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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.02.2021

CORAM:

THE HONOURABLE MR. JUSTICE T.RAJA
and
THE HONOURABLE MR. JUSTICE G.CHANDRASEKHARAN

A.S.No.216 of 2013

1. R.Sasikala
2. R.Geetha
3. R.Sivakumar
4. R.Reetakumari ... Appellants/Plaintiffs

..VS..

1. Aarayee @ Lakshmi
2. Mohanraj
3. Ravichandran
4. Prema ... Respondents/Defendants

This Appeal Suit is filed under Order 41 Rule 1 read with Section 96 CPC against the judgment and decree dated 15.03.2012 made in O.S.No.45 of 2010 on the file of Principal District Judge, Dharmapuri.

For Appellants : Mr.S.Mukunth
for
M/s.Sarvabhauman Associates

For Respondents: Mr.V.Sekar
for
M/s.D.Shivakumaran

JUDGMENT

(Judgment of the Court was delivered by G.CHANDRASEKHARAN, J.,)

The appellants, as the plaintiffs, filed the suit in O.S.No.45 of 2010 on the file of the Principal District Judge, Dharmapuri, seeking the relief of partition of 1/5th share in the suit property and the consequential relief of permanent injunction restraining the respondents/defendants from in any way creating any encumbrance over the appellants' share in the suit property and for costs.

2. The parties are being referred in this Appeal as they were referred before the trial Court.



3. The case of the plaintiffs is that the suit property belonged to Sundaram by way of purchase through a registered sale deed dated 22.10.1971. He died leaving behind his wife - first defendant Aarayee @ Lakshmi, sons - second and third defendants Mohanraj and Ravichandram and daughter -fourth defendant Prema. One son S.Rajan pre-deceased K.Sundaram, leaving behind his wife - first plaintiff and children - plaintiffs 2 to 4. Sundaram constructed a terrace house in the suit property while he was alive. Subsequent to his death, plaintiffs and defendants have been in possession and enjoyment of the suit property. Behind the back of plaintiffs, first defendant executed two registered gift settlement deeds in favour of third and fourth defendants in respect of the suit property. Those settlement deeds will not affect the right of the plaintiffs in the suit property and they are void ab initio and not binding on the plaintiffs. In spite of demanding partition of plaintiffs 1/5th share in the suit property, the defendants have not come forward to partition the suit property, which resulted in filing of the suit.

4. Disputing the claim of the plaintiffs, the second defendant filed written statement stating that it is true that the suit property belonged to Sundaram and a house was constructed during his life time in the suit property, but it is not correct to state that he constructed the house. Only the second defendant expended money for the construction of the house in the suit property. During his life time, Sundaram executed a Will in respect of the suit property in favour of the first defendant on 09.04.2003. Subsequently, the first defendant executed settlement deeds in favour of the defendants 2 and 3 in respect of the suit properties. The first plaintiff filed a suit in O.S.No.315 of 2000 on the file of the District Munsif Court, Mettur against Sundaram and allowed the suit to be dismissed for default. After the death of Sundaram on 05.05.2003, the Will had come into force. Necessary mutations had been taken place in revenue register in the name of the defendants. First plaintiff had again filed a suit in O.S.No.273 of 2009 on the file of District Munsif Court, Mettur against second defendant and that suit is pending. The plaintiffs have no right to claim partition in the suit property and therefore, the defendants prayed for dismissal of the suit.

5. The trial Court framed the following issues:-

1. Whether the plaintiffs are entitled to get 1/5th share in suit properties as prayed for ?
2. Whether the Court Fee has been properly paid ?



3. Whether the suit is maintainable one without seeking relief for declaration ?

4. Is it true to say that the first defendant got right over the suit properties by way of Will ?

5. Whether the Will dated 09.04.2003 came into force ?

6. Whether the plaintiffs are entitled to get the permanent injunction ?

7. To what any other relief the plaintiffs are entitled to ?

6. During the course of trial, plaintiffs examined first plaintiff as PW.1 and marked Exs.A1 to A7. The defendants examined the first defendant as DW.1, second defendant as DW.5 and M.Rajendran, Marimuthu, Ravikumar as DW.2 to DW.4 respectively and marked Exs.D1 to D10. Considering the oral and documentary evidence, the learned trial Judge found that defendants have proved the execution of Ex.D7 - Will by Sundaram and therefore, held that the plaintiffs are not entitled for share in the suit property and dismissed the suit. Against the said judgment, the plaintiffs have preferred this appeal.

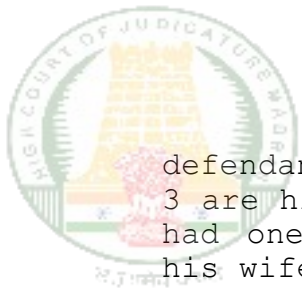
7. Learned counsel for the appellants assailed the judgment of trial Court on the ground that there are material omissions and contradictions in the evidence of attestors examined to prove the execution of the Will. It is not clear as to whether stamp papers for execution of the Will were purchased in Salem or Mettur Dam. Both DW.2 and DW.3 have not specifically stated in their evidence as to whether they have actually seen the testator signing the Will and whether the testator saw the attestors signing the Will. Most importantly, though the Will was said to have been executed on 09.04.2003, the existence of this Will was not referred in the settlement deeds executed by first defendant in favour of defendants 2 and 3 on 07.04.2004. If really the Will was executed on 09.04.2003, it must have been referred in Exs.D8 and D9 settlement deeds, as to how the first defendant Aarayee @ Lakshmi got title to the property in respect of which she executed these settlement deeds. The fact that the existence of Will dated 09.04.2003 is not mentioned in Exs.D8 and D9 clearly shows that Ex.D7 - Will was created by defendants to deprive plaintiffs' legitimate share in the suit property. The existence of the Will is also not mentioned even in Exs.A4, A5 and A7 documents. These instances create a strong suspicion with regard to the genuineness of the Will and on the other hand, points to the fact that the Will had been created by defendants. However, without considering these aspects, learned trial Judge found that the Will was genuine and non-suited the plaintiffs. Therefore, learned counsel for



the appellants/plaintiffs prayed for setting aside the judgment of learned trial Judge and for decreeing the suit.

8. Per contra, learned counsel for respondents/defendants submitted that the first plaintiff's husband Rajan moved away from defendants' family long back and he was not taking care of his parents during his lifetime. After his death, though the first defendant is also a class-I heir of the deceased Rajan and entitled to receive share in the monetary benefits, she was not provided with any monetary benefits and all the monies had been received by the first plaintiff alone. Besides, the first plaintiff filed a suit in O.S.No.315 of 2000 on the file of District Munsif Court, Mettur against the deceased Sundaram and made him to suffer and later, allowed the suit to be dismissed for default. Again, she filed another suit in O.S.No.273 of 2009 against the second defendant in District Munsif Court, Mettur in respect of the same property and the suit is still pending. The suit property is the self acquired property of deceased Sundaram. He had executed Ex.D7-Will in favour of the first defendant, while he was in sound and disposing state of mind on 09.04.2003. Subsequent to his death on 05.05.2003, the Will had come into force. On 07.04.2004, the first defendant had executed two settlement deeds in respect of the suit property in favour of the defendants 2 and 3. Though the existence of the Will and execution of settlement deeds had been mentioned in the written statement filed by the defendants, the plaintiffs have not filed any reply statement questioning the genuineness of the Will. The reason is that the plaintiffs knew well that Sundaram had executed a Will in favour of the first defendant and the first defendant in turn had executed settlement deeds in favour of the defendants 2 and 3. That is the reason why the plaintiffs have not filed suit immediately after the death of Sundaram. Though Sundaram died in 2003, suit was filed only in 2010. It shows that plaintiffs were aware of the existence of the Will and legality of execution of settlement deeds by first defendant in favour of defendants 2 and 3. DWs.2 and 3 had clearly given evidence with regard to the execution of Will and DW.4 had also given clear evidence with regard to preparation of settlement deeds in favour of defendants 2 and 3. Their evidence was not discredited or dislodged by the plaintiff. They withstood the rigour of cross examination and came out unscathed. Learned trial Judge has properly appreciated the evidence and rightly dismissed the suit. Therefore, learned counsel for the respondents prayed for confirming the judgment of the trial Court and for the dismissal of this appeal.

9. From the admitted case of the parties, it is clear that the suit property was originally purchased by the deceased K.Sundaram on 22.10.1971 through a registered sale deed. The sale deed was marked as Ex.A1. There is no dispute with regard to the relationship between the parties. First



defendant is the wife of deceased Sundaram. Defendants 2 and 3 are his sons and fourth defendant is his daughter. Sundaram had one pre-deceased son S.Rajan and the first plaintiff is his wife and other plaintiffs are his children.

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10. Now the issue involved in this case for the consideration of this Court falls within a narrow sphere i.e.,

(1) whether the finding of trial Court that Ex.D7-Will said to have been executed by Sundaram on 09.04.2003 in favour of first defendant Aarayee @ Lakshmi is true and valid, is correct ?

(2) If it is true and valid, the plaintiffs' case has to fail. If it is not a true and valid Will as claimed by the plaintiffs, the plaintiffs are bound to succeed.

11. DW.2 and DW.3 are the attestors to the Will and they have been examined to prove the execution of the Will by Sundaram. As already stated, learned counsel for the plaintiffs brought out some suspicious circumstances like non-mentioning of the existence of Ex.D7-Will in Exs.A2 and A3 settlement deeds and Exs.A4, A5 and A7 documents; the confusion with regard to the place where stamp paper was purchased as to whether it was purchased at Salem or Mettur Dam, to drive home the point that Will is a created Will. He also relied on the ruling reported in (1997) 3 LW 673 (Govindan Chettiar (died) v. Akilandam alias Seethalakshmi and 24 others) for a proposition that the attestors have to be shown the Will and questioned with regard to attestation of the Will. More specifically the attestors have to give evidence that they saw the testator signing the Will and the testator saw the attestors signing the Will. That piece of evidence is lacking in this case.

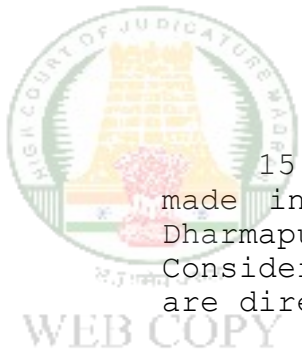
12. True it is that the existence of the Will is not mentioned in Ex.A2 and Ex.A3 settlement deeds and also in Exs.A4, A5 and A7 documents. Whether the omission to mention the existence of Ex.D7-Will in these documents amounts to a suspicious circumstance is a question, which has to be considered. One more aspect canvassed by the learned counsel for the appellants/plaintiffs is that the attestors DW.2 and DW.3 have not specifically mentioned in their evidence as to whether the attestors had seen the testator signing the Will and the testator had seen the attestors signing the Will and therefore, the Will was not satisfactorily proved. However this contention of the learned counsel for the appellants/plaintiffs deserves to be repelled for the reason that both DW.2 and DW.3 have clearly stated in their proof affidavit in para-9 and 8 respectively, that they had seen the testator signing the Will and the testator had seen the attestors signing the Will. The Will was also shown to them at the time of examination and they have identified the signature. Though they were cross-examined sufficiently,



nothing was elicited from their evidence to discredit or disbelieve their evidence with regard to the non-execution of the Will by Sundaram. They have consistently given evidence confirming the execution of the Will by Sundaram and their attesting the Will. Therefore, this Court is of the considered view that the execution of the Will by Sundaram had been proved beyond any doubt by the respondents/defendants. In this view of the matter, this Court finds that the aforesaid ruling is not helpful to the case of the plaintiff.

13. The contention of the learned counsel for the appellants/plaintiffs that in the stamp paper, stamp vendor's address was given as Salem, but Sundaram's address was shown as Mettur, is inconsequential in nature for the reason that Sundaram owns a property in Mettur also. Mettur is within the Salem District. There is nothing wrong in purchasing stamp papers at Salem. The stamp paper was purchased on 08.04.2003 and the Will was executed on 09.04.2003. The attestors have clearly given evidence with regard to the execution of Will. Therefore, there is nothing to suspect genuineness of Will on the ground that stamp paper was purchased at Salem by Sundaram.

14. The defendants examined DW.4 with regard to the execution of Exs.D8 and D9 - settlement deeds by the first defendant. He had stated that the Will dated 09.04.2003 was produced before him by the first defendant at the time of preparation of settlement deeds and he prepared the settlement deeds and mentioned that the property came to be possessed by the first defendant through her husband though it was not specifically stated that she derived title through the Will. May be by oversight, the existence of the Will might not have been mentioned in Exs.D8 and D9 settlement deeds. However, it was stated that the property belonged to first defendant through her husband, by implication, meaning that she got title through Ex.D7-Will. When the execution of Ex.D7-Will is clearly proved through the evidence of DW.2 and DW.3, who are the attestors to the Will, the omission to mention its existence in Exs.A2 and A3 settlement deeds and Exs.A4, A5 and A7 documents will in no way create any doubt with regard to the genuineness of Ex.D7-Will. The trial Court elaborately assessed and discussed the evidence and came to the right conclusion that Ex.D7-Will is a genuine Will, whereby Sundaram bequeathed the suit property to the first defendant, his wife. The first defendant, in turn, had executed Exs.D8 and D9 settlement deeds in favour of defendants 2 and 3. In view of the finding that Ex.D7-Will is true and valid Will, the trial Court found that the plaintiffs are not entitled for claiming partition of 1/5 share in the suit property, which in the considered view of this Court is correct. In this view of the matter, this Court finds no reason to interfere with the judgment and decree of the trial Court.



15. Accordingly, judgment and decree dated 15.03.2012 made in O.S.No.45 of 2010 by the Principal District Judge, Dharmapuri, is confirmed and this Appeal is dismissed. Considering the relationship between the parties, the parties are directed to bear their own costs.

Sd/-
Deputy Registrar(R)

//True copy//

Sub Assistant Registrar

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To

The Principal District Judge,
Dharmapuri.

Copy To

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

+1cc to Mr.V.Sekar, Advocate SR.No.10091

+1cc to M/s.Sarvabhauman Associates, Advocate SR.No.9806

A.S.No.216 of 2013

SSI(CO)
GMY(09/11/2021)