

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 17.02.2020
Date of Verdict : 03.07.2020

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

S.A.No. 13 of 2000

V.Natesan

..Appellant/Plaintiff/1st Respondent

Vs.

- 1.P.S.Chinnasamy (Died)
- 2.Tamilselvi
- 3.Krishnaveni
- 4.Kalpana
- 5.Mangayarkarasi
- 6.Valliyammal (Deceased)
- 7.Pooranambigai
- 8.Manickasundaram
- 9.Parvathi
- 10.Sokkamuthu Vadivel
- 11.Murugesan
- 12.P.M.Kuppusami
- 13.Canara Bank,
rep. its Manager,
Pasur Branch, Pasur,
R.S.Pasur 9P), Erode.
- 14.Karuppanan @ Ayyasamy
- 15.Malarkodi
- 16.Santha Devi
- 17.Devi
- 18.Velumani
- 19.Nallasivam

...Respondents

(R15 & R16 are brought on records as LRs' of the deceased
1st respondent vide order of the Court dated 10.09.2003
made in C.M.P.No.14656 of 2000)

(R17 to R19 brought on record as Lrs' of the deceased
R6 vide order of Court dated 14.12.2018 made in
C.M.P.No.608 to 610 of 2009 in S.A.No.13 of 2020)

Prayer: Second Appeal filed under Section. 100 of C.P.C. against the judgment and decree dated 22.06.1999 passed in A.S.No.220 of 1998 on the file of the II Additional District Court, Erode reversing the judgment and decree dated 15.09.1998 made in O.S. No.67 of 1993 on the file of the Additional Sub-ordinate Judge, Erode.

For Appellant : Mr. V.P.Sengottuvel

For Respondents: Mr.A.K.Kumarasamy, Senior Counsel
for Mr.Kaithamalai Kumaran for R2
to R5, R8, R15 & R16
Mr.K.Ramakrishnan for R7 & R9
Mr.V.Kunchidapatham for R13
R1 & R6 - Died (Steps taken)
R10, R11, R12 & R14 - Notice served
R17 to R19 - Not ready in notice.

J U D G M E N T

This appeal has been filed as against the judgment and decree dated 22.06.1999 passed in A.S.No. 220 of 1998 on the file of the II-Additional District Court, Erode reversing the judgment and decree dated 15.09.1998 passed in O.S.No. 67 of 1993 on the file of the Additional Sub-Ordinate Judge, Erode.

2. For the sake of convenience, parties were referred to as per their ranking in the Trial Court:-

3. The case of the plaintiffs in brief is follows:-

3.1. The suit is filed for partition. The suit property originally belonged to one Chinnappa Gounder. He died and at the time of his death, brothers and sisters were not alive. He also had no issues therefore, defendants 1 to 3 and 5 are the legal heirs of Chinnappa Gounder. Each of them entitled to have 1/5th share in the suit property. The plaintiff is the sister's son of the said Chinnappa Gounder. The plaintiff's father is the brother-in-law of the said Chinnappa Gounder. In the year 1989, his hearing power reduced and he became deaf thereafter, he also fell down and got his leg fractured. One Muthusamy was a friend of Chinnappa Gounder helped him and he was in dictated terms. In the year 1988, on the instructions of the said Muthusamy, the said Chinnappa Gounder executed a Will bequeathing his property in favour of the plaintiff. Even then, the plaintiff did not want all the property and he wanted to share the property with defendants 1 to 3 and 5. Therefore, he requested the Chinnappa Gounder to cancel the said Will and therefore, he also agreed to do it and on the instructions of the Muthusamy, he cancelled the Will and executed another Will as if the entire property was given to the 6th defendant, who is the wife of the deceased, son of his brother. Again the 3rd defendant persuaded the said Muthusamy and after receiving the consideration, the said Muthusamy with assistance of defendants 3 and 6 cancelled the said Will when the Chinnappa Gounder was not well and was also not in sound state of mind, created another document, in which the properties were given to the

defendants 3 and 6. Due to fracture, the said Chinnappa Gounder was lying in the bed. The 9th defendant was in possession of the suit Item 1 to 4 of the suit property and he was giving 10 pothies of paddy twice in a year. It was also duly received by the Chinnappa Gounder and Muthusamy. While being so, the defendants 3 and 6 trespassed into the suit property namely, items 1 to 4 on 08.02.1993 and took possession of the same. Therefore, the plaintiff filed the suit for partition and claimed 1/5th share in the suit property along with mense profits.

4. Resisting the same, the first and second defendants filed written statement and they had also claimed 1/5th share in the suit property. Resisting the same, the 3rd defendant filed written statement which was adopted by the 6th and 7th defendants and stated that the suit property belonged to Chinnappa Gounder and denied the other averments and allegations made in the plaint as false and frivolous. The said Chinnappa Gounder was always healthy and his mental condition was sound. He always thought independently and he did not depend upon others. Therefore, the Will executed in favour of the defendants 3 and 6 are true and valid one. Items 1 to 4 of the suit property were leased out to the 9th defendant when the Chinnappa Gounder was alive. The 9th defendant is directed to handover the possession to the defendants 3 and 6. The said Chinnappa Gounder has lend money to third parties and he was collected interest and capital therefore, prayed for dismissal of the suit.

5. On the side of the plaintiff, he examined P.W.1 and P.W.2 and were marked as Exs.A1 to A5. On the side of the defendants, examined D.W.1 to D.W.4 and marked Ex.D1. Upon perusal of the records oral and documentary evidence adduced by the parties and the submissions of both the counsels appearing for the parties, the Trial Court decreed the suit in favour of the plaintiff. Aggrieved by the same, the defendants 3 and 6 preferred an appeal suit in A.S.No.220 of 1998. The first Appellate Court allowed the appeal and dismissed the suit filed by the plaintiff. Aggrieved by the same, the plaintiff filed this second appeal. At the time of admission, the following substantial questions of law were formulated for consideration:-

(i) Whether the lower Appellate Court is right in holding that the plaintiff has not taken diligent steps to disprove the Will in Ex.B1 when the burden of proving the genuineness of the Will in Ex.B1 lies with the defendant propounder?

(ii) Whether the lower Appellate Court is right in accepting the Will in Ex.B1 when the Will does not contain any reason for the disinheritance of the other legal heirs of Late.Chinnappa Gounder ?

(iii) Whether the lower Appellate Court is right in holding that Ex.B1 is valid, when there was impairment of intellectual facilities, the burden is very heavy on the propounder to show that during the time when the deceased alleged to have executed the Will, he was in his proper sense, and the propounders failed to prove the same ?

6. Heard, Mr.V.P.Sengottuvel, learned counsel appearing for the appellant and Mr.A.K.Kumarasamy, learned Senior Counsel for Mr.Kaithamalai Kumaran for respondents 2 to 5, 8, 15 and 16. No appearance for respondents 7 & 9 and 13. Respondents 1 and 6 died and steps were taken. Notice served to respondents 10, 11, 12 and 14. Respondents 17 to 19 were not ready in notice.

7. The learned counsel appearing for the plaintiff submitted that the suit property belonged to Chinnappa Gounder. He born to one Kumarappa Gounder along with two brothers and sisters. The sister's son who is the plaintiff herein and the said Chinnappa Gounder had no issues and had leaving behind the heirs of Sengodagounder and the heirs of Poongiammal, the plaintiff's mothers. While he was alive on 13.05.1988, he executed Will and bequeathed the entire suit property in favour of the plaintiff. But the plaintiff did not want all the property, he wanted to share the property along with the defendants 1 to 3 and 5. Therefore, he requested the Chinnappa Gounder to cancel the said Will. Thereafter, the said Chinnappa Gounder cancelled the Will executed in favour of the plaintiff and executed another Will and had given entire property in favour the 3rd and 6th defendant by the Will dated 06.12.1988. Due to advice of one Muthusamy Gounder, the Chinnappa Gounder cancelled the said Will and executed another Will in favour of the defendants 3 and 6 on 17.01.1990. In fact, while executing the said Will he was already bed ridden and his leg was broken. He also became deaf and his eyes also perverted therefore, he could not have executed any Will dated 17.01.1990. To prove the said Will, the defendants failed to examine Registrar. In fact, the D.W.1 categorically admitted that the Will was retained by Kumar and not written by Harikrishnan. Originally, the script of the Will is by Hariharan, Therefore, the defendants failed to prove the said Will and they are not entitled to have the entire property.

8. Per contra, the learned Senior Counsel appearing for the defendants submitted that the said Chinnappa Gounder had no issues. D.W.2 only assisted the said Chinnappa Gounder all along his life time. In fact, all the Will registered by the said Chinnappa Gounder in which Ex.B1, Will dated 12.09.1991 only disputed. Both the Courts considered the evidence on record and concluded that last Will executed by the said Chinnappa Gounder and was acted upon and it is a genuine and

true Will. Therefore, under Section 100 of C.P.C, this Court has no power to appreciate the facts once again and it is not permitted. In support of the contention, he also cited the judgment reported in 2019 7 SCC 641 in Gurnam Singh (Dead) by legal representatives and others Vs. Lehna Singh (Dead) by legal representatives.

9. Originally, the suit property belonged to Chinnappa Gounder. He had no issues and he born with the two brothers and two sisters. The plaintiff in none other than the son of the sister of the Chinnappa Gounder. Though the said Chinnappa Gounder executed Will in favour of the plaintiff thereafter, it was cancelled, the said Will was marked as Ex.A1. Thereafter, the said Chinnappa Gounder executed another Will in favour of the 6th defendant and the same was cancelled by him. Again, he executed a Will in favour of the 3rd and 6th defendants. All the three Wills are registered one. The final Will dated 12.09.1991 was marked as Ex.B1. Admittedly, the said Chinnappa Gounder died on 06.11.1992 after execution of Will dated 12.09.1991. According to the defendants, the said Will was executed by the said Chinnappa Gounder while he was in sound state of mind and health. The defendants to prove the Will as contemplated under Section 63 of the Indian Succession Act, they examined D.W.2 and D.W.3. Though the plaintiff made so many allegations as against the D.W.2 who assisted the said Chinnappa Gounder all along during his life time, the plaintiff failed to prove the said allegations. The D.W.2 is a retired teacher, well qualified person and he had no interest over the suit property or the other defendants to direct the said Chinnappa Gounder to execute the Will in favour of the defendants 3 and 6. He was also drawing a salary of Rs.5,000/- per month. After his retirement, his sons are doing business and he was earning more than Rs.15,000/- per month. Therefore, any point of time, the D.W.2, the said Muthusamy was benefitted by the said Chinnappa Gounder and no property was bequeathed to him by the said Chinnappa Gounder. He was being the educated person, he assisted the said Chinnappa Gounder to execute the Will in accordance with his directions. However, the said Chinnappa Gounder executed only one Will in favour of the defendants 3 and 6. There was some suspicious but the said Chinnappa Gounder executed initial Will in favour of the plaintiff. Even according to the plaintiff, it was cancelled on his direction and he wanted to share the property with other defendants. Further, the alleged Will Ex.B1 is also registered one and the defendants also categorically proved the execution of the said Will by the said Chinnappa Gounder. Further the specific stand of the plaintiff is that the Will signature found in the Ex.B1 is not of with Chinnappa Gounder. Even then, they did not take any steps to get any hand writting expert opinion to disprove the signature of the said Chinnappa Gounder. In fact, the Ex.B1 dated 13.09.1991 was

registered in the residence of Chinnappa Gounder. The concerned Sub-Registrar had gone to his house on a request and the Will was registered in favour of the defendants 3 and 6. Therefore, it was duly registered by the authority concerned and it was only disputed by the plaintiff with regards to the registration of the Will. Therefore, the contention of the learned counsel appearing for the appellant cannot be considered with regard to the non-examination of registrar when not even put a suggestion to the D.W.2 and D.W.3 in respect of registration of Ex.B1. Therefore, the first Appellate Court rightly reversed the findings of the Trial Court and dismissed the suit filed by the plaintiff. This Court being the second Appellate Court can consider only the substantial questions of law involved in this appeal. In this regard, the learned Senior Counsel appearing for the defendants cited the judgment reported in 2019 (7) SCC 641 in Gurnam Singh (Dead) by legal representatives and others Vs. Lehna Singh (Dead) by legal representatives in which, the Hon'ble Supreme Court held as follows:-

"13.1. The suspicious circumstances which were considered by the learned trial Court are narrated/stated herein above. On reappraisal of evidence on record and after dealing with each alleged suspicious circumstance, which was dealt with by the learned Trial Court, the first Appellate Court by giving cogent reasons held the Will genuine and consequently did not agree with the findings recorded by the learned Trial Court. However, in second appeal under Section 100 CPC, the high Court, by the impugned judgment and order has interfered with the judgment and decree passed by the first Appellate Court. While interfering with the judgment and order passed by the first Appellate Court, it appears that while upsetting the judgment and decree passed by the first Appellate Court, the High Court has again appreciated the entire evidence on record, which in exercise of powers under Section 100 C.P.C is not permissible.

While passing the impugned judgment and order, it appears that the High Court has not at all appreciated the fact that the High Court was deciding the second appeal under Section 100 C.P.C and not first appeal under Section 96 C.P.C. As per the law laid down by this Court in a catena of decisions, the jurisdiction of the High Court to entertain second appeal under Section 100 C.P.C after the 1976 amendment, is confined only when the second appeal involves a substantial question of law. The existence of "a substantial questions of law" is a sine qua non for the exercise of the jurisdiction under Section 100 C.P.C. As observed and held by this Court in Kondiba

Dagadu Kadam, in a second appeal under Section 100 C.P.C, the High Court cannot substitute its own opinion for that of the first Appellate Court, unless it finds that the conclusions drawn by the lower Court were erroneous being:

Contrary to the mandatory provisions of the applicable law:

Contrary to the law as pronounced by the Supreme Court;
Based on inadmissible evidence by the Supreme Court.

14. When a substantial questions of law an be said to have arisen, has been dealt with and considered by this Court in Ishwar Dass Jain. In the aforesaid decision, this Court has specifically observed and held : (SCC p.437)

" Under Section 100 C.P.C, after the 1976 Amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first Appellate Court without doing so. There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the Appellate Court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. In either of the above situations, a substantial question of law can arise."

15. Applying the law laid down by this Court in the aforesaid decisions to the facts of the Case on hand, we are of the opinion that the High Court has erred in reappreciating the evidence on record in the second appeal under Section 100 C.P.C. The High Court has materially erred in interfering with the findings recorded by the first Appellate Court, which were on reappreciation power under Section 96 C.P.C. Cogent reasons, on appreciation of the evidence, were given by the first Appellate Court. The first appellate Court dealt with, in detail, the so-called suspicious circumstances which weighed with the learned Trial Court and thereafter it came to the conclusion that the Will, which as such was a registered Will, was genuine and did not suffer from any suspicious circumstances. The findings recorded by the first

Appellate Court are reproduced herein above. Therefore, while passing the impugned judgment and order, the High Court has exceeded in its jurisdiction while deciding the second appeal under Section 100 C.P.C."

10. The Hon'ble Supreme Court as well as this Court held in catena of decisions, the jurisdiction of the High Court to entertain second appeal under Section 100 of CPC is confined only when the second appeal involves a substantial question of law. It is not permissible under Section 100 of CPC to appreciate the entire evidence on record. In the case on hand, the first appellate Court by giving cogent reasons held the will genuine and consequently did not agree with findings recorded by the Trial Court. Therefore, the above judgment is squarely apply to this case on hand. A cutting through the substantial questions of law formulated by this Court while admitting this appeal cannot be said to be the substantial questions of law involved in this appeal at all. Under these circumstances, this Court does not find any reason to interfere with the judgment and decree passed by the First Appellate Court and the substantial question of law formulated by this Court are answered as against the plaintiff.

11. In view of the discussion above, this second appeal is dismissed. Consequently, connected Miscellaneous Petitions are closed. No costs.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

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To:-

1. The II-Additional District Court, Erode.
2. The Additional Sub-Ordinate Court, Erode.

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The Section Officer
VR Section
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S.A.No. 13 of 2000

VGII (CO)
SP(29/10/2020)