

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 19.06.2019

Judgment Pronounced on : 14.08.2019

CORAM : THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.1150 of 2005

1.Sundari (Died) Appellant /Appellant / Plaintiff
2.Palanivel
3.Selvamani Appellants 2 and 3
(Appellants 2 and 3 are brought on record as LRS of the deceased
sole appellant vide order dated 15.03.2019 in
CMP.No.5658,
5659 and 5661 of 2019 in SA.No.1150/2005)

Vs

1.Shanmugam
2.Anusiya Respondents / Respondents / Defendants

Prayer : Second Appeal filed under Section 100 of CPC against the judgment and decree in A.S.No.60 of 2004 on the file of the District Court, Nagapattinam dated 28.01.2005, confirming the judgment and decree in O.S.No.103 of 2002 on the file of the Principal Subordinate Judge, Mayiladuthurai, dated 08.04.2004.

For Appellants : Mr.V.Raghavachari

For Respondents : Mr.M.V.Venkateseshan [R1]
R2 - No appearance

JUDGMENT

The plaintiff, who tasted partial success before the trial court and lost her first appeal, has now come forward with the present appeal.

1.2 The suit is laid for partition. The A-schedule to the plaint describes three items of immovable properties, while B schedule deals with movables. The trial Court had decreed the suit as concerning A-schedule items 2 and 3, and dismissed the suit as to the rest. The point in contention is plaintiff's right to Item 1 in the A schedule.

2. The material facts alleged in the plaint are:

- All the three items of immovable properties originally belonged to a certain Amirthathachi Ammal, paternal grandmother of the plaintiff. She married one Rathinasamy

Mudaliar. Both of them died in 1970 and 1974 respectively. They had one son Ramanatha Mudaliar, and the latter was married to Saraswathi.

- Item 1 of the A schedule was purchased by her paternal grandmother Amirthathachi Ammal in 1938 under Ext.A-1 sale deed. On her demise, the property was held as an ancestral property by her father Ramanatha Mudaliyar. So for as items 2 and 3 of A schedule are concerned, they were inherited by Ramanatha Mudaliyar from his father Ratnasami Mudaliyar.
- Ramanatha Mudaliar and Saraswathi had two daughter, of who plaintiff Sundari is one. The other daughter is Anusuya, and she is the 2nd defendant. Besides the two daughters, Ramanatha Mudaliyar had two sons, and they are the first defendant, and one Veeramani. Of them, Veeramani died leaving his mother Saraswathi to succeed to his property. Saraswathy predeceased Ramanatha Mudaliyar and died on 30-12-2000. Accordingly, Veermani's share in the properties to which Saraswathy succeeded to devolved equally on her husband and three surviving children.
- So far as the second defendant Anusuya was concerned, she was married on 07-09-1990, and hence by virtue of Sec.29-A of the Hindu Succession Act, she became a coparcener along with Ramanatha Mudaliyar and the first defendant. Ramanatha Mudaliyar died in 2001, following which, each of plaintiff and defendants 1 and 2 became entitled to 1/3 share in the A-schedule item 1 property, and 20/48 shares in the other two items of properties.
- Be that as it may, the first defendant had disclosed a Will, dated 09-02-2001 said to have been executed by Ramanatha Mudaliyar, and the two daughters (plaintiff and the second defendant) only 1.67 acres of agricultural land. The Will is both bad in law and not genuine as well. The reasons are :
 - (a) Ramanatha Mudaliyar had no right to execute the Will.
 - (b) Ramanatha Mudaliyar was about 80 years and was not in sound state of mental disposition during the whole of February, 2001, that the signature there in may not be his.
 - (c) the first defendant has managed to have a larger allotment to his share. Ramanatha Mudaliyar has been under the care and protection of his daughters and one Natesan, a close relative of his.
- All the properties are in joint possession of the parties. In fact on 29-12-2001 a panchayat had taken place, in which the first defendant and his wife agreed

to share the properties equally, and also to contribute his 1/3 share towards the expenses incurred by the plaintiff, the second defendant and Natesan for maintaining their father including medical expenses involved. A Muchalika (memorandum) too was prepared.

The B schedule properties include the jewels of Ramanatha Mudaliyar in which both the daughters jointly have 2/3 share. The first defendant however, has pledged it with the fourth and fifth defendants.

3. The defense offered by the 1st defendant is that the suit property are the personal or separate properties of Ramanatha Mudaliyar. Hence, Ramanatha Mudaliyar had absolute power of disposition over the suit properties. Accordingly, he executed a Will, dated 09.02.2001 and registered it on 13.02.2001 (marked Ext.B-18) bequeathing the first item of property to the first defendant. The Will was duly attested. He was absolutely healthy till his death on 13.12.2001. On his death, the Will had taken effect. So far as the Muchalika dated 29-12-2001 is concerned, it a fabricated, ante-dated document. Neither the first defendant nor his wife had ever signed the muchalika. So far as the jeweleries are concerned, Ramanatha Mudaliyar himself had pledged the same for raising finances for agricultural activities.

4. During trial, both sides produced oral and documentary evidence. Since, the present dispute is over item 1 in the A schedule, the relevant documents are Ext.A-1=Ext.B-6, the sale deed under which Amirthathachi Ammal had purchased the said property, Ext.B-7, a registered Will dated 04-07-1959 executed by Amirthathachi Ammal, in favour of her son Ramanatha Mudaliyar, and Ext.B-18, the Registered Will executed by Ramanatha Mudaliyar and attested by D.W.2 and D.W.3, and Ext.A-7, the Muchalika dated 29-12-2001, attested inter alia by P.W.3 and P.W.4.

5.1 The trial Court has held that item 1 of the A schedule is the separate property of Ramanatha Mudaliyar. It then proceeded to hold that Ext.B-18 Will is genuine. Turning to Ext.A-7, the trial Court though finds that the stance of the first defendant is uncertain if his pleading and his oral testimony are read together, yet has held that it cannot be accepted as it did not conform to legal formalities. Inasmuch as it has held that Ext.B-18 Will was found to be genuine, and since item 1 in the A schedule was allotted to the first defendant, it dismissed the suit as concerning this item, and passed a preliminary decree as regarding the rest.

5.2. Aggrieved by the same, the plaintiff alone preferred the first appeal. The appellate court came to an identical view as that of the trial Court, and dismissed the appeal.

substantial questions of law:

"a. Whether the courts below ought not to have given precedents to family arrangement over an unproved Will?

b. Whether the non-examination of the 1st defendant is not fatal to the case of the defendants?"

7. What now stands established now is the genuineness of Ext.B-18 Will of Ramanatha Mudaliyar. The issue is if Ext.B18 Will was superceded by Ext.A-7 muchalika, and if the right vested under Ext.B-18 Will is lost under the weight of Ext.A-7?

8. Turning to the second of the substantial question of law first, the contesting first defendant has not examined himself as a witness, but examined his wife as D.W.1. A wife is a competent witness for her husband under Sec.120 of the Evidence Act, and hence it cannot be held that non-examination of the first defendant is fatal to his case. Secondly, the only point involved is about the genuineness and the legal effect of Ext.A-7 muchalika. It is alleged to contain the signature and thumb impression of both the first defendant and his wife. And, when both have been alleged to have contemporaneously signed Ext.A-7 document, it does not matter if the first defendant did not enter the witness box, when his wife has spoken about it.

9. Turning to Ext.A-7 per se, both the Courts have accepted that this document is genuine, in the sense the document has been executed by the first defendant and D.W.1, as they found inconsistency in the pleading of the first defendant and the evidence of D.W.1 on it. Genuineness of Ext.A7 on the point of execution however, cannot be equated to its sustainability in law, for the legal effect of a document is not the same as the execution of a document.

10.1 Vesting of properties under a Hindu Will executed outside the Presidency Town, happens the moment the testator dies, subject however, to the fact that such vesting will be limited to the extent of interest the testator has had in the properties bequeathed. If the Will is challenged in a judicial proceedings, the vesting will become the subject matter of the litigation. Where the courts find that a Will is genuine, then it is a confirmation of the fact that the title has vested properly. If however, a Will was found not be genuine, then it would not imply that a divestiture of right takes place, but it will be based on a judicial statement divesting is the consequence concomitant.

10.2 Accordingly, in the instant case when Ramanatha Mudaliyar died, the properties vested in terms of Ext.B-18 Will in the legatees named in the Will, which include not only the first defendant, but also his other two daughters (the plaintiff and the second defendant). When this Will was challenged before

Court and was found to be true, it is a confirmation of the vesting that had taken place, Therefore, in the present case when Ext.B-18 Will took effect on the demise of Ramanatha Mudaliyar, item 1 of the A schedule had vested in the first defendant.

11. Turning to Ext.A-1, it is typed document in which the first defendant and his wife (D.W.1) have affixed both their signatures and thumb impressions. Other than these two, there are seven signatories, all of who appear to be the Panchayatdars. The person who typed the document has signed as the 8th person. Neither, the plaintiff, nor the second defendant are signatories to the document. It recites that Ramanatha Mudaliyar has died on 13-12-2001, and that it (Ext.A-7) was executed on 29-12-2001, on the 16th day of Ramanatha Mudaliyar's death. There is no reference in it to Ext.B-18, (the registered Will of Ramanatha Mudaliyar which he had executed some ten months prior to his death on 09-02-2001), in it. Necessarily, the question of divesting the title acquired under Will was not the subject matter of Ext.A-7.

12. The legal effect of Ext.A-7 (assuming it is genuine) spotlights on certain unusual peculiarities for this Court to consider it as a reliable document. The reasons are :

- When Ext.A-7 is scanned for further details, it states that the Panchayatdars have decided a dispute before them. This is vastly different from they facilitating resolution of a dispute. Is Ext.A-7, a decree of the Panchayat?
- If Ext.A-7 were to be considered as a memorandum of family arrangement, then consensus shared between all the parties would get reflected by a memorandum signed by all, and not a unilateral declaration. This now gives raise to an ancillary issue if the Panchayatdars have imposed their Will on the first defendant and his wife, and if they have lent their signatures out of their free will? Now, why D.W.1 was made a party to the document (not as an attestor) when no property would vest in her either under Ext.B-18, or dehors it?
- Thirdly, and as indicated earlier, there is no reference to Ext.B-18 Will Ext.A-7, which the Courts below have found to be genuine, and if so, what kind of a resolution of a dispute that the Panchayatdars had attempted? It has to be made known that no Panchayat has the authority to pronounce its decision on the genuineness of a testatmentary document, and therefore, even if Ext.B-18 were discussed, it would be of no consequence in law.
- Fourthly, and very critically, does Ext.A-7 assure anybody of any fairness of the procedure adopted. On the face of it, Ext.A-7 only indicates imposition of the Will

of the seven wise men who constituted the Panchayat on the first defendant and the latter's wife. Fairness, is the foundation on which disputed rights are decided in a civilised society. Fairness of the procedure adopted ensures the justness of the decision-making process. Forsaking fairness is an invitation to arbitrariness and, it cannot be accommodated in our legal system. Panchayats can losely equated to a ADR mechanism, but its role is limited to the extent of facilitating the parties to arrive at the resolution of their dispute among themselves, but they cannot assume the role of a Civil Court to deliver decrees. Ext.A-7, fails on each of the reasons stated.

13 When Ext.A-7 is found to have no efficaicy in law to upset the legal consequences that flows from Ext.B-18, necessarily this Court has to uphold the rights in terms of Ext.B-18.

14. In conclusion, this appeal is dismissed, and the judgment and decree in A.S.No.60 of 2004 on the file of the District Court, Nagapattinam dated 28.01.2005, confirming the judgment and decree in O.S.No.103 of 2002 on the file of the Principal Subordinate Judge, Mayiladuthurai, dated 08.04.2004, is hereby confirmed. No costs.

Sd/-
Assistant Registrar(CCC)

//True copy//

Sub Assistant Registrar

ssn

To:

1.The District Judge
Nagapattinam.

2.The Principal Subordinate Judge
Mayiladuthurai.

3.The Section Officer
High Court, Madras.

+1cc to Mr.M.V.Venkataseshan, Advocate SR.No.69251

+1cc to MrV.Raghavachari, Advocate SR.No.69170

S.A.No.1150 of 2005

VSN II(CO)
GMY(16/06/2020)