



A.S.No.420 of 2013

THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
08~03~2022	24~06~2022

CORAM :

THE HONOURABLE MRS.JUSTICE S. KANNAMMAL

A.S.No.420 of 2013

Uma

... Appellant

Vs.

1. Smt.Akalya

2. R.Manikandan

... Respondents

PRAYER: Appeal Suit is filed under Section 96 r/w. Order 41 Rule 1 of the Civil Procedure Code, to set aside the Judgment and Decree in O.S.No.298 of 2009 on the file of the Principal District Court, Erode, dated 22.07.2013.

For Appellant

: Mr.V.Raghavachari

For Respondents

: Mr.T.M.Hariharan for R1



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J U D G M E N T

The first defendant in the suit viz., O.S.No.298 of 2009 has filed this appeal, challenging the preliminary decree passed by the Principal District Judge, Erode, for partition of the suit properties into two equal shares and allotment of one such share to the plaintiff and also restraining the defendants from alienating or encumbering the suit properties to strangers till final partition is effected.

2. The brief facts leading to the filing of this Appeal Suit are as follows :

2.1. The plaintiff and the first defendant are daughters of one C.S.Ramasamy Iyer and the second defendant is the son of the first defendant. The said C.S.Ramasamy Iyer died on 01.11.1995, leaving behind his wife Tmt.Alamelu Ammal and two daughters, who are the plaintiff and the first defendant in the suit. After his death, his wife and two daughters became entitled to 1/3 share each in the suit properties. On 06.02.2001, Tmt.Alamelu Ammal, mother of the plaintiff, executed a Will, Ex.A-1, while she was in sound and disposing state of mind and bequeathed her share in the suit properties to the plaintiff. Since the



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plaintiff is the younger daughter, out of love and affection, Alamelu

Ammal executed the Will in respect of her share. After the death of Alamelu Ammal on 05.04.2004, the Will, dated 06.02.2001 came into effect and the plaintiff is entitled to 2/3 share and the first defendant is entitled to the remaining 1/3 share.

2.2. The plaintiff and the first defendant are in joint possession and enjoyment over the properties. After some time, there were misunderstandings between the plaintiff and the first defendant with regard to getting of loan from Thindaimalai Co-operative Bank. The first defendant, without the consent of the plaintiff, mortgaged the separate property of the plaintiff, which necessitated the plaintiff to issue notice to the bank. The circumstances warranted that the plaintiff and the first defendant cannot enjoy the suit property in common. Therefore, the plaintiff demanded the first defendant for partition of the suit properties. But, the first defendant was not amenable for partition and she wanted to enjoy her legitimate share. While so, the second defendant, who is the son of the first defendant, proclaimed that he is entitled to the suit property as per the Will, Ex.B-1, said to be executed by C.S.Ramasamy



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Iyer on 11.01.1995, which is not true, valid and genuine. The said C.S.Ramasamy Iyer was not in sound and disposing state of mind and he was not in a position to understand the things on 11.01.1995 and even before long time. The above Will has been fraudulently fabricated by the first defendant and his relatives. Hence, the plaintiff filed the suit for partition and separate possession.

3. The first defendant, filed a written statement, stating as under :

3.1. Mr.C.S.Ramasamy Iyer executed a Will, Ex.B-1, on 11.01.1995 in favour of the second defendant and also a sale deed in favour of one Mahesh. Subsequently, Mr.C.S.Ramasamy Iyer himself sent a reply to the plaintiff for the legal notice issued by her, stating that he has executed those documents. In the reply Notice, Mr.C.S.Ramasamy Iyer has also signed. This fact clearly indicates that Mr.C.S.Ramasamy Iyer, during his life time, admitted the execution of the Will.

3.2. The first defendant was staying with Mr.C.S.Ramasamy Iyer and taking care of him. Nothing was unnatural in executing the Will in favour of his grandson, who was all along living with Mr.C.S.Ramasamy Iyer. The conduct of plaintiff in not filing the suit in spite of legal notice



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of the year 1995 till 2009 clearly shows that the Will is true and valid.

The plaintiff has not challenged the sale deed executed by the said C.S.Ramasamy Iyer to one Mahesh on 11.01.1995 in the suit. The plaintiff suppressed the legal notices issued in the year 1995 and filed the suit. Ex.B3 and Ex.B4, letters of the plaintiff, clearly indicate that the first defendant and her husband have contributed huge amount for construction of the house in the name of the plaintiff. The plaintiff was also given some house property. Exs.B7 to Ex.B9, namely, Property Tax Receipts, Water Tax Receipts and Electricity Receipts, clearly show that only the first defendant and her son are in possession and enjoyment of the suit property. As the Will has been challenged after 12 years, the plaintiff is not entitled to any share in the suit properties. Ex.A.1, the alleged Will, dated 06.02.2001 executed by her mother is not proved in the manner known to law. Since Ex.B.1, Will, has been proved, the plaintiff cannot rely upon Ex.A.1, Will, to claim share through her mother. The plaintiff has not proved that the Ramasamy Iyer was not in good health at the time of execution of Ex.B.1, Will, in favour of the second defendant. Hence, she prayed for dismissal of the suit.



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4. Based on the above pleadings, the trial court framed the following issues for consideration :

- 1. Whether the Plaintiff is entitled to relief of partition and separate possession as claimed in the plaint?*
- 2. Whether Alamelu Ammal executed a Will, dated 06.02.2001, is true?*
- 3. Whether C.S.Ramasamy Iyer executed a registered Will, dated 11.01.1995, in favour of second defendant, as alleged ?*
- 4. To what relief, if any, the plaintiff is entitled ?*

5. On the side of plaintiff, P.Ws.1 to 3 were examined and Exs.A-1 to A-5 were marked. On the side of defendants, D.Ws.1 to 3 were examined and Exs.B-1 to B-9 were marked.

6. The Trial Court, after considering the oral and documentary evidence, and also the arguments of both sides, partly decreed the suit and passed a preliminary decree for partition of the suit properties into two equal shares and allotment of one such share to the plaintiff and also



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granted permanent injunction, retraining the defendants from alienating or encumbering the suit properties to third parties till final partition is effected. Challenging the above decree, the present appeal has been filed by the first defendant.

7. Mr.V.Raghavachari, learned counsel appearing for the appellant/first defendant, submitted that on 11.01.1995 Mr.C.S.Ramasamy Iyer conveyed his property to one Mahesh by a sale deed, Ex.A.4, and, on the same day, he executed a Will, Ex.B.1, bequeathing the remaining land to the second respondent/defendant. It is further submitted by the learned counsel that since both Sale Deed and Will were executed on the same day, the first respondent/plaintiff cannot challenge the Will on the ground of unsoundness. He would also submit that when the first respondent had not replied to Ex.B.2 (reply notice), even though the testator was alive more than eight months after the receipt of the aforesaid notice, the first respondent is estopped from denying the soundness of the testator on the date of execution of the Will. According to him, the first respondent/plaintiff, having knowledge of both the transactions even before the death of the testator, had not



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initiated any proceedings against the transactions within the limitation period and hence the suit was barred by limitation. It is also his submission that the first respondent very well knew about the execution and existence of the Will, Ex.B-1, and the second respondent taking possession of the property and enjoying the same with the knowledge of the first respondent for more than 14 years and since the present suit has been filed after the limitation period, it is not maintainable. He would further submit that the Court below ought to have seen that the Will of Thiru Ramasamy Iyer was proved by the appellant in a manner known to law specified in Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act; Exs.B.7 to Ex.B.9, property tax receipt, water tax receipt and electricity receipt clearly show the long and continuous enjoyment of the appellant after the demise of the father of the appellant and the first respondent, but the learned trial Judge has failed to see that the Will came into existence immediately after the demise of the testator and, hence, the judgement and decree passed by the Court below is liable to be set aside. In support of his contentions, the learned counsel has relied upon the decisions in (i) Dhanpat v. Sheo Ram, 2020 (16) SCC 209; (ii) Ramabai Padmakar Patil & Ors. v. Rukminibai Vishnu



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Vekhande & Ors., 2003 (8) SCC 537; (iii) Sumitra Devi Kochhar v. State, AIR 1999 DEL 226; (iv) Gurudev Kaur & Os. v. Kaki & Ors., 2007 (1) SCC 546; (v) Devayammal v. Poosappan & Ors., 2020 (1) LW 298; (vi) Dhanalakhmi v. Karuppasamy & Ors., 2019 (3) LW 115; and (vii) T. Sundaresa Pai & Ors. v. Sumangala T. Pai & Anr., AIR 2002 SC 317.

8. On the other hand, Mr.T.M.Hariharan, learned counsel for the first respondent/plaintiff submitted that the alleged Will, Ex.B-1, relied upon by the appellant, in favour of the second respondent is not true and valid; at the time of the said alleged Will, Mr.C.S.Ramasamy Iyer was aged about 85 years and he was bedridden due to fracture in hip and he was unable to walk; the attesting witnesses of the Will, dated 11.01.1995, are none other than the close relatives to the husband of the appellant; the sale deed was obtained in favour of one Mahesh, who is the son of one Narasimhan, who has also signed as one of the attesting witnesses; the Will has been created only to defeat the rights of the first respondent/plaintiff in the suit properties; there is no reason to exclude the first respondent/plaintiff from the suit properties; further, there was no dispute between the plaintiff and C.S.Ramasamy Iyer during his life



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time; the said fact clearly shows that the Will is shrouded with suspicious circumstances; the said C.S.Ramasamy Iyer was under the control of the appellant and her husband and their family members; therefore, C.S.Ramasamy Iyer voluntarily executing the Will in favour of the second respondent is highly doubtful; the evidence of the attesting witnesses, namely, D.Ws.2 and 3 clearly shows that the Will could not have been executed by Mr.C.S.Ramasamy Iyer voluntarily; and that the propounder has not dispelled the suspicious circumstances attached to the Will. The learned counsel further contended that the evidence of D.W.3 clearly indicates that in the year 1990 itself the house site had been acquired by Tamil Nadu Housing Board and, therefore, the said C.S.Ramasamy Iyer executing the Will in the year 1995 in respect of the property already acquired by Tamil Nadu Housing Board is highly improbable; the first respondent/plaintiff had already sent a legal notice on 30.01.1995, which has not been replied to by the appellant; only after the documents have been registered, a formal reply has been issued as if the reply has been issued by C.S.Ramasamy Iyer; the said C.S.Ramasamy Iyer would not have issued the reply notice, as the reply notice itself was issued only at the instructions of the appellant and the second



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respondent; therefore, the same cannot be construed as admission of C.S.Ramasamy Iyer as to the execution of the Will and the Will has not been proved in the manner known to law. According to the learned counsel, the first respondent/plaintiff has examined one of the attesting witnesses to prove the Will, Ex.A-1, executed by her mother on 06.02.2001; the said Will has been properly proved and hence the judgment and decree passed by the Court below does not require any interference and that the Appeal Suit is liable to be dismissed with costs.

9. I have heard the learned counsel for the parties and also gone through the records.

10. The point that arises for consideration in this appeal is, whether the first respondent/plaintiff is entitled to the decree, as granted by the trial Court ?

11. The appellant/first defendant and the first respondent/plaintiff are the daughters of C.S.Ramasamy Iyer, to whom the suit properties originally belonged. There is no dispute about that. C.S.Ramasamy Iyer



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died on 01.11.1995, leaving behind his wife Alamelu Ammal and two daughters, namely, the appellant/first defendant and the first respondent/plaintiff. Second respondent is the son of the appellant. Therefore, the properties of C.S.Ramasamy Iyer had to be devolved upon his three legal heirs, namely, wife and two daughters. Thereafter, the said Alamelu Ammal also died on 05.04.2004. When the situation remains thus, while it is the case of the appellant that Ex.B-1, Will, dated 11.01.1995, was executed by her father, namely, C.S.Ramasamy Iyer, in favour of her son, namely, the second respondent/defendant, bequeathing the suit properties, equally, the specific case of the first respondent is that her mother, namely, Alamelu Ammal executed Ex.A-1, Will, dated 06.02.2001, in her favour in respect of her 1/3 share and hence she is entitled to 2/3 share in the suit properties. However, the execution of the said Wills, namely, Ex.B-1, dated 11.01.1995, and Ex.A-1, dated 06.02.2001, is disputed by the parties. Under the circumstances, it is a *sine qua non* to examine the veracity of the Wills, namely, Exs.B-1 and Ex.A-1, for deciding the point involved in this appeal.



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12. The proof or validity of a Will has to be examined on the settled propositions of law, such as the evidence of the attestors, comparison of signatures of the testator, legal principles, intention of the testator and other circumstances.

13. As for Ex.B-1, Will, dated 11.01.1995, it is a registered document. According to the appellant, it was executed by her father in favour of her son, namely, the second respondent, bequeathing the suit properties. When a Will is executed, it should be out of the volition of the testator and it should not be shrouded with any suspicious circumstances. If a Will is shrouded with suspicious circumstances, the same have to be dispelled by the propounder and the beneficiary. Looked at from the above angle, if we see Ex.B-1, the entire suit properties are bequeathed by C.S.Ramasamy Iyer in favour of the second respondent, who is the son of the appellant, depriving the original legal heirs, namely, wife and two daughters, of their right to property, by way of inheritance. At this juncture, the execution of the document Ex.B-1 by C.S.Ramasamy Iyer certainly creates a suspicion in the eye of law. To prove the said document, the propounder and the beneficiary have to examine the



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attestors in the box. No doubt, D.Ws.2 and 3, who are the attestors of the

Will, have been examined and they spoke about the execution of the Will

by C.S.Ramasamy Iyer. However, unfortunately, the said attestors are

close relatives of the appellant. Their evidence also shows that all the

family members of the appellant/first defendant actively took part in the

execution of the Will. Therefore, the evidence of D.Ws.2 and 3, who are

interested witnesses, as to the execution of the Will cannot be weighed

upon. The first respondent/plaintiff had no avocation, whereas the

appellant was holding a Government job. There was no dispute between

the first respondent and her father during his life time. The exclusion of

the first respondent/plaintiff from the inheritance of the properties by

C.S.Ramasamy Iyer would indicate that the Will had not been executed

out of his own volition. There is also no reason in the Will to exclude the

first respondent from inheritance. In this regard, the contention of the

appellant is that the first respondent/plaintiff was already given a house

site by C.S.Ramasamy Iyer and, therefore, she was excluded from the

Will, which contention has been repelled by the first respondent/plaintiff,

stating that the said house site was acquired by Tamil Nadu Housing

Board in the year 1990 itself. If the contention of the appellant that the



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first respondent/plaintiff was given a house site is true, nothing prevented

C.S.Ramasamy Iyer to mention the same in Ex.B-1, Will. In the absence of such a recital in Ex.B-1, the contention of the appellant in this regard has no basis. The evidence of D.W.1, appellant, would clinchingly establish that at the time of execution of Ex.B-1, her father C.S.Ramasamy Iyer was aged over 80 years; he was bedridden with serious fracture in hip; not able to walk; and was under the control of the appellant and her family members. In that position, C.S.Ramasamy Iyer going to Sub-Registrar's Office and executing the Will would create a doubt with regard to voluntary disposition of the suit properties. Depriving the other daughter, namely, the first respondent/plaintiff, who had no job and other properties, in spite of love and affection towards her, would definitely cast suspicious circumstances to the Will. It is true, the Will has been registered and two attesting witnesses, who are close relatives, as aforesaid, have been examined, but, in the opinion of this Court, the attesting witnesses should not be interested. Mere registration of the Will is not enough to dispel the suspicion shrouded on the document. When D.W.1 herself admitted in his evidence that at the time of execution of the Will, her father C.S.Ramasamy Iyer was bedridden,



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D.W.2 would depose that C.S.Ramasamy Iyer came to the office of the Sub-Registrar with a stick. This also creates a grave doubt about his evidence with regard to the attestation of the document and disposing state of mind of C.S.Ramasamy Iyer at the relevant time. Further, D.W.1 has categorically stated in her evidence that Sale Deed and Will were simultaneously presented and registered one after another, whereas, the evidence of D.W.2 shows that only after registration of Sale Deed in favour of Mahesh, son of D.W.3, the Will was prepared in the office of the Document Writer at a later stage and, thereafter, it was registered at a different time. The evidence of D.W.2 in the chief examination is contradictory to the evidence in his cross-examination. D.W.3 has deposed that when they went to Sub-Registrar's Office, Sale Deed and Will were made ready. This clearly indicates the contradictions in the evidences of D.Ws. not only about the suspicious circumstances, but also about the execution of the Will voluntarily by C.S.Ramasamy Iyer. It is also important to note from the evidence of D.W.3 that the appellant, her husband, D.W.3 and mother of D.W.3 were living together in the same house. This would show that all the family members of the appellant were in dominant position of C.S.Ramasamy Iyer at the relevant time.



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Admittedly, C.S.Ramasamy Iyer was aged more than 80 years and bedridden with a fracture in hip. Therefore, it cannot be said that C.S.Ramasamy Iyer was healthy and in sound and disposing state of mind and he executed the Will. The evidence of D.W.3, in the chief examination, also does not approve of the valid attestation of the document as required under Section 63 of the Indian Succession Act, 1925. Also, Exs.B-3 and B-4, letters, indicate that after Ex.B-1, Will, there were some arrangements in the family and subsequently such arrangements were not complied with by the appellant/defendants. Aggrieved over the same, the suit was filed by the first respondent/plaintiff. Active participation of all the family members of the appellant also shows the suspicious circumstances attached to the Will and Will was the result of undue influence of the parties. The intention of the testator of the Will to exclude the first respondent/plaintiff from inheritance of the properties is also absent in the Will. Moreover, the second respondent, in whose favour the Will, Ex.B-1, is said to be executed, has not contested the suit and remained *ex parte*. It is only the appellant/first defendant that contested the suit. Therefore, Ex.B-1 cannot be accorded any legal sanctity.



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14. Considering the totality of facts and circumstances, this Court

is of the considered opinion that the propounder, namely, appellant/first defendant, and the beneficiary, namely, the second respondent have not dispelled the suspicious circumstances attached to the Will, particularly disinheriting the first respondent/plaintiff from any share in the suit properties, and, especially, when the second respondent has not entered into the box and remained *ex parte*. and, hence, Ex.B-1, Will, has not been proved in the manner known to law.

15. Adverting to Ex.A-1, Will, the stand of the first respondent/plaintiff is that her mother executed the same on 06.02.2001 and bequeathed her 1/3 share in the suit properties to her. It is also a registered document. To prove the said Will, she examined P.W.2, Ganesan. He would depose that he was owning an autorikshaw and the testatrix Alamelu Ammal used to travel in his autorikshaw; on 06.02.2001, the first respondent/plaintiff requested him to come to Sub-Registrar's Office to sign as an attesting witness in the Will; accordingly, on that day, at 09.30 a.m., he went to her house and from there they went to Sub-Registrar's Office along with one Devi; thereafter, they went to



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Document Writer's Office, where Alamelu Ammal gave details to the Document Writer; then the Will was prepared and Alamelu Ammal signed in the Will in their presence and the Will was registered. It is the specific case of P.W.2 that the Will was presented for registration in Sub-Registrar's Office on 06.02.2001 and the same was registered on the same day. But, on scrutiny of Ex.A-1, it is seen that the Will was presented for registration in Sub-Registrar's Office on 07.02.2001, i.e., the next day. Therefore, the evidence of P.W.2 that he was present in the Document Writer's Office on 06.02.2001 and attested the document and thereafter the same was presented for registration on the same day is highly doubtful and, as such, his evidence does not satisfy the proof of the Will, as required under law. Further, the other attesting witness, namely, Devi was not examined by the first respondent/plaintiff. Therefore, this Court is of the view that the first respondent/plaintiff has not proved Ex.A-1, Will, in the manner known to law.

16. Since Ex.B-1, Will, propounded by the appellant/first defendant and Ex.A-1, Will, propounded by the first respondent/plaintiff, have not been established as per law, in view of the fact that the appellant and the first respondent are Class I heirs, they are entitled to equal share



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in the suit properties, left out by their father, namely, C.S.Ramasamy Iyer.

Accordingly, the first respondent/plaintiff is entitled to one half share in the suit properties and she is entitled to the relief of permanent injunction as well.

17. All the above aspects were dealt with by the trial Court in detail and a preliminary decree was passed for partition of the suit properties into two equal shares and allotment of one such share to the first respondent/plaintiff. Permanent injunction was also granted, restraining the appellant and the second respondent/defendants from alienating or encumbering the suit properties to third parties until final partition was effected. Therefore, this Court does not find any infirmity or irregularity in the judgment and decree passed by the trial Court in O.S.No.298 of 2009, dated 22.07.2013.

18. The decisions relied upon by the appellant are on different facts and circumstances and hence they are not made applicable to this case.

19. For the foregoing reasons, this Appeal Suit is dismissed. No costs.

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To

1.Principal District Judge,
Erode.

2.V.R.Section,
High Court,
Madras.



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S. KANNAMMAL, J.

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