

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 18.02.2020
Date of Verdict : 10.03.2020

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

S.A.No.748 of 2002
& C.M.P.No.12326 of 2018

Govindasamy Mudaliar ... Appellant/Plaintiff

Vs.

1. Padmanabhan
2. Nageswari
3. Bhuvaneswari
4. Sivasankaran
5. K.Indira (Deceased)
6. Samundeswari

(6th Respondent
brought on record as
legal heir of the deceased
fifth respondent vide order
of the Court dated 13.04.2016
made in C.M.P.No. 493 of
2015 in S.A.No.748 of 2002)

... Respondents/Defendants

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 29.11.2001 made in A.S.No.45 of 1996 on the file of the Additional District Court, Vellore, confirming the judgment and decree dated 14.03.1996 made in O.S.No.131 of 1988 on the file of the Principal District Munsif Court, Vellore.

For Appellants : Mr.A.Palaniappan
For Mr.S.N.Ravichandran

For Respondents

For R1 to R4

& R6 : Mr.S.Anand Venkatesh
For Mr.L.K.Manjunath

R5 : Died

JUDGMENT

This second appeal is directed as against the judgment and decree dated 29.11.2001 made in A.S.No.45 of 1996 on the file of

the learned Additional District Judge, Vellore, confirming the judgment and decree dated 14.03.1996 made in O.S.No.131 of 1988 on the file of the learned Principal District Munsif, Vellore.

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

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

3.1. The suit is filed for declaration and injunction. Originally the suit property owned by Krishnasamy Mudaliar. The second and third defendants are his daughters. The fifth defendant is his second wife. The plaintiff is a relative of the said Krishnasamy Mudaliar and he was looking after and assisting the maintenance of his family and property for the past 30 years. He was residing along with the said Krishnasamy Mudaliar and was assisting to cultivate the suit property. Therefore, the said Krishnasamy Mudaliar was having lot of confidence and affection towards the plaintiff.

3.2. While being so, the said Krishnasamy Mudaliar executed Will in favour of the plaintiff by a registered Will dated 12.03.1980 and bequeathed the suit property. It was executed by the said Krishnasamy Mudaliar and the fifth defendant viz., his second wife jointly. In fact, there was no compulsion or coercion toward him to execute the Will in favour of the plaintiff. Even during his life time of the said Krishnasamy Mudaliar, patta was transferred in favour of the plaintiff and all the revenue records were mutated in his name in respect of the suit property. The said Krishnasamy Mudaliar died on 05.10.1987 and his daughters are the defendants 2 & 3 and son-in-laws are the defendants 1 and 4. Now they are attempting to trespass into the suit property. Hence the suit.

4. The fifth defendant remind ex-parte and resisting the plaintiff's case, the second defendant filed written statement, and the same has been adopted by other defendants. They stated that the suit property are joint family property of the said Krishnasamy Mudaliar. The plaintiff is not related to him and he is a stranger to him. He did not help him to manage his property at any point of time. Playing confidence trick and undue influence played by the plaintiff and also out of coercion, he obtained alleged Will dated 12.03.1980. The fifth defendant never executed the said Will in favour of the plaintiff. Since the entire property is joint family property and as such the said Krishnasamy Mudaliar had no right, interest or title over the property to execute the said Will in favour of the plaintiff. In respect of the fourth item is concerned, the said Krishnasamy Mudaliar never originally gifted to the plaintiff and it is invalid.

4.1. Further contended that admittedly, the said Will dated 12.03.1980 executed by the two testators in which, the said Krishnasamy Mudaliar died. But the fifth defendant is very much alive. Therefore, the plaintiff cannot get any right based on the Will dated 12.03.1980, when the executant is very much alive. The fifth defendant is being the testator can very well cancel the Will. The said Krishnasamy Mudaliar and the fifth defendant put on their love and affection and bequeathed the suit property in favour of the second and third defendants by the last Will dated 10.07.1985 and thereby the Will dated 12.03.1980 stands cancelled. Therefore the plaintiff has no title or interest over the suit property. After demise of the said Krishnasamy Mudaliar, the defendants 2 & 3 are in possession and enjoyment of the suit property and therefore prayed for dismissal of the suit.

5. On the side of the plaintiff, he examined P.W.1 to P.W.5 and were marked Ex.A.1 to Ex.A.13. On the side of the defendants, they examined D.W.1 and marked Ex.D.1. On perusal of the material produced on record and on considering both the oral and documentary evidence adduced by the respective parties and also the submissions made, the trial Court dismissed the suit in filed by the plaintiff. Aggrieved by the same, the plaintiff preferred an appeal suit in A.S.No.45 of 1996 and the first appellate Court also dismissed the appeal by confirming the judgment and decree passed by the trial Court. An unsuccessful plaintiff preferred this present second appeal.

6. At the time of admission of this second appeal on 06.06.2002, the following substantial questions of law were formulated for consideration:-

"i. Whether the Courts below are correct in holding that that joint Will, will not come into effect so long the surviving testator is alive. In the instant case the surviving executant, the 5th defendant not only remained exparte but till date not even chosen to cancel the Will. Therefore, insofar as the share of the deceased testator is concerned, the Will has to be given effect to, this basis principle of law was totally ignored by the Courts below?

ii. Whether the Courts below are correct in fixing the burden of proof on the plaintiff to prove the Will when it was shifted on the person who denied it by the rule of rebuttable presumption under law?"

7. The learned counsel appearing for the appellant/plaintiff submitted that Ex.A.13 was duly executed by the said Krishnasamy Mudaliar and his second wife viz., the fifth defendant. Though she is alive, she was remained absent and set ex-parte in the suit. In fact, she never disputed the execution of Will by filing any written statement. Therefore, Ex.A.13 is proved and it cannot be rejected by law. One of the attesting witnesses of the Will was examined as P.W.2 and he turned hostile. But he was not cross-examined by the plaintiff. Therefore, the Section 71 of the Indian Evidence Act will come into operate.

7.1. He further submitted that though the fifth defendant was being one of the executant of the Will Ex.A.13, she has no right, interest or title over the suit property, since the entire suit property is a self-acquired by the said Krishnasamy Mudaliar and the fifth defendant has no title over the property. Therefore, the fifth defendant executed the Will in simplicity and she has no title over the property, which was bequeathed in favour of the plaintiff. Though P.W.2 turned hostile, he admitted his signature in the Will Ex.A.13 and mere denial of the knowledge about the Will and it cannot be raised any suspicious regarding the execution of the Will.

8. Per contra the learned counsel appearing for the respondents/ defendants submitted that the Will dated 12.03.1980 will came into force only after the death of the executant. Admittedly, the fifth defendant is very much alive and as such she can in any time cancel the Will. Therefore, on the basis of the Will, the plaintiff cannot claim any title in respect of the item Nos. 1, 3, 5 & 6 of the suit property. In respect of the fourth item of the suit property is concerned, it never bequeathed in favour of the plaintiff. Even according to the plaintiff, it was orally gifted in his favour and the plaintiff is failed to prove the same before the trial Court as such, both the Courts below rightly held that the plaintiff is not entitled for any relief as prayed for.

8.1. He further submitted that one of the attestors of the Will was examined as P.W.2 and he himself turned hostile and as such the plaintiff failed to prove the Will as contemplated under Section 68 of the Indian Evidence Act. Therefore, the Will itself become invalid. He also relied upon the following judgments in support of his contention :-

- i. (2017) 1 SCC 257 - Ramesh Verma (dead) Vs. Lajesh Saxena (dead) by legal heirs.
- ii. 1995 (II) CTC 476 - Kashibai & anr Vs. Parwatibai & ors.

9. Heard Mr.A.Palaniappan, learned counsel appearing for the appellant/plaintiff and Mr.S.Anand Venkatesh, learned counsel appearing for the respondents/defendants.

10. Admittedly, the defendants 2 & 3 are the daughters of one Krishnasamy Mudaliar and the defendants 1 & 4 are their husband. The fifth defendant is the second wife of the said Krishnasamy Mudaliar. The first wife already died. According to the plaintiff for the past 30 years, he was along with the said Krishnasamy Mudaliar. The plaintiff helped him to manage his property and also to cultivate his lands. Therefore, out of his love and affection, the said Krishnasamy Mudaliar bequeathed the suit property in his favour by a registered Will, which was marked as Ex.A.13. Even during his life time, patta was issued in favour of the plaintiff and all the revenue records mutated in his name and he is also paying tax to the authority concerned. The plaintiff was examined as P.W.1. After bequeathing the suit property by a Will, Ex.A.13, the said Krishnasamy Mudaliar died on 05.10.1987.

11. Admittedly, the said Krishnasamy Mudaliar and the fifth defendant executed the Will dated 12.03.1980, which was marked as Ex.A.13 and the fifth defendant is very much alive. The plaintiff categorically admitted these facts and deposed that the fifth defendant has no title over the property and she executed the said Will jointly with the said Krishnasamy Mudaliar to prevent her from claiming any right over the suit property in future against the plaintiff. The plaintiff also admitted that after marrying the fifth defendant, the said Krishnasamy Mudaliar gave birth to two male children and thereafter both of them died. The said Krishnasamy Mudaliar had his ancestral property and even before the execution of the Will, there was a partition in which, the item Nos. 3,5 & 6 were allotted to the second defendant and in respect of the item Nos. 1,2,7 & 8 were allotted to the said Krishnasamy Mudaliar and the fifth defendant. Therefore, the fifth defendant has got her share after demise of the said Krishnasamy Mudaliar and also after death of her two male children. Therefore, she has right, interest and title over insofar as the item Nos. 1,2,7 & 8 of the suit properties.

12. Further in the Ex.A.13, there is specific clause that the Will has been executed jointly and it can be revokable and it will be come into force after demise of the executants viz., the said Krishnasamy Mudaliar and the fifth defendant. The fifth defendant is very much alive and as such the Will cannot be executable one. There are two attestors in the Will ie., Ex.A.13, in which one of attestors was examined as P.W.2. He deposed that he did not know about the execution of the Will. But he admitted his signature, which was marked as Ex.A.12 found in Ex.A.13. Even then he was not declared as hostile witness by the plaintiff and not cross-examined him. Therefore, the plaintiff failed to prove the Will as contemplated under Section

68 of the Indian Evidence Act.

13. The learned counsel appearing for the defendants cited the judgment reported in (2017) 1 SCC 257 in the case of Ramesh Verma (dead) Vs. Lajesh Saxena(dead) by legal heirs, which reads as follows :-

"13. A Will like any other document is to be proved in terms of the provisions of Section 68 of the Indian Succession Act and the Evidence Act. The propounder of the Will is called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the disposition and put his signature to the document on his own free will, and the document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. This is the mandate of Section 68 of the Evidence Act and the position remains the same even in <http://www.judis.nic.in> a case where the opposite party does not specifically deny the execution of the document in the written statement."

14. He further relied upon the judgment reported in 1995 (II) CTC 476 in the case of Kashibai & anr Vs. Parwatibai & ors., as follows:-

"10. This brings us to the question of the will alleged to have been executed by deceased Lachiram in favour of his grand-son Purshottam, the defendant No.3. Section 68 of Evidence Act related to the proof of execution of document required by law to be attested. Admittedly, a Deed of Will is one of such documents which necessarily required by law to be attested. Section 68 of the Evidence Act contemplates that if a document is required by law to be attested, it shall not be used as evidence until the 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. A reading of Section 68 will show that "attestation" and "execution" are two different acts one following the other. There can be valid execution of a document which under the law is required to be attested without the proof of its due

attestation and if due attestation is also not proved, the fact of execution is of no avail. Section 63 of the Indian Succession Act, 1925 also lays down certain rules with (C) of Section 63 provides that the Will shall be attested by two or more witnesses each one of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark of the such other person; and each of the witnesses should sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time and no particular form of attestation shall be necessary.

In the above judgments, the Hon'ble Supreme Court of India held that Section 68 of the Indian Evidence Act is mandate to prove the Will and the position remains the same even in a case where the opposite party does not specifically deny the execution of the document in the written statement.

15. In the case on hand, the defendants categorically denied the execution of the Will, which was marked as Ex.A.13, since the plaintiff is no way related the said Krishnasamy Mudaliar and one of the attessor also did not support the case of the plaintiff. Therefore, the above judgments are squarely applicable to the case on hand and the plaintiff failed to prove the very Will dated 12.03.1980. That apart, both the Courts below held concurrently on the facts and as such this Court has power to interfere only on the substantial questions as framed by this Court at the time of admission.

16. Further the contention of the learned counsel appearing for the plaintiff that P.W.2 turned hostile as such Section 71 of the Indian Evidence Act would operates, since the plaintiff examined P.W.3 the scribe of the Will and the P.W.4 the Registrar, who registered the Will executed in favour of the plaintiff. Though the plaintiff examined the scribe of the Will and the Registrar, who registered the Will, he failed to prove the execution of the Will by the said Krishnasamy Mudaliar by examining the witnesses. Admittedly, P.W.2 the attessor was examined and he did not support the case of the plaintiff. Even then the plaintiff failed to declare him as hostile and did not cross-examine him. Therefore, both the Courts rightly dismissed the suit filed by the plaintiff.

17. In view of the above discussion, this Court does not find any valid reason to interfere with the reasonings and findings rendered by the Courts below for upholding the case of the plaintiff. As such, this Court is of the considered opinion that no substantial question of law involved in this appeal. Be that as it may, all the substantial questions of law formulated by this Court are answered in favour of the defendants and as against the plaintiff.

18. In fine, the second appeal stands dismissed by confirming the judgment and decree passed by Courts below. Consequently, connected miscellaneous petition is closed. There is no order as to costs.

s/d-
Assistant Registrar (CO)

True Copy

Sub-Assistant Registrar

rts

To

1. The Additional District Judge,
Vellore,
2. The Principal District Munsif,
Vellore.
3. The Section Officer,
V.R.Section,
Madras High Court,
Chennai.

+1 CC to Mr.S.N.Ravichandran, Advocate sr 21118
+2 Ccs to Mr.L.K.Manjunath, Advocate sr 22067

S.A.No.748 of 2002
& C.M.P.No.12326 of 2018

KJ(CO)
SP(24/07/2020)

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