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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.01.2022

CORAM:

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

AS.No.423/2018 & Cross.Objn.No.60/2018

[Virtual Mode]

1.Sivabagiam

2.Sarojini

. Appellants/Respondents 1 & 2/Plaintiffs

Vs.

1.K.Shanmugam

...1st Respondent/Cross Appellant/
1st Defendant

2.M.Sivasamy

3.M.Aruchamy

.. Respondents 2 & 3/Respondents 3 & 4/
Defendants 2 & 3

Prayer:- Appeal Suit filed under Order 41 Rule 1 r/w Section 96 of CPC, to set aside the judgment and decree dated 30.01.2018 made in O.S.No.332/2013 on the file of the learned Third Additional District and Sessions Court, Coimbatore.

For Appellants

:Mr.N.Manokaran

(Appellants in AS.No.423/18 &
Respondents 1 & 2 in
Cross.Obj.60/18)

For Respondents

:Mr.A.E.Ravichandran

(1st Respondent in AS.423/18 &
Cross Appellant in Cross obj
60/18)

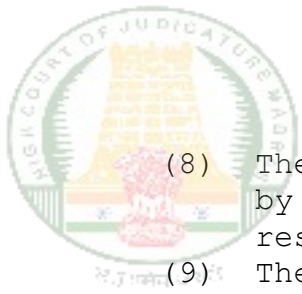
JUDGMENT

- (1) The plaintiffs in the Suit in O.S.No.332/2013 on the file of the learned III Additional District and Sessions Judge, Coimbatore are the appellants in this Appeal Suit.
- (2) The appellants/plaintiffs filed the Suit in O.S.No.332/2013 before the III Additional District Court, Coimbatore for partition and separate possession of 2/5th shares in the Suit properties and for consequential reliefs. Before going into the merits of the case, the genealogy showing the



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- relationship between the parties is necessary. One Muthusamy Gounder is the father of plaintiffs 1 and 2 and 1st defendant through his 1st wife Tmt.Pappammal who died on 01.03.1990. The defendants 2 and 3 are the children of late Muthusamy Gounder and his 2nd wife, Tmt.Palaniammal.
- (3) The Suit properties were described as Item Nos.1 and 2. While Item No.1 is described as landed property, Item No.2 is shown as a property in two parts. The 1st part of the property is referred to as S.No.1 and the 2nd portion is shown as S.No.2 in Item No.2 for all practical purposes. It is the case of the appellants that their father late Muthusamy Gounder acquired the properties.
- (4) The case of the plaintiffs in the plaint is that their father late Sri.Muthusamy Gounder acquired the Suit properties from out of his earnings in the name of his senior wife and elder son, 1st defendant.
- (5) It is their further case that their father Sri.Muthusamy Gounder died in the year, 1980 and that their mother Mrs.Pappammal died in the year, 1990. Stating that their parents died intestate living behind the plaintiffs and the 1st defendant being the legal heirs, the plaintiffs claimed 1/5th share to each. The Suit was contested by the 1st defendant by denying the specific averments in the plaint that the Suit properties were purchased by Sri.Muthusamy Gounder. It is the positive case of 1st defendant that the Suit 1st item was purchased by the 1st defendant out of his earnings. It is also stated that Serial No.1 of Item No.2 was also purchased by the 1st defendant out of his earnings however in the name of his mother Tmt.Pappamal and himself.
- (6) It is the further case of the defendant that Pappammal during her life time executed a registered Will dated 21.10.1989 bequeathing Item No.2 of the Suit schedule in favour of the 1st defendant out of her free Will and volition. It is further stated that out of the Suit properties the 1st item and some portions of the property in Suit 2nd item which are standing in the name of Pappammal, were sold to a stranger and that the Suit is barred by non joinder of necessary parties who are in possession and enjoyment of the property on the basis of the Sale Deeds which were executed even before the Suit was laid.
- (7) The Trial Court dismissed the Suit in so far as Suit 1st item and S.No.1 of 2nd item. The Suit for partition was partly decreed by granting 2/5th share in the property described as S.No.2 of item 2 of the plaint. Aggrieved by the judgment and decree of the Trial Court, the plaintiffs have preferred the present Appeal.



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- (8) The cross objection in Cross Objection No.60/2016 is filed by the 1st defendant as against the decree for partition in respect of S.No.2 of 2nd item in the Suit schedule.
- (9) The Trial Court framed an issue, whether the entire Suit properties are the self acquired properties of Muthusamy Gounder.
- (10) The Trial Court also framed an issue whether the Will alleged to have been executed by Pappammal in favour of 1st defendant on 21.10.1982 is valid and binding on plaintiffs. The other issues are whether the Suit is barred by non joinder of necessary parties and whether the Suit is bad for partial partition.
- (11) With regard to the title over the Suit properties, the Trial Court found that the Suit 1st item was purchased in the name of 1st defendant under Sale Deed dated 01.06.1975 which is marked as Ex.A1. The contention of plaintiffs that the Suit property was purchased in the name of Muthusamy Gounder was disbelieved by the Trial Court. Though an attempt was made by the plaintiffs to improve their case by claiming that properties were purchased out of the income that was generated out of the family business namely (Tiffin Center) conducted by Tmt.Pappammal and Palaniammal along with other family members, the Trial Court did not accept the case on the ground that the plaintiffs cannot put forth a new case which is contrary to the pleadings raised in the plaint. It is seen that defendants 2 and 3 remained ex parte before the Trial Court. With regard to S.No.1 of Item No.2, the Trial Court found that the Will executed by Tmt.Pappammal is true valid and binding on the plaintiffs and the Suit was decreed only in respect of S.No.2 of Item No.2, since the property in S.No.2 of Item No.2 was purchased by the father, Muthusamy Gounder jointly in his name and in the name of Pappammal. The appellants have raised several grounds questioning the findings of the Trial Court with regard to the Will.
- (12) Even though, an attempt was made before this Court by the learned counsel appearing for the appellants that the Suit schedule properties were purchased by father, Muthusamy Gounder in the name of 1st defendant and Tmt.Pappammal, the Trial Court found that no supporting evidence was let in to justify such arguments.
- (13) Learned counsel appearing for the appellant focused his contention on the truth , validity and execution of the Will stated to have been executed by Tmt.Pappammal on 31.10.1989 in favour of 1st defendant till his life and then his son. Learned counsel appearing for the appellants submitted that



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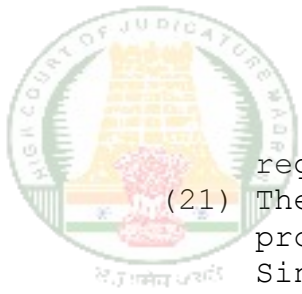
- defendants 2 and 3 did not defend the Suit and failed to appear before the Court to give evidence. Since some of the legal heirs have not defended the Suit, the learned counsel submitted that the Court can presume that they are sailing with the plaintiffs. Regarding the truth and validity of the Will which is marked as Ex.B16, learned counsel pointed out several discrepancies in the statement of attesting witness. It is true that the attesor of the Will examined as DW2 has given some statements which was demonstrate to be contrary to the evidence of DW1. Though it is the case of attesting witness that Tmt.Pappammal was known, to him as he used to take tiffin in the tiffin center run by Pappammal, during the course of evidence, his evidence was slightly different.
- (14) The 1st defendant himself has admitted during the course of examination that the attesting witness did not have any acquaintance with the testator namely, Tmt.Pappammal at any point of time and that DW2 was introduced to Tmt.Pappammal by him. Similarly, there were several contradictions and discrepancies with regard to place of execution and his personal knowledge about the family of Pappammal and various other aspects which would make anyone to believe that the statements of DW2 are nothing but false. However, with regard to attestation his evidence is specific and consistent that he saw the testator putting her thumb impression in the Will in his presence. His further evidence is also that the testator had requested him to sign the document and that he signed the documents in the presence of the testator.
- (15) The attesor also spoke about the attestation done by the other attesting witness. As a matter of fact, this Court can record that the evidence of DW2 as regards attestation is completely satisfying the requirements of Section 63(c) of Indian Succession Act. A few suspicious circumstances and discrepancies in the evidence of DW1 and DW2 are projected by the learned counsel appearing for the appellants.
- (16) The Will is a solemn document comes into operation only after the life time of the testator. The Courts are therefore, expected to examine the document to satisfy several provisions of statute. Section 68 of Indian Evidence Act deals with proof of execution of document required by law to be attested. Section 63(c) of Indian Succession Act describe how the Will to be attested.
- (17) The Courts have held that in a matter of proof of Will, the totality of the circumstances surrounding the Will have to be considered. Since the Will is required to change the line of succession merely because some of the legal heirs are excluded from inheritance, the Court cannot disbelieve the



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Will if the Will is otherwise proved in accordance with law. The Will produced in this case is a registered Will. The attester DW2 who attested the document has also gone to the Registrars Office to sign the document before the Registrar. Several circumstances are brought to the notice of this Court to show that the 1st defendant has played a leading role in the process of execution and registration of the Will of the testator.

- (18) Since attesting witness was a customer of the testator, learned counsel appearing for the appellants submitted that it is not likely that the Will came out of the free Will and volition of the testator. As regards the discrepancies pointed out by the counsel, this Court no doubt accept that there are discrepancies in the evidence of DW2 and that there are contradictions between the evidence of DW1 and DW2 with regard to the place of execution, personal acquaintance of DW2 with the testator and a few other aspects. This Court may also hold that the witness DW2 is not a trustworthy person.
- (19) However, the fact that he attested the document as an attesting witness is not in dispute. The execution of the Will by putting the thumb impression of the testator is not in dispute. The same attesting witness has signed before the Registrar also. In the circumstances, the evidences of DW2 who attested the document and who had spoken about the presence of other witness to satisfy the complete requirements of Section 63(c) of Indian Succession Act cannot be ignored merely because the witness has lied before Court regarding a few aspects which are not connected to the execution of the Will.
- (20) Having regard to the admitted facts, the disputed Will cannot be doubted merely because of the discrepancies. It is repeatedly held by the Hon'ble Supreme Court and this Court that the burden lies on the propounder to prove due execution of the Will. It is also the duty of the propounder of the Will to remove all the suspicious circumstances. Any abnormal or unnatural circumstance may make the Will suspicious. If the propounder removes all the legitimate suspicious circumstances or it is found that the suspicious features are not real or germane, the Court will not hesitate to give effect to the Will. All the fantasies of a doubting mind can not be considered as a suspicious circumstance, as held by the Hon'ble Supreme Court in similar case. Though mere registration of Will may not prove the execution, registration of Will is a strong circumstance to support the genuineness of the Will especially where it is not the case of plaintiff that the



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registration was by impersonation.

- (21) The findings of the Trial Court that the Will has been proved by the 1st defendant is in accordance with the law. Since the 1st item of the Suit property is purchased by the 1st defendant the Trial Court has rightly declined the relief of partition with respect to Suit Item No.1. Similarly, the plaintiff is not entitled to claim partition in respect of S.No.1 of Item No.2 by virtue of the Will executed by the Smt.Pappammal under Ex.B16. As regards S.No.2 of Item No.2, it is admitted that the property was purchased in the name of Pappammal and her husband Thiru. Muthusamy Gounder. The Trial Court is right in granting the decree in respect of S.No.2 of Item No.2. In view of the conclusion arrived at, this Court is unable to find any merit in the Appeal or in the Cross Objection.
- (22) Hence, this Appeal Suit and the Cross Objection are dismissed confirming the judgment and decree dated 30.01.2018 made in O.S.No.332/2013 by the learned Additional District Judge, Coimbatore. No costs.

Sd/-

Assistant Registrar(I)

// True Copy //

Sub Assistant Registrar

cda
To

1.The III Additional District and
Sessions Judge, Coimbatore.

2.The Section officer,
V.R.Section,
High Court, Madras-104.

+1cc to Mr.N.Manokaran, Advocate SR.No.1679

+1cc to Mr.A.E.Ravichandran, Advocate SR.No.1557

AS.No.423/2018

NRL (CO)
CB(28/02/2022)