



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 05.03.2018

CORAM

THE HONOURABLE MR. JUSTICE S.S.SUNDAR

S.A.(MD)No.73 of 2018

and

C.M.P.(MD)Nos.1592 & 1593 of 2018

Swarnam

... Appellant/Appellant/
Defendant

Vs.

1. Kanagammal
2. Thankam
3. Chellam
4. Pavazhakodi @ Janet Pavazham
5. Thankabai

... Respondents/Respondents/
Plaintiffs

Prayer: Second Appeal is filed under Section 100 of C.P.C., against the Decree and Judgment in A.S.No.94 of 2011 passed by the learned Subordinate Judge, Kuzhithurai, dated 13.07.2017, confirming the Decree and Judgment in O.S.No.19 of 2009 passed by the learned Principal District Munsif, Kuzhithurai, dated 13.07.2010.

For Appellants : Mr.G.Radhakrishnan

JUDGMENT

This Second Appeal is filed against the Decree and Judgment passed by the learned Subordinate Judge, Kuzhithurai, in A.S.No.94 of 2011, dated 13.07.2017, confirming the Decree and Judgment in O.S.No.19 of 2009, dated 13.07.2010, passed by the learned Principal District Munsif, Kuzhithurai.

2. Heard the learned counsel appearing for the appellant.

3. The defendant in the Suit in O.S.No.19 of 2009 on the file of the learned District Munsif, Kuzhithurai, is the appellant in this Second Appeal.

4. The Suit in O.S.No.19 of 2009 was filed by the respondents for partition and separate possession of their 1/6th share each in plaint items 1 and 2 and the residential building situated in item No.1.



5. The case of the plaintiffs/respondents in the Suit is that the suit items 1 and 2 originally belonged to one Muthammal, mother of the plaintiffs and the defendant and that she died intestate on 29.01.1995, leaving behind six daughters and one son, namely, the plaintiffs, defendant and one Selvakodi. Though the said Muthammal had a son, by name, Selvakodi, it is contended that the said son died before marriage on 11.11.2004. Stating that all the legal heirs of the said Muthammal are in peaceful possession and enjoyment of the suit properties, the Suit for partition and separate possession of the plaintiffs' $1/6^{\text{th}}$ share each came to be filed.

6. The appellant who is the sole defendant in the Suit contested the Suit on the ground that the plaintiffs were given in marriage by Gold jewels and money utilising the income and that by selling considerable portion of the property of the said Muthammal. It is further stated that the plaintiffs after their marriage have relinquished their rights in favour of their brother, by name, Selvakodi. It is the further case of the appellant that the said Selvakodi, the deceased son of Muthammal during his lifetime executed a registered Will in favour of the appellant on 08.09.2001.

7. From the reading of the written statement, it is to be noted that the claim of the appellant is on the basis of the Will alleged to have been executed by the son of the said Muthammal. The document, namely, the Will was marked as Ex.B.13.

8. The trial Court as well as the lower Appellate Court have categorically held that the appellant has not proved the due execution of the Will which was marked as Ex.B.13. The trial Court has categorically found that the appellant has not even taken steps to prove even the signature of the attestors in the Will. As against the concurrent Judgment and Decree of the trial Court as well as the lower Appellate Court, decreeing the Suit as prayed for, the defendant/appellant has filed the above Second Appeal.

9. In the Memorandum of the Second Appeal, the appellant has raised the following substantial questions of law:-

"(1) Whether the Courts below is right in granting a Decree of partition by appreciating the Sale Deed executed by the vendor without possession and redemption of mortgage of the sale property in favour of the mother of the plaintiff and the defendants?

(2) Whether the Courts below is right in, not considering the registered Will Deed when the Will Deed alone is examined due to the death of the attesting witnesses?



(3) *Whether the Courts below is right in deciding that the appellant herein has not established her job, hence, the dwelling house in the suit property is not constructed by the appellant herein?"*

WEB COPY

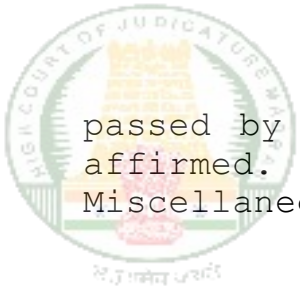
10. The Courts below have categorically found that the Will under Ex.B.13 has not been proved in the manner known to law. It is admitted that the defendant has not examined any of the attesting witness to the said Will. It is further pointed out by the trial Court as well as the lower Appellate Court that the defendant has not even proved that the document has been attested by the attestors. Even if the attestor of the Will is not alive at the time of marking the document, it is possible for the defendant to prove the Will by examining the persons who are acquainted with the signatures of the attestors to prove attestation. No attempt was made by the defendant in this case to let in proper evidence to prove the Will. The lower Appellate Court relying upon the precedents, categorically held that the evidence of the scribe cannot be a substitute and that he cannot depose to prove attestation as required in law. Since the evidence of D.W.3, namely, the scribe is not accepted and the said witness had not signed as a scribe cum attesting witness, the conclusion of the lower Appellate Court can be faulted.

11. There was no argument advanced to substantiate the first question of law framed in the Memorandum of the Second Appeal. Even assuming that there is some mortgage, that can not prevent the plaintiffs from suing for partition. Absolutely, there is no pleading to substantiate the point that is now raised in the third question of law.

12. This Court is unable to see any irregularity or illegality in the Judgment and Decree of the Courts below. The Courts below have applied mind with reference to each and every document in the light of pleadings. In the Second Appeal, the evidence cannot be re-appreciated. This Court find that the reasonings of the Courts below in arriving at conclusions are not vitiated for any legal ground or valid reason.

13. The learned counsel for the appellant further submitted that the Appellant may be given the share of her brother, as the Will executed by her brother is valid to the extent of her brother's share. This argument has no substance as this Court has confirmed the findings of the Courts below that the Will is not proved in the manner known to law.

14. As a result, this Second Appeal is dismissed and the <https://hccse.courts.gov.in/hccse/judgments> Decree and Judgment passed by the learned Subordinate Judge, Kuzhithurai, in A.S.No.94 of 2011, dated 13.07.2017, confirming the Decree and Judgment in O.S.No.19 of 2009, dated 13.07.2010,



passed by the learned Principal District Munsif, Kuzhithurai, is affirmed. However, no order as to costs. Consequently, connected Miscellaneous petitions are closed.

Sd/-

Assistant Registrar (AD-II)

WEB COPY

/True Copy/

Sub Assistant Registrar

To

1. The Subordinate Judge,
Kuzhithurai.
2. The Principal District Munsif,
Kuzhithurai.
3. The Record Keeper, V.R.Section, (2 copies)
Madurai Bench of Madras High Court, Madurai.

PMU

VB/SKN/RSK/SAR1/05.04.2018/4P/5C

S.A. (MD) No.73 of 2018
and
C.M.P. (MD) Nos.1592 & 1593 of 2018
05.03.2018