



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 17.12.2019

CORAM :

THE HONOURABLE MR.JUSTICE **R.SUBRAMANIAN**

S.A(MD)No.647 of 2015

and

M.P(MD)No.2 of 2015

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1.Padmavathi

2.Renganayagi

... Appellants/Appellants/Defendants

Vs.

1.Sundaravalli

2.Revathi

... Respondents/Respondents/Plaintiffs

PRAYER: Second Appeal is filed under Section 100 of C.P.C against the judgment and decree dated 29.11.2013 in A.S.No.7 of 2009 on the file of the Sub Court, Thoothukudi, confirming the judgment and decree dated 19.12.2008 in O.S.No.6 of 2008 on the file of the District Munsif Court, Srivaigundam.

For Appellants

: Mr.Rajaguru

For R1 & R2

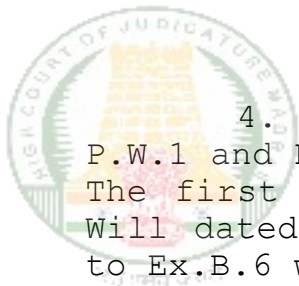
: Mr.M.P.Senthil

J U D G M E N T

The defendants in O.S.No.6 of 2008, who suffered a decree for partition and separate possession of the plaintiffs' 2/3rd share in the suit property, have come up with this Second Appeal.

2. According to the plaintiffs, the suit property belongs to their mother namely, Lakshmi Ammal, who died in 1989 leaving behind her husband Vagulaparanam and 4 daughters namely, the plaintiffs and the defendants. According to the plaintiffs, their father Vagulaparanam died in the year 2000 intestate and their mother Lakshmi Ammal died in the year 1989 intestate. Therefore, according to the plaintiffs, they are entitled to 2/4th share in the suit property.

3. The suit was resisted by the defendants contending that their mother Lakshmi Ammal had orally gifted the suit property to their father Vagulaparanam. He in turn executed a Will dated 19.03.1996 bequeathing the suit property to the defendants 1 and 2. The said Will, being a registered Will, came into effect on the death of Vagulaparanam in the year 2000 and the defendants 1 and 2 became absolute owners of the suit property. On the above contentions, the defendants sought for dismissal of the suit.



4. At trial, the first plaintiff was examined herself as P.W.1 and Ex.A1 and Ex.A2 were marked on the side of the plaintiffs. The first defendant was examined as D.W.1 and the attessor to the Will dated 19.03.1996 one Edward Sam was examined as D.W.2. Ex.B.1 to Ex.B.6 were marked on the side of the defendants.

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5. The trial court, upon consideration of the oral and documentary evidence on record, rightly refused to recognize the oral gift pleaded by the plaintiffs. Upon rejection of the claim regarding oral gift, the trial court, without going into the question as to the validity and proof of Ex.B.6 Will, concluded that the plaintiffs are entitled to 2/4th share. Aggrieved, the defendants 1 and 2 preferred an appeal in A.S.No. 7 of 2009 on the file of the Sub Court, Thoothukudi. The lower Appellate Court also concurred with the findings of the trial court and dismissed the appeal confirming the judgment and decree of the trial court. Aggrieved, the defendants have come up with this Second Appeal.

6. Notice of motion was ordered on 27.10.2015 and pursuant to the notice, Mr.M.P.Senthil had entered appearance for the respondents.

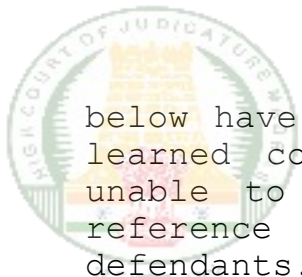
7. Upon hearing the learned counsel for the appellants as well as the respondents, I have framed the following substantial question of law on 04.12.2019:

'Whether the courts below were right in concluding that the Will dated 19.03.1996 would be wholly invalid overlooking the fact that the father of the parties/testator was entitled to 1/5th share in the estate of his wife Lakshmi Ammal'?

8. This appeal was posted today for hearing the learned counsel for the parties on the substantial question of law framed.

9. I have heard Mr.M.Rajaguru, learned counsel appearing for Mr.K.Vinayagan, learned counsel appearing for the appellants and Mr.M.P.Senthil, learned counsel appearing for the respondents.

10. Even though no issue was framed regarding the truth and genuineness of the Will dated 19.03.1996 by the courts below, the defendants have examined D.W.2 the attesting witness of the Will and the Will is a registered Will. The courts below have overlooked the fact that on the death of Lakshmi Ammal in the year 1989, her property would devolve on her husband and her children. Therefore, Vagulaparanam the father of the plaintiffs and the defendants being the husband of Lakshmi Ammal had in fact inherited the 1/5th share. While it is the case of the plaintiffs that Vagulaparanam died intestate in the year 2000, the defendants would plead that Vagulaparanam had executed a Will dated 19.03.1996 (Ex.B.6) bequeathing the entire property to the defendants. Both the courts



below have concurrently found that the oral gift is not valid. The learned counsel for the appellants despite his best efforts is unable to pick holes in the findings of the courts below with reference to the invalidity of the oral gift pleaded by the defendants.

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11. Law is settled that transfer of immovable property either by way of settlement, release or sale for a value above Rs.100/- should be made only by way of a registered instrument and there cannot be a oral gift of immovable property, which is worth more than Rs.100/-. But non acceptance of the plea of oral gift by the courts below would not automatically lead to the conclusion that the Will dated 19.03.1996 is fully invalid. As already pointed out, Vagulaparanam had inherited 1/5th share in the suit property on the death of his wife Lakshmi Ammal in the year 1989. Therefore, he was within his right execute the Will in respect of his 1/5th share, which was inherited on the death of his wife. If Ex.B.6 Will is proved in accordance with law, it will be valid to the extent of 1/5th share, which belonged to Vagulaparanam, the testator. Therefore, the question regarding the truth and validity of the Will dated 19.03.1996 Ex.B.6 will have to be considered. Unfortunately, both the courts below had lost sight of this aspect and had concluded that the plaintiffs would be entitled to 2/4th share, since the oral gift is invalid and consequently, the Will is invalid.

12. This approach of the courts below, in my considered opinion, is not proper and legal. It is fundamental principle that if a person alienates/bequeaths some thing more than what he is possessed of or he is actually entitled to, such alienation would be valid in respect of his entitlement. Only because a person executes Will bequeathing some property to which he has no right, the entire document cannot be held to be invalid. The defendants have examined D.W.2 the attesting witness of the Will. He has spoken about the execution of the Will by Vagulaparanam in the presence of two attesting witnesses i.e D.W.2 and one David Arumugasamy Nainar.

13. A perusal of evidence of D.W.2 shows that it is quite natural and believable. D.W.2 has clearly stated that Vagulaparanam executed the Will in the presence of himself and David Arumugasamy Nainar, other attesting witness. I find no cross-examination on this particular aspect of execution of Will. Therefore, the evidence of D.W.2, in my considered opinion, would establish the truth and validity of Ex.B.6 Will dated 19.03.1996. Once Ex.B.6 is found to be valid, the share of Vagulaparanam in the property of Lakshmi Ammal would automatically go to the defendants, who are the legatees under the Will. Therefore, the courts below are not right in granting decree in 2/4th share each to the plaintiffs and the defendants.

14. In the light of the above, the substantial question of law is answered in favour of the appellants. As a consequence, the judgment and the decree passed by the lower Appellate Court



15. In the result, this Second Appeal is allowed in part. The suit in O.S.No.6 of 2008 on the file of the District Munsif Court, Srivaigundam, stands decreed as follows:

"The plaintiffs would be entitled to a preliminary decree declaring their 2/5th share in the suit scheduled properties".

The plaintiffs will be entitled to seek a final decree. Considering the relationship between the parties, there will be no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar ()

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/ /2020

Sub Assistant Registrar(CS)

CM

To,

1.The Sub Judge, Thoothukudi.

2.The District Munsif , Srivaigundam.

Copy to

The Section Officer, VR Section,
Madurai Bench of Madras High Court, Madurai (2 copies)

+1 CC to Mr.M.P.SENTHIL, Advocate (SR-105928[F] dated 19/12/2019)

+1 CC to Mr.K.VINAYAGAN, Advocate (SR-106078[F] dated 19/12/2019)

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VB(23.01.2020) 4P 7C