

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 14.08.2019

DELIVERED ON: 20.08.2019

C O R A M

THE HONOURABLE MRS.JUSTICE R.HEMALATHA

S.A.No.433 of 2011 and
M.P.No.1 of 2011 and
CMP No.2715 of 2016

M.Girija Appellant/Plaintiff

Vs.

1. N.M.Gopinath
2. Prabha
3. P.Ashwin Ragavendhar
4. P.Archana
5. M.Saghunthala
6. R.Renuka
7. P.G.Krishnan
8. Khadhar
K.GR. Cycle Mart.
9. Balaji Furniture,
Rep. by its Proprietor
10. Ramesh
Thirumurugan Store.
11. Om Saravana Fancy Stores,
Rep. by its Proprietor
R8 to R11 office address: No.17,
Anna Street, Avadi,
Poonamallee Taluk, Chennai 600 054.
12. The Sub Registrar,
Registration Department,
Avadi Sub Registration District,
Avadi, Chennai 600 054.
13. The Sub Registrar,
Registration Department,
Thiruttani Sub Registration District,
Thiruttani.

14. Ragavendra Brick Field,
Rep. by its Partners
(i) J.Pandurangan
(ii) Sundaramoorthy
(iii) Kalidhas
(iv) Thangamani
Office Address, Melpakkam Village,
Morai Via, Veerapuram post,
Ambattur Taluk, Chennai 600 055.

15. Dhanalakshmi

16. Minor Arthi

17. Minor Iswarya

(Minor respondents 16 and 17 are
represented by their mother and guardian
Dhanalakshmi, the 15th respondent)

.... Respondents/Defendants 2 -18

PRAYER: Second Appeal filed under Section 100 of
the Code of Civil Procedure against the decree and judgment
dated 29.09.2010 passed in A.S.No.31 of 2010 by the
Subordinate Judge, Poonamallee, upholding the decree and
judgment dated 06.01.2010 passed in O.S.No.88 of 2004 by the
Additional District Munsif, Poonamallee.

For Appellant : Mrs.S.Deepika

For Respondents : Mr.V.Prashanth Kiran
(R1 to R5 and R15 to R17)

Mr.P.Wilson Topaz
for Mr.C.Santhoshkumar (R6)

Mr.S.Jaganathan,
Government Advocate (for R12, R13)

Claim against R7, 11, and 14 - Given up

Ror R8 to R10 - No appearance.

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JUDGMENT

The unsuccessful plaintiff before both the courts
below has filed the present second appeal.

2. The parties are referred to as per their ranking
in the original suit and at appropriate places, their ranks in
the present second appeal would also be indicated, if
necessary.

3. The brief case of the plaintiff: The plaintiff and the defendants 1, 2, 6 and 7 and late Parthasarathy are the children of late Munusamy Naidu and late Sundarakannammal. The defendants 3, 4 and 5 are the legal heirs of late Parthasarathy. The properties described in 'A', 'B', and 'D' schedules were originally owned by the plaintiff's father N.Munusamy Naidu. He also mortgaged the 'C' schedule property in favour of the 8th defendant. Since the properties are the self acquired properties of Munusamy Naidu, the plaintiff is entitled to 1/6th share in the suit property. The plaintiff's father died on 30.05.2002 and her mother predeceased her father. When the plaintiff demanded the defendants 1 to 3 for partition of the suit properties, they refused to do so, which forced the plaintiff to issue a lawyer's notice dated 15.12.2003 (a copy of which is marked as Ex.A1) to them. The defendants sent a reply dated 24.12.2003 (Ex.A2) contending that late Munusamy Naidu during his lifetime, executed a Will dated 18.03.1992 (Ex.B1) in favour of his sons Parthasarathy, N.M.Devaraj(D1) and N.M.Gopinath (D2). According to the plaintiff, her father never executed Ex.B1 Will in favour of the defendants 1 to 3 and that the 8th defendant was paying a portion of the yield from the 'C' schedule property to her father in lieu of interest. Her further contention is that after her father's death, the defendants 1 to 3 were collecting the same. She has therefore, filed the suit for partition of the suit properties into six equal shares and to allot one such share to her.

4. During the pendency of the suit, the first defendant died and his legal heirs were impleaded as defendants 16 to 18. The defendants 13, 14, and 15 were also impleaded as per the orders passed in I.A.No.1672 of 2004 and I.A.No.1673 of 2004 by the learned Additional District Munsif, Poonamallee.

5. The suit was resisted by the defendants 2, 3, 9 to 12, 15, 16 and 18 on the following grounds.

(i) The relationship and the genealogical tree mentioned in the plaint are admitted. Late Munusamy Naidu during his life time bequeathed his properties in favour of his sons Parthasarathy, Devaraj and Gopinath through a Will dated 18.03.1992 (Ex.B1).

(ii) In the said Will, there is a specific mention that while disposing housing plots at Omsakthi Nagar at Morai Village, his sons should pay a sum of Rs.1,00,000/- each to his daughters.

(iii) Munusamy Naidu, the plaintiff and the defendants 1,2 and 6 jointly executed a power of attorney in favour of late Parthasarathy, the eldest son of late Munusamy Naidu authorising him to deal with the property at Morai Village and the said power of attorney was also registered as document No.415/94 on the file of the Sub Registrar, Avadi.

received a sum of Rs.2,00,000/- at the time of executing power of attorney, the 6th defendant refused to receive Rs.2,00,000/- and instead demanded a plot in Omsakthki Nagar. Therefore, two plots were allotted to her at Annai Sundara Kannammal Garden at Morai Village.

(v) Munusamy Naidu executed another Will dated 22.05.2000 (Ex.A3) with regard to the properties in S.No.130/1B1 measuring 12 cents along with a shop at No.17, Anna Street, Gandhi Nagar, Avadi, Chennai-54. In fact, Ex.A3 Will was executed by late Munusamy only to prevent the daughter from creating any confusion over the properties bequeathed in favour of the defendants 1 to 3 through Ex.B1 Will.

(vi) As per Ex.B1 Will, all the beneficiaries took possession of their respective properties to the knowledge of the plaintiffs.

(vii) Out of 89 plots mentioned in A schedule properties, many plots were sold.

(viii) The wife and children (D3 to D5) of late Parthasarathy and the defendants 1 and 2 entered into a partition deed dated 02.07.2004, as per the Will Ex.B1.

6. The 7th defendant in her written statement had claimed 1/6th share in the suit properties.

7. The learned Additional District Munsif, Poonamallee framed necessary issues and after full contest, dismissed the suit filed by the plaintiff on the following grounds.

(i) Though the plaintiff had denied the execution of the Will Ex.B1 by her father, the defendants are able to establish the due execution of the Will (Ex.B1) by late Munusamy Naidu.

(ii) Except the plaintiff, other daughters of late Munusamy did not deny the execution of the Will (Ex.B1) by late Munusamy.

(iii) There is no suspicious circumstance attendant on the Will Ex.B1, since late Munusamy had set apart certain properties in favour of his daughters through another Will dated 22.05.2000 (Ex.A3) and further directed his sons through the Will (Ex.B1) to pay a sum of Rs.1,00,000/- each to his daughters at the time of disposal of plots at Omsakthi Nagar.

(iv) The intention of testator is therefore clear from the evidence on record and the plaintiff had also admitted her father's signature on Ex.B1.

8. Aggrieved over the same, the plaintiff filed an appeal in A.S.No.31 of 2010 before the Subordinate Judge, Poonamallee. The learned Subordinate Judge, Poonamallee, after analysing the evidence on record, dismissed the appeal filed by the plaintiff vide his decree and judgment dated 29.09.2010 on the following grounds.

(i) Since Munusamy Naidu bequeathed some of his properties in favour of his daughter through a Will (Ex.A3), there is no suspicious circumstance attendant on the Will Ex.B1.

(ii) The contention of the plaintiff that Munusamy Naidu did not bequeath any property in favour of his wife, cannot be a sole ground to hold that Ex.B1 is not genuine since the plaintiff herself admitted that his mother owned several properties.

(iii) The defendants have established the execution of the Will Ex.B1 by late Munusamy during his life time by adducing acceptable evidence.

(iv) The fact that the plaintiff had executed a power of attorney on lines with the recitals contained in the Will Ex.B1 would clearly go to show that the plaintiff was aware of the Will Ex.B1.

9. Now, the plaintiff has filed the present second appeal contending that the following substantial questions of law arise for consideration.

(1) Whether the courts below are right in not considering the fact that non mentioning of Ex.B1 Will in Ex.A3 Will is fatal to the case of the defendants.

(2) Since Ex.A3 is subsequent to Ex.B1 Will, whether Ex.B1 can have enforceability.

(3) Whether the non-examination of the scribe and the other attester to the Will Ex.B1 is not fatal to the case of the defendants.

10. Initially, notice regarding admission was issued and after some adjournments, the case was listed on 14.08.2019.

11. Heard Mrs.S.Deepika, learned counsel appearing for the appellant and Mr.V.Prashanth Kiran, learned counsel appearing for the respondents 1 to 5 and 15 to 17 and Mr.P.Wilson Topaz, learned counsel appearing for the 6th respondent and Mr.S.Jaganathan, Government Advocate (Civil Side), learned counsel appearing for the respondents 12 and 13.

12. At the outset, it may be observed that the present second appeal is against the concurrent findings recorded by both the courts below. The matter in issue is whether the Will dated 18.03.1992 (Ex.B1) is true and valid and late Munusamy Naidu executed the Will Ex.B1 bequeathing his properties mentioned in Ex.B1 in favour of his sons. The defendants have examined one of the attestors to the Will Ex.B1 to prove the execution of Ex.B1 by late Munusamy. Both the courts have properly appreciated the evidence adduced on

the side of the respondents/defendants and had also taken into account the evidence of the plaintiff as PW1. Both the courts below had also taken into account the following surrounding circumstances.

(1) A registered Power of Attorney was executed in favour of late Parthasarathy, the eldest son of late Munusamy Naidu by the daughters (including plaintiff) and two other sons of late Munusamy and this execution of Power of Attorney is mainly for disposal of plots in "Omsakthi Nagar", since late Munusamy Naidu wanted his sons to pay Rs.1,00,000/- each to his daughters at the time of disposal of properties at "Omsakthi Nagar" and this is specifically mentioned in the Will Ex.B1.

(2) The Will dated 22.05.2000 (Ex.A3) executed in favour of the daughters of late Munusamy Naidu clearly shows the intention of the testator.

(3) If at all the testator had any intention to bequeath any other shares in his properties in favour of his daughters, he could have done so through the Will dated 22.05.2000 (Ex.A3).

13. The main contention of the learned counsel appearing for the appellant is that since there is no whisper about Ex.B1 Will in the Ex.A3 Will, Ex.B1 cannot be said to be genuine. Her further contention is that the scribe and the other attesting witnesses to Ex.B1 have not also been examined by the respondents to prove the Will. It is to be noted that as per Section 68 of the Indian Evidence Act, if a document is required by law to

be attested, it shall not be used as evidence until one attesting witness has been called for the purpose of proving its execution. In the instant case, one of the attestors has been examined as DW2. Both the courts below had categorically and concurrently held that the evidence of DW2 is satisfactorily. There is nothing to show that the reasons recorded by both the courts below are perverse and in fact they had taken into consideration the effect of all the evidence and documents. Therefore, there is no substantial question of law involved in the present second appeal.

14. After 1976 amendment, the scope of Section 100 of the Code of Civil Procedure has been drastically curtailed and narrowed down. The High Courts would have jurisdiction of interference under Section 100 of the Code of Civil Procedure only in a case where substantial questions of law are involved. The decree and judgment passed by both the courts below are based on well settled principles of law and therefore, I do not see any reason to interfere with the same.

15. In the result,

(i) The second appeal is dismissed. No costs. The connected miscellaneous petitions are closed.

(ii) The decree and judgment dated 29.09.2010 passed in A.S.No.31 of 2010 by the Subordinate Judge, Poonamallee and the decree and judgment dated 06.01.2010 passed in O.S.No.88 of 2004 by the Additional District Munsif, Poonamallee are upheld.

Sd/-

Assistant Registrar(CS-V)

//True copy//

Sub Assistant Registrar

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To

1. The Subordinate Judge, Poonamallee.

2. The Additional District Munsif, Poonamallee.

Copy To

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

+1cc to Mrs.S.Deepika, Advocate SR.No.71885

+1cc to Mr.V.Prashanth Kiran, Advocate SR.No.70505

+1cc to Special Government Pleader(CS) SR.No.71073

S.A.No.433 of 2011 and

M.P.No.1 of 2011 and

CMP No.2715 of 2016

SAI (CO)

GMV (09/12/2019)

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