



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 07.09.2021

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)No.907 of 2005

and

C.M.P. (MD)No.5911 of 2005

WEB COPY

1.Esther Packiathai
2.Koil Joseph
3.Athisaya Raj
4.Christopher
5.Lalitha
6.Phiyala

... Appellants/Appellants/
Defendants

Vs.

Chella Mariyal

... Respondent/Respondent/
Plaintiff

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree made in A.S.No.10 of 2005, dated 30.06.2005 on the file of the Principal District Court, Tirunelveli, confirming the judgment and decree made in O.S.No.251 of 2001 dated 28.07.2004 on the file of the Principal Sub Court, Tenkasi.

For Appellants : Mr.H.Arumugam
For Mr.S.Kumar

For Respondent : Mr.S.A.Ajmal Khan,
For Mr.Sulthan Alowdhin

JUDGEMENT

The defendants in O.S.No.251 of 2001 are the appellants in this second appeal. The appeal arises out a suit for partition. The suit properties belonged to one Andrews Andrea. He married one Janaki and through her begot the plaintiff Chella Mariyal and one Elizabeth Rani. After the demise of Janaki, Andrews Andrea got married to Esther Packiathai. Through the second marriage, he begot three sons and two daughters. Andrews Andrea passed away on 05.11.2001. The plaintiff, who was born through the first wife claimed 1/9th share in the suit properties. The defendants filed written statement controverting the plaint averments. According to them, before his demise, Andrews Andrea had executed a registered Will dated 23.06.2000 (Ex.B1) bequeathing all the properties in favour of the first defendant/Esther Packiathai, who was his second wife. Based on the divergent pleadings, the trial Court framed the necessary issues.



2.The plaintiff examined herself as P.W.1, one Packiamuthu was examined as P.W.2, one Lingam, who was said to have executed the suit Will was examined as P.W.3. Exs.A1 to A3 were marked. The first defendant examined herself as D.W.1. One of the attestors of the Will was examined as D.W.2. D.W.3/Palani was examined to testify regarding the mental capacity of the testator. Exs.B1 to B3 were marked.

3.After a consideration of the evidence on record, the trial Court disbelieved the suit Will and granted preliminary decree allotting 1/9th share in favour of the plaintiff. Aggrieved by the same, the defendants filed A.S.No.10 of 2005 before the Principal District Court, Tirunelveli. By the impugned judgment and decree dated 30.06.2005, the appeal was dismissed and the decision of the trial Court was confirmed. Challenging the same, this second appeal came to be filed.

4.The second appeal was admitted on the following substantial question of law:-

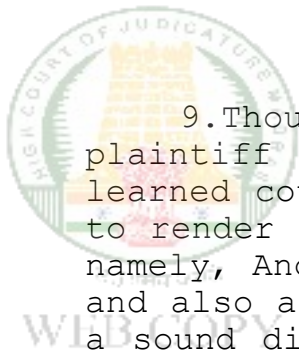
"Whether the Courts below are right in holding that the execution of the Will dated 23.06.2000 is not legally proved by the appellants?"

5.Heard the learned counsel on either side.

6.The learned counsel appearing for the appellants reiterated all the contentions set out in the memorandum of grounds and called upon this Court to answer the substantial question of law in favour of the appellants and set aside the impugned judgments and decrees and dismiss the suit.

7.Per contra, the learned counsel appearing for the respondent submitted that the Courts below have concurrently held that the suit Will propounded by the defendants was not established. Since it is a pure question of fact, this Court exercising jurisdiction under Section 100 of Civil Procedure Code may not interfere with such a concurrent finding of fact. He called upon this Court to dismiss the second appeal.

8.I carefully considered the rival contentions and went through the evidence on record. The learned counsel appearing for the appellants even before commencing his submissions made it clear that dehors the outcome of the second appeal, the appellants are ready to give 1 acre and 25 cents of land on the eastern side of the fourth schedule comprised in Survey No.1311/2. The first appellant/Esther Packiathai has also filed an affidavit to this effect. The same is taken on record.



9. Though this should substantially address the concerns of the plaintiff and the matter could be disposed of on this basis, the learned counsel appearing for the appellants called upon this Court to render adjudication on merits also. The father of the plaintiff namely, Andrews Andrea was the Vice President of the local panchayat and also a member of the local pastorate committee. That he was in a sound disposing state of mind till the very end is spoken to by D.W.3/Palani, a panchayat staff. The question that arises for consideration is whether the suit Will dated 23.06.2000 was proved by the defendants. Since the defendants propounded the said Will, the burden to prove the same lay only on them. Section 68 of the Indian Evidence Act and Section 63 of Indian Succession Act are the relevant provisions.

10. Section 68 of the Indian Evidence Act reads as follows:

"Proof of execution of document required by law to be attested. -If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence: 1[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]"

11. Section 63 of the Hindu Succession Act reads as follows:-

"63 Execution of unprivileged Wills. -Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [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 seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other

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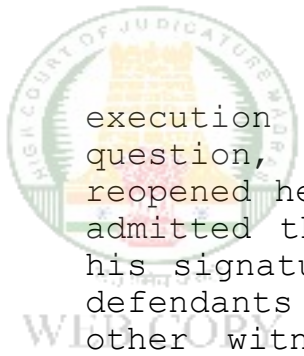
each of the witnesses shall sign the Will in



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."

12.Ex.B1 was attested by one Kovilpandi and one Lingam. Kovilpandi was examined as D.W.2. D.W.2 deposed that the testator/Andrews Andrea asked him to be a witness in the Will to be executed by him. Accordingly D.W.2 went to the office of the scribe on 23.06.2000 at about 10.00 a.m. D.W.2 further deposed that based on the instructions given by Andrews Andrea, the scribe wrote down the Will. Thereafter, he read the contents of it. Thereafter, Andrews Andrea signed at the foot of each page of the Will. He clearly stated that the scribe, Lingam as well as himself (D.W.2) saw the testator affixing his signature in each page of the Will and thereafter, he signed as an attester. When the attester affixed the signature, the same was duly witnessed by the testator as well as the scribe and also the other witness namely, Lingam. In other words, the testimony of D.W.2 indicates that all the ingredients set out in Section 63 of the Indian Succession Act were fully satisfied. D.W.2 was cross examined. During the course of the cross examination, D.W.2 stated that Lingam was brought by the testator by himself and that D.W.2 did not have any acquaintance with the said Lingam. The cross examination was more on the mental condition of the testator. In fact the signature attributed to the testator was also disputed. But no serious question was posed as regards the role played by Lingam, the other witness. D.W.2 was cross examined on 20.04.2004. The defendants evidence was completed on 26.04.2004. Thereafter, the plaintiff's side was reopened and the other attester namely, Lingam was examined as P.W.3. P.W.3 was examined on 16.07.2004 after the plaintiff's side was reopened. P.W.3 admitted that the signature found in Ex.B1 was his signature. He however stated that he did not witness anybody affixing their signatures. He claimed that he went to the office of the scribe for private purpose and based on the request of the scribe, he put his signature. The courts below have held that the suit Will was not proved only in the light of the testimony of P.W.3/Lingam.

13.As rightly pointed out by the learned counsel for the appellants, the Courts below have failed to take into account Section 71 of the Indian Evidence Act, 1872. The said provision reads that if the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence. In the case on hand, the defendants have not only filed the original Will but also examined one of the attestors. The testimony of the attester/Kovilpandi is in total consonance with Section 63 of the Indian Succession Act. Thus, the defendants have already proved the Will as contemplated under Section 68 of the Indian Evidence Act. It is significant to note that no suggestion was put to D.W.2 that the other witness/Lingam did not witness the



execution of the Will. Without putting any such suggestion or question, after the defendants' side was closed, the plaintiff reopened her side and examined the said Lingam on her side. Lingam admitted that the signature found in Ex.B1/suit Will is very much his signature. After so admitting, he undermined the case of the defendants by stating that he did not witness the testator or the other witnesses putting their signature in the document. The question is whether merely because Lingam/P.W.3 had not chosen to support the defendants, the suit Will can be said to have been not proved. The Courts below ought to have invoked Section 71 of the Indian Evidence Act. Merely because one of the attesting witness did not support the case of the propounder, that would not automatically mean that the Will was not proved. The Courts below ought to have seen that whether the propounder has proved the Will by other evidence. In this case, the propounder had examined a direct witness namely, one of the attestors of the Will. The original Will has been marked. The Will is also a registered document. That it was a registered document carries with a presumption of validity (vide AIR 1995 SC 1852 (PPK Gopalan Nambair v. PPK Balakrishnan Nambiar and Others in Paragraph Nos.4 and 5). The plaintiff initially submitted that she was not aware as to who was this Lingam. Only after the defendants' side was closed, she reopened her side and examined him on her side. Lingam does not appear to be a credible witness. The Courts below ought to have held that the suit Will was established by the propounder by producing the original Will and by examining D.W.2. Since the Courts below have lost sight of the mode of proof set out in Section 71 of the Indian Evidence Act, I answer the substantial question of law in favour of the appellants. The judgments and decrees of the Courts below are set aside. However, in view of the undertaking affidavit filed by the first appellant, there will be a decree in favour of the plaintiff allotting 1 acre and 25 cents on the eastern side of Survey No.1311/2 in Sivalarkulam Village, Alangulam Taluk, Tenkasi District (Item No.4 in the suit schedule). As and when the plaintiff applies for measurement and demarcation of the property now allotted to her, she would extend her fullest cooperation.

14.The second appeal is disposed of on these terms. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-I)

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Sub Assistant Registrar(CS)

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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 Principal District Court,
Tirunelveli.

2.The Principal Sub Court,
Tenkasi.

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V.R. Section,
Madurai Bench of Madras High Court,
Madurai. (2 COPIES)

+1 CC to M/s.SULTHAN ALOWDHIN, Advocate (SR-28734[F] dated
09/09/2021)

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