



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 05.10.2021

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)No.1182 of 2005

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K.Jagadeesan @ Allikannan

... Appellant / Respondent /
Plaintiff

Vs.

1. T.Kanthiah
2. Petchiammal

... Respondents / Appellants /
Defendants

Prayer: Second appeal filed under Section 100 of C.P.C., against the judgment and decree made in A.S.No.36 of 2003 on the file of the Sub Judge, Kovilpatti, dated 30.08.2005, reversing the judgment and decree of the District Munsif, Kovilpatti, made in O.S.No.225 of 1998, dated 27.02.2003.

For Appellant : Mr.H.Arumugam,
for Mr.S.Kumar

For Respondents : Mr.B.Rajesh Saravanan
* * *

J U D G M E N T

The plaintiff in O.S.No.225 of 1998 on the file of the District Munsif, Kovilpatti, is the appellant in this second appeal.

2. The suit was filed for the relief of declaration that the suit first schedule belongs to the plaintiff and for recovery of the suit second schedule from the defendants' possession. The case of the plaintiff is that the suit schedule originally belonged to his grandmother Smt.Shanmugavadivammal. She is the plaintiff's grandmother. She had purchased the suit property under three sale deeds dated 03.10.1960, 30.12.1966 and 08.08.1967(Ex.A.1 to Ex.A.3). The suit property has been classified as Natham. Shanmugavadivammal's son, namely, Kathalingam got married to Smt.Alphonse Mary. The plaintiff was born to them. The plaintiff was brought up as a Christian. Later, he got converted to Hinduism in the year 1979. Since Kathalingam abandoned and neglected the family and left the matrimonial home and was leading a wayward life, the plaintiff's grandmother executed an unregistered Will dated 24.12.1973 bequeathing the suit schedule property in favour of the plaintiff. Shanmugavadivammal passed away on 05.03.1976. Thereafter, the Will came into force and the plaintiff also took possession of the same. While so, when the plaintiff was planning to put up a new building in the suit schedule property, he faced obstructions from the defendants. The plaintiff would further allege that sometime in January 1999, the defendants occupied the eastern portion of the



suit first schedule and put up a wooden shed. Therefore, the present suit came to be laid.

3. The defendants are husband and wife. The second defendant filed written statement controverting the plaint averments. The case of the defendants is that the suit property originally belonged to Shanmugavadivammal. However, the execution of the Will dated 24.12.1973 in favour of the plaintiff was denied. According to the defendants, after the demise of Shanmugavadivammal, the suit property devolved on her son, namely, Kathalingam. He was the only son of Shanmugavadivammal. Kathalingam executed a registered sale deed dated 09.12.1998 conveying the suit 2 ½ cents of land forming a major portion of the suit first schedule in favour of the second defendant. The defendants called for dismissal of the suit.

4. Based on the divergent pleadings, the learned trial Munsif framed the necessary issues. The plaintiff examined himself as P.W.1. The suit Will was marked as Ex.A.16. One Gandhiammal and Muthiah are shown as the attesting witnesses. Gandhiammal was examined as P.W.2. The plaintiff's mother Alphonse Mary was examined as P.W.3. Ex.A.1 to Ex.A.18 were marked. The first defendant examined himself as D.W.1. One Meenakshi was examined as D.W.2. Ex.B.1 to Ex.B.5 were marked. An Advocate Commissioner was appointed and his report and plan were marked as Court Exhibit 1 to 3. After a consideration of the evidence on record, the trial Court by judgment and decree dated 27.02.2003, decreed the suit as prayed for. Aggrieved by the same, the defendants filed A.S.No.36 of 2003 before the Sub Court, Kovilpatti. The first appellate Court by judgment and decree dated 30.08.2005, allowed the appeal and reversed the decision of the trial Court and dismissed the suit. Challenging the same, this second appeal came to be filed.

5. This second appeal was admitted on the following substantial question of law:-

“ Whether the lower appellate Court is right in holding that the Will Ex.A.16 was not proved? ”

6. Heard the learned counsel on either side.

7. The learned counsel appearing for the appellant submitted that there can be no dispute that the suit property originally belonged to Shanmugavadiammal. She obtained title over the suit property under Ex.A.1 to Ex.A.3. Since her only son Kathalingam was leading a wayward life, she executed Ex.A.16 Will dated 24.12.1973. The suit Will was duly proved by the plaintiff by examining P.W.2 Gandhiammal, one of the attestors. The learned counsel submitted



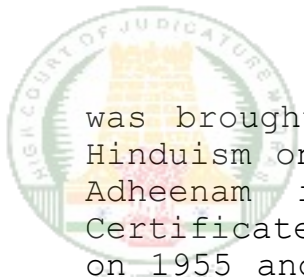
first appellate Court without any justification reversed the same. He called for answering the substantial question of law in favour of the appellant and set aside the impugned judgment and decree and restore the decision of the trial Court.

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8. Per contra, the learned counsel appearing for the respondents submitted that the suit Will is a fabricated document. He submitted that following the demise of Shanamugavadivammal, the title over the suit property devolved only on her son. The second defendant had purchased major portion of the suit property under Ex.B.5 dated 09.12.1998 for valuable consideration. There is no dispute that the plaintiff's mother was a Christian. Her name was Alphonse Mary. He would further state that Shanmugavadivammal was a Christian and therefore, even assuming the suit Will is true and genuine, it ought to have been probated. The first appellate Court chose to reject Ex.A.16, since it has not been probated. He would also state that the parties are neighbours. After selling the suit property in favour of the second defendant, the defendants' vendor Kathalingam had set up his son to institute the present suit. That is why, the first appellate court came to the conclusion that there is collusion between the plaintiff and his father. He would also state that Ex.A.16 is written on a stamp paper which has been purchased in the name of one Selvan from Tirunelveli. When the parties are residing at Kayathar, it is improbable that the stamp papers would have been purchased in the name of one Selvan, Tirunelveli. Since the suit was instituted in the year 1998, in order to confer a veneer of credibility, a old stamp paper was somehow unearthed and a Will had been fabricated. He would submit that the finding that the suit Will is not genuine is essentially a question of fact. He would also submit that exercising jurisdiction under Section 100 of Cr.P.C., this Court ought not to disturb such a factual finding. He would further add that the question of law formulated cannot be called as a question of law much less a substantial question of law. In this regard, he placed reliance on the decision of the Hon'ble Supreme Court reported in (1999) 9 SCC 248 (NALINAKSHI N.RAI AND OTHERS V. INDIRA SHETTY).

9. I carefully considered the rival contentions and went through the evidence on record.

10. There is no dispute that the suit property originally belonged to the plaintiff's paternal grandmother Smt.Shanmugavadivammal. She had purchased the same under Ex.A.1 to Ex.A.3. The only question that arises for consideration is whether Ex.A.16 suit Will has been proved or not. The trial court came to the conclusion that the plaintiff had proved Ex.A.16 and decreed the suit. The first appellate court had reversed the said decision by holding that Ex.A.16 has not been proved. The specific case of the plaintiff is that his father Kathalingam had left the matrimonial



was brought up as a Christian and thereafter he was converted to Hinduism on 11.11.1979. Ex.A.4 is the certificate issued by Madurai Adheenam in this regard. Ex.A.5 is the plaintiff's S.S.L.C. Certificate and it can be seen therefrom that the plaintiff was born on 1955 and his religion is shown as Christian. Since the plaintiff has propounded Ex.A.16 document, the burden to prove the same lay entirely on him. Section 68 of the Indian Evidence Act, 1872 sets out the mode of proof. If a document that has to be proved is a Will, it has to be proved by examining atleast one of the attesting witnesses, if the attester is alive and is subject to the process of the Court. As per Ex.A.16, two persons are said to have attested Ex.A.16; one is Gandhiammal and the other is Muthiah. Gandhiammal was examined as P.W.2. A careful perusal of her testimony indicates that she had withstood the cross examination by the defendants and her testimony could not be shaken at all. Merely because Ex.A.16 is written on a stamp paper purchased in the name of one Selvan, Tirunelveli, it could not be considered as a suspicious document. During the relevant time, a Will can be written even on a plain paper and it did not require any stamp duty. A Will requires to be attested by two witnesses and it must have been executed by the testator. In this case, Ex.A.16 Will does have two witnesses and through one of the attesting witnesses, the Will had been proved. What reinforces the confidence of the Court is marking of Ex.A.15. It is the specific case of the plaintiff that Ex.A.15 corresponds to the suit property. Ex.A.15 pertains to Survey No.721/44. The case of the plaintiff is that it corresponds to new survey number. It clearly probabalise that if Ex.A.16 Will was never executed following the demise of Shanmugavadivammal, the suit property would have devolved on her son Kathalingam and Ex.A.15 would have reflected only in the name of the plaintiff's father. The fact that the plaintiff's name has reflected in Ex.A.15 evokes the confidence of this Court. Though Ex.A.7 does not relate to the suit property, it is the adjacent house belonging to the plaintiff which also stands in the name of the plaintiff and not in the name of the father. Ex.A.7 is the building approval plan given by the local body. The plaintiff submitted an application dated 02.12.1998 and the local body had granted permission on 09.12.1998. Ex.B.5 was executed by the plaintiff's father in favour of the second defendant on the same date (ie.,) on 09.12.1998. If really the suit property belonged to the plaintiff's father, the plaintiff could not have submitted the application to the local body. Thus the combination of circumstances clearly indicates that Kathalingam, the plaintiff's father was not residing with the family and that he had left the matrimonial house. In fact the plaintiff's mother P.W.3 Alphonse Mary was also examined as a witness. No women would step into the witness box and make a statement for the sake of few cents of land that she was abandoned by her husband. The first appellate Court had given utterly irrelevant reasons for holding that the suit Will has not been proved. Since the finding of the trial Court has been set aside by assigning irrelevant reasons, the substantial question of law arises as to who is the owner of the suit property. The trial Court has found in favour of the appellant.



11. The impugned judgment and decree passed by the first appellate Court are set aside and the decision of the trial Court is restored. This second appeal is allowed. No costs.

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Assistant Registrar (CS-II)

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Sub Assistant Registrar(CS)

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Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

1. The Sub Judge,
Kovilpatti.
2. The District Munsif,
Kovilpatti.
3. The Record Keeper, V.R.Section,
Madurai Bench of Madras High Court, Madurai. (2 Copies)

+1 CC to M/s.B.RAJESH SARAVANAN, Advocate (SR-31570[F]
dated 07/10/2021)

+1 CC to M/s.S.KUMAR, Advocate (SR-31639[F] dated 07/10/2021)

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