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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 30.11.2021

PRONOUNCED ON : 07.12.2021

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

S.A.No.868 of 2011

Ranganathan

... Appellant/Plaintiff

Vs.

1. Chinnasamy

2. Arjunan

3. Rajamanickam

4. Murugan

5. Dharmalingam

... Respondents/Defendants

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Code of Civil Procedure, against the Judgment and decree dated 31.07.2009 made in A.S.No.12 of 2008 on the file of the learned Principal Subordinate Judge, Krishnagiri, confirming the judgment and decree dated 31.08.2007 made in O.S.No.56 of 2006 on the file of the learned District Munsif cum Judicial Magistrate, Pochampalli.

For Appellant : Mrs.V.Srimathi

For Respondents : Mr.J.Hariharan
for Mr.V.Nicholas

J U D G M E N T

The present Second Appeal is directed against the Judgment and decree dated 31.07.2009 made in A.S.No.12 of 2008 on the file of the learned Principal Subordinate Judge, Krishnagiri, confirming the judgment and decree dated 31.08.2007 made in O.S.No.56 of 2006 on the file of the learned District Munsif cum Judicial Magistrate, Pochampalli.



2. The appellant/plaintiff has filed a suit as against the defendants before the learned District Munsif cum Judicial Magistrate, Pochampalli, in O.S.No.56 of 2006, seeking the relief of declaration, declaring that the plaintiff is the absolute owner of the suit property and for consequential permanent injunction. The learned District Munsif cum Judicial Magistrate, Pochampalli, by judgment and decree dated 31.08.2007, dismissed the suit in entirety.

3. Challenging the same, the appellant/plaintiff preferred an appeal in A.S.No.12 of 2008 on the file of the learned Principal Subordinate Judge, Krishnagiri. The learned Principal Subordinate Judge, Krishnagiri, by judgment and decree dated 31.07.2009 dismissed the appeal and confirmed the findings arrived at by the learned District Munsif cum Judicial Magistrate, Pochampalli. Being dissatisfied with the same, plaintiff is before this Court with the present Second Appeal.

4. For the sake of convenience hereinafter the appellant is called as 'plaintiff' and the respondents are called as 'defendants'.

5. The laconic averments made in the plaint, are as follows:

(i) The suit property originally belonged to one Kali Gounder. He sold the same to only Kutty @ Mariyappa Gounder, who is the father of the plaintiff and defendants 1, 3 to 5, by virtue of the registered sale deed under Document No.745/1964. After made purchase, the said Mariyappa Gounder was in possession and enjoyment of the suit schedule property by paying the kist to the Government. On 22.09.2000, he executed a Will, in favour of the plaintiff through which, he bequeathed the suit property to the plaintiff. After the execution of the said Will, he died on 07.12.2003.

(ii) Thereafter, after the death of the said Mariyappa Gounder, the plaintiff took possession of the suit property. Patta has also been changed in the name of the plaintiff. He spent a huge amount for improving the said property and cultivating the periodical crops. The defendants have no right, title or interest in the suit schedule property. On 08.07.2006, the defendants attempted to trespass into the suit property and the same was managed by the plaintiff. Now, the defendants are claiming right over suit properties. Hence, the suit.

6. The case of the defendants, as averred in the written



statement, is as follows:

(i) The suit property was purchased by the father of the plaintiff in the capacity of the Kartha. After made purchase, the suit property is under the enjoyment of plaintiff, defendants 1 and 3 to 5. The Will dated 22.09.2000, has not been executed by the said Mariyappa Gounder in a sound disposal state of mind. The same was created by the plaintiff to grab the properties which are due to the defendants. By playing fraud under suspicious circumstances, the plaintiff recently altered the revenue records, without the knowledge of the defendants. Only after filing of suit, the defendants came to know about the evil design of the plaintiff.

(ii) The defendants have obtained a loan by pledging the suit mentioned properties at Co-operative Bank. The defendants are in joint possession and having equal rights in the suit property. It is false and imaginary that the defendants attempted to trespass and tried to take forcible possession of the suit property. The Defendants 4 and 5 have served in Indian Army till 2001 and 2003, respectively and they are law abiding citizens. Hence the suit filed by the plaintiff is liable for dismissal.

7. Based on the above pleadings, the learned District Munsif cum Judicial Magistrate, Pochampalli, framed necessary issues and tried the suit. On the side of the plaintiff, five witnesses were examined as PW1 to PW5 and seven documents were exhibited as Ex.A1 to Ex.A7. Similarly, on the side of the defendants, three witnesses were examined as DW1 to DW3 and three documents were marked as Ex.B1 to B3.

8. Having considered the materials placed before him, the learned District Munsif cum Judicial Magistrate, Pochampalli, came to the conclusion that the alleged Will dated 22.09.2000, is not proved as required by law and ultimately, vide judgment and decree dated 31.08.2007, dismissed the suit filed by the plaintiff. In the appeal preferred by the plaintiff, the learned Principal Subordinate Judge, Krishnagiri, confirmed the findings arrived at by the trial Court and dismissed the appeal.

9. Feeling aggrieved over the concurrent findings of the Courts below, the plaintiff is before this Court with this present second appeal. When the second appeal is taken up for admission, this Court formulated the following substantial questions of law.



Whether the Courts below are right in disbelieving the Will, when the execution was proved by examining PW3 to PW5?

10. Heard Mrs.V.Srimathi, the learned counsel appearing on behalf of the appellant/plaintiff and Mr.J.Hariharan, the learned counsel appearing on behalf of the respondents/defendants and perused the materials available on record.

11. Initially, on going through the background of the plaintiff's case, it is not in dispute that the property in question was purchased by the father of the plaintiff. In respect to his legal heirs, while at the time the plaintiff herein gave evidence as PW1, has stated before the trial Court that his father gave birth to eight children. He had further stated that apart from the defendants, he had two sisters viz., Anjiammal and Neela.

12. In the said circumstances, on going through the plaint it seems that the said Anjiammal and Neela are not added as a party in the present suit. Since the suit has been filed for the relief of declaration in respect to the property purchased by one Kutty @ Mariyappa Gounder, who is the father of the plaintiff, it would be necessary to add all the legal heirs of the said Kutty @ Mariyappa Gounder, as a party to the proceedings. Therefore, non inclusion of the sisters of the plaintiff, is nothing but fatal to the case of the prosecution and on that score alone, the suit is liable for dismissal.

13. Further, it is the case of the plaintiff that the suit schedule property was purchased by his father and afterwards during his life time, in a sound state of mind, he executed a Will in his favour. The further case of the plaintiff is that after the death of his father, the alleged Will executed by his father came into effect and thereupon, mutations are effected in the revenue records. Only in the said circumstances, the defendants who are the brothers of the plaintiff denied the rights having by the plaintiff and attempted to interfere with the possession of the plaintiff.

14. Therefore, it is apparent that for availing the relief of declaration and injunction, it is necessary for the plaintiff to prove the Will dated 22.09.2000, alleged to be executed by his father. The trial Court as well as the first appellate Court while at the time of deciding the said issue raised, came to the conclusion that the alleged Will has not been proved in terms of Section 63 to 69 of the Indian Evidence



Act and therefore, the relief sought by the plaintiff cannot be granted in his favour.

15. In respect to the said findings, the learned counsel appearing for the appellant, contended that the Will dated 22.09.2000, alleged to be executed by Kutty @ Mariyappa Gounder was a registered one. In order to prove the Will, before the trial Court, on the side of the plaintiff, the attesters were examined as PW2 to PW4 and the scribe has also been examined as PW5. Though, the evidence given by PW2 is eschewed, when at the time PW3 and P4 gave evidence, before the trial Court they clearly narrated the execution of the Will as the Kutty @ Mariyappa Gounder put his signature in the Will in their presence. Therefore, it cannot be held that the Will alleged to be executed by Kutty @ Mariyappa Gounder is not proved in terms of Sections 63 of the Indian Evidence Act.

16. The learned counsel after contending as above, relied on the judgment of this Court in J.Mathew (died) and others Vs. Leela Joseph, reported in 2007 (5) CTC 318, wherein the Division Bench of this Court, has held as follows:

"23.....in Rani Purnima Debit and another v. Kumar Khagendra Narayan Deb and another, AIR 1962 SC 567:

"23. There is no doubt that if a will has been registered, that is a circumstance which may, having regard to the circumstances, prove its genuineness...."

17. Further, the learned counsel for the appellant/plaintiff referred to the judgment in Dhanpat Vs. Sheo Ram (Deceased) through Lrs. And others, reported in AIR 2020 SC 2666, wherein our Hon'ble Apex Court has held as follows:

"23. In view of the aforesaid judgments, at least one of the attesting witnesses is required to be examined to prove his attestation and the attestation by another witness and the testator. In the present case, DW-3 Maha Singh deposed that Chandu Ram had executed his Will in favour of his four grandsons and he and Azad Singh signed as witnesses. He deposed that the testator also signed it in Tehsil office. He and Azad Singh were also witnesses before the Sub-Registrar. In the cross-examination, he stated that he had come to Tehsil office in connection with other documents for registration. He deposed that Ex.D-4-the





attesting witness at least has been called for the purpose of proving its execution.

23. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law. Similarly, Sections 59 and 63 of the Indian Succession Act, also relevant.

24. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by Will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context.

25. Section 63 requires that the testator shall sign or affix his mark to the Will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a Will.

26. However, there is one important feature which distinguishes Wills from other documents. Unlike other documents the Will speaks from the death of the testator, and so, when it is propounded or produced before a Court, the testator who has already departed the world cannot say whether it is his Will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last Will and testament of the departed testator. Even so, in dealing with the proof of Wills, the Court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will.

27. Ordinarily when the evidence adduced in support of the Will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated. There may, however, be cases in which the execution of the Will may be surrounded by suspicious circumstances.

28. Here, it is a case, though the evidence given by PW3 to PW5 are in support of the plaintiff's case, particularly, in



respect to the signature put by the testator, their cross examination and other circumstances creates a doubt, whether the testator executed the alleged Will in a sound state of mind or not.

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29. In this occasion, the first point now indicated by the learned counsel appearing for the respondents / defendants is that it is not necessary for the testator to go to Jolarpettai and execute the Will, since in Pochampalli itself, wherein the deceased Mariyappa Gounder was residing, the Sub Registrar's office exists.

30. It is true, the evidence given by PW1 would show that his father was residing near to Pochampalli. In Pochampalli there exists a Sub Registrar's Office. Further, the District Registrar's Office, to the said Sub Registrar's Office, is situated at Krishnagiri.

31. In the said occasion, after avoiding the above referred places the testator went to Jolarpettai and after inviting PW3, executed a Will. More than that in respect to the execution of the Will, PW3 gave evidence as he did not know about any information given by the testator for preparing the Will. Further, he states that he does not know about the property whether the same was purchased by the testator or not. Accordingly, the said evidence would go to show that PW3, is not present at the time of execution. Since the Will pertains to the case has not been executed on the own handwriting of the testator, the evidence given by PW3 would definitely not amount to proof of execution.

32. Before the trial Court, one another attester Loganathan was examined as PW2. He has also given his evidence before the Court that he does not know the contents of the Will and about the nature of property bequeathed in favour of the plaintiff. The said evidence also would create a doubt whether he was present at the time of executing the Will or not.

33. The one another important aspect which has to be decided in this appeal is that the plaintiff gave evidence as his father is having the habit of putting his signature. On the other hand, on going through the Will under dispute, it seems only the thumb impression of the testator was obtained in the Will. In this regard, PW1 gave evidence as due to old age, the testator has not signed in the Will and the said evidence also creates a doubt whether the testator at the time of executing the Will, was in a sound state of mind. Accordingly, the Courts below decided the issue in the same line and observed as the Will has not been proved as required by the law.



34. Hence, in the light of the above discussions, the substantial question of law, is answered in favour of the respondents/defendants and the present second appeal is dismissed. The judgment and decree dated 31.07.2009 made in A.S.No.12 of 2008 on the file of the learned Principal Subordinate Judge, Krishnagiri, is confirmed. No Costs.

Sd/-

Assistant Registrar(CS-IX)

//True Copy//

Sub Assistant Registrar

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To

1.The Principal Subordinate Judge,
Krishnagiri.

2.The District Munsif cum Judicial Magistrate,
Pochampalli.

Copy To

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

+lcc to Mr.V.Nicholas, Advocate SR.No.64591

+lcc to Mr.V.Raghavachari, Advocate SR.No.64200

S.A.No.868 of 2011

SPD(CO)
GN(28/12/2021)