

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 07.01.2022

JUDGMENT DELIVERED ON : 20.01.2022

CORAM

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

S.A.Nos.1245 and 1246 of 2013

and

M.P.No.1 of 2013

Santhamani ... Appellant/14th Defendant in both the S.As

...Versus...

1.P.Karthikeyan
2.P.Sathishkumar ...Respondents 1 and 2/Plaintiffs 2 and 3
3.Dr.Geetha
4.P.Sivakami
5.Nalini
6.Kalvikkarasi Rajamanickam
7.K.Chinnasamy
8.Pavathal
9.Vijaya

Ponnusamy [Died]

10.M.R.Pichamuthu
11.John Britto Raj
12.Sabastin Kumar @ Peter Anthony @ Prathip
13.Mohanadevi
...Respondents 3 to 13/Defendants 1,
3,4,5,7,8,9,11,12,13,15 in
S.A.No.1245 of 2013

1.Mohanadevi ...1st Respondent/15th Defendant
2.P.Karthikeyan
3.P.Sathishkumar ...Respondents 2 & 3/Plaintiffs 2 & 3
4.Dr.Geetha
5.P.Sivakami
6.Nalini
7.Kalvikkarasi Rajamanickam
8.K.Chinnasamy
9.Pavathal
10.Vijaya

Ponnusamy [Died]

11.M.R.Pichamuthu

12.John Britto Raj

13.Sabastin Kumar @ Peter Anthony @ Prahip

...Respondents 4 to 13/Defendants

1,3,4,5,7,8,9,11,12,13 in S.A.No.1246 of 2013

PRAYER in S.A.No.1245 of 2013: This Second Appeal is filed under Section 100 of C.P.C., against the judgment and decree in A.S.No.102 of 2009 dated 14.09.2012 on the file of the I Additional District Judge, Erode, confirming the judgment and decree made in O.S.No.131 of 1999 dated 12.01.2009 on the file of the Principal Subordinate Judge, Erode.

PRAYER in S.A.No.1246 of 2013: This Second Appeal is filed under Section 100 of C.P.C., against the judgment and decree in A.S.No.147 of 2009 dated 14.09.2012 on the file of the I Additional District Judge, Erode, reversing the judgment and decree made in O.S.No.131 of 1999 dated 12.01.2009 on the file of the Principal Subordinate Judge, Erode.

For Appellant :: Mr.R.Nalliyappan in both cases

For R13 in SA 1245 of 2013

and

For R1 in SA 1246 of 2013 :: Mr.V.Ayyadurai, Senior Advocate

For Mr.K.Selvaraj

RR 1 to 12 in SA 1245 of 2013

RR 2 to 13 in SA 1246 of 2013::Dispensed with vide Court order dated 07.12.2021 in both cases

J U D G M E N T

The defeated defendant/D14 is the appellant herein.

2. One Sellammal along with Karthikeyan and Sathishkumar filed O.S.No.131/1999 before the Sub-Court, Erode seeking the relief of partition and for separate possession. In the said suit, the sons of the deceased N.R.Ramasamy Gounder, namely Palanivelappa Gounder, Rajamanickam, Sadasivam (second defendant) and Dr.Thooran Srinivasan and his wife Dr.Geetha (first defendant) were added as parties. Sellmmal is the grandmother of Karthikeyan and Sathishkumar, born to her pre-deceased son Palanivelappa Gounder both of whom have filed the above suit. Since, one of the sons of N.R.Ramasamy Gounder, namely Srinivasan, died, his wife Dr.Geetha has been added as a party.

3. Pending suit, the second defendant-Sadasivam died. D.W.14 Santhamani and D.W.15 Mohanadevi were impleaded as per the order in I.A.No.449 of 2003, dated 08.01.2004. The trial Court has decreed the suit in-part. The plaintiffs 2 and 3 filed A.S.No.111 of 2009 and the 14th defendant preferred A.S.No.102 of 2009. Both the appeals were dismissed. The First Appellate Court observed that Item No.2 of the property is held to be not available for partition for the plaintiff and held to be the half share to Dr.Geetha, first defendant and another half share to Mohana Devi-the 15th defendant. Hence, the 14th defendant has filed the above two Second Appeals.

4. The above Second Appeals were admitted on 28.02.2014 on the following common Substantial Question of Law:-

Whether the finding of both the Courts below that Ex.B12, the alleged unregistered Will, is not proved, is perverse finding as contended by the appellant?

5. Heard Mr.Nalliyappan, learned counsel for the appellant and he relied upon the decision of the Supreme Court reported in 2001 7 SCC 503 [N.Kamalam(Dead) and another vs. Ayyasamy and another] and stated that the credential value of the attestor PW3 conclusively proves that Ex.B12/Will is genuine and as per the Will, the appellant is entitled for share in the property.

6. Per contra, Mr.Ayyadurai, learned Senior Advocate contended that the suit property is an ancestral property that was subjected to the orders of attachment in the Maintenance Case as per the decree in O.S.No.689/93 (Ex.B13). The appellant is not legally wedded wife of the testator and she is not entitled to any share in the property. The genuineness of execution of the Will is different from the validity of the Will. The appellant, who alleges that she is wife of testator of Will, has to dispel the suspicion surrounding the Will. In the recital, the reasons assigned for affixing the left thumb impression, instead of putting the signature, is artificial, could not be believed. Then, as per the evidence of DW2, DW3, DW4 and DW5, he has not assigned any reason to dispel the suspicious circumstances. Property in dispute is not a vacant site and there is a petrol bunk. Suspicion with regard to non mention or omitting to mention about DW6//Mohana Devi, who is the legally wedded wife and no reason has been assigned nor acceptable reason has been given that when the Will was drafted by an advocate and attested by a Notary Public and however, the

same remained as an unregistered Will.

7. Mr.Ayyadurai, learned senior counsel appearing for the 15th defendant viz., Mohanadevi, made submissions regarding facts of the case.

Facts of the case and relationship between the parties"

8(a).One Ramasami Gounder had four sons and one of the son pre-deceased during the year 1969. There was a partition among the family members under Ex.A9/Partition Deed. After the death of the said Ramasami Gounder, the widow of the said Ramasami Gounder along with grand son (son of the predeceased son) has filed a suit in O.S.No.131 of 1999 before the learned Principal Subordinate Judge, Erode, for partition.

8(b).There are seven items of the property. In respect of Item No.2 of the property, the defendant No.15/Mohana Devi, who is aid to be the first wife, has filed a separate written statement alleging that Item No.2 of the schedule property was allotted to the said Ramasamy Gounder under Ex.A9/Partition Deed and after such partition, under Ex.A8/Settlement Deed, he has settled the property in favour of the said Sadashivam (D2). During the pendency of the suit, some of the parties have died and one Sellammal died on 24.01.2001. Subsequently, the son of the pre-deceased son, namely the first son of Sellammal and in other words, grand son of the Chellammal through her first son, was transposed as a plaintiff and on the death of the said Sadasivam, his two wives, namely D14/Santhamani & D15/Mohanadevi were impleaded and they have also filed written statement separately.

8(c).D15/Mohanadevi has raised two issues, viz., in view of Ex.A8/Settlement Deed in favour of her husband, who is the second defendant viz., Sadasivam, he became the absolute owner of the property and on his death, being the legally wedded wife, she is entitled for Item No.2 of the suit property.

8(d).Per contra, D14/Santhamani has filed separate written statement alleging that she is also the wedded wife, since D15/Mohanadevi has left the matrimonial home and the said Sadasivam during his life time, had executed Ex.B12/Will in her favour and hence, she alone is entitled for property.

8(e).During the trial, to prove the Will, she had examined DW3/Scribe and DW4 & DW5/attestors of the Will and the Death Certificate of Sadasivam was marked as Ex.B5. The Will is dated 01.07.2012 and is a notarized Will. As per Death Certificate, Sadasivam died on 05.09.2002.

9.The Trial Court has held that, with regard to the nature and character of the property, Ramasami Gounder had only life estate under Ex.A9/Partition Deed and therefore, Ex.A8/Settlement Deed is not valid and if any property is sold, it is for the parties to workout the remedy, separately in respect of Ex.B12.

10.Hence, D14/Santhamani & D15/Mohanadevi have filed appeals in A.S.No.102 of 2009 & A.S.No.147 of 2009 respectively.

11.The Lower Appellate Court has held that, Ex.A9/Partition Deed is valid and consequently held that Item No.2 of the Schedule property has become exclusive property of the original second defendant viz., Sadasivam and Ex.B12/Will not proved in the manner known to law and consequently it was held that D15/Mohanadevi is entitled to Item No. 2 of the property. Under Ex.A8/Settlement Deed, half share is given to Sadasivam and remaining half share was settled in favour of the husband of the first defendant. As D14/Santhamani's right has been negatived, she filed S.A.Nos.1245 & 1246 of 2013 against the common Judgment in A.S.Nos.102 & 147 of 2009.

12.Mr.Ayyadurai, learned Senior Advocate, contended that the Lower Appellate Court has disbelieved Ex.B12/Will, since it is not registered will and the same does not contain the signature of Sadasivam, who used to put sign only the signature and hence, the thumb impression found in Ex.B12/Will causes serious suspicion, besides, in certain pages of the Ex.B12/Will, thumb impression is double printed or smudged.

13. According to the learned Senior Advocate, with regard to the above suspicious circumstances surrounding unregistered the Will, he relied upon the decisions reported in CDJ 2021 SC 1035[Murthy &others vs.C.Saradambal & others] and CDJ 2021 SC 978 [State of Haryana vs. Harnam Singh (Dead) Thr.Lrs&others].

14. In view of the submission and discussion supra, the scope of the appeals is now confined to Item No.2 of the suit property alone. The Courts below have rightly come to the conclusion that Ex.A8 Settlement Deed is true and valid. Ex.A8 Settlement Deed is executed by N.Ramasamy Gounder, wherein he has settled the property in favour of Sadasivam (second defendant) and 4th son Thooran Srinivasan who is represented by his wife Dr.Geetha (first defendant)

15. As against the said finding and that Item No.2 is not available for partition. Other defendants and plaintiffs have

not preferred any appeal. In respect of the branch of the Thooran Srinivasan, there is no appeal and hence the Second Appeal is now confined to half share in Item No.2 of the schedule of the property alone.

16. According to Mr.Nalliyappan, learned counsel for the appellant in both appeals, viz., D.W.14, she is a legally wedded wife. She lived along with the said Sadasivam and Mohana Devi, his first wife, left long ago and out of true love and affection, the said Sadasivam had executed Ex.B12 Will, in and by which, he had bequeathed the his share (half share in the 'B' schedule property) to her and marked Ex.B5 the Death Certificate of Sadasivam.

17. The lower Court records reveals that original plaintiff Sellammal died on 24.11.2011 as per Ex.A1. Thooran Srinivasan, 4th son of the said Ramasamy Gounder died on 27.10.1989 as per (Ex.A18). The second son S.R.Rajamanickam died on 24.07.1994 as per (Ex.A19). The Sadasivam-second defendant died on 05.09.2002 as per (Ex.B5).

18(a). The relationship between the parties, are not in dispute. Ex.B8 is the Settlement Deed executed by N.Ramasamy Gounder in favour of his two sons Sadasivam-second defendant and Thooran Srinivasan. The trial Court has held that it is a ancestral property and hence Ramasamy Gounder has no right to settle the entire property. The said finding was reversed by the appellate Court. Since it is a property, falling share under the partition deed, it is held to be separate and exclusive property of Ramasamy Gounder. Consequently, Ex.A8 Settlement Deed is held to be valid and thus, Thooran Srinivasan and his legal heir Dr.Geetha are entitled to half share, while Sadasivam is entitled to half share.

18(b). In respect of this half share, there is a dispute between the defendants 14 and 15. D14 admits D15 Mohana Devi is the first wife of the said Sadasivam, however she claims that 1st wife left matrimonial home and hence, she had lived with him in the capacity of wife and hence, Sadasivam has executed Ex.B12 Will and died on 05.09.2002 Ex.B12 Will is dated 31.07.2002. Date of the death of the Sadasivam is not in dispute.

19. The crux of the issue as reflected in the Substantial Question of Law is that whether Ex.B12 Will is proved in the manner known to law. The 14th defendant examined herself as D.W.2 and claimed benefit under Ex.B12 Will as the propounder of the Will and she being the beneficiary under the Will, has marked the Will subject to admissibility and relevancy. D.W.3 is scribe and D.W.4 and D.W.5 are two attestors. As per Ex.B5-Death Certificate, Sadasivam died on 05.09.2002. It is a specific case

of D.W.2 that the Will came into operation. Per contra, D15 Mohana Devi, first wife was examined as D.W.6 she disputed the Will on multiple grounds that are discussed infra.

20. Whether 2nd defendant Sadasivam executed a Will in favour of 14th defendant Santhammal on 31.07.2002 is, true and valid one?

21. On a perusal of EX.B12 Will, it is seen that it contains 4 pages. It is not a registered one. In the first page of the Will, two thumb impressions were found. One thumb impression merged with another thumb impression. In fourth page also, two thumb impressions were found. All the thumb impressions are not properly affixed. On a perusal of the written statement filed by the said Sadasivam, it is found that he had put his signature in the written statement. The first two word "S.R" was in English and the remaining name "Sadasivam" was in Tamil. As per the plaint, his age is 59 years. So, on the date of execution of Will, his age may be 59 years. There is no evidence that the said Sadasivam was sick and he is not able to puts his signature in the Will. A person usually puts his signature in all documents, but he has not signed in the Will, on the other hand, alleged to have affixed his left thumb impression.

22. At this juncture, the matrimonial proceedings, between the parties assumes significance. On a perusal of the certified copy of the deposition of Sadasivam in H.M.O.P.No.15/1990 before the Principal Subordinate Judge Court, Erode (which was marked as Ex.B17), the said Sadasivam was the petitioner and the 15th defendant, namely Mohanadevi, was arrayed as sole respondent.

23. It is also pertinent to keep in mind, under Ex.B12, recitals therein reflects that after the lifetime of the testator, his wife S.Santhamani alone is entitled to take the property. The said Sadasivam deposed evidence before the Sub Court, Erode and stated that "I do not know who is Santhamani". But in the Will, he has stated "எனது மனைவி எஸ்.எஸ்.சாந்தாமணி ஒருவர் மட்டும் ; ". On the other hand, it is admitted that 15th defendant Mohanadevi is his wife. On a perusal of the certified copy of the final order passed in H.M.O.P.No.15/1990 (which was marked as Ex.B16), it is found that the said H.M.O.P was filed by the Sadasivam and the same was dismissed on 15.03.1993. Therefore, the 15th defendant Mohanadevi is the only wife of said Sadasivam. But in the Will, it is stated that Santhamani is his wife. Without getting proper divorce from competent Court, he cannot marry any other person. Under such circumstances, the said Sadasivam cannot aver and affirm to say that Santhamani is his wife.

24. The said Ex.B12-Will was executed on 31.07.2002. As already discussed, the above property was settled by Ramasamy Gounder in favour of the said Sadasivam and Dr.Thooran Srinivasan by way of Ex.A8 dated 06.02.1977.

25. Even in the year 1977 itself, the item No.2 of the suit property consists of petrol bunk and all other rooms. But in the Will, it is described as 'Vacant site'. P.W.1 deposed so in evidence in the cross examination. But in the Will, it is shown as 'vacant site'. Furthermore, in between Sadasivam and Dr.Thooran Srinivasan, no partition was effected. There is no pleading by Sadasivam in his written statement also. On the other hand, Sadasivam filed his written statement and in page 3, para 6 therein, he has stated as follows:

"This defendant submits that the suit item No.2 may be divided into two equal shares and one such share may be allotted to this defendant".

26(a). Such being the nature, how can he execute the Will and demarcate as if on the western side of the site No.15 belongs to him. Mere examination of the witnesses of Will by the said Santhammal will not be sufficient to prove the Will.

26(b). One part is the said Santhamani is not proved she is the wife of Sadasivam. Sadasivam himself deposed in his evidence he is not aware of who is Santhamani. Sadasivam himself averred that the 15th defendant Mohanadevi is the wife of said Sadasivam. Sadasivam was filed divorce petition as against Mohanadevi and the same was dismissed. Thereby till date the said Mohanadevi is the only legally wedded wife of Sadasivam.

26(c). Under such circumstances, Sadasivam cannot make a Will nor could state that Santhamani is his only wife. Furthermore, in the schedule of property of the Will, it is stated that 'vacant land', but even prior to 1977 there was a petrol bunk in the property assumes significance.

26(d). Furthermore, he filed his written statement and ask for partition of item No.2 of the suit schedule property. But in the Will specifically demarcating. Apart from all those discrepancies.

26(e). Besides, Sadasivam usually has signed in all the documents, but in the Will it is found to be some thumb impression. The said thumb impressions also not legible and it is merged. Hence, I found that the above Will is not a true and genuine one. Accordingly, the point No.5 is decided."

27(a). Thus, I find that the case as projected by D.W.2, D-14 appears to be on the shaky ground. Admittedly, D.W.2 is not a legally wedded wife of the testator, in view of Exs.B16 and B17 and she is not entitled for inheritance and hence, she claims right under Ex.B12 Will. The attester of the Will and scribe were examined. The scribe is an Advocate practising as a Government Advocate in the Criminal Side. His evidence is that at the time of the execution of the Will, the testator of the Will Mr.Sadasivam had good health, but unable to sign. It is a typed Will by the Advocate. The Will which is said to have been prepared by an Advocate is found to be attested by a Notary Advocate. But no reason has been assigned for not registering the same when all persons connected with it are legally qualified. However, the lame excuse was given in the cross-examination and in the event of the Will being registered, it will be known to public and the same could not be a ground to believe their version. This Court is conscious of the legal position that as per Section 18 of the Registration Act, registration of a Will is only an additional or attendant circumstances in proving it with rebuttal presumption available under Section 114, illustration (e) of the Evidence Act. Non registration of the Will is not the sole criteria to determine the genuineness of the Will. However, it is one of the multiple reasons, as discussed infra to show when all the persons connected with the Will are legally qualified persons, however, no explanation much less than any plausible explanation for non-registration of the Will besides a double thumb impression in a single page and smudged thumb impression in other places cause serious doubts as to the genuineness of the document.

27(b). Under the said Will, Santhamani is described as legally wedded wife. The marital status of the said Santhamani as claimed in the Will, is dislodged by his legally wedded wife by marking Exs.B15 and B16, viz., the Court proceedings and deposition is by none other than the testator of the Will. In the absence of any divorce or dissolution of the marriage with the first wife, Santhamani-appellant cannot claim to be the legally wedded wife. Since the first wife is living, this Court finds that any long co-habitation with any man, will not entitle her to be a legally wedded wife.

28. Yet another circumstance is with regard to the description of the property. While it is an admitted case that there is a petrol bunk existing in the suit property, however, under Ex.B12-Will the property is described as a vacant site. Had it not been from the ill-health of the testator, during his sound health, the petrol bunk could have also been reflected in the schedule of the property and it is described as vacant site and hence, I find it also as another suspicious circumstance surrounding the Will and hence, I find that execution of the

Will is one thing, while validity of the same is other. As stated supra, whether Ex.B12 Will is proved in the manner known to law as contemplated under Section 63 of the Indian Succession Act and Section 68 of the Indian Succession Act. Both the attestors could depose regarding the presence of the testator and affixing of the thumb impression. Admittedly, except this document, all other documents have been signed by the testator. In other words, the attester is always used to sign, but only in the Will document, he has affixed his left thumb impression. A recital is also added thereto to make it believe, that the will is genuine.

29. Mr.Ayyadurai, learned Senior Advocate has drawn my attention to the copy of the will.

30. The lower Court records reveals that in Ex.B12-Will, at page one, two left thumb impressions have been affixed and in one and two places, the thumb impression is merged which creates a reasonable doubt as to the genuiness of the Will. There is absence of the positive explanation as to why the testator has affixed the left thumb impression, instead of his signature. Besides the above noted feature that two thumb impressions are found on the single page and other thumb impression found on the other places has merged by overlapping one thumb impression on the other, also creates reasonable doubt whether the thumb impression has been obtained during the conscious state of the testator.

31. Admittedly, D15 is the legally wedded wife, but in the document, the recital is as if D14 is the legally wedded wife and also there is a clear misdescription of the property and therefore, all the above facts put into cumulatively and on cumulative analysis of the above said circumstances, creates a sea of suspicion surrounding Ex.B12 will.

32. Taking note of the similar lines, the lower Appellate Court has rightly come to the conclusion that Ex.B12 Will produced by D14 is not true and genuine and had not proved the will in a manner known to law.

33. The decision reported in CDJ 2021 SC 1035 [Murthy & others vs.C.Saradambal & others] and CDJ 2021 SC 978 [State of Haryana vs.Harnam Singh (Dead) Thr.Lrs & others] are kept in mind. As to mode of true proof of the Will, burden proof of lies on beneficiary. No doubt, it is true that Will need not be registered. It is a case that both the testator and the scribe, who is an advocate attester, who is a Notary Public and the true attester are all legally trained persons. No legally acceptable evidence has been adduced for non registering the said document. With regard to reliability of unregistered will, decision of

this Court in 2020 vol III Madras weekly Notes civil 28 [Gajarajan Vs.S.Gandhimathi selvam] is taken into consideration.

34. Merely because the beneficiary was living with the testator for long time, she cannot be subscribed with the marital status as that of legally wedded wife, especially when the first wife is alive, and disputing relationship.

35. In view of the copy of the judgment in matrimonial proceedings, in Ex.B16 and Ex.B15, the lower Appellate Court has rightly held that D15 is the legally wedded wife and D14 is not a legally wedded wife. Since the Will was not proved in the manner known to law, both the Court below have rightly disbelieved the evidence of D.W.2 and the oral evidence of D.W.s 3 to 5.

36. In view of the discussion supra, on a different analysis, the said finding of the lower Appellate Court is hereby confirmed and hence, I do not find any merits in the above Second Appeals. Accordingly, the substantial question of law is held against the appellant and in favour of the respondents.

37. In the result, both these Second Appeals are dismissed, confirming the judgment and decree of the lower appellate Court. No costs. Consequently, connected M.P is also closed.

Sd/-
Assistant Registrar(CS-V)

//True copy//

Sub Assistant Registrar

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To

1.The I Additional District Judge, Erode.

2.The Principal Subordinate Judge, Erode.

3. The Section Officer,
V.R.Section, High Court, Madras.

+1cc to Mr.R.Nalliyappan, Advocate SR.No.3584

+1cc to Mr.K.Selvaraj, Advocate SR.No.3351

S.A.Nos.1245 and 1246 of 2013 and

M.P.No.1 of 2013

NRJK(CO)
GMV(01/04/2022)