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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.01.2021

CORAM

THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM

C.M.A.No.1993 of 2012

M.P.No.1 of 2012

- 1.Sarada @ Nagammal
- 2.Rajamani
- 3.Selvambal
- 4.Maheswari

...Appellants/Plaintiffs

Vs.

- 1.Dhanasekaran
- 2.Dhanalakshmi
- 3.Malathi
- 4.Balu
- 5.Raju @ Varadaraja Pillai
- 6.Pappayi
- 7.Amudha @ Boopathi
- 8.Vasantha

...Respondents 1 to 5/  
Defendants 1,2,10,11,12

...Respondents 6 to 8/Defendants 4,6,7

Prayer : Civil Miscellaneous Appeal filed under Order 43 Rule 1 (u) of CPC, to set aside the judgment and decree dated 30.09.2011 in A.S.No.9 of 2011 on the file of the Additional District Court (Fast Track Court No.1) Salem, setting aside and remand back the judgment and decree dated 23.07.2010 in O.S.No.367/2003 on the file of the Principal Sub-Court, Salem.

For Appellants : Mr.R.Meenal

For Respondents: Mr.P.Jagadeesan for R1 to R5

No Appearance for R6

J U D G M E N T

The Judgment and Decree passed in A.S.No.9 of 2011 dated 30.09.2011 is sought to be set aside in the Civil Miscellaneous Appeal.



2. The appellants are the plaintiffs, who instituted a suit for declaration and recovery of possession based on the three Wills marked as documents in the suit. The suit was decreed in favour of the appellants by the trial Court and in the first appeal, the Appellate Court remanded the matter back to the trial Court for verification of the thumb impression of the executor of the three Wills.

3. The learned counsel for the appellants reiterated that the appellants had established the genuinity of the Will before the trial Court and the signature of the executants were also verified and a decree was passed in favour of the appellants. Thus, the first Appellate Court has committed an error in remanding the matter back to the trial Court for verification of the signature of the executor of the Will. The learned counsel for the appellants further contended that the signature was admitted during the trial and the suit was decreed in favour of the appellants. While so, there is no valid reason for the first Appellate Court to remand the matter back to the trial Court.

4. The learned counsel for the appellants is of the opinion that even if a doubt arises in respect of the signature of the executor, the first Appellate Court itself would have verified the signature instead of remanding the matter back to the trial Court.

5. The learned counsel for the respondents objected the said contention by stating that the three Wills were executed by way of an impersonation and serious doubts are raised by the defendants even before the trial Court. The trial Court, without considering the grounds raised by the defendants, decreed the suit in favour of the appellants. The first Appellate Court rightly arrived a conclusion that there is a doubt in respect of the signature of the executor of the Will and therefore, there is no reason to interfere with the judgment and the Civil Miscellaneous Appeal is liable to be dismissed.

6. It is relevant to consider the findings of the first Appellate Court for remanding the matter back to the trial Court to verify the signature of the said Chinammal. The findings of the trial Court are that "Ex.B13 to Ex.B15 Wills are registered Wills and the Testatrix died merely 7 years after the execution of Ex.B15 Will. The exclusion of the plaintiffs in the Will cannot be considered as unnatural, because of the fact that the first plaintiffs was the rival of Chinammal and plaintiffs 2 to 4 are the children of the rival through her husband. Therefore, the natural inclination to bequeath the properties should be only in favour of the children born through her natural sister. It is admitted fact that D.W.1 and D.W.2 are the children of the natural sister of Chinammal. If really the defendants 1 and 2



wanted to create the Will, they could have stopped with a single Will. Nobody would trouble themselves with the creation of three Wills. Ex.B13 to Ex.B15 Wills are prior to Ex.A14 Will. However, there is no mention about the Ex.B13 to Ex.B15 Wills in Ex.A14 Will. It is admitted by the plaintiffs that the defendants 1, 2 and 10 to 12 are in actual and constructive possession of the suit properties, thereby meaning they were enjoying the suit properties in pursuance of Ex.B13 to Ex.B15 Wills. However, these factors are not considered by the trial Court.

The Trial Court also found in agreement with the suggestion of the plaintiffs that some one might have impersonated Chinammal in the execution of Ex.B13 to Ex.B15 Wills. Therefore, this Court is of the considered view that the apprehension that some one might have impersonated Chinammal should be removed while proving these Wills. As already stated that the appellants/defendants 1, 2 and 10 to 12 filed I.A.No.319/11 for comparing the disputed thumb impression in Ex.B13 to Ex.B15 with admitted thumb impression of Chinammal. In the facts and circumstances of this case, I.A.No.319/11 is allowed and with a view send the disputed thumb impression of Chinammal in Ex.B13 to Ex.B15 to the finger print Expert to compare with admitted thumb impression of Chinammal and give an opportunity to prove Ex.B13 to Ex.B15 Wills on the basis of scientific evidence. The Judgment and decree of the trial Court passed in this suit is set aside and the case was remanded to the trial Court for sending Ex.B13 to Ex.B15 Wills along with the documents containing admitted thumb impression of Chinammal (to be produced by the defendants 1,2, 10 to 12) for the comparison of Finger Print Expert and to decide the matter accordingly".

7. This Court is of the considered opinion that the doubt raised by the respondent before the first Appellate Court was rightly considered by the first Appellate Court. Even a semblance of doubt with reference to the signature in a Will is to be verified and if necessary, through scientific methods, in view of the fact that the three different Wills were executed and based on the Will, the suit for declaration and possession is filed. Therefore, it is necessary that the genuinity of the Will is of paramount importance to confer the right on the plaintiff regarding the suit properties. Thus, the signature in a Will must be established beyond any pale of doubt. In the present case, a doubt has been raised by the defendants even before the trial Court. However, the trial Court though verified, has not scientifically proved the thumb impression of the said Chinammal and arrived a conclusion that the Will is a genuine document. The first Appellate Court has rightly gone to those documents and made a finding that the thumb impression of



the said Chinnammal is to be verified through an Expert. When there is a doubt regarding the thumb impression, the option would be available to send the same to the opinion of the Expert so as to arrive a conclusion that the Will is a genuine document. The allegation of impersonation was raised by the respondents before the trial Court. Under these circumstances, the cogent finding arrived by the first Appellate Court is in accordance with law and the genuinity of the Will is to be verified and the same was not done by the trial Court, while passing the Judgment and decree in favour of the appellant.

8. The learned counsel appearing on behalf of the appellant raised an objection mainly on the ground that the respondents had filed an application before the first Appellate Court in order to prolong and protract the issues. In the event of remanding the matter back to the trial Court, parties has to suffer as dismissal of the suit and again filing an appeal would cause prejudice and will take long time.

9. There is a force in the arguments advanced in this regard by the learned counsel appearing on behalf of the appellant. It is relevant that under Section 107 CPC, the first Appellate Court empowered to take additional evidence or to require such evidence to be taken. Sub Clause (d) of Section 107 CPC is unambiguous in this regard. Therefore, the first Appellant Court itself is empowered to refer the signature to the handwriting expert and if necessary take evidence and decide the issues. Even under Sub Clause-3, the first Appellate Court can frame the additional issues for the purpose of deciding the dispute between the parties to the first appeal. This being the powers conferred on the first Appellate Court regarding the examination of further evidences or scrutinization of the documents. This Court is of the considered opinion that lapses can be filled by the first Appellate Court itself. Order 41 Rule 33 CPC is clear in this regard that the first Appellate Court could be exercising the powers of the trial Court and it is in continuation of the original suit filed.

10. This being the principles, this Court is of the considered opinion that exercise of sending the disputed signature for verification through handwriting expert and examination of witnesses and evidences if necessary shall be done by the first Appellate Court itself and by framing additional issues if necessary. Under these circumstances, instead of remanding the matter back to the trial Court, the first Appellate Court is directed to complete the exercise of the process of verification of the signature and thumb impression in the disputed Will as well as examine the witnesses if necessary by providing opportunity to all the parties to



cross examine etc., and decide the issues on merits and in accordance with law and dispose of the first appeal on merits.

11. Accordingly, the judgment and decree dated 30.09.2011 passed in A.S No.9 of 2011 is set aside and the matter is remanded back to the first Appellate Court for disposal of the appeal on merits and in accordance with law. The first Appellate Court is requested to dispose of the appeal as expeditiously as possible and preferably within a period of six months from the date of receipt of a copy of this judgment. The parties to the appeal suit are directed to co-operate for the earlier disposal. Unnecessary adjournments are to be rejected by the Court. Adjournments on genuine grounds can be granted by recording the reasons for such an adjournment.

12. In the result, the Civil Miscellaneous Appeal stands allowed. No costs. Consequently, connected miscellaneous petition is also closed.

Sd/-  
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

ssb/uma  
To

1. The Additional District Judge,  
(Fast Track Court No.1),  
Salem.

2. The Principal Sub-Judge,  
Salem.

+1cc to Mrs.R.Meenal, Advocate Sr.1078  
+1cc to Mr.P.Jagadeesan, Advocate Sr.1380

C.M.A.No.1993 of 2012  
M.P.No.1 of 2012

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