



S.A(MD).No.794 of 2010

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED: 02.08.2022

CORAM: JUSTICE N.SESHASAYEE

S.A(MD)No. 794 of 2010

1.Maniappan
2.Sundar Raj
3.Tmt.Manimegalai Appellants/Respondents/Plaintiffs

Vs

1.Mayilsamy ... 1st Respondent/Appellant/1st Defendant
2.Amuthavalli
3.Kanniammal ..Respondents 2 & 3/Respondents 4 & 5
/Defendants 2 & 3

Prayer : Second Appeal is filed under Section 100 of Code of Civil Procedure, against the judgment and decree dated 28.04.2010 in A.S.No.123 of 2007 on the file of the Principal Sub Court, Dindigul, reversing the judgement and decree dated 18.07.2008 in O.S.No.121 of 1997 on the file of the District Munsif cum Magistrate, Veda sunthur.

For Appellants : Mr.R.Ramadurai

For R1 : Mr.T.Antony Arul Raj



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JUDGMENT

The plaintiffs in the suit for partition are the appellants. They laid the suit in O.S.No.121 of 1997 before the District Munsif cum Judicial Magistrate, Vedasanthur. The suit came to be decreed. Challenging the same, the first defendant preferred A.S.No.123 of 2007 before the Principal Sub Court, Dindigul and that came to be allowed. Challenging the said decree of the First Appellate Court, this Second Appeal is preferred. For narrative convenience, the parties would be referred to as per their rank before the trial court.

2.1 The facts are:

- There are 4 items of properties. These properties and others were held by a certain Karuppanna Gounder as the *karta* of the joint family.
- Karuppanna Gounder was married twice. Through his first wife, he had a son, the first plaintiff herein. Then there was second marriage with the third defendant, through whom he had 4 children. They are the plaintiffs 2 and 3 and the defendants 1 and 2.
- On 13.02.1979, Vide Ext.A.2 = Ext.B.1 partition deed, Karuppanna Gounder and his 3 sons namely, the plaintiffs 1 and 2 and the first



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defendant divided their ancestral properties. In this, Karuppanna Gounder was allotted 'A' schedule properties, which is now described as suit properties.

- According to the plaintiffs, on 23.03.1987, Karuppanna Gounder died intestate and they claim that each of his heirs would be entitled to 1/6th share in the suit properties.

2.2 The suit was resisted by the defendants 1, 2 and 3. According to them, Karuppanna Gounder did not die intestate, that he had executed an unregistered Will dated 15.02.1982 bequeathing 'A' schedule property allotted to him under Ext.A.2 partition exclusively to the first defendant, one of his sons born through his second wife. This Will is marked as Ext.B. 2. Based on this Will, revenue records have been mutated in his name. He also claims prescription of title by adverse possession.

2.3 The plaintiffs filed their reply challenging the very execution of Ext.B.2 Will.



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3. The dispute went to trial. The crux of the issue is about the genuineness of Ext.B.2 Will. For proving the Will, the first defendant examined D.W.2, one of its attestors. The trial court disbelieved Ext.B.2-Will and decreed the suit. The matter reached the first appellate Court at the instance of the first defendant and it was allowed. As indicated earlier, the plaintiffs have promptly preferred the present Second Appeal.

4. On 01.08.2022, while admitting this Second Appeal, this Court has framed the following substantial questions of law:

i) Was not the First Appellate Court egregiously erred in relying solely on the evidence of D.W.2 for holding that Ext.B.2 Will is genuine?

ii) Was not the First Appellate Court erred in ignoring certain attending circumstances as borne out by evidence of D.W.2?

5. The learned counsel for the appellants submitted:

- It is an admitted fact that a partition deed was executed on 13.02.1979 and the original is available on record as Ext.B.1. It is an admitted fact that Karuppanna Gounder is illiterate and would always execute



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documents by affixing his left hand thumb impression(L.H.T). Indeed, in Ext.B.1 partition deed, he had not signed it. He however, had affixed his L.H.T before the Registering Authority, and the same is available in the endorsements made by the Sub Registrar's Office in Ext.B.1. It is in this setting, the proof of Ext.B.2-Will said to have been executed by an illiterate requires to be proved, argued the counsel. If Ext.B.2 is considered the following aspects emerge from within the document:

- ✕ The L.H.T is not clear in any of the 3 pages and the substantial portion of the thumb impression is only seen as a smudge. This implies that even a thumb impression cannot be compared with the admitted thumb impression of the Karuppanna Gounder available in Ext.B.1.
- ✕ The relationship of Karuppanna Gounder to his other children was cordial. Here for excluding the other natural heirs of Karuppanna Gounder, the Will recites that the 1/6th share which Karuppanna Gounder had in 'A' schedule property to Ext.B1 partition deed was exclusively bequeathed to the first defendant because the first defendant had met the marriage expenses of Karuppanna



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Gounder's two daughters namely, the third plaintiff and the second defendant. However, in Ext.B1 partition deed, it is expressly stated that the first defendant was given more properties than others in 'C' schedule, as he was required to meet expenses of his two sisters. It is evident from the valuation given for each of the schedule of properties in Ext.B.1 partition deed that while the first plaintiff was given properties worth around Rs.12,000/- the first defendant was given property worth more than Rs.25,000/- and the second plaintiff was given properties worth barely some Rs.4500. When in 1979, the parties have joined to execute a partition deed, substantial properties have been allotted to the first defendant because he was also given an obligation meet the marriage-expenses of his sisters. Then it is incongruent for the father to ignore this stipulation within about 3 years from the date of execution of Ext.B.1 when he alleged to have executed Ext.B.2 Will on 15.02.1982.

- D.W.2 in his testimony has deposed that Ext.B.2 was executed at the Sub Registry. Here, the Sub Registry and the Office of the Tahsildar lie in the same premises. It is in that premises the Will was executed. If Karuppanna Gounder had walked up to the Sub



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Registry, it is curious that he had chosen not to register the Will, especially, when the Will does not carry any stamp duty.

- When admittedly, Karuppanna Gounder was illiterate, it is nigh difficult to believe that he was able to provide all the information regarding the description of the property from his memory. Indeed, D.W.2 does not state that the Will was prepared after referring to the details about the property from Ext.B.1 partition deed.

6. Per contra, the learned counsel for the first defendant/first respondent argued that the first defendant as a propounder of Ext.B.2 Will had examined D.W.2, one of the attesting witnesses. This attesting witness speaks to the material aspects of execution of the Will. This testimony goes even unimpeached.

7. Proof of Will is not just about a mechanical process of examining an attesting witness to speak about how the Will was executed. The genuineness of Will has got two aspects:

- i) the genuineness of execution *per se*; and



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ii)the genuineness to understand such execution in the context of surrounding circumstances.

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At the end of the day, the propounder of the Will has to satisfy the conscience of the Court that the Will is genuine, and unless this litmus test is passed, no court can hold that a Will has been proved.

8. The core issue is whether Karuppanna Gounder had executed Ext.B.2 Will. In fitness of things, the purported thumb impression of Karuppanna Gounder in Ext.B.2 should have been compared with his admitted thumb impression available in Ext.B.1 partition deed. When this Court looked into the thumb impression in Ext.B.2 Will, that which are in the first two pages are not adequately clear whereas in the last page, it seem to be better than those in the first two pages. Turning to Ext.B.1 partition deed, the admitted thumb impression of Karuppanna Gounder in the endorsement of the Sub Registry appears incomplete. This is only *prima facie* view. This Court is not an expert to compare the finger prints. However, the thumb impression of Karuppanna Gounder as available in the last page of Ext.B.2 appears to be better than the one in the Sub Registry's endorsement.



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9. In fitness of things, the thumb impression in Ext.B.2 must be compared with Ext.B.1. Here, this Court does not agree with the approach of the first appellate Court, where it only went by testimony of D.W.2 in abject neglect to the circumstances provided by the evidence on record.

10. The matter necessarily has to be remanded back and to save time, this Court remands it back to the First Appellate Court. The first appellate court is required to summon even *suo motu* the thumb impression of Karuppanna Gounder available with the Sub Registry concerned where Ext.B.1 was registered. The First Appellate Court shall appoint a forensic finger print expert for comparing these thumb impressions at the expense of the first defendant. When once the report of the forensic expert is made available, the first appellate Court is required to approach the case as follows: If the First Appellate Court holds that the purported thumb impression of Karuppanna Gounder in Ext.B.2 does not reconcile with his admitted signature in Ext.B.1 and that which is available in Sub Registry, then it settles the issue. If on the other hand, the First appellate court finds that the disputed thumb impression available in Ext.B.2 belongs to Karuppanna Gounder, then it ought to address whether the Will is believable in the



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context of certain circumstances raised by the learned counsel for the plaintiffs/appellants herein as detailed in paragraph 5 of this judgment.

11. In conclusion, this Second Appeal is allowed and the judgment and the decree of the First Appellate Court in A.S.No. 123 of 2007 on the file of the Principal Sub Court, Dindigul, is set aside. The matter is remanded back to the First Appellate Court for the purposes indicated in paragraph No.10 above. No costs.

02.08.2022

Index : Yes/No

Internet : Yes/No

CM

To,

- 1.The Principal Sub Court, Dindigul,
- 2.The District Munsif cum Magistrate, Veda sunthur.
- 3.The Section Officer,

VR Section,

Madurai Bench of Madras High Court,

Madurai.



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