

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 08.01.2019

Pronounced on : 21.01.2019

CORAM

THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN

S.A.No.1305 of 2003

1.Nagammal
2.Kumar
3.Kandhan
4.Iyappan
5.Gnanasoundhari ... Appellants/Defendants

Vs

1.Sundaresan ... 1st Respondent/Plaintiff
2.Subramani ... 2nd Respondent/6th Defendant

PRAYER: The Second Appeal filed under Section 100 of CPC, against the judgment and decree of the Principal District Court, Tiruvannamalai in A.S.No.38 of 2002 dated 25.03.2003 reversing the judgment and decree of the Subordinate Court, Arani, in O.S.No.156 of 1994 dated 15.09.2000.

For Appellants : Mrs.Mythili Suresh
For Sarvabhauman Associates

For R1 : Mr.P.Rajendra Kumar

JUDGEMENT

The 1st - 5th defendants in O.S.No.156 of 1994 on the file of the Subordinate Court, Arani, are the appellants herein.

2.O.S.No.156 of 1994 had been filed by the plaintiff Sundaresan seeking partition and separate possession of $\frac{1}{2}$ or 5/10 share in the suit property. This suit was dismissed by judgment and decree dated 15.09.2000. Thereafter, the plaintiff had filed A.S.No.38 of 2002. The appeal was allowed by judgment and decree dated 25.03.2003 by the learned Principal District Judge, Thiruvannamalai.

3.Challenging that judgment, the 1st - 5th defendants had

filed the present Second Appeal. The second appeal had been admitted on 21.10.2003, on the following three substantial questions of law:-

1. When Ex.B1 Will dated 10.05.1992 had been proved in accordance with Section 63 of Indian Succession Act read with Section 68 of the Evidence Act by examining one attesting witness as DW2, whether the Lower Appellate Court is correct in law in disbelieving the case?

2. When it is axiomatic in law that the birth certificate cannot be the proof regarding parentage, whether the lower appellate court is justified in law in holding that the first respondent was born to the late. Krishna Pandithar on the basis of Ex.A6 Birth Certificate dated 08.05.2002.

3. Whether the lower appellate court is justified in law in disbelieving the evidence of Pws.1 to 3 and in rejecting Ex.B2 Will on flimsy grounds especially when it is well settled in law that the intention of the testator has to be given effect and the Court should consider the last statement of the testator in such manner?

O.S.No.156 of 1994 (The Subordinate Court, Arani):

4. Krishna Pandithar father of the plaintiff and Selvaraj the husband of the first defendant were brothers. Both Krishna Pandithar and Selvaraj died prior to the institution of the suit. The suit property was house and house site in Door No.1A, Muthumariamman Koil Street, T.S.No.25 measuring 0.03 cents, Ramakrishnapet, Arani, Thiruvannamalai District. This suit property originally belonged to Ayeemmal @ Bakkiammal. She had two sons namely, Selvaraj and Krishna Pandithar. After her death they both inherited an individual $\frac{1}{2}$ share each in the property.

5. The plaintiff is the son of Krishna Pandithar. The 1st - 5th defendants are the legal heirs of Selvaraj. The 6th defendant is a mortgagee of the suit property. The mortgagors were the 1st - 5th defendants who had mortgaged their interest over the suit schedule property. The plaintiff claimed $\frac{1}{2}$ share in the suit property. He had issued notice dated 29.05.1994 claiming partition. The 1st - 5th defendants sent a reply dated 06.06.1994 denying partition. Consequently, the suit had been filed seeking partition and separate possession.

6.The first defendant filed a written statement, stating that Bakkiammal had executed a Will in her favour and in favour of her sons, Jayakumar, Kandhan, Iyappan and daughters Gnanasoundari and Vasuki on 10.05.1992 in a sound disposing mind. It was stated that the first defendant was looking after Bakkiammal till her death. It was also stated the plaintiff was not the legal heir and a stranger. It was stated the suit should be dismissed.

7.On the basis of the above pleadings, the learned Subordinate Judge, Thiruvannamalai, framed the following issues:-

- 1.Whether the plaintiff was entitled to the relief sought to the plaint?
- 2.Whether the claim of the defendants that they are entitled for the suit property under the Will dated 10.05.1992 is correct?
- 3.Whether the plaintiff can claim entitlement to the suit property as legal heir?
- 4.Whether there is cause of action for instituting the suit?
- 5.To what other relief the plaintiff entitled?

8.During trial, the plaintiff Sundaresan examined himself as PW1 and two other witnesses Annamalai and Patchaiappan were examined as PW2 and PW3. The first defendant examined herself as DW1 and examined two other witnesses Dravidamani and Subramani as DW2 and DW3. The plaintiff marked Exs.A1 - A8. Ex.A1 is the title deed of the suit property. Exs.A2 and A3 are the notices exchanged between the parties. Ex.A5 is the Death Certificate of Krishna Pandithar. Ex.A6 is the Birth Certificate of plaintiff. The defendants marked Exs.B1 - B4. Ex.B1 is the Will executed by Bakkiammal. Ex.B2 is the Death Certificate of Bakkiammal.

9.The learned Trial Judge took up Issue No.3. He observed that it was the case of the defendants that the wife of Krishna Pandithar, by name Karppagammal lived with him only for 5 months and thereafter, lived with another person called Lakshmanan and that therefore the onus had shifted to the plaintiff to prove that his parents lived together for 280 days and since that was not proved, the learned Judge held that the plaintiff was not the son of Krishna Pandithar. The learned Judge then took up Issue No.2, namely proof of the Will dated 10.05.1992 which was marked as Ex.B1. He relied on the evidence of DW2 and stated that even though only one witness had attested Ex.B1, the Will had been proved in manner known to law and consequently, held that property vested entirely with the 1st-5th defendants and consequently, dismissed the suit for partition.

A.S.No.38 of 2002 (The Principal District Court,

Thiruvannamalai):-

10.The plaintiff then filed the appeal before the Principal District Court, Thiruvannamalai. The learned Principal District Judge, reappraised the evidence and framed points for consideration. The learned Principal District Judge, found that Ex.A6 is the Birth Certificate of the plaintiff, wherein the name of the father and the place of birth had been given. It had also been registered in the Sub-Registrar office Peranamallur. The learned Judge also found that there had been no divorce between Krishna Pandithar and Karpagammal. It was seen that Krishna Pandithar died only in 1974 as evidenced by Ex.A5, Death Certificate. The learned Judge found that the plaintiff was his legal heir and the legitimate son of Krishna Pandithar and Karpagammal. The Principal District Judge then took up the proof of the Will projected by the defendants. It was an unregistered Will dated 10.05.1992 and had been marked as Ex.B1. The learned Principal District Judge found that DW1 in her evidence stated that Bakkiammal put her left thumb impression on a hand written Will. However, Ex.B1 was a typed Will. It was also found that the executant of the Will was not in a sound state of mind. The learned Judge refused to accept that the Will was genuine document and consequently rejected the same. Finally, the learned Judge decreed the suit as prayed for.

S.A.No.1305 of 2003:

11.Challenging the Judgment in A.S.No.38 of 2002, the 1st-5th defendants had filed the present Second Appeal. The Second Appeal had been admitted on 21.10.2003, on the following three substantial questions of law:-

- 1.When Ex.B1 Will dated 10.05.1992 had been proved in accordance with Section 63 of Indian Succession Act read with Section 68 of the Evidence Act by examining one attesting witness as DW2, whether the Lower Appellate Court is correct in law in disbelieving the case?
- 2.When it is axiomatic in law that the birth certificate cannot be the proof regarding parentage, whether the lower appellate court is justified in law in holding that the first respondent was born to the late. Krishna Pandithar on the basis of Ex.A6 Birth Certificate dated 08.05.2002.
- 3.Whether the lower appellate court is justified in law in disbelieving the evidence of Pws.1 to 3 and in rejecting

Ex.B2 Will on flimsy grounds especially when it is well settled in law that the intention of the testator has to be given effect and the Court should consider the last statement of the testator in such manner?

12.The first respondent had filed the suit seek partition and separate possession of the suit property. The suit property originally belonged to Ayeeammal @ Bakkiammal. She had two sons, namely, Selvaraj and Krishna Pandithar. They were both entitled to $\frac{1}{2}$ share in the suit property. The plaintiff claimed to be the son of Krishna Pandithar. He therefore instituted the suit seeking $\frac{1}{2}$ share in the suit property. The 1st - 5th defendants were the legal heirs of Selvaraj namely, his wife and children. The plaintiff claimed that they were entitled to another $\frac{1}{2}$ share. The 6th defendant was a mortgagee to whom the 1st - 5th defendants had mortgaged their interest over the suit property.

13. In the written statement filed by the 1st - 5th defendants, it had been stated that Bakkiyammal had executed a Will dated 10.05.1992. It was also stated that the plaintiff was not the legal heir to claim the property and that he was a stranger. This pleading in the written statement had been developed further in the evidence of DW1, who was the first defendant. She claimed that her younger sister Karpagammal married Krishna Pandithar, a man with some physical ailments. According to her evidence they lived together only for 6 months. Karpagammal thereafter lived with another person called Lakshmanan. She also stated that Krishna Pandithar died in the year 1969. However, it is seen from Ex.A5, Death Certificate that he actually died only on 13.02.1974. The plaintiff was born on 08.05.1972. His Birth Certificate which had been registered with the Sub-Registrar office, Pernamallur, had been produced as Ex.A6. A perusal of Ex.A6 shows that it is a certified copy obtained from the Sub-Registrar, Pernamallur, Thiruvannamalai District. It shows that a male child was born on 08.05.1972 at Velumanthangal Village. The Registration Number was also given. The date of registration was 15.05.1972 within seven days from the date of the birth. The name of the father was given as Krishna Pandithar. The name of the mother was given as Karpagam. They were described as Hindu, Naavithar. The permanent address was also given as Velumanthangal Village. It is seen that the document is proximate to the date of birth. The names of the parents were both given. In contrast to this the only evidence available is the oral evidence of DW1. However, DW1 appears to be a confused lady.

14. During her evidence, she stated with respect to the Will that an Advocate K.M.Natarajan in Walajah had prepared the Will and Bakkiammal had put her left thumb impression on a hand written Will. Ex.B1 however is a typed Will, typed on two separate stamp papers. The only witness is Dravidamani examined as DW2. His signature alone is found. His details and address are not given. The scribe of the Will or the Advocate K.M.Natarajan have not been examined as witnesses.

15. Section 63(c) of the Indian Succession Act is as follows:-

Sec.63(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 acknowledgment 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.

16. Even though it is claimed that an Advocate had prepared the Will, necessary recitals in conformity with the above provision that the witness saw the testatrix signing the Will in his presence and that he signed in her presence are not found. The Will had been attested only by one witness, whereas the provision stipulates that there should be at least two witnesses. The Trial Court has proceeded on a tangential ground believing the evidence of DW1. However, the Will had not been proved in manner known to law. The learned Principal District Judge had disbelieved the evidence of the attesting witness DW2. It was specifically found that evidence of DW1 is contrary to Ex.B1 which was typed and not handwritten as claimed. It is also seen that DW2 is the sister's son of Bakkiammal. It is seen that in his evidence he had not stated that the Will was written as instructed by Bakkiammal. As a matter of fact PW2 is another younger brother of Bakkiammal, who stated that Bakkiammal was not of sound state of mind when the Will was executed. These are suspicions which arise over the execution of Ex.B1. In view of the same, I hold that the learned Principal District Judge was correct in refusing to accept its validity.

17. The first substantial question of law is under Section 63 of Indian Succession Act, read with Section 68 of Evidence

Act. In this case, the evidence of DW2 is not at all convincing. He had improved the evidence of DW1 who categorically stated that a hand written Will was prepared and the testatrix affix her left thumb impression in a hand written Will. As pointed out, the Will was typewritten. Consequently, I hold that Lower Appellate Court was correct in law, in disbelieving the evidence of DW2.

18.I hold with respect to the second substantial question of law that the only evidence which is available namely, Ex.A6 Birth Certificate can be relied on since the date of birth of the plaintiff was 08.05.1972 and the date of registration of the Birth Certificate was 15.05.1972 within a period of seven days. The name of both the parents and the place of birth have been given. There is no reason to doubt the said certificate. It is also a registered document.

19.The third substantial question of law relates to Ex.B2, which must be actually Ex.B1, but as had been pointed out the suspicious circumstances surrounding the execution of Will have not been removed by the propounder of the Will and the Will cannot be granted a seal of approval by this Court..

20.Consequently, the Second Appeal is dismissed, however, without costs. The judgment and decree of the First Appellate Court in A.S.No.38 of 2002 dated 25.03.2003 passed by the Principal District Court, Thiruvannamali, is confirmed.

Sd/-
Assistant Registrar(CS-IV)

//True copy//

Sub Assistant Registrar

Smv
To

1.The Principal District Court, Thiruvannamalai.

2.The Subordinate Court, Arani.

3.The Section Officer, VR Section, Madras High Court.

+1cc to M/s.Sarvabhauman Associates, Advocate SR.No.4472

+1cc to Mr.P.Rajendra Kumar, Advocate SR.No.4060

S.A.No.1305 of 2003

CNR (CO)
GMY (08/03/2019)