



IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	DELIVERED ON
05~04~2019	23~04~2019

CORAM :

THE HONOURABLE MR. JUSTICE N.SATHISH KUMAR

S.A.No.1160 of 2010

Dhanalakshmi ...Appellant/Appellant/2nd Plaintiff

-Vs-

1.Karuppasamy ...1st Respondent/2nd Respondent/
/2nd Respondent

2.P. Maheshkumar

3.R. Rajeswari ...Respondents 2&3/Respondents 3&4/
/L.Rs.of 1st Defendant

Second Appeal filed under Section 100 of C.P.C., against the Decree and Judgement dated 04.01.2010 made in A.S.No.67 of 2009 on the file of the Additional district Court/Fast Track Court No.II, Gobichettipalayam, confirming the Judgment and Decree dated 28.08.2008 in O.S.No. No.110 of 2002 on the file of the First Additional Sub-Court, Gobichettipalayam.

For Appellant : Mr.I.Abrar Md.Abdullah

For Respondents : Mr.V. Raghavachari for
M/s.M. Narayanaswamy for R1
No appearance for R2 and R3

JUDGMENT

Aggrieved over the concurrent findings of the courts below the present second appeal is filed. The parties are arrayed as per their ranking before the trial Court.

2. The brief facts leading to file this Civil Revision Petition are as follows:

2.(a) A suit has been filed by the First Plaintiff for partition against his son Defendants 1 and purchaser of the suit property. It is the contention that property originally belong to one Palanisamy husband of the Plaintiff and father of the



first defendant. The said Palanisamy died intestate in the year 1995. The first Plaintiff and first defendant became Class-I legal heirs entitled to equal share in the suit property. First Defendant taking advantage of the fact that the Plaintiff was not well and entered into an agreement with the Second Defendant on 07.03.2001. At the intervention of the Plaintiff and Panchayatdars, the above agreement was cancelled on 26.4.2001. In view of the family arrangement it was agreed to sell 23 cents in order to clear the debts of the family. When the matter stood thus, the First Defendant violating the right of the Plaintiff alienated the entire suit property in favour of 2nd Defendant to defraud the share of the Plaintiff. Hence the suit for partition. Pending suit she has executed a Will dated 2.7.2003 in favour of the 2nd Plaintiff. On the strength of the above Will the second Plaintiff was brought on record.

2.(b) Defendant No.1 remained exparte. Second Defendant filed a statement to the effect that the First Plaintiff has relinquished her share in favour of the Second Plaintiff and his son. First defendant and son effected many alienation. The First Plaintiff has not challenged the alienation. Now, suit has been filed to non-suit the sale in his favour dated 26.12.2001. In addition it is the contention that the alleged Will of the First Plaintiff is not valid. She has not executed the Will while in sound state of mind. The Will has been prepared by the First Defendant with the assistance of relatives. The Will is fabricated one. The second Plaintiff is not in possession of the property. The Trial court framed necessary issues. On the side of the Plaintiff P.W.1 to P.W.3 were examined and Ex.A.1 to Ex.A.9 were marked. On the side of the Defendants, Second Defendant was examined as D.W.1 along with one Saravanakumar was examined as D.W.2 and Ex.B.1 to Ex.B.2 were marked. The trial Court having found that the First Plaintiff had share in the suit property, however, disbelieved the Will propounded by the Second Plaintiff. The First Appellate Court has also ultimately dismissed the appeal. Challenging the same the present second appeal is filed.

3. The Appellant has raised the following substantial Questions of Law in the Second Appeal:

"a) Whether the 2nd Plaintiff has proved the due execution and genuineness of the Will / Ex.A.9 particularly when the second defendant being a stranger is debarred from challenging the Will?

b) Whether the principle of spes successionis would operate against the defendants 1 and 2 to claim absolute claim over the suit property dehors the existence of the Will Ex.P.9?



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c) Whether the Courts below have committed an error in giving findings regarding the sale deed dated 26.12.2001 notwithstanding the factum of family arrangement pleaded by the Plaintiffs especially when the sale deed dated 26.12.2001 had not been produced before the Court?"

4. The counsel appearing for the appellant submit that the First Plaintiff being the wife of Palanisamy inherited the property along with the First Defendant. She has equal share in the suit property. The First Plaintiff died during the pendency of the suit. She has also executed Ex.A.9 Will bequeathing her share to her daughter in law. It is the contention of the learned counsel, the First Defendant is acting against the interest of the family and in the habit of selling the family properties which was objected by his mother. Thereby she has filed partition suit. The very conduct of the mother filing partition suit against her son, clearly indicate that both are at loggerheads. Therefore, as a sharer she has bequeathed her share only in the interest of her daughter-in-law she is residing away from the First Defendant.

5. P.W.2 and P.w.3 have clearly spoken about the execution of the will by the First Plaintiff. Their evidence is not even shaken in the cross examination. Whereas the trial Court and first appellate court has simply disbelieved the Will on the ground that the Will has been prepared without verifying the originals. Such appreciation by the courts below is against the settled principles of law. Hence, submitted that the Courts below have not appreciated the facts. He relied upon a judgment of the Honourable Apex Court reported in Sridevi and Others v. Jayaraja Shetty and others [MANU/SC/0065/2005] and Madhukar D.Shende v. Tarabai Aba Shedage [MANU/SC/0016/2002].

6. Learned counsel appearing for the respondent would contend that the Will propounded by the second Plaintiff is fabricated one at the instance of the first defendant. First Defendant is none other than the husband of the second plaintiff. Only to non-suit the sale made in favour of the second defendant the Will has been projected. Attesting witnesses are the close relatives of the Plaintiffs and First Defendant. Hence, the Courts below have rightly disbelieved the Will and submitted that the appeal has to be dismissed.

7. In the light of the above submissions when the facts are analysed, the mother has filed a suit against his son, originally alleging that to defraud her share he has sold the suit property. The first defendant remained exparte. The fact remains that the property is self-acquired property of Palanisamy, the husband of the First Plaintiff and father of the



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First Defendant. Second Defendant is also close relative of the first Defendant. He said to have purchased the property on 26.12.2001. Second Defendant did not dispute the share of the plaintiff but his only contention is that the First Plaintiff has relinquished her share in favour of the First Defendant her son. The courts below have correctly found that the relinquishment pleaded by the defendant has not been established and in fact the trial Court has held that First Plaintiff has half share in the suit property. Second Plaintiff has subsequently impleaded on the strength of Ex.A.9 Will. It is the case of the Second Plaintiff that the First Plaintiff has left the Will Ex.A.9 dated 2.7.2003 in respect her undivided share in the suit property in her favour. On the strength of Ex.A.9, second Plaintiff was impleaded after the death of the First Plaintiff. It is also well settled, undivided share can be bequeathed there is no bar under law to execute such a Will. It is the only contention of the defendant that the Will has been fabricated. It is to be noted that the first plaintiff has made a specific allegation against her son defrauding her share. Admittedly the first Plaintiff had half share in the suit property. It is also alleged that in order to clear of the debts of the family only 23 cents agreed to be sold and in remaining property she has half-share. The trial Court and First Appellate court have rightly held that the First plaintiff had share in the suit property. However, disbelieved the Will on the ground that the Will was written without referring to the original title deed.

8. P.Ws.2 and 3 were examined to prove the Will. In their evidence, they have categorically stated that the Will was executed by the testatrix while she was in sound state of mind and both the attesting witnesses seen the testatrix executing the Will in their presence. The testatrix also seen the attesting witnesses signed in the Will. The evidence of P.W.2 and P.W.3 clearly established the execution of the Will. Except general denial in the cross examination, the mental state of the testatrix and execution of the documents has not seriously disputed. The cross examination in fact proceeded with regard to some other family arrangement in the family. Admittedly, the testatrix illiterate widow. Therefore, the courts below holding that the Will has been written without referring to the original title deed is to be disbelieved. Such approach of the courts below in my view, is not correct, for the simple reason that merely because the title deeds were not referred in the Will the Will cannot be non-suited. What is to be seen is the execution of the Will in sound state of mind. P.W.2 and P.W.3 in unison voice clearly spoken about the execution of the Will in a sound state of mind of the testatrix. The evidence of the P.W2 and P.W.3 not only satisfy the execution aspect but also attestation as contemplated under Section 63(c) of the Indian Succession



Act. Admittedly, the testatrix had half share in the suit property. Merely because P.W.2 and P.W.3 were relatives of the testatrix, that itself is not a ground to disbelieve the execution of the Will. Admittedly, the testatrix was fighting against her own son, she was illiterate lady. She has filed a suit to preserve her share in the suit property. She being a widow and illiterate rustic lady, taking assistance of her relatives is common and normal conduct. Therefore, merely because P.Ws.2 and 3 are relatives of the testatrix, that may not be a ground to disbelieve the Will when the evidence of P.Ws.2 and 3 do not show any artificiality. In fact their evidence established the execution and attestation and there is no suspicious circumstances established in their evidence. The intention of the testatrix has to be seen. The very nature of the suit itself indicate that she wanted to preserve her legitimate share in the property which she was legally entitled. Therefore, she being aged widow leaving the Will to her daughter-in-law who is also residing separately from the first defendant is normal conduct. Her intention can be seen from the Will that the Will has been left only to preserve her share and the share would go to her daughter-in-law who is residing separately from the first defendant.

9. In Sridevi's Case (supra) the Honourable Apex court has held as follows:

"11. It is well settled proposition of law that mode of proving the will does not differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by Section 63 of the Indian Succession Act, 1925. The onus to prove the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and proof of the signature of the testator, as required by law, need be sufficient to discharge the onus. Where there are suspicious circumstances, the onus would again be on the propounder to explain them to the satisfaction of the court before the will can be accepted as genuine. Proof in either case cannot be mathematically precise and certain and should be one of satisfaction of a prudent mind in such matters. In case the person contesting the will alleges undue influence, fraud or coercion, the onus will be on him to prove the same. As to what are suspicious circumstances have to be judged in the facts and circumstances of each particular case. { For this see H. Venkatachala Iyengar v. B.N. Thimmajamma & Ors. [(1959) Supp.1 SCR 426]



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and the subsequent judgments Ramachandra Rambux v. Champabai & Ors. [(1964) 6 SCR 814]; Surendra Pal & Ors. v. Dr. (Mrs.) Saraswati Arora & Anr. [(1974) 2 SCC 600]; Smt. Jaswant Kaur v. Smt. Amrit Kaur & Ors. [(1977) 1 SCC 369]; and Meenakshiammal (Dead) thr. LRs. & Ors. v. Chandrasekaran & Anr. [(2005) 1 SCC 280]"

10. In Madhukar D.Shende's case (supra) the Honourable Supreme Court has held as follows:

"9. It is well-settled that one who propounds a will must establish the competence of the testator to make the will at the time when it was executed. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the will in the manner contemplated by law. The contestant opposing the will may bring material on record meeting such prima facie case in which event the onus would shift back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed the same. The factors, such as the will being a natural one or being registered or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of 'not proved' merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance. "

11. Ex.A.9 the Will seen, it is clearly stated the reason for bequeathing the property. It is recited that since her son is acting against the interest of the family, she is bequeathing the property to the second plaintiff. P.W.2 and P.W.3 evidence when carefully seen they have spoken about the execution of the Will while she was in sound state of mind. They also stated that since the registration is not mandatory the same is not registered. Except general suggestion in the cross examination of both P.Ws.2 and 3 the execution and attestation have not seriously disputed. It is to be noted that the second defendant is only the purchaser of the property. He pleaded oral relinquishment of the property by the first plaintiff which has not been established. He is also aware of the fact that the



First Defendant did not have title to the entire suit property. Knowing above fact, he has purchased the property. He is in fact stranger to the family he cannot question the Will executed by the mother to the second plaintiff, daughter-in-law.

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12. It is further to be noted that as already discussed absolutely there is no suspicious circumstances whatsoever, brought in the evidence of P.Ws.2 and 3. Merely because while writing the will title deeds have not been referred, the same may not be a ground to non-suit the Will. The trial Court has disbelieved the Will only on the ground that the Will has not been referred title deeds. Whereas the First Appellate court has gone to the extent of saying that scribe has not been examined. It is to be noted that to prove the Will only examination of anyone of attesting witnesses required not the scribe. Merely because scribe has not been examined that cannot be a ground to disbelieve the Will. In fact, the First Appellate court has not also appreciated the facts properly. When the First Appellate court and the trial Court have not appreciated the evidence properly and arrived a conclusion such findings are definitely perverse one.

13. It is also to be noted that the defendants having claimed that the property purchased on 26.12.2001 and entered into an agreement with third parties. Further it is to be noted that the document also not released due to the under valuation of the property. The above agreement also subsequently cancelled. These facts clearly indicate that the defendants also aware of the fact that the first defendant did not have title to the entire property. Hence substantial question of law answered in favour of the appellant and the appeal is allowed. The findings of the courts below are set aside. Preliminary decree is passed declaring half share in favour of the Second Plaintiff in the suit property.

14. In the result, Second Appeal is allowed. Preliminary Decree is passed declaring half share in favour of the Second Plaintiff in the suit property. No costs.

ggs

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The the Additional district Judge,
Fast Track Court No.II, Gobichettipalayam



2.The First Additional Subordinate Judge,
Gobichettipalayam.

Copy to:-

The Section Officer,
V.R.Section,
High Court, Madras - 104.

+1cc to Mr.I.Abrar MD Abdullah, Advocate, SR.No.38879
+1cc to Mr.M.Naraayana Swamy, Advocate, SR.No.38958

S.A.No.1160 of 2010

Kak(22/11/2019)