

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 26.11.2019

PRONOUNCED ON : 12.12.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

A.S.No.666 of 2014 and
MP.No.1 and 2 of 2014

1.K.Sakthivel
2.S.Shyamala Devi ..Appellants/Defendants

Vs.

1.Kalaivani
2.K.Savithiri ...Respondents /Plaintiffs

Prayer:- First Appeal filed under Section 96 of CPC against the judgment and decree dated 20.03.2014 passed in O.S.No.145 of 2011 on the file of IV Additional District and Sessions Court, Coimbatore.

For Appellants : Mr.S.Kalyanaraman

For Respondents : Mr.C.Veeraraghavan

JUDGMENT

Aggrieved over the judgment and decree dated 20.03.2014 passed in O.S.No.145 of 2011 on the file of IV Additional District and Sessions Court, Coimbatore, the defendants have preferred the first appeal.

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

3.Suit for partition and permanent injunction.

4.The case of the plaintiffs in brief is that the first defendant is their brother and the plaintiffs and the first defendant are the daughters and son of R.A.Kandasamy and their

mother is S.K.Kamalam and S.K.Kamalam died on 01.08.2006 leaving the suit properties and after her demise, the plaintiffs and the first defendant are in the joint possession and enjoyment of the suit properties. The plaintiffs requested the first defendant to allot their lawful shares in respect of the suit properties. However, the first defendant did not come forward to effect the partition and refused the same and furthermore, also attempted to alienate the suit properties to the third parties with a view to deprive the rights of the plaintiffs over the same and the second defendant has been impleaded as a party to the suit and hence, according to the plaintiffs, the suit for appropriate reliefs.

5.The defendants resisted the plaintiffs' suit contending that the suit properties belonged to S.K.Kamalam, the mother of the plaintiffs and the first defendant, however, disputed the claim of the plaintiffs that after the demise of S.K.Kamalam on 01.08.2006, the plaintiffs and the first defendant are in the joint possession and enjoyment of the suit properties. According to the first defendant, the deceased S.K.Kamalam bequeathed the suit properties in his favour by way of the Will dated 29.01.2003 and therefore, the claim of the plaintiffs that they have share in the suit properties is false. After the demise of S.K.Kamalam, the Will executed by her had come into force and the first defendant became the absolute owner of the suit properties by virtue of the abovesaid Will and the first defendant and his wife had put up construction in the items 1 & 2 of the suit properties and they are no more vacant sites as put forth in the plaint. Further, the first defendant settled the suit properties in favour of his wife viz., the second defendant on 21.10.2010 and she is a necessary party to the suit and on account of the non impleadment of his wife, the suit is bad for non-joinder of necessary party. The case of the plaintiffs that the first defendant is attempting to alienate the suit properties to third party is false and to the notice issued by the plaintiffs, suitable reply had been given by the first defendant and even in the reply notice, the first defendant had stated about the Will executed by the mother and the plaintiffs are aware of the existence of the Will and therefore, the suit is liable to be dismissed.

6.On the basis of the abovesaid pleas set out by the respective parties, the following issues and additional issues were framed by the trial Court for consideration:

"1.Whether the plaintiff entitled for partition as prayed for in the suit?

2.Whether the plaintiff entitled for permanent injunction as prayed for in the plaint?

3.Whether the plaintiff and defendant are in joint possession of the suit properties?

4.To what other relief?

Additional Issues

1.Whether the Will dated 29.01.2003 in favour of the defendant is true, valid and binding?

2.Whether the settlement deed dated 21.10.2010 executed by the first defendant in favour of his wife is valid and binding?"

7.In support of the plaintiffs' case, PW1 was examined and Exs.A1 & A6 were marked. On the side of the defendants, DWs1 & 2 were examined and Exs.B1 to B6 were marked.

8.On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to grant the reliefs in favour of the plaintiffs as prayed for. Impugning the same, the defendants have preferred the present appeal.

9.The following points arise for determination in this first appeal:

"(1).Whether the Will dated 29.01.2003 is true, valid and binding on the plaintiffs?

(2).Whether the plaintiffs are entitled to obtain the partition and separate possession of 2/3 share in the suit properties as put forth by them?

(3).Whether the plaintiffs are entitled to obtain the relief of permanent

injunction as prayed for?

(4).To what relief the plaintiffs are entitled to?

(5).To what relief the defendants/appellants are entitled to?"

10.Point Nos.1 to 3

The relationship between the plaintiffs and the first defendant is not in dispute. The plaintiffs and the first defendant are the daughters and son of S.K.Kamalam and R.A.Kandasamy. The second defendant is the wife of the first defendant. It is not in dispute that the suit properties belonged to their mother S.K.Kamalam. It is admitted that S.K.Kamalam died on 01.08.2006. According to the plaintiffs, as the legal heirs of the deceased S.K.Kamalam, they are entitled to 2/3 share in the suit properties and despite their request to allot their share, the first defendant refused to give their share and on the other hand, endeavoured to alienate the suit properties to third parties with a view to deprive their right over the same and hence, it is put forth that they had been necessitated to lay the suit for appropriate reliefs.

11.Per contra, the defence had been taken by the defendants contending that the deceased S.K.Kamalam had not died intestate and on the other hand, she had left a Will dated 29.01.2003 bequeathing the suit properties in favour of the first defendant and by virtue of the abovesaid Will, it is the first defendant, who is entitled to the suit properties and the plaintiffs are not entitled to claim any share in the same as put forth by them and also disputed the claim of the plaintiffs that they had been in the possession and enjoyment of the suit properties following the death of the mother and further, it is put forth by the defendants that the first defendant had settled the suit properties in favour of his wife viz., the second defendant by way of the settlement deed dated 21.10.2010 and accordingly, it is put forth that the second defendant is the absolute owner of the suit properties as such and accordingly, contended that the plaintiffs' suit is liable to be dismissed.

12.The suit properties are admitted to be belonging to the mother S.K.Kamalam and naturally on her demise, her legal heirs viz., the plaintiffs and the first defendant would each be entitled to 1/3 share in the suit properties. However, the first defendant has projected the Will dated 29.01.2003 for disputing the claim of share of the plaintiffs in respect of the suit properties. The plaintiffs have disputed the truth and

validity of the Will projected by the defendants. In the light of the abovesaid rival contentions put forth by the respective parties, the defendants being the propounder of the Will in question, the burden is upon the defendants to establish the truth and validity of the same.

13. With reference to the proof and validity of the Will as per law, the defendants have examined one of the attestors to the Will as DW2. DW2 Rajamani, in the course of his evidence, has deposed that Kamalam executed a Will on 29.01.2003 and one week prior to the same, she had solicited his presence to sign as attesor to the Will to be executed by her and accordingly, when he went to the Advocate's office on the relevant date, Kamalam dictated the terms of the Will to the typist and on the basis of the same, the Will was typed and at that point of time, the other attesor Rajamani was also present and he would also depose that Kamalam's husband Kandasamy was also present and Kamalam was in the possession of the documents and he saw them and Kamalam had executed the Will in his presence and he and Rajamani had attested the Will and he witnessed the execution of the Will by Kamalam and also witnessed by the other attesor and his attestation had been witnessed by Kamalam and therefore, it is seen that the Will in question had been established to be executed by Kamalam bequeathing the suit properties in favour of her son viz., the first defendant and when DW2 has tendered evidence clearly on the above aspects in an acceptable and reliable manner and despite the cross examination, nothing has been culled out from him to discredit his evidence in any manner, in such view of the matter, as rightly pointed out by the defendants' counsel by projecting the evidence of the attesor viz., DW2, the defendants have established the truth and validity of the Will executed by Kamalam.

14. The trial Court has mainly disbelieved the Will in question on the footing that Kamalam's husband was also present at the time of the execution of the Will and therefore, according to the trial Court, the Will is not a valid document and according to the trial Court, there has been an active participation of Kamalam's husband in the execution of the Will on the part of Kamalam. However, the abovesaid reasoning of the trial Court is found to be totally unacceptable. No doubt, DW2 has deposed that Kamalam's husband was also present at the time of the execution of the Will. Considering the recitals found in the Will in question viz., Ex.B2 Will, Kamalam has given valid reasons for disinheriting the daughters from succeeding to her properties and also given acceptable reasons for bequeathing her properties in entirety to the first defendant her only son and also would state that her husband would be entitled to enjoy the

suit properties till his demise and thereafter, the first defendant is to inherit the suit properties absolutely. Therefore, considering the recitals found in the Will, when it is found that Kamalam has not given any right of inheritance in respect of the suit properties to her husband other than enjoyment during his life time and the right of inheritance in absolute had been given only to the first defendant, in such view of the matter, merely because, Kamalam's husband was present at the time of the execution of the Will that cannot be construed that he had influenced or prevailed upon Kamalam to execute the Will in favour of the first defendant excluding the daughters.

15. In the decision reported in (2005) 8 Supreme Court Cases 67 (Pentakota Satyanarayana and others Vs. Pentakota Seetharatnam and others), it has been held that any and every circumstance is not a suspicious circumstance and further held that even in a case where active participation and execution of the Will by the propounders/beneficiaries was there, the same by itself is not sufficient to create any doubt either about the testamentary capacity or the genuineness of the Will and the position of law with reference to the same has been outlined in the abovesaid decision as follows:

"25. It is settled by a catena of decisions that any and every circumstance is not a suspicious circumstance. Even in a case where active participation and execution of the Will by the propounders/beneficiaries was there, it has been held that that by itself is not sufficient to create any doubt either about the testamentary capacity or the genuineness of the Will. It has been held that the mere presence of the beneficiary at the time of execution would not prove that the beneficiary had taken prominent part in the execution of the Will. This is the view taken by this Court in Sridevi & Ors vs. Jayaraja Shetty & Ors, (2005) 2 SCC 784. In the said case, it has been held that 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 the proof of signature of the testator as required by

law would be sufficient to discharge the onus.. . .

16.The abovesaid position of law has also been followed by this Court in the decision reported in 2017 (2) CTC 35 (Mad) (Kasthuri Bai and two others Vs.V.Ashok Kumar and three others). Considering the abovesaid principles of law outlined by the apex Court, when DW2 has only stated that Kamalam's husband was present at the time of the preparation of the Will and when he had not deposed anything about Kamalam's husband influencing Kamalam or prevailing upon her in the execution of the Will as per his dictates and on the other hand, as above noted, when DW2 has tendered clear evidence that the Will had been prepared and typed as per the directions given by Kamalam and Kamalam was also having the documents with her at the time of the preparation of the Will and when there is no material to hold that Kamalam's husband had in any manner attempted to prevail upon her or influence her to execute the Will as per his wish and desire, in such view of the matter, when it is found that Kamalam's husband had been given only life time enjoyment of the suit properties and it is only the first defendant, who had been given the absolute right over the same after the demise of the husband, in such view of the matter, the presence of Kamalam's husband at the time of the execution of the Will by itself would not render the Will in question as a suspicious factor as determined by the trial Court.

17.Considering the judgment of the trial Court in entirety, the trial Court has only proceeded to hold that the Will in question is invalid due to the active participation of Kamalam's husband. However, as above noted, when Kamalam's husband had only been present at the relevant time but not participated in any manner in the execution of the Will in question and the same having been done, in all aspects, only by the testatrix Kamalam and accordingly, Kamalam had also acknowledged the contents of the Will and executed the same in the presence of the attestors as spoken by DW2 in a clear manner, in such view of the matter, the reasonings of the trial Court for disbelieving the Will do not merit acceptance in any manner and liable to be rejected.

18.Considering the materials placed on record, it is found that the daughters of S.K.Kamalam viz., the plaintiffs are well placed in life and comparatively, it is found that the first defendant, at the relevant point of time, was not in an affluent position and he was looking after the parents. Considering the abovesaid factors in toto, accordingly, it is seen that Kamalam had for valid reasons chosen to bequeath her properties in favour of her only son viz., the first defendant and therefore,

the mere factor that Kamalam had disinherited her daughters from succeeding to her properties and given the properties in entirety to the first defendant, that by itself, would not render the Will in question as a suspicious or an invalid instrument. In the decision reported in 2008-1-L.W.255 (Savithri & others Vs. Karthyayani Amma & others), it has been held that deprivation of a due share to the natural heirs itself is not a factor which would lead to the conclusion that there exists suspicious circumstances and therefore, merely because, the plaintiffs have been excluded from succeeding to the properties of their mother, it cannot be construed that the Will in question is surrounded by suspicious circumstances.

19.As rightly put forth by the defendants' counsel, considering the reasonings set out by the testatrix Kamalam as to why she had chosen to bequeath her properties in entirety to the first defendant and when furthermore, it is noted that Kamalam had died nearly 3 years after the execution of the Will and as put forth by the defendants' counsel, if there had been any element of prevailment on the part of her husband in the execution of the Will, Kamalam would have chosen to cancel the same during her life time and on the other hand, when it is seen that Kamalam had died leaving the Will in question and the execution of the Will by her had been duly established as per law by the defendants, in such view of the matter, the trial Court is found to be not justified in disbelieving the Will in question. In this connection, the observation of the Privy Council is relevant to be noted and the same is reported in *Sunanda Arunachellam Chetty and others V. S.R.M.Ramaswami Chetty*, 1916 Indian Cases (Vol.XXXV) PC 1, which is extracted below:-

"When a Will has once been made and is apparently in perfect form, and the evidence of the attesting witness is to be trusted, few things can be more dangerous than to attempt to recreate the kind of Will that the man ought, in the opinion of the Court, to have made and once the man's mind is free and clear and is capable of disposing of his property, the way in which it is to be disposed of rests, with him, and it is not for any Court to try and discover whether a Will could not have been made more consonant either with reason or with justice."

20. In the light of the abovesaid discussions, when it is found that the suit properties had been bequeathed in entirety by the testatrix Kamalam in favour of the first defendant, in such view of the matter, the plaintiffs are found to be not entitled to claim any share in the suit properties as put forth by them and therefore, the claim of share in the suit properties as projected by the plaintiffs does not merit acceptance.

21. For the reasons aforesaid, I hold that the Will dated 29.01.2003 is true, valid and binding on the plaintiffs and therefore, hold that the plaintiffs are not entitled to obtain the partition and separate possession of 2/3 share in the suit properties as claimed by them. I further hold that the plaintiffs are not entitled to obtain the relief of permanent injunction as put forth by them. Accordingly, the point Nos.1 to 3 are answered.

22. Point Nos.4 & 5

In the light of the abovesaid discussions, the judgment and decree dated 20.03.2014 passed in O.S.No.145 of 2011 on the file of IV Additional District and Sessions Court, Coimbatore, are set aside and resultantly, the suit laid by the plaintiffs in O.S.No.145 of 2011 is dismissed without costs. Accordingly, the first appeal is allowed. No costs. Consequently, connected miscellaneous petition, if any, is closed.

-s/d-
Assistant Registrar

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