



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.06.2021

CORAM:

THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

S.A. No.1307 of 2007

Rathnavel ... Appellant/1st Defendant

Versus

1. Thamilarasi
2. Uma ... Respondents 1 & 2/Plaintiffs
3. Aiyammal
4. Mahalakshmi
5. Saroja
6. Tamilarasi ... Respondents/Defendants 2 to 6

Prayer : Second Appeal filed under Section 100 of the Civil Procedure code, against the judgment and the decree dated 23.02.2007 made in A.S. No.145 of 2006 on the file of the Principal Subordinate Judge, Salem confirming the Judgment and decree in O.S. No.958 of 2004, dated 08.03.2006 on the file of II Additional District Munsif, Salem.

For Appellant : Mr.M.Devaraj

For Respondents : Mr.S. Karthikeyan for R1 & R2
- No appearance
R3 & R4 - Died - Time expired
R5 & R6 - Served - No appearance

JUDGMENT

(Heard through Video Conference)

Heard Mr.M.Devaraj, learned counsel for the appellant and also perused and examined the materials and evidence available on record.

2. This Second Appeal has been filed challenging the concurrent findings of the Courts below.

3. The Appellant is the first defendant in the suit O.S. No.958 of 2004 on the file of the II Additional District Munsif, Salem. The respondents 1 and 2 are the plaintiffs in the said suit. The remaining respondents are the tenants in the suit property. The appellant / first defendant and the



first and second respondents in the Second Appeal are siblings born to Irusayee and Dasappan. The suit was filed for partition by the respondents 1 and 2 against the appellant seeking their share of the property in the suit schedule property. The appellant / first defendant contested the suit by filing the written statement stating that even prior to the filing of the suit, a registered Will dated 06.06.1991 was executed in his favour by his mother Irusayee and by virtue of the same he is the absolute owner of the suit schedule property. The respondents 1 and 2 disputed the same before the Trial Court.

4. Before the Trial Court, the respondents 1 and 2 / plaintiffs filed 8 documents, which were marked as Exs.A1 to A8 and on the side of the appellant / 1st defendant, 15 documents were filed, which were marked as Exs.B1 to B15. On the side of the respondents 1 and 2 / plaintiffs, two witnesses were examined viz., the first respondent / plaintiff as PW1 and the second respondent / plaintiff as PW2. On the side of the appellant / first defendant, three witnesses were examined, viz., DW1, the appellant herein, S.Nachiappan as DW2 and Jagannathan as DW3.

5. Before the Trial Court only one of the attesting witness viz., S.Nachiappan to the Will, dated 06.06.1991, Ex.B15 was examined as a witness by the appellant / first defendant, though there were two attesting witnesses in the alleged Will, Ex.B15. The Attesting witness in his deposition before the Trial Court has categorically during his cross examination has deposed that he is not aware as to whose favour the alleged Will, dated 06.06.1991 (Ex.B15) was executed.

6. The Trial Court after giving due consideration to the materials and evidence available on record has rejected the contention of the appellant / first defendant and decreed the suit in favour of the respondents 1 and 2 and passed a preliminary decree in favour of the respondents 1 and 2 by which, they were entitled to 2/3rd share in the suit schedule property and the remaining 1/3rd share was allotted to the appellant / first defendant. Aggrieved by the same, the appellant / first defendant preferred an appeal before the Principal Subordinate Court, Salem in A.S. No.145 of 2006.

7. The Lower Appellate Court also confirmed the decree passed by the Trial Court in OS. No.958 of 2004 after giving a finding based on the materials and evidence available on record that there is no merit in the appeal. Aggrieved by the same, the appellant / first defendant has preferred this Second Appeal.

8. The appellant / first defendant has raised the following substantial questions of law in the Second Appeal :



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a) Whether the Courts below are right in coming to the conclusion that Ex.D15 was executed in suspicious circumstances even after the fact that the DW2 has deposed that he had attested the Will after the same being executed and further was present even during the time of the registration of the Will. When the Will clearly says that the bequeath is made in the sound disposing state of mind that too 9 years prior to the date of the death of the Testator.

b. Whether the findings of the Courts below regarding Ex.B15 is correct in view of the fact that the Testator had the capacity to make the Will and when the same has been registered, the execution is also proved.

c. Whether the courts below are correct in disbelieving Ex.B15, which was shown to have been properly executed and attested as per Section 63 of the Succession Act. Further the same was also registered which proves the fact of the execution of the will.

d. Whether the lower appellate court misread and misapplied the evidence available on record.

9. The Trial Court as well as the Lower Appellate Court based on the materials and evidence available on record has come to the conclusion that Ex.B15, the disputed Will dated 06.06.1991 was executed in suspicious circumstances and rejected it outright. Admittedly in the cross examination of DW2, the attesting witness to the Will dated 06.06.1991, he has deposed that he is not aware as to whose favour, the said Will, Ex.B15 was executed. The appellant / first defendant has admittedly examined only one attesting witness. He has not examined the remaining attesting witness nor has he examined the scribe to the Will to prove his case that the Will was executed in his favour by his mother. The appellant / first defendant and the respondents 1 and 2 are siblings. The Trial Court has also observed while decreeing the suit in favour of the respondents 1 and 2 that initially, the appellant / first defendant had disputed that the respondents 1 and 2 were the children of Irusayee and thereafter had backtracked by conceding that they are infact her children.

10. Section 63 of the Indian Succession Act, 1925 reads as follows:

63. Execution of unprivileged Wills - Every testator, not being a soldier employed in an expedition or engaged in actual warfar [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules :-

a) the testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

b) The signature or mark of the testator, or the



signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has been some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of the witnesses shall 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.

11. As seen from the aforesaid Section, the attesting witness himself must have seen the Testator signing the Will and only in his /her presence, he will have to attest the Will. The Will shall also be attested by two witnesses.

12. This Court has also perused and examined the cross examination of the attesting witness (DW2), wherein, he has admitted that he does not know in whose favour the Will dated 06.06.1991, Ex.B15 was executed. While that be so, it is for the appellant / first defendant to prove his case that there is a registered Will executed in his favour. The burden of proof has been shifted to the appellant / first defendant once the respondents 1 and 2 / plaintiffs have disputed the existence of any Will and the attesting witness, during his cross examination has deposed that he does not know in whose favour the Will was executed. The appellant / first defendant has miserably failed to establish before the Courts below by letting in proper evidence to show that a Will dated 06.06.1991, Ex.B15 was indeed executed in his favour by his mother Irusayee.

13. This Court has also perused and examined the evidence available on record and does not find any infirmity in the findings of the Tribunal. This Court while exercising powers under Section 100 of Civil Procedure Code cannot reverse the findings of the Courts below, which is based on materials and evidence available on record as the findings cannot be faulted with. There is absolutely no substantial question of law involved and further there are also no debatable issues, which on the face of it, calls for interference. Hence, there is no merit in the Second Appeal. Accordingly, this Second Appeal is dismissed. No costs.

Sd/-
Deputy Registrar (CS)

//True copy//

<https://hcservices.ecourts.gov.in/hcservices/>

Sub Assistant Registrar



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To

1. The Principal Subordinate Judge, Salem.
2. The II Additional District Munsif, Salem.
3. The Section Officer, VR Section, High Court, Madras.

S.A. No.1307 of 2007

BS (CO)
GMY (21/10/2021)