

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 10.07.2019
CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE
S.A.No.1495 of 2005

1.Sasikala (Died)
2.P.Anilkumar Appellants/ Appellants / Defendants
3.P.Ashok Kumar Appellant

(3rd appellant brought on record as legal heir of the deceased first appellant viz., Sasikala, Vide Order of Court dated 28.06.2019 made in CMP.No.21971/2018 in S.A.No.1495/2005)

Vs

1.A.Boopalan
2.Vairam @ Vairamani
3.Kumar @ Rathnakumar Respondents/Respondents/Plaintiffs

Prayer :- Second Appeal filed under Section 100 of the Civil Procedure Code, preferred against the judgment and decree dated 30.07.2004 made in A.S.No.76 of 2003 on the file of the I Additional District Judge, Salem, confirming the judgment and decree dated 25.04.2003 made in O.S.No.371 of 1999 on the file of the II Additional District Munsif, Salem.

For Appellants : Mr.R.Nalliyappan

For Respondents : Mrs.V.Srimathi

JUDGMENT

The suit is laid for bare injunction. The trial Court decreed the suit, and in the appeal preferred by the defendants, the first appellate Court confirmed the decree of the trial Court. Parties would be referred to by their rank before the trial Court.

2. The dispute is over the suit property which a certain Paramasivam owned. He was married to Sasikala, the first defendant, and out of their wedlock, they had a son. He is not a party to the suit. The matrimony of Paramasivam and Sasikala ran into a rough weather and they lived separately. Paramasivam therefore filed H.M.O.P. No.17 of 1981 for restitution of his conjugal rights. This Court was informed that Sasikala remained exparte in the proceedings but, she filed her counter to that petition. It is in this setting, Paramasivam was stated to have executed Ext.A-12, an unregistered Will dated 19.10.1998, in favour of the plaintiffs, who are his brother and nephews. Paramasivam died on 14.2.1999. Claiming title under Ext.A12

Will, and faced with the resistance to their peaceful possession from the first defendant (Sasikala), the plaintiffs have laid the suit. The second defendant is the purchaser of the suit property under the first defendant.

3. The second defendant filed the written statement and the same was adopted by the first defendant. The plea taken in the written statement was that the said Paramasivam had never executed the alleged Will dated 19.10.1998 in favour of the plaintiffs, that the first defendant and her son succeeded to the suit properties after the demise of Paramasivam.

4. During trial, the Will in controversy was marked as Ext.A-12. The core issue before the Courts below was whether Ext.A-12 Will is genuine. To prove the Will, its propounder examined P.W.2, one of the attestors of the Will. The trial Court has relied not only on the testimony of P.W.2, but has also taken into account the nature of counter that the first defendant Sasikala had filed in HMOP.No.17 of 1981 (Ext.A13) and also the counter in I.A.No.173/1982 in HMOP.No.17 of 1981, which is available on record as Ext.A-14, and held that Ext.A-12 Will is genuine and decreed the suit. This decree later came to be confirmed by the first appellate Court. Aggrieved by the decree of the first appellate Court, the defendants have now come before this Court in this second appeal.

5. The appeal was admitted on the following substantial questions of law :

1) Whether the Courts below are right in holding that the due execution of the Will is proved merely based on the evidence of P.W.2 one of the attesting witness by completely overlooking the fact that the respondents/plaintiffs miserably failed to explain and clear the several suspicious circumstances viz., (i) genuineness of the signature of the testator; (ii) unnatural, improbable and unfair disposition made in the Will and (iii) respondents 1 and 3, propounders themselves taking active part in the execution of the Will that are surrounding the execution of the alleged Will?

2) Whether the judgments of the Courts below are liable to be set aside as the same are perverse and contrary to the law laid down by the Supreme Court in H.Venkatachala Iyengar vs. B.N.Thimmajamma (AIR 1959 SC 443), Rani Purnima Debi vs. Kumar Khagendra NarayaDeb (AIR 1962 SC 567) and Shashi Kumar Banerjee vs. Subodh Kumar Banerjee (AIR 1964 SC 529)?

Arguments:

6. The learned counsel for the appellants argued that when a Will is propounded, the burden is entirely on the propounder of the Will to prove its genuineness both as to the factum of its execution, and also the mental disposition that accompanies such execution. It is further argued:

- The plaintiffs are the brother and nephews of the first defendant's husband Paramasivam, and the deceased Paramasivam himself had a son through Sasikala. There is no case that even though his (Paramasivam's) relationship with the first defendant was strained, his relationship with his son too was strained. There is therefore, no just reason to exclude his son.
- Secondly, turning to the execution of the Will, the signature in the Will does not appear genuine. This is borne out by the fact that the first defendant had filed a criminal case against the plaintiffs alleging that the plaintiffs have fabricated Ext.A12 Will by forging the signature of her husband Paramasivam. To establish that, she had obtained a certified copy of the lease deed executed by Paramasivam about a month prior to his death, sometime in February 1999, and that the Investigating Agency had compared his signature in Ext.B-35 with the impugned signature in Ext.A12 Will to arrive at his conclusion that the Will is fabricated. Ext.B-35, in the contextual setting in which it is positioned, tilt the balance against the plaintiffs, in that it now imposes a greater burden on the plaintiffs to come clean on the allegation that the Will is fabricated.
- Thirdly, in a suit for bare injunction, the Courts below ought not to have travelled beyond the lawful possession of the plaintiffs and should have not ventured into entering a finding on the genuineness of the Will, argued the learned counsel.

7.1 Per contra, the learned counsel for the respondents argued that Paramasivam had earlier laid HMOP.No.17 of 1981 against Sasikala, his wife, for restitution of his conjugal rights. In the counter filed in 1983, the first defendant (Sasikala) had alleged that her husband had swindled the business income of her father. She had also indicated that she was residing with her father for some 13 years prior to her counter. This would imply that for a considerable length of time, Paramasivam was not cared by the first defendant. It is in this setting, he executed a Will in favour of his brother and his brother's children, who cared him all along and there is nothing abnormal about it.

7.2 Turning to Ext.B-35 lease deed on which the investigating agency has relied on, the Will itself indicates that the Will was executed while Paramasivam was hospitalised. There is therefore a possibility that there might be some marginal variance in the signature. Turning to Ext.B35, the lease deed, the learned counsel argued that it was a piece of evidence before the Criminal Court, and that it does not bind the Civil Court, unless the same is proved in the manner known to law.

Discussion & Decision:

8. It is an indisputable fact that Paramasivam and the first defendant did not share a happy matrimony. Indeed, Paramasivam had laid HMOP.No.17 of 1981 for restitution of conjugal rights. In her counter marked as Ext.A14, filed sometime in 1983, the first defendant has alleged that her husband had swindled the business income of her father and the second fact in the context of the case is that Sasikala had averred that she was staying with her father for some 13 years prior to the date of filing the counter. This would imply that separation from her husband should be dated back to 1970. And, Paramasivam had died only in February 1998, which would imply that for 28 long years, the first defendant had not cared for her husband Paramasivam. The evidence on record did not indicate that Paramasivam and the plaintiffs (Paramasivam's brother and his brother's children) were at loggerheads at any time, and that their relationship too was strained.

9.1 The ordinary course of human conduct which a reasonable man under circumstances looks for guidance would require this Court to consider that Paramasivam could only look for care from his brother. After all there is no other lady stated to have entered the life of Paramasivam by either parties. As rightly argued by the respondents' counsel, the settings are perfect for Paramasivam to contemplate on executing a Will in favour of his brother and his brother's children. Yet another factor this Court has noticed is that, it has come out in evidence that Paramasivam had two properties other than the properties covered by the Will and he had executed the Will only as regards the suit property. So far as the other property is concerned, he allowed his wife and son to succeed to the same. A statement has been made in the course of the arguments that the first defendant had sold the other property which she had obtained from her husband by succession. The just question that now arises is, as to why the plaintiffs should leave the other property to be succeeded by the first defendant and her son, if only they had intended to fabricate Ext.A-12 Will. The thumb rule in deciding the Civil Court is the rule of preponderance of probability. If the facts of the case is decided on the plane of preponderance of probability, then the advantage tilts in favour of the plaintiffs. If the testimony of P.w.2 is now appreciated in this

backdrop, there is hardly any material to suggest that Ext.A-12 Will is suspicious.

9.2 So far as the report of the investigating agency in a criminal case is concerned, first, it has no evidentiary value in deciding the present dispute. If the defendant need to rely on the same, the truth of its contents need to be decided independently. In this context, it may further be recorded that one of the records in Ext.B-35, a certified copy of the lease deed itself has been accessed by the investigating agency only after the demise of Paramasivam and there is no knowing if the signature in Ext.B-35 itself was genuine.

10. In conclusion, this Court does not find any merit in the appeal and since both the substantial questions of law are decided against the appellants, this appeal is dismissed. The judgment and decree dated 30.07.2004 made in A.S.No.76 of 2003 on the file of the I Additional District Judge, Salem, is hereby confirmed. No costs.

Sd/-
Assistant Registrar

// True Copy//

Sub Assistant Registrar

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To:

- 1.The I Additional District Judge, Salem.
- 2.The II Additional District Munsif, Salem.
- 3.The Section Officer, VR Section, High Court, Madras.

+1cc to Mr.R.Nalliappan, Advocate, SR.No.57913.

+1cc to Mr.V.Raghavachari, Advocate, SR.No.57883.

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BR(CO)
CSR: 12.02.2020