

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :22.07.2019
PRONOUNCED ON : 13.09.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A. No.99 of 2016

G.Jothi Chakravarthi ... Appellant/Appellant/ Defendant

Vs.

S.Balaji ...Respondent/Respondent/Plaintiff

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree of the I Additional District Judge's Court at Erode, dated 03.07.2015 in A.S.No.63 of 2014 confirming the judgment and decree of the I Additional Subordinate Judge's Court at Erode, dated 02.08.2014 in O.S. No.226 of 2013.

For Appellant : Mr. P.Valliappan

For Respondent : Mr.T.Murugamanickam, Senior Counsel
for M/s.Zeenath Begum

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 03.07.2015, passed in A.S.No.63 of 2014, on the file of the I Additional District Court, Erode, confirming the judgment and decree dated 02.08.2014, passed in O.S. No.226 of 2013, on the file of the I Additional Subordinate Court, Erode.

2. For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

3. Suit for declaration and permanent injunction.

4. The case of the plaintiff, in brief, is that his father, namely, Soundararajan had a sister by name Navaneetham and Navaneetham and her husband Chennakrishnan Naidu had a daughter by name Susila and Susila married one Radhakrishnan and they had no issues and Susila was employed as a teacher and with her earnings, purchased the suit property and the portions lying on the south of the suit property by way of a registered sale deed dated 19.02.1969 and enjoying the same and that she had sold the portions lying on the south of the suit property to the plaintiff by way of a sale deed dated 11.05.2009 and enjoying the remaining portions i.e., the suit property till her demise

and it is only the plaintiff and his mother who had been looking after Susila and taking care of her needs and Susila was affectionate towards the plaintiff and out of love and affection and on her free volition, in a sound and disposing state of mind, executed a Will in favour of the plaintiff bequeathing the suit property and the abovesaid Will is her last testament and Susila died on 20.04.2012 and on the strength of the Will executed by her dated 18.11.2009, it is only the plaintiff who has title to the suit property and the plaintiff is in the exclusive possession and enjoyment of the same and the defendant is the brother's son of Susila's husband Radhakrishnan and he is well aware of the Will executed by Susila in favour of the plaintiff and the defendant is residing at Salem and the defendant, with a view to grab the suit property, attempted to interfere with the plaintiff's possession and enjoyment of the suit property and hence, according to the plaintiff, he has been necessitated to lay the suit against the defendant for appropriate reliefs.

5. The defendant resisted the plaintiff's suit contending that the plaintiff's suit is not maintainable either in law or on facts and stated that the plaintiff is not in the possession and enjoyment of the suit property after the death of Susila and also disputed the case of the plaintiff that Susila had executed a Will in favour of the plaintiff on 18.11.2009 bequeathing the suit property to him and according to the defendant, on 11.05.2009, Susila executed a registered Will in favour of the defendant and after her demise on 20.04.2012, it is only the defendant who has been enjoying the suit property by applying for change of taxes and other changes and in fact, it is stated that Susila had already executed a Will dated 28.07.2008, wherein, the suit property had been allotted to the defendant and the property belonging to her lying to the south of the suit property had been allotted to the plaintiff and therefore, the plaintiff has no necessity to purchase the property lying to the south of the suit property which had been allotted to him vide the Will dated 28.07.2008 that too for a sum of Rs.6,50,000/- and the sale deed dated 11.05.2009, in favour of the plaintiff is not true and it is only the defendant who is having right in the suit property by way of the Will dated 11.05.2009 and therefore, according to the defendant, there is no cause of action for the plaintiff to lay the suit and prayed for the dismissal of the plaintiff's suit.

6. In support of the plaintiff's case, PWs 1 to 3 were examined, Exs.A1 to A8 were marked. On the side of the defendant, DWs 1 and 2 were examined, Exs.B1 to B12 were marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the Courts below were pleased to grant the reliefs in favour of the plaintiff as prayed for. Impugning the same, the present second appeal has been preferred by the defendant.

8. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration:

(a) When Ex.A2 Will dated 18.11.2009 has not been proved in terms of Section 63(c) of the Indian Succession Act, 1925 read with Section 68 of the Evidence Act, 1872, are the Courts below correct in upholding the same?

(b) Whether the Courts below are correct in law in disbelieving Ex.B3 registered Will without any basis?

(c) When a part of the property had been bequeathed to the respondent under Ex.B2 registered Will dated 28.07.2008, whether there was any necessity for the respondent to obtain a sale deed under Ex.B1 on 11.05.2009 for the same property?

(d) Whether the judgment of the lower Appellate Court is vitiated due to non framing of points for determination as contemplated under Order XLI, Rule 31 of the Code of Civil Procedure?

9. Subsequently, this Court had also formulated additional substantial questions of law for determination in the second appeal as follows:

"a) Whether the lower appellate court was justified in rejecting I.A. No.586 of 2014 filed under Order 41 Rule 27 of the Code of Civil Procedure without assigning any reason?

b) Whether the lower appellate Court is justified in law in giving a go-by to the procedure contemplated under Order 41 Rule 27 of the Code of Civil Procedure while dealing with the application seeking permission to produce additional documents?

c) When the certified copy of the registered Will sought to be produced at the appellate stage was already marked as Exhibit B3 and the execution of the same was not denied, is the lower appellate Court correct in law in not considering the application seeking production of the said document and in not even referring the same in the impugned judgment?"

10. It is not in dispute that the suit property belonged to Susila. Both the plaintiff and the defendant are found to be related to Susila as put forth by them in their respective pleas. Both the plaintiff and the defendant claim title to the suit property based on the Wills said to have been executed in their favour by Susila and according to the plaintiff, Susila had bequeathed the suit property in his favour by way of a Will dated 18.11.2009 and the same has been marked as Ex.A2 and according to the plaintiff, Ex.A2 is the last testament of Susila. Susila is found to have died on 20.04.2012 and the same is not in dispute. Her death certificate has been marked as Ex.A3. Per contra, according to the defendant, Susila had executed a registered Will in his favour bequeathing the suit property on 11.05.2009 and thus, according to the defendant, the abovesaid Will, the registered copy of which has been marked as Ex.B3, is the last testament of Susila and therefore, it is he who had acquired title to the suit property on the basis of the Will and therefore, according to the defendant, the Will projected by the plaintiff marked as Ex.A2, dated 18.11.2009, is not a true and valid Will and the plaintiff is not entitled to seek and obtain the reliefs prayed for in the suit on the basis of the abovesaid Will.

11. It is found that the property lying to the south of the suit property also belonged to Susila and according to the plaintiff, he had purchased the said property from Susila for a valid consideration by way of a registered sale deed dated 11.05.2009 and the registered copy of the abovesaid sale deed has been marked as Ex.B1. It is found that with reference to the abovesaid property comprised in Ex.B1, a registered sale agreement had been entered into between Susila and the plaintiff on 11.07.2008, which has been marked as Ex.A6, whereunder, Susila had agreed to sell the property lying to the south of the suit property in favour of the plaintiff for a sum of Rs.6,50,000/- and that she had also received a sum of Rs.5,00,000/- as advance on the date of the sale agreement and following the same, had also chosen to execute a sale deed in favour of the plaintiff dated 11.05.2009 in respect of the said property, which document has been marked as Ex.B1. The defendant has also projected the Will dated 28.07.2008 said to have been executed by Susila and the registered copy of the same has been marked as Ex.B2 and according to the defendant, by way of the abovesaid Will Ex.B2, the A schedule property described therein had been allotted to the defendant and the B schedule property had been allotted to the plaintiff and therefore, it is put forth by the defendant that by way of Ex.B2 Will Susila had already bequeathed the property lying to the south of the suit property in favour of the plaintiff and the plaintiff is therefore not required to purchase the same by way of Ex.B1 sale deed and therefore, according to the defendant, the sale deed Ex.B1 projected by the plaintiff for claiming title to the property lying to the south of the suit property is also not true and valid. As could be seen from the materials available

on record, it is found that by way of Ex.B3 Will dated 11.05.2009, Susila had cancelled the earlier Will executed by her dated 28.07.2008 marked as Ex.B2. Therefore, when Susila by way of Ex.B3 Will had chosen to cancel the earlier Will executed by her, in such view of the matter, to say that there is no necessity on the part of the plaintiff to acquire the property from Susila by way of Ex.B1 sale deed, as such, cannot be readily accepted. As abovenoted, Ex.B1 sale deed is preceded by a sale agreement dated 11.07.2008 marked as Ex.A6. In addition to that, to establish the veracity of Ex.B1 sale deed, it is seen that Susila had also referred to the abovesaid sale deed executed by her in favour of the plaintiff in Ex.B3 Will relied upon by the defendant. That apart, while describing the property in Ex.B3 Will, the same has been described as lying to the north of the property purchased by the plaintiff S.Balaji. So, as rightly determined by the Courts below, inasmuch as Susila had indeed alienated the property lying to the south of the suit property in favour of the plaintiff by way of Ex.B1 sale deed, naturally, she is also seen to have made a reference about the same under Ex.B3 Will as abovenoted.

12. As above pointed out, both the parties claim title to the suit property based on the Will said to have been executed by Susila. In such view of the matter, the plaintiff has come forward with the suit seeking for the reliefs of declaration and permanent injunction based on the Will produced by him marked as Ex.A2 and also put forth the case that Ex.A2 is the last testament of the deceased Susila. The plaintiff, to sustain his claim, has examined the attesor as PW2 and the scribe of the abovesaid Will as PW3.

13. PW2 Jayaramakrishnan, the attesor, had deposed that Susila had executed Ex.A2 Will and he had attested the same and the recitals of the said Will are given only by Susila and the scribe had also written the recitals as stated by Susila and the abovesaid Will has been executed in favour of the plaintiff and after the Will has been prepared, Susila had affixed the signature in every page of the Will and that he and the other attesor had attested the same and that he and the other attestors as well as the scribe had witnessed the execution of the Will by Susila and Ex.A2 Will contains her signature and the scribe and Susila had witnessed the attestation of the Will by him and the other attesor and Susila and the attestors had witnessed the signature affixed by the scribe in the Will and the said Will was executed on 18.11.2009 and that Susila was in a sound disposing state of mind at the time of the execution of the Will. The abovesaid factors had also been reiterated by the attesor PW2, during the course of cross examination. As found by the Courts below, despite the cross examination of PW2, the defendant has not been able to cull out anything from him to disbelieve his version with reference to the execution of the Will by Susila in favour of the plaintiff on 18.11.2009. Therefore, it is seen that the attesor PW2 has clearly deposed

qua the execution of Ex.A2 Will by the deceased Susila in a sound disposing state of mind and as rightly found and determined by the Courts below, by way of the reliable evidence of PW2, the plaintiff is found to have established the truth and validity of Ex.A2 Will as per law.

14. Not stopping there, the plaintiff has also examined PW3, the scribe and PW3 has also deposed that Ex.A2 Will had been executed by Susila in favour of the plaintiff and Susila had affixed her signature in Ex.A2 in his presence and the attestors had attested the same in his presence and the attestors had attested the execution of the Will by Susila and Susila had also witnessed the attestors signature in the Will and that both Susila and the attestors had witnessed him signing the Will and that Susila was in a sound and good state of health and mind at the time of the execution of the Will. His evidence is found to be totally inspiring, acceptable and also corroborative to the evidence of the attesor PW2. Though the defendant had cross-examined PW3, as rightly found and determined by the Courts below, nothing has been extracted from PW3 to disbelieve his version qua the execution of the Will in the presence of the attestors and the scribing of the same by PW3.

15. In the light of abovesaid factors, it is found that Ex.A2 Will has been prepared as per the dictates of Susila and after reading the contents of the Will and being satisfied with the same, Susila in a sound disposing state of mind, on free volition, had executed the same in the presence of the attestors and the same had been established by the plaintiff by examining the PWs 2 and 3 and therefore, when it is found that Ex.A2 Will had been executed by the deceased Susila in complete manner and by way of Ex.A2 Will, Susila is found to have revoked the earlier Will executed by her i.e., Ex.B3 Will dated 11.05.2009, in such view of the matter, it is found that Ex.A2 Will is the last testament of the deceased Susila and by way of the same, the Will dated 11.05.2009 stands revoked and as regards the mental fitness and health condition of Susila at the time of the execution of Ex.A2 Will, as abovenoted, PWs 2 and 3 have clearly deposed about the same and in fact, the defendant, examined as DW1, has admitted during the course of evidence that Susila was in a very good state of mind and good health. Therefore, it is found that Susila was in a sound disposing state of mind till her demise and accordingly, it is found that Ex.A2 Will had come to be executed by her out of her own volition, knowing the contents of the same and in such view of the matter, the Courts below are found to be justified in upholding the truth and validity of Ex.A2 Will.

16. As could be seen from the materials placed on record, Susila is found to be a person who use to keep on changing her mind and accordingly, it is found that though she has chosen to execute three wills during her life time dated 28.07.2008 Ex.B2, 11.05.2009 Ex.B3 and 18.11.2009 Ex.A2, inasmuch as the plaintiff

has established that Ex.A2 Will is her last testament and by way of Ex.A2, Susila is found to have revoked the Will Ex.B3, merely because it is a registered one, when it is not necessary as per law that the registered will should be revoked by another registered Will and the Registered Will can always be revoked by an unregistered Will and when the plaintiff, as abovestated, has established the veracity of Ex.A2 Will and also established the same as the last testament of Susila, in such view of the matter, the contention of the defendant that there is no necessity on the part of Susila to execute Ex.A2 Will in favour of the plaintiff has been rightly rejected by the Courts below.

17. The defendant had endeavoured to examine DW2 for the theory that the plaintiff had demanded the sale of the suit property from him, however, when as abovenoted, the plaintiff has derived title by way of Ex.A2 Will, there is no need on the part of the plaintiff to make any demand from the defendant for the sale of the suit property to him. Furthermore, as found by the Courts below, DW2 has admitted the signature of Susila in Exs.B1 and B2 and he has clearly averred that the signature found in Ex.B3 Will is not that of Susila. Therefore when the defendant's witness himself has raised a cloud of suspicion over the genuineness of Ex.B3 Will, to say that the defendant had acquired the valid title to the suit property based on Ex.B3 Will cannot at all be accepted.

18. In addition to that, the defendant, during the course of cross examination, has admitted that he has not perused Exs.A2 and A6 projected by the plaintiff with the permission of the Court and that he had not endeavoured to determine that the signature available in Ex.A2 Will is not that of Susila. As rightly held by the Courts below, when the defendant had not even chosen to peruse Ex.A2 and A6 projected by the plaintiff, it does not stand to reason as to how come the defendant had proceeded with the case by contending that the signature contained in Ex.A2 Will is not that of Susila. As abovenoted, when the plaintiff has established the genuineness and validity of Ex.A2 Will through PWs 2 and 3 and when the evidence of PWs 2 and 3 are found to be inspiring and trust worthy in all aspects and nothing has been culled out by the defendant from them during cross examination and when the evidence of DWs 1 and 2 are found to be not helpful to doubt the validity of Ex.A2 Will, the position being so, when, despite the same, the defendant had not endeavoured to verify and test the signature of Susila found in Ex.A2 Will through an expert to refute the plaintiff's case. When the plaintiff has established his case through PWs 2 and 3, as abovenoted, atleast to sustain his case, the defendant should have endeavoured to verify the signature of Susila found in Ex.A2 Will by way of an expert.

19. However, the defendant had not endeavoured to go for the abovestated exercise for the reasons best known to him. When the materials placed on record would go to show that Susila had

executed the Will in favour of the plaintiff who had taken care of her needs and Susila is found to be a person who used to keep on changing her mind and by cancelling the earlier Will executed by her by way of executing Ex.A2 Will in favour of the plaintiff, she is found to have revoked/cancelled the earlier Will executed by her and it is resultantly found that it is only the plaintiff who is entitled to claim title to the suit property based on Ex.A2.

20. When as above discussed, in the natural course of events, Susila is found to have executed Ex.A2 Will out of love and affection by cancelling Ex.B3 Will already executed, in such view of the matter, the Courts below are found to be correct in holding that there are no suspicious factors surrounding the genuineness of Ex.A2 Will and the alleged suspicions put forth with reference to the same had been cleared by the plaintiff through the acceptable and reliable evidence of PWs 2 and 3 and in such view of the matter, the Courts below are wholly justified in upholding Ex.A2 Will and thereby rightly upheld the claim of title to the suit property based on the same.

21. As regards the claim of possession of the suit property, considering materials placed on record by the respective parties, when it is found that most of the documents projected by the defendant are after the institution of the suit and also found to be contradictory to each other as determined by the Courts below and on the other hand, the documents projected by the plaintiff go to put forth the case of his claim of possession and enjoyment of the suit property and when it is seen that the defendant is a permanent resident of Salem and also admitted that he has not marked any voters identity card to evidence his claim of possession and enjoyment of the suit property and admitted that he is only residing at Salem, the Courts below are right in holding that the defendant is not in the enjoyment of the suit property and the same is in the possession and enjoyment of the plaintiff and it is found that the defendant is attempting to interfere with the possession and enjoyment of the plaintiff based on Ex.B3 Will, however, the abovesaid Will having been revoked by the Ex.A2 Will executed in favour of the plaintiff, in all, it is found that the Courts below are found to be justified in holding that it is the plaintiff who is in the possession and enjoyment of the suit property and entitle to claim the relief of permanent injunction.

22. As regards the plea of additional evidence sought to be projected by the defendant before the first appellate Court, it is found that by way of the said application in I.A.No.586 of 2014, the defendant had only endeavoured to produce the Will dated 11.05.2009. However, when as abovenoted, the registered copy of the Will had already been marked as Ex.B3 and in such view of the matter, it is found that when the defendant had not

evinced interest to proceed with the enquiry in the abovesaid application and accordingly, it is seen that the abovesaid application had been adjourned now and then along with the appeal and finally, the appeal having been disposed of, the application preferred by the defendant for the reception of the additional evidence has also come to be dismissed. Considering the document sought to be produced by the defendant by way of the abovesaid application being only the registered Will dated 11.05.2009, the registered copy of the same having been already exhibited in the matter, the resultant position, as contended by the plaintiff's counsel, the defendant himself is found to have not evinced interest to invite the orders of the Court in the said application, as nothing would turn based on the reception of the said document and when the parties had proceeded with their rival case upon the Will projected by them before the trial Court and also adduced evidence with reference to the same one way or the other, in such view of the matter, in my considered opinion, considering the facts and circumstances of the case, the first appellate Court is found to be correct and justified in dismissing the abovesaid application consequent to the dismissal of the main appeal and when by way of the abovesaid application, the defendant, as above pointed out, not endeavoured to project any new document, accordingly, it is evident that the defendant has also not evinced interest to invite the decision of the Court with reference to the same. In such view of the matter, the arguments now put forth by the defendant's counsel as if the first appellate Court has not followed the principles of law governing the reception of additional evidence qua the additional document sought to be projected by the defendant as additional evidence for the reasons aforesaid cannot at all be accepted.

23. The defendant's counsel in support of his contentions placed reliance upon the decisions reported in AIR 1959 SC 443 (H.Venkatachala Iyengar Vs. B.N.Thimmajamma and others), 2015 (4) CTC 771 (Tamilkodi Vs. N.Kalaimani 2. Kalaiselvi), 2002 (1) CTC 244 (Madhukar D.Shende Vs. Tarabai Aba Shedage), 2007 (2) CTC 172 (Niranjan Umeshchandra Joshi Vs. Mridula Jyoti Rao and others), AIR 1990 Kerala 226 (Thayyullathil Kunhikannan and others Vs. Thayyullathil Kalliani and others), 2018 (3) MWN (Civil) 584 (Periathal and 4 others Vs. Gomathi 2. Velusamy) and 2015 (5) CTC 856 (Hemavathy Vs. Udhavum Karangal rep by Mr.Vidyasagar). The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the case at hand.

24. The Courts below, in the light of the above discussions, are found to have analysed the oral and documentary evidence adduced in the matter in the right perspective and also after correctly appreciating the principles of law governing the issues involved in the matter between the parties qua the subject matter, rightly upheld the case of the plaintiff and I do not find any valid reason warranting interference with the

abovesaid reasonings of the Courts below and accordingly, the substantial questions of law formulated in the second appeal are answered against the defendant and in favour of the plaintiff.

25. In conclusion, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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