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S.A.No.105 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 07.09.2022

PRONOUNCED ON: 23.11.2022

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.105 of 2021

Savithri

...Appellant

Vs

1. L. Nagaraj
Mallamma (Deceased)

2. L. Lakshmi
3. L.Prema
4. Shantha
5. L.Padma
6. Rajeswari

...Respondent

Prayer: Second Appeal is filed under Section 100 of C.P.C against the judgment and decree dated 04.12.2019 passed in A.S.No.16 of 2014 by the District Judge, The Nilgiris Udagamandalam reversing the judgment and decree dated 10.07.2014 passed in O.S.No.30 of 2006 by the Subordinate Judge, The Nilgiris, Udagamandalam.

For Appellant : Mr. L.Dhamodaran



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For Respondent-1: Mr.T.Murugamanickam, senior counsel
/Caveator for Mr.V.Rajesh

For Respondents

2 to 5 : Mr.B. Jawahar

For Respondent-6: Not ready in notice

JUDGEMENT

The plaintiff in the suit O.S.No.30 of 2006 filed for partition on the file of the Subordinate Court, Nilgiris, Udhagamandalam is the appellant before this Court.

2. The brief facts which have culminated in filing of the above appeal are herein below set out and the parties are referred to in the same litigative status as before the trial Court.

3. Before proceeding to discuss the facts of the case, it is necessary to just set out the genealogy for morefully appreciating the relationship amongst the parties.

Lingappa
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Maallamma(1st defendant)

Savithri
(plaintiff)

Nagaraj
(2nd defendant)

Lakshmi
(3rd defendant)

Prema
(4th defendant)

Shantha
(5th defendant)

Padma
(6th defendant)

Plaintiff's case:

4. It is the case of the plaintiff that the suit properties belonged to one Lingappa. The plaintiff is the daughter of Lingappa. The first defendant is the wife and defendants 2 to 6 are the children of the said Lingappa and the plaintiff's siblings. The suit properties were purchased by the said Lingappa out of the sale proceeds from the sale of the ancestral properties situate in Mandya, Karnataka. The said Lingappa died on 06.11.2004. On the death of the said Lingappa, the properties had devolved equally upon all of them. The plaintiff would submit that despite her request for partition, the second defendant was not coming forward to partition the property. Therefore, the plaintiff had issued a legal notice dated 22.02.2006 requesting for a partition of the properties. The second defendant had



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issued a reply on 01.03.2006, in which, he had contended that the suit properties have been bequeathed upon him by his father Late, Lingappa under a Will dated 31.07.2003. The plaintiff would contend that she had sent a suitable re-joinder on 09.03.2006 and followed it up with the suit.

Written statement:

5. The defendants 1, 3 to 6 had filed a written statement more or less adopting the case of the plaintiff. The second defendant had filed a written statement *inter-alia* contending that the suit for a partition has to fail, since his father had executed a Will dated 31.07.2005 bequeathing the entire properties upon him. He would further submit that all the sisters had been married providing them with the requisite jewels and articles. That apart, the father had also made fixed deposits in the names of their daughters and wife. He would submit that the plaintiff had got married in the year 1977 followed by the marriage of the other defendants, namely, 3 to 6 which took place in the years 1982, 1986, 1998 and on 30.08.1990 respectively. He would further submit that the Will was prepared by one



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Mr.T.P.N.Nambiar, a well respected senior Advocate in Ooty and also attested by respectable members of the Society, who were known to his father. He would further contend that on the 11th day after the death of his father, the said Will taken out and read over to the plaintiff as well as the other defendants and therefore, she cannot at this stage feign ignorance about this document. Therefore, he would submit that the plaintiff and the other defendants are not entitled to a partition, since his father had bequeathed the suit properties upon the second defendant and had also provided well for his daughters, who are the plaintiff and defendants 3 to 6 herein. Therefore, he would pray that the suit for partition has to be dismissed.

Trial Court:

6. The learned Subordinate Judge had framed the following issues:

(i) *Whether the plaintiff is having 1/7 share in the*



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suit schedule property?

(ii). Whether the suit properties were bequeathed in the name of 2nd defendant as per Will dated 31.7.2003?

(iii) To what relief the plaintiff is entitled for?

On 05.10.2007, the following additional issues were framed:

- 1. Whether the 6th defendant is entitled to an undivided 1/3 rd share in the suit property?*
- 2. To what reliefs?*

On 30.06.2014, the following additional issue was framed:

- (i) Whether the suit property is ancestral property or self acquired property of late J.Lingappa?*

The 2nd issue framed on 20.12.2006 was re-casted as hereunder:

“Whether the Will dated 31.07.2003 is genuine, valid and binding on the plaintiff and the defendants 1 and 3 to 7”?

7. Though the plaintiff had contended that the suit property was a



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joint family property which was refuted by the 2nd defendant no issue regarding the above was framed. However, arguments have been addressed upon this issue. The plaintiff had examined himself as P.W1 and marked Exs.A1 to A4, which are only the legal notices that had been issued. On the side of the defendants, the 6th defendant was examined as D.W1, the 2nd defendant as D.W2, Mr.T.P.N.Nambiar, Advocate and a Senior member of the Bar as D.W3, One T.Jawarappa and C.Raman, attesting witnesses of Ex.B2 as D.W4 and D.W5 and one Sivalinga Gowd, D.W6 and marked Exs.B1 to B12.

8. The learned Subordinate Judge held that the properties were ancestral by placing reliance on Exs.B7 to B10-Sale Deeds which according to the learned Judge, would show that late, Lingappa had sold his ancestral properties in Mandya District of Karnataka and with the sale proceeds he has proceeded to purchase the suit properties. The learned Judge has held that the sale of these lands had taken place in the year 1970 and the suit properties were also purchased thereafter. There is no proof let in by the



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defendants to show that his father's income out of his employment has yielded sufficient income to purchase the suit properties. The learned Judge had also held that the Will is not a valid one for the following reasons.

a) *In January 2003, the Testator's eye sight had gone and there are recitals regarding the same in the Will. However, the scribe and the attesting witnesses, i.e., D.W3 to D.W5 would state that his eye sight was okay.*

b) *The scribe did not have any contact with the Testator and it was D.W4, who had brought the Testator to him.*

c) *The signatures in the Will does not resemble the signature of a man with the poor eye sight.*

d) *The said Lingappa cannot will away the co-parcenary property.*

The suit was ultimately decreed.



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Appellate Court:

9. Aggrieved by the judgment and decree of the trial Court, the second defendant had filed an appeal in A.S.No.16 of 2014 on the file of the District Court, Ooty. The learned District Judge, by judgment and decree dated 04.12.2019 was pleased to allow the appeal and set aside the judgment and decree of the trial Court. Challenging the same, the plaintiff is before this Court.

Second Appeal:

10. The second appeal has been admitted by this Court on 12.02.2021 on the following substantial questions of law:

- “i. Whether the finding of the appellate Court improper when the suspicious circumstances around the execution of the Will by the Testator was not proved by the profounder?*
- ii. Whether the finding of the appellate Court contrary to the provisions of Section 62 of the Indian Evidence Act?*



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- iii. *Whether the appellate Court erred in reversing the judgment of the trial Court without deciding the issue in respect of the documents marked as Exs.P7 to P10?*
- iv. *Whether the appellate Court failed to take note that the Testator was unaware of the language and contents of the document in Ex.B2?”*

Submissions:

11. Mr. L.Dhamodaran, learned counsel appearing on behalf of the plaintiff would submit that the lower appellate Court has not properly considered the fact that the suit properties have been purchased out of the ancestral nucleus. To prove the said fact, Exs.B7 to B10, which are the Sale deeds relating to the properties situate in Mandya District, Karnataka all of which are in the year 1970 around the time when the plaintiff's father, Lingappa had purchased the suit properties have to be considered. These documents were marked through P.W1. He would submit that by filing these documents, the plaintiff has proved the ancestral nucleus and therefore, the finding of the trial Court that the properties are ancestral ought to have been upheld by the lower appellate Court. Once the properties are

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claimed to be the joint family properties, all the sharers are entitled to an equal share in the same. However, the second defendant is attempting to take away the entire properties on the basis of a testamentary bequest made upon him by late Lingappa on 31.07.2003. The learned counsel would submit that the plaintiff has been able to establish the suspicious circumstances surrounding the execution of the above document. The plaintiff would contend that the father was admittedly blind and the same has also been set out in the Will and while so, the signatures found in the Ex.B2-Will appear to be the signatures that have been affixed by the Testator with the help of some one, who has guided to make his signatures. Therefore, there appears to be no consensus *ad idem*. Though in the Will dated 31.07.2003 the Testator would state that his eye sight was weak, the 2nd defendant has not been able to establish how his signatures had been obtained in the Will.

12. The learned counsel would rely upon the judgment reported in ***AIR 1959 SC 453 [H.Venkatachala Iyengar Vs. B.N.Thimmajamma and***



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Others] and ***AIR 2009 SC 1766 [Bharpur Singh and Others Vs. Shamsher Singh]*** in support of his arguments regarding the suspicious circumstances.

He would further submit there is no consensus *ad idem*, since the deceased Testator was not in a proper state of mind, as he was blind. He would further submit that the lower appellate Court has not framed the issues properly and in support of the said arguments, he would rely upon the judgment reported in ***2021 4 CurCC (SC) 429 [Murthy Vs.C.Saradambal and Others]*** and had referred to paragraphs 30(a), 37, 38 and 39. He would also rely upon the judgment reported in ***2018(4) CTC 662 [G.Saraswathi and another Vs. Rathinammal and Others]*** and ***2021 AIR (SC) 4652 [K. Karuppuraj Vs.M.Ganesan]***, since the Testator was unacquainted with the English language the appropriate jurat had to be set out in the Will, which in the instant case has not been done. In support of the above fact, he would also rely upon the judgment reported in ***2011 (5) CTC 287 [N. Govindarajan Vs. N. Leelavath]*** and ***2007 (2) CTC 760 [P.Kotteswaran Vs. A.Shanmugam and Others]***. He would further submit that on the date of the execution of the Will, the Testator did not have the testamentary



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capacity, as the properties did not belong to him, being a joint family property and that suspicious circumstances shrouded the execution of the Will. Therefore, he would submit that the judgment and decree of the appellate Court has to be set aside.

13. Per contra, Mr. T.Murugamanickam, learned senior counsel appearing on behalf of the respondent 1 / caveator would submit that the pre-suit notice, which was issued by the plaintiff to the second defendant did not make any reference to ancestral properties. That apart, the said notice has been replied under Ex.A2 by the 2nd defendant stating that the property has been bequeathed upon him. To this, the plaintiff has issued Ex.A3-Re-joinder once again stating that the properties are the self-acquired properties of her father. He would submit that the plaintiff has nowhere stated that the said Lingappa was bedridden and not in a sound and disposing state of mind. Except for failing sight, it is not the contention of the plaintiff and the other defendants that the said Lingappa was blind. He would submit that the properties which are the subject matter of Exs.B7 to B11 would



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show that more than 50% of the properties were self-acquired properties.

Therefore, it is for the plaintiff to prove that there was a blending of the self-acquired properties along with joint family properties so as to bring all the properties under the umbrella of the ancestral properties. That apart, the suit properties have been purchased for a sum of Rs.20,000/-, whereas the total sale consideration under the above documents, Exs.B7 to B10 was only a sum of Rs.13,200/-. He would submit that insofar as the Will is concerned, the second defendant has discharged the onus of proof by examining D.Ws4 and 5, the attesting witnesses and D.W6, the brother of the Testator, who would in unison state that the said Lingappa has come to the office of D.W3 and given him instructions to prepare the Will and in line with his instructions the Will had been prepared and executed. He would further submit that although the 2nd defendant has proved the Will by examining the witnesses, the plaintiff who claims that the same is fabricated and forged has not taken any steps to have the signatures examined by an expert. Therefore, considering the fact that the suit properties have been purchased from out of the self-acquired funds of the said Lingappa and the



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said Lingappa has executed a Will, which has been proved by examining D.Ws 4 and 5, the lower appellate Court has rightly allowed the appeal and there is no reason to set aside the judgment and decree of the lower appellate Court.

Discussion:

14. In order to answer the substantial question of law, it is necessary to first appreciate the controversy in the above case. Two issues arise from the pleadings and evidence which need to be addressed:-

a) Whether the suit schedule property is the ancestral property of Lingappa, since according to the plaintiff, the same has been purchased from and out of the ancestral nucleus; and

b) Whether Ex.B2-Will is a valid one executed by the testator in a sound disposing state of mind.



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The plaintiff has marked Exs.B7 to B11, which are the Sale Deeds that have been executed by the deceased Lingappa in favour of others to prove that the suit property was purchased from out of the ancestral funds. In none of the Sale Deeds has Lingappa mentioned that the property which he is selling is ancestral property. On the contrary, the Sale Deed would imply that it is a self-acquired property of Lingappa. Further only 2 properties have been sold prior to the purchase of the suit property and the amount received as sale consideration is far less than the sale consideration paid by Lingappa for the purchase of the suit property. Once there is no proof to show that the suit property is purchased from out of joint family nucleus, then it has to be concluded that the suit property is the self-acquired property of Lingappa, which he could deal with in any manner which he desired. That apart, the deceased Lingappa was employed in the Tamil Nadu Electricity Board and therefore, it can be safely presumed that it is only his income that has gone into purchase of the suit property. In fact, in his Ex.B2-Will, Lingappa has clearly mentioned that during his life time, as an employee of the Tamil Nadu Electricity Board, he had acquired a single item of



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immovable property, which is the suit schedule property. Therefore in the light of the categoric assertion of the Testator it has to necessarily be concluded that the suit property is the self acquired property of the Testator Lingappa.

15. The second issue is about the validity of Ex.B2-Will. The plaintiff would assail Ex.B2 on the ground that 3 years prior to its execution, the Testator Lingappan had lost his eye sight and the said fact is proved by the recitals in Ex.B2-Will, in which the testator would state that he had lost his eye sight since January 2003. The Will is executed on 31.07.2003. The Will is a registered one. The testator has executed the Will before the Sub-Registrar and the attesting witnesses as well as the identifying witness are one and the same. The defendants have examined D.W3, who is an Advocate who had prepared the Will on the instructions of the testator. D.W3 is a very senior member of the Ooty Bar Association. He has in clear terms deposed that the said Lingappa has suffered from a failing eye sight. It is also not the categoric case of the plaintiff that her father was a blind.



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D.W3 has reiterated the contentions stated by him in the chief examination also in his cross examination. He has stated that the testator was brought to the office by Jawarappa, one of the attesting witness, who has been examined as D.W4. He has also deposed that his acquaintance with Jawarappa is as his client. The witness has gone on to state that the said Lingappa did not bring any of children to his office at the time of preparing the Will. The Will has been prepared only on the instructions of Lingappa. The second defendant has also examined two attesting witnesses, who have also signed as identifying witnesses before the Sub-Registrar. Jawarappa, who has been examined as D.W4, has corroborated the evidence of D.W3 by stating that he had taken initiative to organise for the preparation and execution of the Will. In fact, the witness would state that at the request of Lingappa, he got an appointment with the Advocate 4 days prior to execution of the document. He has also deposed that the contents of the Will has been provided by Lingappa to the Advocate. He has also corroborated the evidence of D.W3 that after preparing the Will in English, the contents had been translated and explained to Lingappa. Both the



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witnesses have deposed to the effect that they have seen the said Lingappa executing the Will and in turn has seen the 2 of them signed the Will as attesting witnesses. As regards his eye sight, he has deposed that the said Lingappa was only suffering from failing eye sight. This statement was also reiterated by D.W5 who has stated that the said Lingappa was only suffering from a failing eye sight. D.W5 is the retired Air Force Personnel, who is known to Lingappa since the year 1979. Therefore, the second defendant has proved the execution of Ex.B1-Will in the manner known to law. Considering the fact that this Court has held that the suit property is the self-acquired property of Lingappa and as Ex.B2-Will is held to be a valid Will, substantial questions of law 3 and 4 are answered against the plaintiff. No arguments have been addressed by both counsels on the 2nd substantial question of law and therefore it is taken that the appellant has not canvassed the same.

16. The plaintiff would allege suspicious circumstances only on the ground of failing eye sight. She would rely upon the statement in Ex.B2 to



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substantiate it. The plaintiff cannot rely upon a single statement in the document to state that the other recitals are not made by the deceased Testator. Though the plaintiff has stated that the Lingappa was blind, no evidence has been produced to prove the same. On the contrary, D.Ws.3 to 5 would in unison state that the Lingappa has suffered from a failing eye sight, which means that he is not a blind, but his eye sight is slowly failing him. Lingappa has also made a mention about the same. However, it appears that the true import of the Testator's statement has been lost while translating his contentions from the vernacular to the English. If really he was a blind, the "jurat" would also be worded differently. The signatures affixed by the Testator appear to be the same in all the pages of the Will. The fact that the document is a registered one would reinforce the above conclusion as the Sub-Registrar would have definitely cross checked the Testator's capability of executing the Will, if he is blind. Further the fact that the Testator has taken into confidence his friends DW.4 and DW.5 to identify a lawyer to prepare the Will and thereafter asking them to be the witnesses not only when signing in the lawyer's office but also at the Sub-

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Registrar's office would clearly prove that the Will has been prepared only at the request of and instructions of the Testator. The contents of the Will giving reasons for bequeathing the property only on the son and the exclusion of the wife and daughter would indicate the sound disposing state of mind of the Testator. Therefore, the suspicious circumstances raised by the plaintiff pales into insignificance. Therefore, the substantial questions of law No.1 is answered against the plaintiff. Accordingly, the second appeal is dismissed. There shall be no order as to costs.

23.11.2022

Index : Yes/No
Speaking order/non-speaking order
srn

To

1. The District Judge, The Nilgiris Udagamandalam
2. The Subordinate Judge, The Nilgiris, Udagamandalam.
3. The Section Officer, V.R.Section, High Court, Madras.

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