

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.10.2019

CORAM:

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

S.A.NO.930 OF 2019

AND

C.M.P.NO.19762 OF 2019

1.Mathew

2.Sahayamary @ Thulasi

.. Appellants/
Appellants/Defendants

Vs.

Rosamma

.. Respondent/
Respondent/Plaintiff

PRAYER:

Second Appeal filed under Section 100 of C.P.C., to set aside the judgment and decree dated 27.02.2019 made in A.S.No.44 of 2018 on the file of the Sub-Court, Sathyamangalam, confirming the judgment and decree dated 28.08.2014 made in O.S.No.317 of 2011 on the file of the District Munsif Court, Sathyamangalam.

For Appellants : Mr.D.R.Arun Kumar

For Respondent : Mr.S.Parthasarathy

J U D G M E N T

The defendants in O.S.No.317 of 2011, who suffered a decree for partition and separate possession of the plaintiff's 1/3rd share in the suit property have come up with this Second Appeal.

2. The suit was filed by the sole respondent claiming that the suit property belonged to her father Gurusamy, who had two wives viz., Nachal @ Rathinammal and Tulasi @ Sahayamary. The plaintiff is the daughter born through the first wife Nachal @ Rathinammal and the 1st defendant and one Poongodi was born to Gurusamy through the second wife Tulasi @ Sahayamary. The plaintiff would further claim that Poongodi died unmarried. The mother of the defendants is living with her. The mother of the plaintiff Nachal @ Rathinammal died on 10.05.1976. According to

the plaintiff, on the death of Gurusamy on 17.07.1997, the suit property devolved on the plaintiff and the defendants and as such she is entitled to $\frac{1}{2}$ share.

3. The suit was resisted by the defendants contending that the second wife of Gurusamy viz., Tulasi @ Sahayamary is a necessary party to the suit. It was the further contention of the defendants that Gurusamy had left a Will dated 10.12.1996 bequeathing the suit property to the 1st defendant absolutely and therefore the plaintiff is not entitled to any share.

4. The trial court by the judgment and decree dated 21.03.2016 dismissed the suit on the ground of non-joinder of Tulasi @ Sahayamary, though it had recorded a finding that the defendants have not proved the Will dated 10.12.1996. Aggrieved by the said dismissal of the suit, the plaintiff preferred an appeal in A.S.No.40 of 2016. The lower appellate court by its judgment and decree dated 28.11.2017 allowed the appeal and remanded the matter giving liberty to the plaintiff to implead Tulasi @ Sahayamary in the suit. The lower appellate court while doing so affirmed the findings of the trial court with reference to the Will.

5. On remand, the plaintiff took steps to implead Tulasi @ Sahayamary as party and she was impleaded as 2nd defendant. After remand, the trial court by its judgment dated 10.10.2018 decreed the suit granting $\frac{1}{3}$ rd share to the plaintiff. The findings regarding the proof of Will were affirmed by the trial court. Aggrieved by the said decree, the defendants preferred an appeal in A.S.No.44 of 2018.

6. The lower appellate court on a reconsideration of the evidence concluded that the Will dated 10.12.1996 has not been proved as required under law. On the said findings, the lower appellate court affirmed the judgment and decree of the trial court. Aggrieved the defendants are on appeal.

7. I have heard Mr.D.R.Arun Kumar, learned counsel appearing for the appellant.

8. Mr.D.R.Arun Kumar, learned counsel appearing for the appellant would submit that the courts below were not right in holding that the defendants have not proved the Will as required under law. He would refer to the evidence of the plaintiff as PW1, wherein, according to him, PW1 has admitted execution of the Will by the father.

9. He would also draw my attention to the judgment of the Division Bench of Andhra Pradesh High Court in Valluri Jagannamohini Seetharama Lakshmi and another Vs. Kopparthi

Ramachandra Rao and others reported in 1994 AIR (A.P.) 284, wherein, the Division Bench had held that if there is unequivocal admission of the Will by the contesting party and the execution of the testamentary instrument and its attestation are not challenged, then the court need not insist on strict compliance with Section 68 or 69 of the Evidence Act.

10. The learned counsel would also rely upon the Division Bench judgment of the Kerala High Court in Thayyullathil Kunhikannan and others Vs. Thayyullathil Kalliani and others reported in 1990 AIR (Kerala) 226, which is to the same effect.

11. In both the judgments referred to by the counsel, on facts the courts found that there was an unequivocal admission of the Will by the contesting party. Therefore, the Division Benches of the Andhra Pradesh and Kerala High Courts came to the conclusion that strict compliance with Section 68 was not necessary.

12. But, in the case on hand, the evidence of the plaintiff, relied upon by the counsel, in my opinion does not contain an unequivocal admission of the execution of the Will by the Testator. All that is stated in the evidence is that she was aware of the will and her father and the 1st defendant had created the Will in order to deprive her of her share. Though, this admission appears to have been made in the cross examination, immediately thereafter, she had stated that her father did not know about the execution of the Will and the Will is not true and genuine. In the light of the said evidence, I am unable to accept the submissions of the counsel, that there was an unequivocal admission of the execution of the Will in the case on hand.

13. On the proof of the Will, the courts below have found that both the attesting witnesses examined as DW2 and DW3 have categorically deposed that they did not see the Testator signing the Will. If the attesting witnesses have not seen the Testator signing the Will, then it is obvious that there is non compliance of Section 68 of the Evidence Act. Section 68 of the Evidence Act reads as follows:-

68. Proof of execution of document required by law to be attested-- If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence:1[Provided that it

shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]

14. A reading of the above provision would show that insofar as the execution of the Will, the proof required is to the effect that the attesting witnesses should speak about they being present at the time the testator signed the Will and the testator being present when they signed the Will. If such evidence is absent, then the Will cannot be upheld.

15. Both the courts below have categorically found that the attesting witnesses have not spoken about their presence at the time when the Will was signed. In fact, the attesting witnesses have deposed that they had signed and walked out of the premises and they did not know when the Testator signed the instrument. In the light of the said evidence, I do not think that the findings of the courts below as to the execution of the Will by the deceased Gurusamy could be termed as perverse, in order to enable the second appellate court to interfere with the same.

16. I do not find any question of law much less a substantial question of law in order to enable me to entertain the appeal. Hence, the Second Appeal is dismissed without being admitted. No costs. Consequently, the connected miscellaneous petition is also closed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

dsa

To

1. The learned Sub-Judge,
Sathyamangalam.
2. The learned District Munsif,
Sathyamangalam.

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3. The Section Officer, V.R. Section,
High Court of Madras, Chennai 600 104.

+1cc to Mr.S.Parthasarathy, Advocate, S.R.No.89039
+1cc to Mr.D.R.Arun Kumar, Advocate, S.R.No.89173

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GMR (CO)
CS/02/06/2020



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