



SA(md)No.601 of 2006

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED: 31.10.2022

CORAM: JUSTICE N.SESHASAYEE

S.A.(MD)No.601 of 2006

Saraswathi

....Appellant/Respondent/Defendant

Vs.

Gnana Pandithan

....Respondent/Appellant/Plaintiff

Prayer : Second Appeal is filed under Section 100 of Code of Civil Procedure, against the judgment and decree dated 08.02.2006 made in A.S.No.12 of 2005 on the file of the Additional Subordinate Court, (District Judge-Trainee) Sivagangai, reversing the judgment and decree dated 07.12.2004 made in O.S.No.66 of 2004 on the file of the District Munsif Court, Sivagangai.

For Appellant : M/s.M.Manonmani
for Mr.S.Srinivasa Raghavan

For Respondent : Mr.G.Prabhu Rajadurai



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JUDGMENT

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The defendant in O.S.No.66 of 2004 is the appellant herein. The suit was dismissed by the trial Court, but came to be decreed by the First Appellate Court.

2. The facts are as below:

- The suit property is described as a residential house bearing Door No. 3C, Tagore Street, Sivagangai. This property and couple of other properties originally belonged to a certain Kunjarammal. She was married to one Murugan. The couple had eight children of whom Balasubramanian was their eldest son and Gnana Pandithan is one of their younger sons and he is the plaintiff herein. There was another son namely Krishna, who died very young. Kunjarammal's husband Murugan had passed away some time in 1970. Subsequently, in the year 1997, she lost her elder son Balasubramanian too. The defendant is the widow of Balasubramanian.
- The plaintiff would now plead that on 02.08.2001, vide Ext.A.2-Will, Kunjarammal had bequeathed the whole of the suit properties to him exclusively. He would also plead that Balasubramanian and his family



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were in physical possession of the property as tenant under Kunjarammal. After the demise of Kunjarammal, his widow, the defendant herein and her son continue to live there. On this pleading, he had laid the suit for declaration and recovery of possession.

3. The defence taken are:

- that Kunjarammal, at the relevant time when Ext.A.2-Will was purported to have been executed, was down with paralysis and her right leg and left hand have been seriously affected by paralysis. Hence, she could not have executed Ext.A.2. And, at any rate, she would not have been to the Sub-Registry to complete the registration of the Will as she was not in a position to move and that the testator was impersonated before the Sub-Registry.
- Given the fact that she is down with paralysis, she was not in a sound state of mental disposition to execute the Will.
- Inasmuch as the plaintiff had admitted that his brother Balasubramanian was a tenant of the building, a suit for recovery of possession cannot be maintained, unless the lease is terminated and eviction is sought in the manner known to law.



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4. The plaintiff disputed the contention taken in the written statement with his reply statement.

5. The dispute went to trial. Before the trial Court, the plaintiff examined himself as P.W.1 and he also examined both attestors of the Will as P.W.2 and P.W.3 and he examined one of his sisters as P.W.4. He had produced Ext.A.1 to Ext.A.13, of which, the critical document is Ext.A.2. The plaintiff has also issued Ext.A.4, suit notice to the defendant and the reply is Ext.A.6. For the defendants, the defendant examined herself as D.W.1. She examined a neighbour of Kunjarammal to speak to her illness and immobility and also examined her sister in law, Manimegalai [wife of one Ananda Vadivelu, one of the sons of Kunjarammal] for the same purpose.

6. On appreciating the evidence, the trial Court disbelieved Ext.A2-Will and also had held that inasmuch as the plaintiff had admitted that the defendant is the tenant of the building, she could be evicted only by the Eviction Proceedings under the Tamil Nadu Buildings (Lease and Rent Control) Act. Aggrieved by this decree, the plaintiff preferred the first appeal before the First Appellate Court where he was successful on all counts. The First Appellate Court upheld the genuineness of Ext-A.2-Will and had held that the



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discrepancies which the trial Court relied on are inconsequential. Turning to the jurisdiction of the civil Court to grant the decree for recovery of possession, since the defendant had denied the tenancy, a suit for recovery of possession is maintainable. Hence, this second appeal at the instance of the defendant.

7. This appeal was admitted for considering the following substantial questions of law:-

- i. Whether the suit for declaration and recovery of possession is maintainable when the plaint alleges that the defendant has been a tenant in the suit property and when the suit property is situated in a municipality notified under the Tamil Nadu Building (Lease and Rent Control) Act?*
- ii. Whether a suit for declaration of title on the basis of a Will be decreed without adducing evidence as envisaged by Section 68 of the Indian Evidence Act?*
- iii. Whether a Will alleged to have been executed by a testator be termed to be genuine and true without appreciating the physical health of the testator and by analyzing the mental health of the testator?*



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8. The learned counsel appearing for the appellant submitted that:

- There is major contradiction as to the time of execution of Ext.A.2-Will.

Whereas, P.W.2, one of the attesting witnesses would say that the Will was executed at around 3.30 p.m. on 02.08.2001 and was registered thereafter. However, the Will was actually registered between 12.00 p.m. and 01.00 p.m. on that date. P.W.3, another attesting witness would depose that the Will was executed around 12 '0' clock prior to its registration between 12.00 p.m. and 01.00 p.m. One Will cannot be executed twice. P.W.2 witness if it is taken on its face value only indicates that he could not have seen the due execution of the Will. It is not the case either of the plaintiff or of P.W.2 that the testator had signed and acknowledged the execution of the Will at a later point of time to the attesting witness. The First Appellate Court has gone wrong in treating this major discrepancy as to the attestation as a minor discrepancy.

- Both P.W.2 and P.W.3 have deposed that the plaintiff was present at the time when the Will was executed which implies that there was an active participation of the plaintiff in executing the Will. When the defendant's husband namely Balasubramanian has no discordiality in his relationship with the testator, there is no need for the testator to ignore her heirs.



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- The plaintiff has produced Ext.A.7 which is a copy of testimony of the testator when she was examined as D.W.2 in another suit in O.S.No.225 of 1999 which was laid against her by her son Ananda Vadivelu. In this document, she had signed but barely two years later, she had fixed her thumb impression. While the defendant has pleaded that the testator was afflicted of paralysis, the same was admitted by the plaintiff himself in his cross-examination as P.W.1. In a situation such as that, it is important that the Sub-Registrar ought to have made an endorsement in the Will that the Will was read over and the same was understood by the testator before the same was executed. This endorsement is not there and it renders a Will suspicious. It is in contradiction to Rule 82(iii) of the Registration Rules. She also relied on the authority in ***Malliga vs. P.Kumaran*** reported in [2022 (2) MWN (Civil) 67].

10. Per contra, the learned counsel for the respondent/plaintiff argued that:

- P.W.2 was examined some three years after he attested and the examination of witness should not be converted into some kind of test of memory.



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- It is an admitted fact that Kunjarammal was down with paralysis but it is nobody's case that her mental faculties had failed when she executed a document Ext.A.2. Because she is down with paralysis, it provided the right situation for her to contemplate while executing the Will which she indeed has done.
- The Will is a registered one and the presumption under Section 114 of the Evidence Act would indicate that all official acts are duly done and therefore, a mere failure to make an endorsement by the official concerned would not render the registration as invalid in law.
- Both D.W.1 and D.W.3 who are daughters-in-law of Kunjarammal have conceded in their testimony that they knew about the allotment of certain properties under Ext.A.2-Will. This would imply that they indeed have admitted the Will.

11. After carefully weighing the rival submissions, this Court finds that the preponderance of probabilities is in favour of the defendant/appellant and the reasons are:-

- Admittedly, the Will was executed between 12.00 p.m. and 01.00 p.m. and P.W.3 says that it was executed about the time when it was registered. The other attesting witness namely P.W.2 would say that



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Kunjarammal executed some document around 3.30 p.m. on that date. If that is so, what was the document that P.W.2 attested.

- Where the testator fixes only her thumb impression and is found to suffer from paralysis, it is necessary that the Registering Official shall make necessary endorsement that he had satisfied himself that the Executor of the document knew what was being executed as has been held in *Malliga's* case (supra). And, this endorsement is absent.
- Both P.W.2 and P.W.3 say that the plaintiff was present throughout. It has to be noted that the defendant is the widowed daughter-in-law of Kunjarammal and it is not adequately explained why she had to be excluded by Kunjarammal especially when she never share any difference.
- Mere registration *ipso facto* does not prove the genuineness of the document. So far as the alleged admission of D.W.1 and D.W.3 about their knowledge regarding the Will is concerned, it has to be said that even if the Will is admitted by the other side, it has to be proved before the Court of law and the standard of proof required is for higher than the standard of proof in proving other facts. After all, the Court is the conscience keeper of the testator and the Court must satisfy itself that the Will is genuine.



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12. In fine, this Court cannot appreciate the approach of the First Appellate Court and finds every reason to hold it in favour of the defendant/appellant. Accordingly, this Second Appeal is allowed and the judgment and decree of the First Appellate Court passed in A.S.No.12 of 2005 on 08.02.2006 is set aside and the judgment and decree of the trial Court passed in O.S.No.66 of 2004 on 07.12.2004 is restored. No costs.

31.10.2022

ssb

To

1.District Munsif Court, Sivagangai

2.Additional Subordinate Court, (District Judge-Trainee), Sivagangai.



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N.SESHASAYEE., J.

ssb

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