

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 05.03.2020

Delivered on: 08.05.2020

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.789 of 2008

and

C.M.P.No.1 of 2008

1.S. Natarajan
2. S. Balasubramaniam ...Appellants/Defendants 1 & 2

Vs

1. Shanmugasundaram
2. Manoranjitham ...Respondents/Plaintiff/
3rd Defendant

PRAYER: Second Appeal is filed under section 100 of the Civil Procedure Code to set aside the Judgment and decree passed in A.S.No.49 of 2007 on the file of the Principal District Court, Erode, dated 21.11.2007 confirming the Judgment and decree passed in O.S.No.422 of 1999 on the file of the I Additional Sub Court, Erode, dated 29.09.2006.

For Appellants : Mr. V. Kathirvel

For Respondent-1 :M/s.Zeenath Begum

For Respondent-2 :M/s.Prithivi

(For M/s.Kaithamalai Kumaran)

J U D G M E N T

This Second appeal is filed by the defendants 1 and 2 in the suit O.S.No.422 of 1999 on the file of the Ist Additional Sub-ordinate Judge, Erode, challenging the concurrent Judgment and Decree of the Court below. The Parties are referred to in the same litigative status as in the suit. It is necessary to briefly allude to the facts of the case and the Judgment and decree of the Courts below for morefully appreciating the challenge to the Judgment and Decree.

2. The plaintiff had filed a suit seeking for partition and injunction before the 1st Additional Sub Judge, Erode, claiming a 2/4th share in suit items No.1 to 4, a 1/3rd share in item No.5 & 6 and a 1/4th share in Item No.7 & 8. The case of the plaintiff is that suit items 1 & 2 were purchased by his paternal grand mother Sellayee under Sale Deeds dated 10.03.1902 and 09.01.1927. On her death, her only son Sengottaia Gounder, the father of the plaintiff and the defendants inherited it. Items No.3 & 4 were purchased by the Sengottaia Gounder on 13.05.195. Sengottaia Gounder died on 04.02.1965 leaving behind him surviving his wife Sellayee and the plaintiff and the defendants as his sole surviving legal heirs.

3. It is the further case of the plaintiff that in October, 1987, the 3rd defendant had released her share in the suit item Nos. 1 to 4 in favour of her mother and brothers on 14.11.1991. Sellammal who was living with the plaintiff, had bequeathed her 1/4th share in item Nos.1 to 4 in favour of the plaintiff. On 24.05.1997, Sellammal died and her Will came into force. Item No.5 & 6 were purchased jointly by the plaintiff and defendants and likewise item Nos.7 & 8 were purchased jointly by the plaintiff and defendants. The plaintiff submits there arose misunderstanding in the joint enjoyment of the suit properties and the plaintiff had suggested several modes of division so that each sharer could enjoy their respective share in a convenient manner. However, the defendants 1 & 2 were not willing for a division. On 09.07.1999, the plaintiff had demanded a partition which was not agreed to and therefore the plaintiff had come forward with the above suit.

4. The Written Statement of the defendants 1 & 2 would proceed on the basis that the Will executed by their mother in favour of the Plaintiff was an invalid one inasmuch as the mother was aged and not in a sound and disposing state of mind. The Will had been created while she was in the care of the plaintiff. The defendants 1 & 2 would contend that on 15.01.1988, their mother, the plaintiff and the defendants had entered into a family arrangement. The mother was living in turns with her children. They would further contend that their mother was receiving their father's pension. They would further allege that the suit is filed for partial partition.

5. The defendants has also filed an additional Written statement inter alia, contending that the 5th item of the property which is adjacent to the 3rd item of the property was allotted to the share of the 2nd defendant in the family arrangement. Likewise, the defendants are entitled to a 1/3rd share each in the 6th item and a 1/4th share each in items No.7 & 8.

6. The 3rd defendant had filed a written statement contending that she is entitled to a 1/4th share in Item No.7 & 8. She had not refuted the execution of the Will by the mother in favour of the Plaintiff.

7. The 1st Additional Sub-Judge, Erode, on a perusal of the pleadings had framed the following issues:

1. Whether the plaintiff is entitled to the decree for partition and injunction?

2. To what other relief was the plaintiff entitled to?

The plaintiff besides examining himself as P.W.1 had also examined the attesting witness of the Will, Ex.A11 as P.W.2 and had marked Ex.A1 to Ex.A11. The defendants had examined themselves as D.W1 and D.W2 and marked Ex.B1 to Ex.B17. Ultimately, the learned Judge had decreed the suit as prayed for.

8. Aggrieved by the said Judgment and Decree, the defendants 1 and 2 had filed A.S. No.49 of 2007 on the file of the Principal District Court, Erode. The learned Judge also confirmed the Judgment and Decree of the Trial Court.

9. Aggrieved by this concurrent Judgment and Decree, the defendants 1 and 2 are before this Court. The appeal was not admitted and only notice has been directed to the respondents herein.

10. Mr. Kathirvel, the learned counsel appearing on behalf of the defendants 1 and 2 would attack the validity of Ex.A11-Will on the ground that the plaintiff has failed to prove the fact that Ex.A11 has not only been executed by Sellayee in a sound and disposing state of mind but also out of her own volition. He would submit that the plaintiff had actively participated in the execution of the Will since on the very same day of the execution of Ex.A11-Will in which P.W.2 had signed as an attesting witness, the plaintiff had signed as a witness in Ex.B17-Will executed by P.W.2's father. He would therefore contend that the plaintiff had actively participated in the execution of Ex.A11-Will as he was present in the Registration office at the same time the Will was executed by his mother. That apart, P.W.2 is an interested witness whose evidence cannot be relied upon. He would submit that this Court should draw adverse inference for the non-examination of the other attesting witness. He would rely on the Judgment of the Hon'ble Supreme Court reported in 2003(2) SCC Page No.91, in the case of "Janki Narayan Bhoir Vs.Narayan Namdeo Kadam" in support of his argument that the proof of the execution of the Will and its attestation by two or more witnesses is mandatory and in the absence of proof of the attestation by the witnesses no right flows from the Will.

11. Per contra, Ms.Zeenath Begum, the learned counsel appearing on behalf of the plaintiff would submit that the Will, Ex.All was refuted by the defendants 1 and 2 on the ground that the mother was aged and not in a sound and disposing state of mind. This fact has been disproved by the plaintiff by examining P.W.2 who not only spoke about the execution but also the mental state of the mother. He has also in his clear and cogent evidence deposed that the Will was prepared at the behest of the mother who was always residing with the plaintiff. His evidence has not been contradicted in the cross. She would also draw the attention of the Court to the recital of the Will extracted in the Judgment of the Appellate Court which would clearly prove that decisive nature of the mother. Further the Family arrangement canvassed by the defendants 1 and 2 have not been proved by them. She would contend that the defendants 1 and 2 have not made out any question of law calling for the interference of this Court in the judgment and decree of the Courts below.

12. Heard, the Counsels and perused the papers. The appellants /defendants 1 and 2 have tried to question the validity of the Will Ex.All only on the ground that P.W.2 the attesting witness is an interested witness and the plaintiff had not proved the Will in the manner known to law. Both the Courts below have delved in detail to the documentary and oral evidence adduced on both sides to uphold the execution and validity of the Will. They have considered the fact that the defendants who had come forward with the case that the mother was not in a sound and disposing state of mind had failed to prove the same. That apart, they were unable to shake the evidence of P.W.2 regarding the execution of the Will. In these circumstances, this Court exercising jurisdiction under Section 100 of the Code of Civil Procedure is of the opinion that the appeal does not give rise to any substantial question of law.

13. In the result, the Second appeal is dismissed and the Judgment and Decree of the Courts below is confirmed. Consequently, connected miscellaneous petition is closed. However, there shall be no order as to costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To:

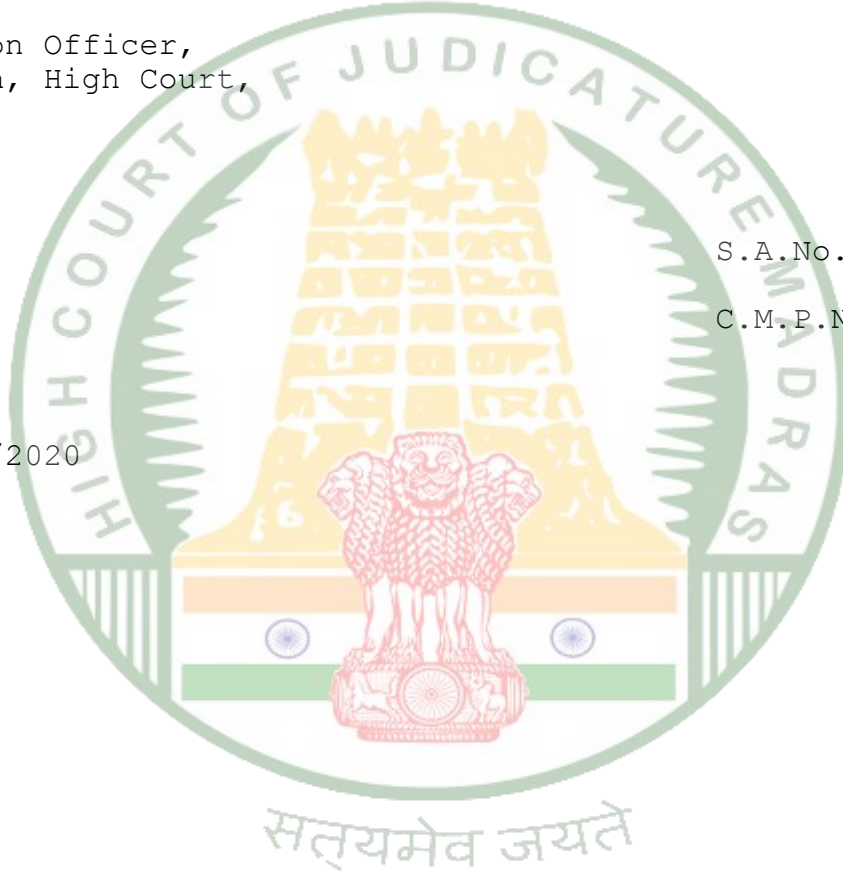
1. The Principal District Judge,
Erode.
2. The I Additional Sub Judge,
Erode.

Copy to

The Section Officer,
VR Section, High Court,
Madras.

S.A.No.789 of 2008
and
C.M.P.No.1 of 2008

ssi[co]
srg 18/12/2020



WEB COPY