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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.12.2021

DELIVERED ON : 23.12.2021

CORAM:

THE HONOURABLE MR.JUSTICE R. PONGIAPPAN

S.A.No.101 of 2010

Kalamani

... Appellant/Plaintiff

Vs

1.Nagarajan

2.Kamala

... Respondents/Defendants

Prayer : The Second Appeal is filed under Section 100 of C.P.C. against the judgment and decree dated 13.11.2008 in A.S.No.56 of 2007 on the file of the Principal District Court, Salem, confirming the judgment and decree dated 20.06.2007 in O.S.No.46 of 2005 on the file of the Sub Court, Mettur.

For Appellant : Mr.N.Manokaran

For Respondents : Mr.C.Prakasam

JUDGMENT

This appeal is focused as against the judgment and decree dated 13.11.2008 passed in A.S.No.56 of 2007 by the learned Principal District Judge, Salem in confirming the judgment and decree dated 20.06.2007 passed in O.S.No.46 of 2005 by the learned Subordinate Judge, Mettur.

2. For the sake of convenience, hereinafter the parties are called as per their litigative status before the trial Court.

3. The laconic averments found in the plaint are as follows:

3.1. The suit properties originally belonged to one Nachiappa Gounder and he was in possession and enjoyment of the suit properties till his lifetime. The said Nachiappa Gounder had died leaving his only son Chellamuthu. Being the reason that the plaintiff is the daughter of Chellamuthu she is entitled to



half share in the properties left out by her grandfather Nachiappa Gounder and the remaining half share will go to her father. Her father had kept one Dhanabackiyam as a mistress and through her, the defendants were born. Hence, the defendants are illegitimate children born to Chellamuthu. The defendants may claim share in the half share of the property of their father along with the plaintiff and that she is entitled to $4/6^{\text{th}}$ share and the remaining $2/6^{\text{th}}$ share should go to the defendants. The plaintiff asked the defendants to divide the properties through mediators, but the defendants did not come forward to divide the properties and postponing the division of properties by giving some lame excuses.

4. The averments found in the written statement filed by the first defendant, which was adopted by the second defendant are as follows:

4.1. The suit properties originally belonged to Nachiappa Gounder and he had executed a Will dated 07.04.1993 in favour of the first defendant. The testator Nachiappa Gounder died on 15.11.1993 and after his demise, the Will came into force and the first defendant is enjoying the properties by changing the patta and therefore, the plaintiff cannot claim any right, title or interest over the properties as a legal heir of her father Chellamuthu Gounder. Chellamuthu had married the defendants' mother after the death of his first wife and that their mother was not kept as mistress of Chellamuthu, and it was a lawful marriage between Chellamuthu and their mother. Out of his own volition and out of love and affection, the said Nachiappa Gounder had executed a Will in favour of the first defendant. Therefore, the plaintiff cannot file a suit for partition.

5. Based on the above averments, the trial Court framed necessary issues and tried the suit. On the side of the plaintiff, the plaintiff examined herself as P.W.1 and marked 14 documents as Exs.A1 to A14. Similarly, on the side of the defendants, the first defendant examined himself as D.W.1. He examined the attestors of the Will as D.W.2 and D.W.3 and one Society Staff as D.W.4, and marked 16 documents as Exs.B1 to B16. Apart from those documents Exs.X1 and X2 were marked.

6. Having considered the materials placed before him, the learned Subordinate Judge, Mettur came to the conclusion that the plaintiff is not entitled to the relief of partition and ultimately dismissed the suit.



7. Aggrieved over the same, the plaintiff filed an appeal in A.S.No.56 of 2007 before the Principal District Judge, Salem, wherein, the learned Principal District Judge, Salem, after elaborate enquiry, by judgment and decree dated 13.11.2008 confirmed the findings arrived at by the trial Court and dismissed the appeal. Feeling aggrieved over the same, the plaintiff is before this Court with the present second appeal.

8. At the time of admission, this Court had formulated the following substantial questions of law:

(1) Whether the Courts below are justified in accepting Ex.B2(Will) without following the established legal principle that beneficiary of the Will should prove the intention of the testator, especially when the remaining legal heirs are denied their legitimate share?

(2) Whether the Courts below are correct in assessing the genuineness of Ex.A2 when the guardian of the beneficiary was not examined to prove the intention of the testator?

(3) Whether the Courts below are justified in rejecting Exs.A6 to A9 and Exs.A12 to A14, which would prove the plaintiff's joint possession of the suit property, especially when the Lower Appellate Court is the final Court of fact?

9. Heard the learned counsels appearing on both sides and perused the materials available on record.

10. It is the case of the plaintiff that by succession, the plaintiff is entitled to 4/6th share in the suit schedule property. On the other hand, it is the case of the defendants that Nachiappa Gounder, who is the grandfather of the plaintiff as well as the defendants, during his lifetime had executed a Will (Ex.B2) dated 07.04.1993, through which he bequeathed the entire suit property to the first defendant. Since at that time the first defendant was minor, he appointed one Subramanian as guardian to the first defendant. Subsequently, on 15.11.1993, the said Nachiappa Gounder died and thereafter the suit schedule properties came to the hands of the first defendant and till now, he is in possession and enjoyment of the suit properties.

11. It is the contention raised by the learned counsel for the appellant that some circumstances, which appeared in respect of the execution of the Will, create a doubt as to whether the

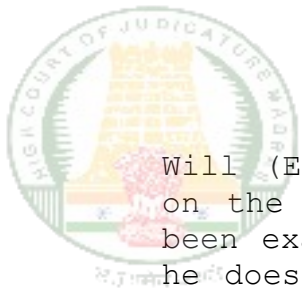


alleged Will (Ex.B2) was executed by Nachiappa Gounder in sound state of mind or not. He would further submit that D.W.2 and D.W.3 are the close relatives of the first defendant, who are alone stand as witnesses on the side of the defendants. The plaintiff is the motherless child at the time of execution of the Will, but in respect of the same, the deceased Nachiappa Gounder did not say anything about the position of the plaintiff and therefore, the same creates a doubt as to whether the alleged Will was executed within the knowledge of the testator or not.

12. The learned counsel appearing for the appellant/plaintiff would further submit that after the death of the testator in the year 1993, till filing of the suit, the first defendant has not taken any steps to change the entries made in the revenue records pertaining to the suit property. The said circumstances are, sufficient to disbelieve the execution of the Will and therefore, the findings arrived at by the Courts below is erroneous one.

13. Per contra, the learned counsel appearing for the respondents/defendants would contend that, in the pleadings set out in the plaint, the plaintiff has not challenged the validity of the Will and therefore, it is not correct to challenge the same in the subsequent stage. More than that, since the deceased Chellamuthu married the mother of the defendants after the death of his first wife, it cannot be said that the defendants are the illegitimate children. His further submission is that non mentioning the plaintiff in the Will is not a sufficient ground to disbelieve the Will. According to him, immediately after the death of Nachiappa Gounder, on 11.02.1998, vide Ex.B3, the first defendant had submitted an application before the Revenue authorities for changing the name in the Revenue records, therefore, it cannot be said that mutations are not effected immediately.

14. Now, on considering the said submissions with relevant records, admittedly, the suit schedule properties were belonged to one Nachiappa Gounder. His wife Arukkani gave birth to one Chellamuthu. The said Chellamuthu married one Saraswathi, who is the mother of the plaintiff. After the death of the said Saraswathi in the year 1991, Chellamuthu got married to one Dhanabackiam, who is the mother of the defendants 1 and 2. Being the reason that the Chellamuthu married the Dhanabackiam after the death of Saraswathi, it cannot be said that the defendants 1 and 2 are the illegitimate children born to Chellamuthu and Dhanabackiam. Secondly, it is not in dispute that the alleged



Will (Ex.B2) is a registered Will, in order to prove the same, on the side of the defendants, the attestors of the Will have been examined as D.W.2 and D.W.3. Though D.W.3 gave evidence as he does not know about the contents of the Will, in respect of the execution of the Will, the evidence given by D.W.1 is not having any significant factor, which creates a suspicious circumstances. Accordingly, in terms of Section 68 of the Indian Evidence Act, the defendants had proved the Will before the trial Court.

15. Further the registration of the Will gave an additional strength to the defendants' case. In fact, in the pleadings set out in the plaint, the plaintiff has not challenged the validity of the Will. Even after knowing the fact that the defendant had alleged that there was a Will dated 07.04.1993, by way of denying the same, the plaintiff has not filed any reply statement. Therefore, in the absence of any denial, this Court cannot hold that the alleged Will is not a genuine one. In other words, the appointment of the guardian is not the sole reason to disbelieve the entire Will.

16. Though it was contended on the side of the plaintiff that the mutation was not effected till 2004, as rightly pointed out by the learned counsel appearing for the defendants that immediately after attaining majority, on 11.02.1998 itself, the first defendant had submitted an application before the Revenue authorities for changing the entries in the revenue records. So in all, the sequence of events narrated by the defendants does not create any suspicious circumstances over their case.

17. The learned counsel for the appellant would rely on the judgment of the Hon'ble Apex Court reported in 2020 (4) CTC 321 (Shivakumar and others vs. Sharanabasappa and others), wherein, the Hon'ble Apex Court issued guidelines in respect of the acceptance of Will. The relevant portion is extracted below:

"11. For what has been noticed hereinabove, the relevant principles governing the adjudicatory process concerning proof of a Will could be broadly summarised as follows:-

1. Ordinarily, a Will has to be proved like any other document; the test to be applied being the usual test of the satisfaction of the prudent mind. Alike the principles governing the proof of other documents, in the case of Will too, the proof with



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9. In the ultimate analysis, where the execution of a Will is shrouded in suspicion, it is a matter essentially of the judicial conscience of the Court and the party which sets up the Will has to offer cogent and convincing explanation of the suspicious circumstances surrounding the Will."

18. Now on relying upon the guidelines issued in the above referred judgment, here it is the case that the suspicious circumstances now indicated by the appellant is not up to the level of creating a strong circumstances to disbelieve the Will. Of course, the plaintiff has filed some documents alleging that they supplied the sugarcane to the Ponni Sugars and Chemicals Ltd., alleging that the said sugarcane was raised in the said land, which is in her possession. The said documents were marked as Exs.A6 to A9 and A12 to A14, and those documents alone would not be sufficient to prove plaintiff's possession over the properties. In other words, since the Will was executed at that time the first defendant was minor, appointing one relative as guardian is a formal one and the same is not a reason for disbelieving the Will. More than that the Genealogy tree now shown by the plaintiff, would go to show that the first defendant alone is the male member in the family of Nachiappa Gounder. Therefore, it is natural and also a custom at that time on the part of the testator to give his property to the male member. In other words it is not the case of the plaintiff that she is an unmarried girl and also residing in his father's house after her marriage. Those aspects gave an additional strength that the said Nachiappa Gounder, with sound state of mind, executed the alleged Will.

19. The another one contention raised by the learned counsel for the appellant is that the testator is having the habit to put his signature in anywhere, but in the alleged Will, only the thumb impression of Nachiappa Gounder was found and the same is one of the circumstances for disbelieving the case of the first defendant.

20. Now on considering the said submission, here it is a case, before the trial Court, D.W.4 - Mr.Elangovan gave evidence to the effect that the said Nachiappa Gounder is having the habit of marking his thumb impression. In order to substantiate the same, he has produced a copy of the 'Pravesa Puthagam' and the application for loan. Now on going through the said documents, the deceased Nachiappa Gounder affixed his thumb impression in the year 1977 itself. Therefore, the evidence



given by D.W.4 concludes that the deceased Nachiappa Gounder is having the habit of putting his signature as well as thumb impression. Therefore, the said circumstance narrated by the appellant, is also not sufficient to disbelieve the stand taken by the defendants.

21. Of course, in the concurrent findings arrived at by the Courts below, it is not necessary for this Court to interfere with the factual findings arrived at by the Courts below. Herein also the learned counsel for the appellant did not indicate a special circumstance, which necessarily warranting interference in the findings arrived at by the trial Court. Accordingly, I am of the view that no Substantial Questions of Law arises in this appeal.

22. In the result, this Second Appeal stands dismissed. No costs.

SD/-
ASSISTANT REGISTRAR

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SUB ASSISTANT REGISTRAR

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To

1.The Principal District Judge,
Salem.

2.The Subordinate Judge,
Mettur.

+1cc to Mr.N.Manokaran, Advocate Sr.69325

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