he his not aware of the number of papers in which Subramaniya Nadar put his thumb impression. PW 2 further stated that he is unaware as to whether description of suit property was given and how many copies were taken. PW2 also stated that he is unaware about distribution of properties and the persons to whom the property was given in the Will. PW2 also stated that he went for registration on the next day and the defendants Tamil Selvi and Thangam were present. He further stated that he is unaware whether both Thangam and Tamil Selvi signed in it. PW 2 also stated that he did not know as to whether any correction was

made in the last page of the Will. According to him, Subramaniya Nadar's thumb impression obtained at the time of registering the Will. It is thus clear that PW2 was unaware of several things as stated above, about execution of registration of the Will. The other attesting witness to the document who deposed as PW3 stated that he is working as Electrician but not on permanent basis. He also stated that he has signed as witness in number of documents and if anybody asked him, he will go and sign as a witness. According to him, Subramaniya Nadar aged above 75 years at the time of execution document. PW3 also stated that the Will was written in plain paper and he did not know the number of papers in which the Will was written and details of the property and allotment of the same to persons. PW3 also stated that he read the contents of the Will but do not know the details. PW 3 stated that the Will was written in front of the Sub-Registrar in the Kollidam Sub-Registrar Office. According to him, document was written in the previous day and registered on the next day. PW3 stated that on the date of the registration, testator Subramaniya Nadar did not come to the Office while himself along with PW2 Munusamy, Vaidiyanathan and Tamil Selvi went to the Sub-Registrar Office. Thus, according to PW3 testator was not present at the time of registration of the Will. Further, PW3 admits that he used to sign regularly as witness in the documents irrespective of whether the person is known to him or not. Thus, the evidence of PW3 is in contrast to that of other attesting witness PW2 in several aspects.

15. According to P.W.2, both days i.e., on the day of execution and on the date of registration both P.W.2 and P.W.3 were present, but, P.W.3 has stated that testator Subramaniya Nadar was present and signed only on the date of execution and not on the registration day. PW1 Tamil Selvi also stated that she did not know the order in which the witnesses signed and whether all of them signed with the same pens or with different pens. He further sated that the arrangements for execution of the Will was made by her father. Thus, PW1 who is the beneficiary of the Will took active part in execution of Ex.A1 Will. It is thus clear that PW2 and PW3 have not stated uniformly has to not happened when Ex.A1 was executed on the first day and got registered on the next day. Eventhough PW1 Tamil Selvi is not an attesting witness; what she deposed does not inspire confidence to the Court as she has given regular answer that "She does not know" to number of questions put to her. Further, apparently PW1 Tamil Selvi has taken active part in the execution of Ex.A1 agreement. In such circumstances, the conclusion of the First Appellate Court for the reasons stated by it that the execution of Ex.A1 Will is surrounded in suspicious circumstances is appropriate and the same is to be confirmed.

16.The another circumstances relied on by the first appellate Court is that if really the Will was executed by the father certainly he would have mentioned about his children and why the Will was executed in favour of two daughters alone and why no property was not given to legal heirs, of his another daughter. However, on the side of the defendants there is no proper explanation as well as no documentary evidence to prove what are the circumstances which necessitated Subramaniya Nadar to execute the Will in favour of his two daughters only. Thus, the suspicious circumstance relied upon by the first appellate Court is appropriate and acceptable one.

17.From the above discussion, it is clear that the trial Court has not elaborately discussed the evidence of attesting witnesses, but the first appellate Court considered and analysed the evidence of P.W.1 to P.W.3 who are the beneficiary as well as the attestors of the Ex.A1 Will. It is pointed out that mere examining of the attesting witness alone is not sufficient to prove the Will and it should be proved by showing that the Will was executed by the testator in sound disposing state of mind. Admittedly, the age of the testator at the time of execution of Ex.A1 Will was more than 75 years. Further as per the evidence of PW2 after execution of Will, within the period of about 15 days the testator died. The said Ex.A1 Will was executed on 22.01.1998 and the testator died on 28.01.1998. It is thus clear that he died within 7 days of execution of Ex.A1 Will. As such they exist doubt over the mental and physical health condition of testator. The evidence of attesting witnesses, namely, P.W.2 and P.W.3 must be cogent to prove the Will. However, the evidence of P.W.3 is contrary to the evidence given by P.W.2. In such circumstances, the first appellate Court came to the conclusion that the suspicious circumstances surrounding the execution of Ex.A1 Will is not explained properly by the defendants. Hence, on such facts, it was held by the Court below that Ex.A1 was not proved by cogent evidence. Therefore, the lower appellate Court correctly allowed the Appeal and reversed the findings of the trial Court. Further, on relying Ex.A2 and Ex.A3 exchange of notices, the first appellate Court came to the conclusion that the plaintiff's mother is one of the daughter of Subramaniya Nadar. The conclusion arrived by the first appellate Court on the basis of available evidence. Therefore, the findings of the first appellate Court with regard to Ex.A1 is acceptable.

18.As far as the contention regarding, the non-joinder of necessary parties are concerned, the plaintiff Kaliyaperumal has clearly stated that he is not having any sisters. Contrary to that there is no evidence on the side of the defendants, to

prove that the daughters of said Bakiyam are alive. As such, the contention of the defendants that the suit is not bad for non-joinder of parties is unsustainable. Thus, viewed from any angle, the findings of the first appellate Court is just and proper, as the same is based on complete consideration of facts and available evidence on record. Thus, the Court finds no need or reason to interfere with the same.

19. The Trial Court failed to consider all these aspects and erroneously dismissed the suit which the Lower Appellate Court has set right by reversing such finding and decreeing the suit. Therefore, I find that the appellant herein is not entitled to succeed. Consequently, the substantial question of law raised in the appeal are answered against the appellant.

20. In the result, the second appeal is dismissed. The Judgment and Decree dated 20.01.2006 passed in A.S.No.29 of 2005 by the learned Principal Sub Judge, Mayiladuthurai is hereby confirmed. Considering the relationship of the parties, there is no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

rrg/nvsri

To

1. The Principle Sub Court, Mayiladuthurai.
2. The District Munsif Court, Sirkali.

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The Section Officer,
V.R. Section, High Court,
Madras. (2 copies)

+1cc to Mr.S.Kalyanaraman, Advocate, S.R.No. 29406
+1cc to Mr.A.Muthukumar, Advocate, S.R.No. 29355

S.A.No.988 of 2006

CP(CO)
GN(11/01/2019)