



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date : 13.11.2019

CORAM

WEB COPY

THE HONOURABLE MS. JUSTICE P.T.ASHA

S.A.(MD)No.32 of 2015

and

M.P.(MD)No.1 of 2015

and

C.M.P.(MD)No.6721 of 2018

Sekar

.. Appellant/1st Respondent/1st Defendant

Vs.

1.Girija @ Girigujambal

.. 1st Respondent/Appellant/Plaintiff

2.Kalyani

.. 2nd Respondent/2nd Respondent/2nd Defendant

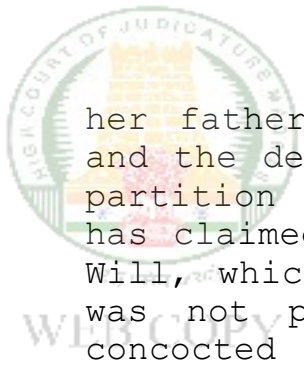
Prayer : This Second Appeal filed under Section 100 of Civil Procedure Code, to set aside the judgment and decree dated 03.09.2014 passed in A.S.No.2 of 2004 on the file of the II Additional District Judge, Thanjavur reversing the judgment and decree dated 10.10.2003 passed in O.S.No.32 of 1999 on the file of the Principal Subordinate Judge, Kumbakonam.

For Appellant : Mr.R.Subramanian For Mr.N.C.Ashokkumar
For Respondents:Mr.S.Krishnan For Mr.S.Karthick Subramanian

JUDGMENT

The above second appeal was filed against the judgment and decree passed in A.S.No.2 of 2004 dated 03.09.2014 on the file of the learned II Additional District Judge, Thanjavur reversing the judgment and decree of the trial Court passed in O.S.No.32 of 1999 dated 10.10.2003, on the file of the learned Principal Subordinate Judge, Kumbakonam. The parties are referred in the same litigative status as in the trial Court.

2.The case of the plaintiff is that 'A' schedule property is an ancestral property of her father, Vaiyapuri and 'B' schedule property is the self acquired property. The plaintiff and the defendants are siblings. The plaintiff was married to one Veerasami with whom she had three children, viz., two sons and one daughter. Her husband deserted way back in the year 1977. From the date of desertion, she has been living in the care and custody of



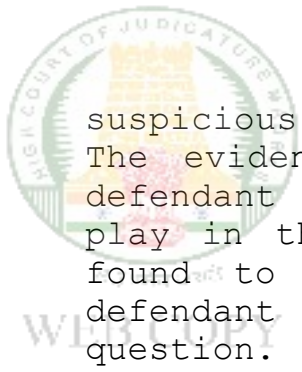
her father, who died leaving behind him surviving the plaintiff and the defendants as his legal heirs. The plaintiff has demanded partition from the first defendant. However, the first defendant has claimed right to the entire suit properties on the basis of a Will, which he claimed was executed by the father. The said Will was not produced. According to the plaintiff, the Will is a concocted one fabricated by the defendants. Therefore, she would contend that she is entitled to a 1/6th share in plaint A schedule property and a 1/3rd share in the B schedule property. The plaint A schedule property is the residential building. In this, the plaintiff is residing in the front portion and the first defendant is in the rear portion. She further prayed that the suit be decreed as prayed of.

3.The first defendant had filed a written statement inter alia denying the various allegations contained in the plaint and contending that as regards 'A' schedule property, the plaintiff is not entitled to a share in view of the fetter placed by Section 23 of the Hindu Succession Act. He would further contend that his father executed a Will on 15.08.1993, in which, the properties have been bequeathed in his favour. The first defendant would further contend that the execution of the Will was very well known to the plaintiff, despite which, she has filed the present suit.

4.The plaintiff had filed a reply statement refuting the contention in the written statement and reiterating on the fact that the Will is a fraudulent one and it was done in collusion with the second defendant. She would submit that she is in enjoyment and possession of the A schedule property and she is entitled to a share.

5.The learned Principal Sub Judge, Kumbakonam by his judgment and decree dated 10.10.2003, was pleased to dismiss the suit holding that the Will executed by the father was a valid Will and therefore, the plaintiff was not entitled to any share in the property. Further the plaintiff is not entitled to any share in the 'A' schedule property and the same is for the dwelling house and the male members have not sought for a partition.

6.The said judgment and decree was taken in appeal in A.S.No.2 of 2004 before the learned II Additional District Judge, Thanjavur. The learned II Additional District Judge, Thanjavur reversed the judgment and decree of the trial Court by holding that the Will was not proved and that suspicious circumstances surrounded the execution of the Will. The learned Judge has relied upon the evidence of the expert and his report marked as Exs.C1 and C2 to hold that the Ex.B2, Will is a forged document, which did not contain the signature of the testator. The learned Judge has held that the first defendant has not been able to dispel the



suspicious circumstances surrounding the execution of the Will. The evidence of witness would clearly indicate that the first defendant who is the legatee under the Will had a active role to play in the execution of the document. Therefore, the Will was found to be a fraudulent document and therefore, the first defendant could not claim exclusive right to the property in question. As regards the plea taken by the first defendant that the plaintiff cannot claim a right in the 'A' schedule property, as the same is a dwelling house in the light of Section 23 of Hindu Succession Act, the learned Judge has relied upon the Hindu Succession Act amended Act, 2005 to state that Section 23 has been repealed. Therefore, the judgment and decree was reversed and the suit decreed as prayed for. Challenging the said judgment and decree, the first defendant is before this Court.

7.Heard the counsel and perused the records.

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

"(a)Whether in law the lower Appellate Court is right in relying upon expert opinion overlooking the statutory provisions of Section 63 of Indian Succession Act ?

(b)Whether in law the lower Appellate Court is right in overlooking to see that under Section 63 of Indian Succession Act, a Will has to be proved by examining atleast one attesting witness and not by any other means ?

(c)Whether in law the lower Appellate Court is erred in holding that there were discrepancy between the evidence of D.W.2 and D.W.3 regarding time of execution overlooking the fact that the time difference is only an half an hours and the evidence was adduced after a lapse of ten years, and

(d)Whether the judgment of the lower Appellate Court vitiates as the application to send the document for expert opinion was allowed against the settled principles of law and the judgment was delivered without even listing the documents and witness during the pendency of appeal ?"

9.As regards the A schedule property, the first defendant had taken out the defense that the same being the dwelling unit, the plaintiff was not entitled to claim right in the suit property as the male members had not partitioned the property. Section 23 of Hindu Succession Act prior to its amendment reads as follows:

"23.Special Provision respecting dwelling houses

- Where a Hindu intestate has left surviving him or her both male and female heirs specified in class I of the schedule and his or her property includes a dwelling-house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of



the dwelling-house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein;

Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling-house only if she is unmarried or has been deserted by or has separated from her husband or is a widow."

10.This Section has been repealed by Hindu Succession Act (Amendment) Act, 2005(39 Of 2005), Section 4 with effect from 09.09.2005. However, it has to be borne in mind that the suit in question has been filed way back on 23.02.1999. Therefore, the plaintiff would be entitled to a right of residence in the 'A' schedule property till the brother does not seek to have the property partitioned.

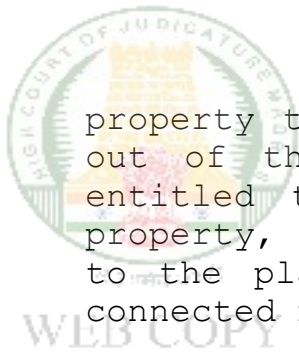
11.As regards the B schedule property, the lower Appellate Court has narrated several instances as to why the learned Judge had come to the conclusion that the Will is shrouded with suspicion.

12.The first defendant has not been able to let in any convincing reasons for dispelling the findings of the lower Appellate Court. The lower Appellate Court has found that though the first defendant has examined the attesting witness to the Will, there are several inconsistencies in the evidence, which raises suspicion with regard to the Will having not been executed by the father of the plaintiff. Therefore, the expert's report, which has been marked as Exs.C1 and C2, coupled with the inconsistency in the evidence of D.W.2 and D.W.3 can only lead to the inference that the Will has not been properly proved. Therefore, the plaintiff is entitled to a share in the B schedule property, which is the self acquired property of the father.

13.The substantial questions of law are answered against the appellant. This Court finds that there is no substantial question of law raised with reference to the right to the dwelling house under Section 23 of the Hindu Succession Act. Therefore, the following substantial question of law is framed to which, both the parties have adduced their arguments:-

"Whether the plaintiff is entitled to a share in A schedule property in the light of the Section 23 of Hindu Succession Act ?"

14.The above issue is answered against the plaintiff. In the result, the second appeal is partly allowed. The plaintiff will be entitled to a right of residence in the A schedule



property till her lifetime. In case, the brother decides to move out of the property or if there is a change in law, she is entitled to seek a partition. As regards the suit B schedule property, there shall be a preliminary decree granting 1/3th share to the plaintiff. There is no order as to costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

/ /2020

Sub Assistant Registrar (CS)

Mrn

To

1.The II Additional District Judge,Thanjavur.

2.The Principal Subordinate Judge, Kumbakonam.

Copy to

The V.R. Section,-2 copies
Madurai Bench of Madras High Court,
Madurai.

+1 CC to Mr.N.C.ASHOK KUMAR, Advocate (SR-98132[F] dated 14/11/2019)

+1 CC to Mr.KARTHICK SUBRAMANIAM, Advocate (SR-98293[F] dated 14/11/2019)

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