



S.A(MD).No.47 of 2011

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 28.06.2022

CORAM: **JUSTICE N.SESHASAYEE**

S.A(MD).No.47 of 2011

and

M.P(MD).No.1 of 2011

R.Govindasamy

...Appellant/Appellant/Defendant

Vs

R.Vasudevan

....Respondent/ Respondent/Plaintiff

Prayer : Second Appeal is filed under Section 100 of Code of Civil Procedure, against the judgment and decree dated 12.03.2010 passed in A.S.No.241 of 2008 on the file of the I Additional Subordinate Court, Thiruchirappalli confirming judgment and decree dated 25.02.2008 passed in O.S.No.1052 of 1999 on the file of the I Additional District Munsif, Thiruchirappalli.

For Appellant : Mr.M.Saravanan
For Respondent : Mr.G.S.Asok Adhithyan

JUDGMENT

The defendant in O.S.No.1052 of 1999 on the file of I Additional District Munsif, Tiruchirappalli, having suffered a decree successively both before the trial Court as well as before the First Appellate Court, has come before



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this Court with the present appeal. For narrative convenience, the parties shall be referred to as per their rank before the trial Court.

2. The plaintiff's case is:

- Certain Radhakrishnan possessed some properties. The parties hereto are the two of his sons, and there are other children as well. While so, on 18.05.1972 Vide Ext.A.4 -partition deed, Radhakrishnan divided the properties and allotted them to his children in different lots. Both the plaintiff as well as the defendant were also provided separate items of properties in that partition.
- While so, the defendant herein had laid O.S.No.319 of 1983 for partition against his father Radhakrishnan and his other siblings. In that suit, Radhakrishnan took up a plea based on Ext.A.4-partition deed herein above indicated. Indeed, during the trial of the suit, this partition deed came to be marked as Ext.B.30. O.S.No.319 of 1983 went to trial and both sides adduced oral and documentary evidence. On appreciation of the evidence before it, the trial Court dismissed the suit. Indeed, the trial Court found believed the partition dated 18.05.1972. There was no further appeal.



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- While so, Radhakrishnan had executed a registered Will, dated 13.06.1979 bequeathing two of the properties that came to be allotted to his share under Ext.A.4-partition in favour of the plaintiff. The Will was attested *inter alia* by P.W.2, the testator's younger brother. Notwithstanding the fact that item 2 property in the plaint was allotted to the share of Radhakrishnan in Ext.A.4-partition, he let his son, the defendant herein to occupy the same.
- On 25.06.1996 Radhakrishnan died, wherein after, his Will came into force. The suit is laid for recovery of possession of item 2 property along with mesne profits.

3. In the written statement the defendant had contended :

- Ext.A.4-partition deed is not true as it excludes the two daughters of Radhakrishnan and the partition never came into force. The defendant admittedly is in possession of the suit property and he had improved the property by expending considerable sums of money. This itself will tilt against the allegations founded on Ext.A.4-partition deed. Earlier, there was a panchayat regarding the division of property and Ext.B-2 *Mutchalika*, dated 15-06-1980 came to be executed. In terms of the *Mutchalika*, Radhakrishnan had to pay the



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defendant a sum of Rs.50,000/- (Rupees Fifty Thousand only) and this amount was not paid. The Will purported to have been executed by Radhakrishnan is a fabrication. At any rate, he was not in sound state of mental disposition at the relevant time and that the plaintiff had put his father under duress and obtained his signature in the Will. Indeed, the Will does not contain any particulars of the property or its description or survey number or the boundaries. At any rate, Radhakrishnan had no right to execute a Will as alleged, since the properties are ancestral properties. Indeed, Radhakrishnan had dealt with a portion of the property covered under the Will and sold it to a certain Kannudaiyan. This fact is deliberately suppressed by the plaintiff.

- Be that as it may, the plaintiff on the strength of the Will alleged to have been executed by Radhakrishnan, tried to disturb the defendant's possession of the suit property. Hence, the defendant instituted O.S.No.1742 of 1997 for bare injunction. There is no cause of action for the suit. This apart, the defendant is in continuous and uninterrupted possession of the property and at any rate, has prescribed title by adverse possession.



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4.1 The dispute went to trial and before the trial Court, the plaintiff examined himself as P.W.1 and he had produced Ext.A.1 to Ext.A.22, of them, Ext.A.1 is the certified copy of the Will of Radhakrishnan, dated 13.06.1979 and Ext.A.21 is the photostat copy of the same. The Will was proved by examining P.W.2, an attester of the Will, who as earlier mentioned is the brother of the testator. For the defendant, he examined himself as D.W.1 and also examined two other persons as D.W.2 and D.W.3. He produced two Mutchalika as Ext.B.1 and Ext.B.2, which are dated 27.04.1980 and 15.06.1980 respectively. D.W.2 and D.W.3 are stated to be the *panchayathars* in the two panchayats.

4.2. The trial Court had earlier framed as many as 7 issues, of which, the first issue is directed into the genuineness of Ext.A.1 = Ext.A.21-Will of Radhakrishnan. It appears from the judgment of the trial Court, the defendant had taken exception to Ext.A.4-partition deed, consistent with his plea in the written statement. The trial Court dealt with this aspect and has held that the defendant cannot challenge Ext.A.4 partition deed, more so because the same issue was earlier decided against the defendant in the suit that he had laid in O.S.No.319 of 1983 as evidenced by Ext.A.22, a copy of the judgment of the said suit. Turning to the other aspects on the



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genuineness of the Will, the trial Court relied on the testimony of P.W.2 and other attending circumstances to come to the conclusion that the Will indeed was genuine and proceeded to decree the suit.

5. Aggrieved by the judgement of the trial Court, the defendant preferred the First Appeal in A.S.No.241 of 2008 before the First Additional Subordinate Court, Tiruchirappalli. The First Appellate Court on a reappraisal of evidence before it, came to the same conclusion which the trial Court had arrived, by adopting almost the same line of reasoning of the trial Court. This decree of the First Appellate Court is now under challenge.

6. The Second Appeal was admitted for considering the following substantial questions of law:

1. Whether the First Appellate Court has failed to frame a necessary issue regarding the genuineness and validity of the Will propounded by the respondent/plaintiff?

2. Whether the Courts below have committed an error in law in granting the relief of declaration without a prayer for the same?



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7. Heard both sides. The learned counsel for the defendant made the following submissions:

- The plaintiff has not produced the original of the Will, dated 13.06.1979. Instead, he has only produced Ext.A.1, which is certified copy of the Will and also produced xerox copy of the same in Ext.A. 21. In his Chief-examination, as P.W.1 he has deposed that the original Will was torn. It is not adequately made clear whether it meant that the entire Will was destroyed or partially destroyed. Now, the burden is entirely on the plaintiff to produce at least the torn pieces of the Will before the Court since the principal burden in proving the Will rest exclusively on the propounder of the Will. This is not done.
- Even assuming that there was a Will actually exists, in the matter of proving it, the attesor of the Will, who was examined as P.W.2, does not help the cause of the plaintiff since his testimony has considerable inconsistencies. He would first testify that he did not know where the Will was prepared, and then would proceed to say that he read the Will in terms of which, the testator bequeathed the property to his children after his demise. However, the Will that was



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produced before the Court as the last Will of the testator does not provide any such terms.

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The learned counsel submitted that taking the circumstances wholly there arises a strong suspicion about if Ext.A.1 equal to Ext.A.21 at all was the Will which Radhakrishnan had executed. He rely on the ratio reported in ***R.Narayansamy (deceased) and ors Vs. Mohanasundaram 2*** [2018(6) CTC 17] and reported in in ***Benga Behera and another Vs., Braja Kishore Nanda and other*** [(2007) 9 SCC 728].

8. Per contra, the learned counsel for the plaintiff submitted that the circumstances surrounding the execution of the Will may not be lost sight of. The Will was executed on 13.06.1979. The Will recites that the testator had three sons, of whom two of his sons which included the defendant herein did not care him. This the reason stated for excluding the other two sons from the bequeath. Some 7 years prior to that, Vide Ext.A.4 dated 18.05.1972 partition deed was brought into existence by the testator himself. Now, after the execution of the Will, the dispute arose over division of property and this was sought to be resolved by the intervention of panchayadars. At least there were two such panchayats and separate Mutchalikas were executed. These documents, marked as Ext.B.1 and Ext.B.2, of them, Ext.B.1 is dated 27.04.1980 and Ext.B.2 is dated



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15.06.1980 were attempted to be proved through D.W.2 and D.W.3. In this document, the defendant wholly accept Ext.A.4, partition deed. Despite this and concealing Ext.B.2, he laid O.S.No.319 of 1983 for partition against his brothers and few others, which included the present plaintiff as well. That suit came to be dismissed after hot contest as could be seen from Ext.A.22 judgment. The totality of the circumstances would indicate that the defendant and his father have always been in loggerheads for several years and the Will had to be understood in the context of these circumstances. Turning to Ext.A.1-Will *per se* the plaintiff has deposed that the Will was destroyed and when someone says it was destroyed, he cannot be required to produce that which is already destroyed. Fortunately, the Will is the registered Will and hence, the certified copy could be obtained and was produced. So far as the testimony of P.W.2 is concerned, he has testified on 27.08.2007 some 28 years after he had attested the Will, when he was 80 years old. The length of time that separates the act of attestation and the time of deposition necessarily will lead to certain lapses in memory, and that cannot be exaggerated to impeach the genuineness of the Will.

9. This Court carefully weighed the rival submissions. The focus here is more on the proof of Ext.A.1-Will, and whether the non-production of the



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original of the Ext.A.1-Will before the Court is fatal to the case of the plaintiff. That the testator and the defendant herein were sharing differences for considerable length of time is no secret. The genuineness of the Will is the centre point to the entire litigation, and the defendant has not asked a single question during the cross-examination of P.W.1 about the Will. The learned counsel for the defendant would try to canvass that if the Will is torn as contended by the plaintiff, then he ought to have produced at least those that remained with him. But, whether the Will is torn or entirely destroyed can be ascertained only if the plaintiff was probed on it during cross-examination. When he had an opportunity to probe the plaintiff, the defendant missed those opportunities. Presently, the argument of his counsel appears to be an effort in desperation to aid the defendant, but he notwithstanding his earlier experiences with litigations did not appear to be diligent during the trial.

10. Turning to the second contention of the defendant, on perusing the testimony of P.W.2 and comparing that testimony with the contents of Ext.A.1 = Ext.A.21-Will there indeed is a discrepancy about the nature of bequeath made under the Will. But it should be remembered that an attestor is only required to possess *animus attestandi* and he is not even required to



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know the contents of the Will. Even if he had made a wrong statement about the contents of the Will, then he must be given a huge provision since he had testified to a fact happened some 28 years prior to the date of his testimony.

11. Turning to the point that the properties are not specifically described in the Will is concerned, the Will referred to Ext.A.4-Partition and the division of properties among the children. Ext.A.4 partition also indicates that some properties are allotted to the testator, and the Will says all that belonged to the testator would go to the plaintiff. Therefore, there is no real ambiguity in constructing the Will and even here the defendant fails.

12. On a proper assessment of the case, this Court does not find that the judgement of the first appellate court warrants any interference by this court. In fine, the Second Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

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Index : Yes/No

Internet: Yes/No

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To

1. I Additional Subordinate Judge, Tiruchirappalli.
2. I Additional District Munsif, Tiruchirappalli.
- 3.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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