



A.S(MD)No.50 of 2011

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 13.07.2022

CORAM :

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

A.S(MD)No.50 of 2011

P.Ganapathy

... Appellant

VS.

- 1) K.Krishnammal
- 2) S.Subbuthai
- 3) P.Ramasamy(Died)
- 4) Vijayalakshmi
- 5) Akilandeshwari
- 6) Venkatesh

... Respondents

(The respondents 4 to 6 are brought on record as legal heirs of the deceased 3rd respondent vide order dated 13.03.2018 in CMP(MD)Nos. 1986 to 1988/2018).

Appeal Suit filed under Section 96 of the Code of Civil Procedure, against the judgment and decree passed in O.S.No.97 of 2008 on the file of the Additional District Court, Fast Track Court No.I, Tirunelveli, dated 21.12.2010.

For Appellants

: Mr.S.Meenakshi Sundaram, Senior Counsel
for Mr.N.GA.Natraj



A.S(MD)No.50 of 2011

For Respondents

: Mr.H.Arumugam for
Mr.J.Senthil Kumariah

WEB COPY

JUDGMENT

The respondents 1 and 2 as plaintiffs filed O.S.No.97 of 2008 against the appellant/1st defendant and the 3rd respondent/2nd defendant before the Additional District Court, Fast Track Court No.I, Tirunelveli, for partition of half share in the suit properties and to direct the defendants to pay a sum of Rs.1,08,000/- to the plaintiffs towards medieval income for the period between 2000 and 2008 and also to pay a sum of Rs. 4,500/- per month towards medieval income from the date of plaint till the date of partition and possession of the plaintiffs in the suit properties. After trial, the trial Court passed a preliminary decree for partition by judgment and decree dated 21.12.2010. Aggrieved by the said judgment and decree, the 1st defendant as appellant has filed this appeal.

2. Brief facts in the plaint are as follows:-

One Patta Konar is the father of the plaintiffs and the defendants and the said Patta Konar had two wives namely, one Mookammal and



A.S(MD)No.50 of 2011

Lakshmi Ammal who are sisters. Lakshmi Ammal had no issues. The parties are the children of Patta Konar born through Mookkammal. The suit properties belonged to Patta Konar, Mookammal and Lakshmi Ammal. Patta Konar died 30 years ago and Mookammal and Lakshmi Ammal died in 2001 and 2005 respectively. All of them died intestate, as such, the parties are entitled to the suit properties jointly. The 3rd item of suit schedule belonged to Patta Konar, items 1, 4 and 6 belonged to Mookammal and items 2 and 5 belonged to Mookammal and Lakshmi Ammal jointly. According to the plaintiffs, all the parties to the suit are entitled to 1/4 share each in the suit properties. The 1st defendant was residing in one portion of item 5 of the suit schedule and let the other portion of item 5 for rent and received rent of Rs.4,000/-. Further, the 1st defendant let the ground floor in item 3 of the suit schedule for rent and received Rs.3,000/- towards rent. Further, a Fertilizer Shop situated close to South Mutharamman Temple in Palayamkottai was run by Patta Konar. After his death, the 1st defendant converted that shop into a Xerox shop in the name and style of Uma Xerox and is receiving income at Rs.2,000/- per month. According to the plaintiffs, they are entitled to half share in all the income from the abovesaid suit properties. The 1st



defendant neither gave half share in the business income nor partitioned the suit properties and gave share to the plaintiffs despite their requests, but attempted to sell the suit properties to third parties. Hence, the plaintiffs issued an advocate notice dated 21.06.2008. Despite receipt of the said notice, the defendants did not send any reply notice. Hence, the suit.

3. Brief averments in the written statement filed by the 1st defendant are as follows:-

The relationship is admitted. The 1st defendant denied the averment that Patta Konar, Mookammal and Lakshmi Ammal died intestate and further denied that the suit properties jointly belonged to the plaintiffs and the defendants. The 1st defendant also denied the averment that the 3rd item of suit schedule stands in the name of Patta Konar, because, nearly 4 cents of land in 3rd item have been acquired for formation of road and 4 cents have been encroached by some persons. Hence, only 20 cents of land is present in the 3rd item, as such, the suit is liable to be dismissed for mis-description of the extent of property. The 1st defendant also denied the share of each parties as 1/4 in the suit



A.S(MD)No.50 of 2011

properties. The averment that the 1st defendant rented out the 5th item of the suit schedule and received rent at Rs.4,000/- per month, is denied, whereas, the 1st defendant is residing in a portion of the 5th item which belongs to Lakshmi Ammal, who had executed a registered will dated 04.06.1999 bequeathing the house in the 5th item of the suit schedule to the wife of the 1st defendant namely, Ulagammal. According to the 1st defendant, Ulagammal is a necessary party to the proceedings and failure to implead her would vitiate the proceedings. The 1st defendant also denied the averment that the 1st defendant leased out the ground floor in the 3rd item of the suit schedule and is receiving rent of Rs.3,000/-. In the will dated 04.06.1999, Lakshmi Ammal bequeathed her share nearly 4.66 cents exclusively to the 1st defendant and therefore, rest of the parties to the suit are jointly liable only to 23.34 cents excluding 4.66 cents allotted to the 1st defendant and out of 23.34 cents, as stated above, 4 cents of land in 3rd item have been acquired for formation of road and 4 cents have been encroached by some persons. The 1st defendant further denied the averment that the Fertilizer Shop situated close to South Mutharamman Temple in Palayamkottai run by Patta Konar was converted by the 1st defendant into a Xerox shop in the



name and style of Uma Xerox and he is earning Rs.2,000/- per month from the said shop. Actually, the 1st defendant had taken the shop from one Nadar after paying a valuable consideration and pays rent to the Executive Officer of the said temple, as such, he is in exclusive possession of the same and this property has not been included in the suit schedule. The 1st defendant stoutly denied the claim of half share by the plaintiffs in the business income. According to the 1st defendant, after the death of Lakshmi Ammal, the registered will dated 04.06.1999 came into force and pursuant thereto, the 1st defendant is in exclusive possession of the properties mentioned in the will and the plaintiffs are not entitled to any extent of the properties mentioned in the will. The plaintiffs were given in marriage even before 1956 and they are not entitled to any benefits of claim as prayed. Thus, the suit is liable to be dismissed.

4. Based on the above pleadings, the trial Court framed the following issues:-

- i. Whether the plaintiffs have share in the suit properties?
- ii. Whether preliminary decree giving 1/4 share to the plaintiffs in



the suit properties as claimed by them, can be passed?

- iii. Whether Ulagammal is a necessary party to the suit?
- iv. Whether Lakshmi Ammal executed a will dated 04.06.1999?
- v. Whether the plaintiffs have no right in the suit properties?
- vi. Whether the plaintiffs are entitled to medieval loss as claimed by them?
- vii. To what relief, the plaintiffs are entitled to?

5. In order to substantiate the case, on the side of the plaintiffs, the plaintiffs examined themselves as PW1 and PW2 and marked 6 documents as Exs.A1 to A6. On the side of the defendants, the 1st defendant examined himself as DW1 and one Narayanan was examined as DW2 and 6 documents were marked as Exs.B1 to B6.

6. The trial Court considering the pleadings, oral and documentary evidence, passed a preliminary decree for partition by judgment and decree dated 21.12.2010. Challenging the said judgment and decree, the 1st defendant as appellant has filed this appeal.



A.S(MD)No.50 of 2011

7. The learned Senior Counsel for the appellant would submit that in item 3 of the suit schedule, originally 28 cents were available. 4 cents have been encroached by third parties and 4 cents have been acquired by the Government through the acquisition proceedings. Therefore, in item 3, only 20 cents are available and Lakshmi Ammal executed a will dated 04.06.1999 in respect of that 20 cents in favour of the appellant and his wife. Hence, item 3 of the suit schedule is not liable for partition. The said Lakshmi Ammal also executed a will in respect of items 2, 3 and 5 of the suit properties and the will has been duly proved by examining the Attestor. Though the respondents 1 and 2/plaintiffs have not specifically denied about the execution of the will on the ground of fraud or coercion, they thrown some suspicious circumstances i.e., disinheritance of the close relatives, active participation of the appellant during execution of the will and the conduct of the Attestor. In the will, it is stated that the appellant residing in item 5 of the suit schedule, has looked after the Testatrix Lakshmi Ammal and he only performed all the funeral ceremonies of Lakshmi Ammal, since she had no issues and the respondents 1 and 2 settled with their husbands' houses.



8. According to the learned Senior Counsel, the suspicion raised by the respondents is only minor discrepancy which will not go to the root of the case with reference to execution of the will. Since the appellant alone looked after the Testatrix Lakshmi Ammal and satisfied her wish and will, out of love and affection, she bequeathed items 2, 3 and 5 of the suit schedule in favour of the appellant and his wife. The learned Senior Counsel would further submit that the shop situated close to South Mutharamman Temple in Palayamkottai was leased out to a third party, after that, the appellant got the said shop on lease from the temple authority and he is not in possession of the shop as a co-sharer after the death of his father. Therefore, the respondents are not entitled to any share in the leasehold right of that shop. As regards the allegation that the appellant converted the fertilizer shop run by Patta Konar into a xerox shop, the learned Senior Counsel would submit that actually, the 1st defendant had taken the shop from one Nadar after paying a valuable consideration and pays rent to the Executive Officer of the said temple, as such, he is in exclusive possession of the same and this property has not been included in the suit schedule. The will executed by Lakshmi Ammal in favour of the appellant and his wife is



valid and the appellant also proved the will. Therefore, the appellant has removed all the suspicion raised by the respondents. The said Lakshmi Ammal has also given other properties to the respondents and therefore, the plea of disinheritance is not applicable. However, the trial Court has miserably failed to appreciate the evidence and erroneously come to the conclusion that the will is not proved and decreed the suit in toto. Thus, the judgment and decree passed by the trial Court in respect of will mentioned properties is liable to be set aside.

9. The learned counsel for the respondents would submit that the properties originally belonged to Patta Konar, and his two wives namely, Mookammal and Lakshmi Ammal. Patta Konar, Mookammal and Lakshmi Ammal died intestate. The appellants and the respondents are the legal heirs of Patta Konar, Mookammal and Lakshmi Ammal and they are entitled to equal share in the suit properties. The appellant has not specifically pleaded in the written statement that since he only took care of Lakshmi Ammal, out of love and affection, she bequeathed items 2, 3, 5 of the suit schedule to him. As regards the 3rd item, though the appellant pleaded that third parties encroached 4 cents and 4 cents was



A.S(MD)No.50 of 2011

acquired by the Government, he has not produced any documents and has also not established that there is an encroachment. Even otherwise, the encroacher can be removed as per law as they have no title. As far as the Fertilizer shop adjacent to the temple, admittedly, Patta Konar was a lessee. After his death, the plaintiffs and the defendants are entitled to leasehold right, but the appellant has not established that after the death of the father, the said shop was surrendered to the temple and thereafter under individual capacity, the appellant had taken the shop on lease with the temple.

10. The counsel for the respondents attacked the will on three grounds namely, propounder of the will/appellant actively participated during the execution of the will, disinheritance of other legal heirs and the conduct of the Attestor. DW2 who is said to have attested Ex.B3-will, is a Government servant and on the date of executing the will, without getting permission during office hours or without applying leave from his office, DW2 could not have been present in the Sub Registrar office which itself raises a doubt as to the execution of the will was in the presence of PW2-Attestor and therefore, the appellant has not proved



A.S(MD)No.50 of 2011

the execution of the will and has not removed the suspicious circumstances. Though DW1/appellant has stated that at the time of execution of the will, he and his wife and PW2/Attestor were present, whereas, DW2/Attestor has stated that at the time of execution of the will, the wife of the appellant was not present. Though the appellant stated that there is no pleading by the respondents 1 and 2/plaintiffs regarding denial of execution of will, the learned counsel for the respondents would state that even though such denial has not been pleaded, it is the duty of the propounder to prove the will and to remove all the suspicious circumstances, for which, he placed reliance on the following decisions:-

(i) K.Laxmanan vs. Thekkayil Padmini and others reported in (2009) 1 SCC 354.

(ii) Shivakumar and others vs. Sharanabasappa and others reported in 2020 (4) CTC 321.

Thus, the learned counsel for the respondents would pray for dismissal of the appeal.

11. Heard both sides and perused the records.



A.S(MD)No.50 of 2011

12. Admittedly, the appellants and the respondents are brothers and sisters. They are deriving title from their parents. The case of the respondents 1 and 2/plaintiffs is that Patta Konar, Mookammal and Lakshmi Ammal died intestate and therefore, all the parties to the suit are entitled to equal share in the suit properties. The learned counsel for the appellant raised a plea that some of the items of schedule properties stand in the name of the step-mother, Lakshmi Ammal/second wife of Patta Konar and some of the properties stand in the name of both Lakshmi Ammal and Mookammal/mother of the appellant and therefore, the step-mother/Lakshmi Ammal executed a will in favour of the appellant and his wife. Thus, as far as her share is concerned, the respondents 1 and 2/plaintiffs are not entitled to any share and the appellant alone is entitled to the same. Though the will has been denied by the respondents 1 and 2/plaintiffs, but however, during the examination, PW1 and PW2 have not stated that the will was obtained by fraud or the will was forged by the appellant, whereas, they thrown some suspicious circumstances, which are; active participation of the appellant; disinheritance of the other legal heirs and also the conduct of the Attestor.



A.S(MD)No.50 of 2011

13. Admittedly, the will has been marked as Ex.B3 which is a registered will and DW2 who attested the will during the execution. Since the will is a registered one, its execution cannot be questioned. However, the propounder has to prove the will in the manner known to law under Section 68 of the Indian Evidence Act. The will has been produced before the Court and it has been executed as contemplated under Section 63 of the Indian Succession Act and also the will has been proved under Section 68 of the Indian Evidence Act, by examining the Attestor. The genuineness of the will has been questioned by the respondents 1 and 2/plaintiffs on the ground of conduct of the Attestor, since the Attestor is a public servant and during office hours, he engaged in a private work without obtaining permission or leave which is not acceptable. As pointed out by the learned counsel for the appellant, the Registration Office and also the office in which DW2/Attestor was working are within the same compound and the Attestor is a known person to the Testatrix. Therefore, at the request of the Testatrix, he had gone to the Registration office. Though the respondents 1 and 2 stated that the propounder of the will/appellant was present, but his wife was not present in the Registration office, the appellant says that both himself



A.S(MD)No.50 of 2011

and his wife were present in the Registration office. The Testatrix is a widow who is none other than the second wife of Patta Konar and all the appellant's brothers and sisters were residing in a far away place and the appellant only was residing in the suit properties and also looked after his father, mother and step-mother Lakshmi Ammal and performed the funeral ceremonies of Lakshmi Ammal. Since the appellant took care of Lakshmi Ammal by residing with her in the suit properties and satisfied her wish and will, out of love and affection, she executed a will in favour of the appellant, the fact that the appellant residing with Lakshmi Ammal took care of her is not denied.

14. Though the learned counsel for the respondents states that it is not mandatory to file reply statement, there is no quarrel over the said proposition. Normally, reply statement need not be filed and it is not mandatory. Reply statement is not a pleading. However, when the appellant has specifically denied the equal share claimed by the plaintiffs stating that Lakshmi Ammal executed a will, the plaintiffs ought to have replied to that averments. During cross examination, though PW1 has stated that Lakshmi Ammal has not executed the will, she has not



A.S(MD)No.50 of 2011

alleged fraud or coercion or any other suspicious circumstances. Only at the time of arguments, suspicious circumstances were raised as stated above. Mere non obtaining of permission or leave by the Attestor would by itself not be a sole ground to hold that the will is surrounded by suspicious circumstances. DW2 Attestor is a known person to the Testatrix who is an illiterate woman wanted the help of DW2 and therefore, called him and at her request, DW2 was also present and attested the document. It is not the case of the respondents that the Registration office is far away from the office of DW2, whereas, both offices situate in the same compound and therefore, such minor discrepancies cannot lead to discredit the will.

15. Though the learned counsel for the respondents would submit that the will was prepared long back, that was not established. The respondents have not questioned the mental disposing state of mind of the Testatrix and the other two grounds are only disinheritance and active participation. The Testatrix is an illiterate woman and had no issues. Since the appellant was taking care of her by residing in her house, there is nothing wrong to take the appellant with her to the



A.S(MD)No.50 of 2011

Registration Office. Therefore, the active participation of the appellant cannot be the ground to discredit the will. As far as disinheritance is concerned, the appellant and the respondents are the direct legal heirs. The Testatrix is the second wife of the father of the appellant and since the respondents 1 and 2/plaintiffs married and settled with their husbands' houses and the 3rd respondent was working in Chennai, the appellant alone was the person who was taking care of Lakshmi Ammal which fact has not been denied neither by filing reply statement nor even during the examination. Though the learned counsel for the respondents submits that no evidence can be let in without any pleadings, there is no quarrel over the said proposition. Only in the pleadings, facts can be pleaded, but evidence need not be pleaded. The appellant pleaded the fact in the written statement that he was residing with Lakshmi Ammal and fulfilled her wish and will and out of love and affection, she executed the will. Being a widow and having no direct legal heirs, Lakshmi Ammal was residing with the appellant and the appellant also was taking care of her which is not disputed by the respondents.



A.S(MD)No.50 of 2011

16. Therefore, under these circumstances, the suspicious circumstances raised by the respondents may not be valid grounds to disbelieve the will. Therefore, the finding of the trial Court regarding the will executed by Lakshmi Ammal in favour of the appellant and his wife alone is set aside. The respondents are not entitled to partition in respect of the properties covered in the will dated 04.06.1999. Regarding the other properties, the judgment and decree passed by the trial Court is confirmed.

17. In view of the above, the Appeal Suit is partly allowed. No costs. Consequently, connected miscellaneous petition is closed.

bala

13.07.2022

Index : Yes / No

Internet : Yes

To

The Additional District Judge,
The Additional District Court,
Fast Track Court No.I,
Tirunelveli.



WEB COPY



A.S(MD)No.50 of 2011

P.VELMURUGAN, J.

bala

JUDGMENT MADE IN
A.S(MD)No.50 of 2011
DATED : 13.07.2022