



S.A.No.315 of 2013
and M.P.No.1 of 2013

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.09.2022

CORAM

THE HONOURABLE MRS. JUSTICE T.V.THAMILSELVI

S.A.No.315 of 2013

and

M.P.No.1 of 2013

- 1.Rajendran (Died)
- 2.Malarvizhi
- 3.Ramya
- 4.Dharanya
- 5.Gokul

...Appellants

(Appellants 2 to 5 brought on record as LR's of the deceased sole appellant vide order of Court dated 06.03.2019 made in C.M.P.No.5405/2018 in S.A.No.315/2013)

Vs.

- 1.Kannammal
- 2.Chinnammal

... Respondents

(Second Respondent herein given up as unnecessary parties)

Prayer : Second Appeal filed under Section 100 CPC, 1908 against the decree and judgment dated 16.07.2012 passed in A.S. No.93 of 2010, on the file of the Principal District Court, Erode, upholding the decree and judgment dated 01.04.2010 passed in O.S. No.24 of 2010, on the file of



S.A.No.315 of 2013
and M.P.No.1 of 2013

WEB COPY the Subordinate Court, Perundurai.

For Appellants : Mr.T.Murugamanickam, Sr. Counsel
for Ms.Zeenath Begum
For R1 : Mr.A.Sundaravadanen

JUDGMENT

The appellant herein is the second defendant in O.S. No.24 of 2010, on the file of the Subordinate Court, Perundurai, filed by the plaintiffs therein for the relief of partition against the defendants claiming that the suit properties are joint family ancestral properties in which they are having 8/18 shares. The first defendant admits that Item Nos.1 to 9 & 11 are the ancestral properties of Chennimalai Gounder. With regard to Item No.8 she claims that it is her husband Thirumalaisamy's self acquired property and he also executed a Will on 15.03.1998 in favour of her. Based upon that she is the absolute owner of Item No.8 subsequently, she sold the same to the second defendant. Hence, the defendants 1 & 2 claim Item No.8 of the suit property as their absolute property.



S.A.No.315 of 2013
and M.P.No.1 of 2013

WEB COPY

2. On considering both side submissions, the Trial Court framed six issues. Considering the evidence adduced on both sides and documents, the trial Judge concluded that Item No.8 of the suit property was purchased by Thirumalaisamy from the income derived from the joint family ancestral properties, thereby, declared Item No.8 also joint family property and also concluded that the Will executed by Thirumalaisamy is surrounded by suspicious circumstances thereby, the Will was disbelieved and the plaintiffs' claim of 8/18 was allotted to her by way of preliminary decree. Further also held that the sale deed stands in the name of the second defendant also does not bind on the plaintiff's share.

3. Aggrieved over the same, the plaintiff preferred an appeal in A.S. No.93 of 2010, on the file of the Principal District Court, Erode. The First Appellate Judge independently analysed the evidence, framed five separate issues and finally held that all the properties including Item No.8 as joint family properties and the alleged Will was not proved by the defendants and also held that suspicious circumstances are attached with



S.A.No.315 of 2013
and M.P.No.1 of 2013

WEB COPY

the Will, thereby the Will was disbelieved and also the sale deed stands in the name of the second defendant does not bind on the plaintiff's share. Accordingly, the appeal was dismissed by confirming the Trial Court's findings.

4.Challenging the concurrent findings of the Courts below, the purchaser / second defendant preferred this appeal contending that both the Courts below failed to take a note that in the absence of any objections regarding the validity of Ex.B7 Will, it should have been held that the first defendant is competent to sell the property bequeathed to her under this Will in favour of this appellant. Further contended that Item No.8 of the suit property was purchased by Thirumalaisamy from his own funds and the burden is upon the plaintiff to prove that it was purchased out of joint family nucleus. Both the Courts below erroneously held that Item No.8 is a joint family property and hence, the findings rendered by the Courts below is unjust and misconception of law and hence, prayed to set aside those findings.



WEB COPY



S.A.No.315 of 2013
and M.P.No.1 of 2013

5.This appeal is admitted on the following substantial questions of law :

(a) "When Ex.B7 will has not been specifically denied by the plaintiffs.

Whether it is necessary to prove the same in view of the proviso to Section 68 of the Indian Evidence Act?

(b) When the plaintiff's assert that, suit Item No.8 is joint family properties, then, whether the burden can be shifted of the defendants to prove, that, it is the separate property of an individual member of the joint family property?

6.The brief facts of the case is as follows:

The suit Item Nos.1 to 9 & 11 are the ancestral properties of one Chennimalai Gounder. The said Chennimalai Gounder died intestate nine years ago leaving behind his son late Thirumalaisamy and his wife and daughter i.e. the plaintiffs herein. The said Thirumalaisamy had a son namely Thavasiappan. The first defendant is the wife of Thirumalaisamy Gounder. Both Thirumalaisamy and his son Thavasiappan died intestate



S.A.No.315 of 2013
and M.P.No.1 of 2013

WEB COPY

on 26.06.1998. They committed suicide by consuming poison on same day. On the death of Thirumalaisamy and his son Thavasiappan, the plaintiffs are entitled to 8/18 share together in the suit properties and the first defendant is entitled to 10/18 share. The plaintiffs and the first defendant are in possession and enjoyment of the suit properties. Due to misunderstanding the plaintiffs demanded for amicable partition for which the first defendant refused and hence, the suit.

7. The first defendant admits the relationship and also admits that the suit Item Nos. 1 to 9 & 11 are the ancestral properties. With regard to Item No.8 she submits that it is a self acquired property purchased by her husband Thirumalaisamy out of his own income. During his life time Thirumalaisamy (husband of the first defendant) executed a Will Ex.B7 in her favour bequeathing the said property as absolute owner. Now she sold the property to the second defendant for valid consideration. Hence, with regard to Item No.8 she claimed herself as absolute owner of the property. With regard to other properties she has not raised much objections. The second defendant claimed himself as a



S.A.No.315 of 2013
and M.P.No.1 of 2013

WEB COPY

bonafide purchaser of Item No.8. Both the Courts below, considering the evidence on either side, held that Item No.8 of the suit property was also purchased out of the joint family nucleus, thereby deemed it as ancestral property and also disbelieved the Will (Ex.B7) and held that the Will is surrounded by suspicious circumstances. Consequently, Item No.8 sold in favour of the second defendant is also not binding on the plaintiffs. During the pendency of the suit, the first plaintiff died. The second defendant contested the suit and thereafter, the second defendant also died and his legalheirs are contesting the appeal.

8. Challenging the findings of the Courts below, the purchaser filed this appeal contending that Ex.B7 was admitted by the plaintiffs and even then the non acceptance of the validity of the Will by the Courts below is totally misconception of law and facts and prayed to set aside the findings.

9. Per contra, learned counsel for the plaintiff submits that the suit Item Nos.1 to 9 & 11 are the ancestral properties of Chennimalai



S.A.No.315 of 2013
and M.P.No.1 of 2013

WEB COPY

Gounder and Thirumalaisamy. During his life time one of the ancestral property was sold and out of that the sale proceeds, Item No.8 was purchased in the name of Thirumalaisamy and the same was proved before the trial Court. Both the Courts below rightly appreciated those evidence and held that it is a joint family property. There is no controversy between the parties in respect of Item Nos. 1 to 7 of the suit properties regarding their nature as an ancestral properties.

10.Considering the rival submissions, initial burden is upon the plaintiffs to prove that Item No.8 was purchased out of joint family nucleus. To prove the same, before the trial Court, the plaintiff produced two sale deeds Ex.A2 & Ex.A3 of the year 1973 and contended that Chennimalai Gounder and his son Thavasiappan sold some of the ancestral property in order to purchase a new land to that effect. The recitals mentioned in the documents is properly appreciated by the trial Judge. That apart, immediately after selling the ancestral properties within two months through Ex.A4, suit Item No.8 was purchased in the name of Thirumalaisamy and hence the conjoined reading of Ex.A2 to



S.A.No.315 of 2013
and M.P.No.1 of 2013

WEB COPY

Ex.A4 reveals that Item No.8 of the suit property was purchased out of joint family nucleus. So the burden lies upon the plaintiffs is discharged. The main objection raised by the first defendant is that the property was purchased by her husband Thirumalaisamy out of his self earning. It is pertinent to point out that the first defendant / wife of Thirumalaisamy did not get into the witness box to depose those facts. No material evidence was adduced that Item No.8 was purchased out of self income by Thirumalaisamy. Therefore, both the Courts below rightly held that Item No.8 is purchased out of joint family nucleus and that the first defendant has not proved that it is a self acquired property which needs no interference. Accordingly, the substantial question of law 'B' is answered.

11.Learned counsel for the appellant argues that the Will Ex.B7 was not challenged by the plaintiffs. In spite of that, the Courts below erroneously held that it is attached with suspicious circumstances even though the Will was proved through the attester D.W.2 by complying the mandate condition required under Section 68 of the Evidence Act.



S.A.No.315 of 2013
and M.P.No.1 of 2013

WEB COPY

12.Per contra, the plaintiffs submit that the Will was not executed by the executor Thirumalaisamy and it was created by the first defendant with a help of her counsel and the second defendant, and also argued that mere examination of the attestor is not sufficient to come to a conclusion that the Will is proved and as other suspicious circumstances not been removed by the defendant. In such case the Will is deemed to be not proved. In support of their contention, they relied upon the ratio laid down in "*Kavita Kanwar Vs Pamela Mehta and Others*" reported in "(2021) 11 SCC 209" Which is extracted hereunder :

"Family and Personal Laws - Will - Necessity of removing legitimate suspicion by cogent and convincing explanation - Testamentary capacity, soundness of mind of testatrix, her handwriting and signature on Will proved - however, Will surrounded by unexplained and suspicious circumstances - Hence held, though no single factor standing alone can operate against validity of propounded Will but cumulative effect of these unexplained suspicious circumstances prove that Will in question cannot be probated in favour of appellant - Fact that testatrix executed and signed Will having understood meaning, effect and purport of content not proved.

31.In the ultimate analysis, we are satisfied that the will in question is surrounded by various suspicious circumstances which are material in nature and which have gone unexplained. The cumulative effect of these suspicious



S.A.No.315 of 2013
and M.P.No.1 of 2013

WEB COPY

circumstances is that it cannot be said that the testatrix was aware of and understood the meaning, purport and effect of the contents of the will in question. The appellant, while seeking probate, has not only failed to remove and clear the aforesaid suspicious circumstances but has even contributed her own part in lending more weight to each and every suspicious circumstance. The will in question cannot be probated from any standpoint.

37.The discussion foregoing is sufficient to find that thick clouds of suspicious circumstances are hovering over the will in question which have not been cleared; rather every suspicious circumstance is confounded by another and the curious case of the alleged third page of the will effectively and completely demolishes the case of the appellant. Put differently, it is difficult to be satisfied that what is literally coming out of the document in question had been the last wish and desire of the testatrix as regards succession of her estate. On the contrary, we find enough and cogent reasons to affirm the material findings of the trial court and the High Court that it cannot be said that the testatrix executed and signed the document in question as her will after having understood the meaning, effect and purport of the contents."

In the present case, the first defendant W/o. Thirumalaisamy submits that her husband executed the Will / Ex.B7 bequeathing Item No.8 in her favour thereby, she claimed as absolute owner of the said property. It is pertinent to note that the first defendant did not enter into the witness box. Being a beneficiary of the Will, she is the right person to depose



S.A.No.315 of 2013
and M.P.No.1 of 2013

about the above execution of the Will, but she failed.

13.The facts and circumstances reveal that the second defendant is not only the purchaser of the property but also an Advocate for the first defendant and he contested the case on behalf of the first defendant. Further more, the second defendant/Rajendran is one of the attester of the Will. The facts also reveals that Thirumalaisamy and his son Thavasiappan committed suicide on the same day two months later on the alleged execution of the Will / Ex.B7. What necessitated Thirumalaisamy to execute the Will in favour of his wife / first defendant when his son was alive at that time. By committing suicide by the father and son on the same day, reveals that there was no cordial relationship between the husband and wife (first defendant). The first defendant is the right person to remove all these suspicious circumstances casted over the Will/Ex.B7. As stated above, she remained absent and the second defendant alone contested the suit. Admittedly, he is not only the purchaser but also an Advocate of the first defendant who played master role with regard to creation of Ex.B7 Will. He is a third party to the



S.A.No.315 of 2013
and M.P.No.1 of 2013

WEB COURT

Thirumalaisamy's family and he had no personal knowledge about the family affairs of Thirumalaisamy. The person who is having knowledge about the family affairs of Thirumalaisamy is a right person to speak about the circumstances which necessitated him to execute the Will / Ex.B7. Admittedly, the alleged beneficiary / wife of Thirumalaisamy not appeared before the trial Court to speak about all these facts and circumstances. One of the attesor was examined as D.W.2 to prove the execution of the Will. Strange circumstances prevailed in Thirumalaisamy family, leads strong suspicious circumstances over Ex.B7 / Will and the first defendant miserably failed to remove suspicious circumstances over the Will. Therefore, examination of one of the attesor alone is not sufficient to conclude that the Will is proved by the defendant for the aforesaid reasons. Even though the plaintiff has not challenged the validity of the Will but the burden is casted upon the beneficiary / first defendant to prove the validity of the Will as mandated under Section 68 of the Evidence Act. That apar,t if the Will is surrounded by unexplained and suspicious circumstances it should be removed by the beneficiary through the material evidence. The authority relied by the plaintiff is



S.A.No.315 of 2013
and M.P.No.1 of 2013

WEB COPY squarely applicable to the facts of the case. Hence, the Courts below rightly held that the Will was not proved which needs no interference. Accordingly, the substantial question of law 'A' is answered.

14. With regard to the other findings i.e. the share of the properties, the trial Court rightly analysed the facts which needs no interference. Accordingly, the second appeal is dismissed as no merits and the findings of the trial Court is confirmed and hence, the plaintiff is entitled for 8/18 share in the suit properties. Accordingly, preliminary decree is passed. No costs. Consequently, connected miscellaneous petition is closed.

06.09.2022

Index: Yes/No
Internet: Yes/No
Speaking/Non-Speaking order
mtl

T.V.THAMILSELVI, J.



WEB COPY



S.A.No.315 of 2013
and M.P.No.1 of 2013

mtl

To

- 1.The Principal District Court, Erode,
- 2.The Sub Court, Perundurai.
- 3.The Section Officer, VR Section, High Court, Madras.

S.A.No.315 of 2013
and M.P.No.1 of 2013

06.09.2022