



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED:30.03.2022

CORAM:

THE HONOURABLE **MR.JUSTICE S.M.SUBRAMANIAM**

S.A(MD)No.208 of 2022

and

C.M.P(MD)No.2441 of 2022

WEB COPY

1.Chellaiah
2.Muthusamy @ Kumar
3.Karthick
4.Venkatesh

... Appellants/Appellants/
Defendants

Vs.

Vellaiyammal ... Respondent/Respondent/Plaintiff

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 22.01.2022 passed in A.S.No.67 of 2021 on the file of the learned Additional District and Sessions Judge (Fast Track Court), Tenkasi, confirming the judgment and decree dated 12.08.2020 passed in O.S.No.168 of 2015 on the file of the learned Principal Subordinate Judge, Tenkasi.

For Petitioner : Mr.A.Rajaram

JUDGMENT

The second appeal has been filed questioning the validity of the judgment and decree dated 22.01.2022 passed in A.S.No.67 of 2021 on the file of the learned Additional District and Sessions Judge (Fast Track Court) Tenkasi, confirming the judgment and decree, dated 12.08.2020 passed in O.S.No.168 of 2015 on the file of the learned Principal Subordinate Judge, Tenkasi.

2.The plaintiff and the first defendant are brother and sister and their mother's name is Karuppi and their mother purchased the first scheduled property under a registered sale deed, dated 11.09.1981 from Venkattachalam Iyer and others. The mother of the plaintiff and the first defendant was in exclusive possession and enjoyment of the first scheduled property as absolute owner. The second scheduled property was also belonged to Karuppi and she was in possession and enjoyment of the second scheduled property as an owner. She died 21 years back at the time of filing of the suit. The said Karuppi was residing in the second scheduled property till her death. Before one year of her death, she was not in sound state of mind and she was in ill health. After the death of the said Karuppi, the first defendant is in joint possession and enjoyment of the first scheduled property on behalf of the plaintiff also. The first defendant had given a half share to the plaintiff of the items cultivated in the first scheduled property. The first defendant leased out the second scheduled property to the third party and shared the rent amount to the plaintiff. However, for about four



months, the first defendant evaded payment of plaintiff's share of rent and he had shared the income from the first scheduled property till 2010. The first defendant had failed to give the plaintiff's share from the first scheduled property and tried to sell the scheduled properties. When the plaintiff asked the first defendant to sell the scheduled properties, the plaintiff demanded the partition of her share from the first defendant in the presence of Village Headman, even then, the first defendant was not heeding. Thus, the plaintiff sent a lawyer notice demanding partition on 10.05.2011 and the first defendant has not replied to the said notice. However, the defendant declared to the third parties that their mother had executed a Will deed in the year 1991 relating to the scheduled properties and therefore, he will not give any share to the plaintiff. The first defendant further executed a settlement deed dated 12.07.2011 in favour of the defendants 2 to 4 and they are in possession and enjoyment of the scheduled properties and therefore, the plaintiff was constrained to institute a suit for partition and possession.

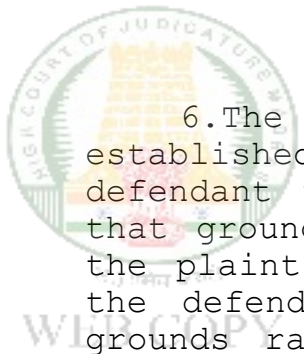
3.The defendants filed a written statement denying the averments in the plaint. It is contended by the first defendant that their mother Karuppi during her life time had executed a registered Will deed, dated 22.02.1991 in sound disposing state of mind. After her death, the Will came into effect and the first defendant is in continuous possession of the scheduled properties. It is stated that the plaintiff had knowledge about the Will deed executed by their mother on 22.02.1991 in favour of the first defendant, but she has not taken any action during the relevant point of time and now had instituted the suit after a lapse of many years. In view of the Will executed in favour of the first defendant, it is contended that the plaintiff has no right in receiving of the suit scheduled property. Thus, the suit is to be rejected.

4.The trial Court framed the following issues:

"ISSUES:

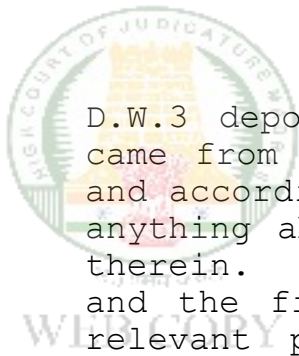
- 1.Whether the suit is bad for non-joinder of necessary parties?
- 2.Whether the plaintiff is entitled to the relief of partition as prayed for?
- 3.To what other relief the plaintiff is entitled for?"

5.The plaintiff herself was examined as P.W.1 and Ex.A.1 to Ex.A3 were marked through P.W.1 and Ex.A.4 was marked through the cross examination of D.W.1. On the side of the defendants, the first defendant was examined as D.W.1 and Ex.B.1 to Ex.B.4 were marked through D.W.1 . Further on the side of the defendants, one Tr.Ramakrishnan and one Tr.Chellasamy were examined as D.W.2 and Ex.B.5 and Ex.B.6 were marked through them.



6.The trial Court formed an opinion that the plaintiff has established her right for partition. The Will as stated by the defendant was not established beyond any reasonable doubt and on that ground the preliminary decree was passed granting $\frac{1}{2}$ share in the plaint scheduled properties in favour of the plaintiff. Thus, the defendant filed an appeal suit in A.S.No.67 of 2021. The grounds raised in the appeal suit were considered by the first appellate Court. The findings of the first appellate Court reveals that the mother of the plaintiff and the first defendant was not in a sound mind while executing the Will. D.W.2 is only scribe and a scribe cannot be considered as an attesting witness. D.W.3 has not seen the testator affixing her thumb impression. Thus, the presumption under Section 90 of the Evidence Act will not applicable to the contents of the Will. The contents of the Will has to be proved as per the Indian Evidence Act. The age of the testator and the date of death creates a suspicious circumstance in respect of the Will executed in favour of the first defendant by the mother of the plaintiff and the first defendant. Mere non filing of reply statement for the Written Statement filed by the defendant cannot be constrained as an admission. The first appellate Court further formed an opinion that the defendant had admitted the the scheduled properties belonged to the mother of the plaintiff and the first defendant viz., Karuppi. It is further admitted that the first defendant is the son and the plaintiff is the daughter of the said Karuppi. Therefore, as per Section 15(1) of the Hindu Succession Act, the plaintiff and the first defendant are having each $\frac{1}{2}$ share in the scheduled properties. But the defendant denied the share to the plaintiff on the ground that the mother of the first defendant had executed a Will deed dated 26.02.1991 in favour of the first defendant. The first defendant himself had gifted lands to the plaintiff, but the particulars regarding the gift were not pleaded specifically by the first defendant and therefore, the said contention of the first defendant was rejected by both the Courts.

7.From the available records, it was established that except suit scheduled property, there are no other property available for the plaintiff and the first defendant. Accordingly, the first appellate Court arrived a finding that the scribe was examined as D.W.2. D.W.2 in his evidence admitted that Ex.B.1 Will deed was prepared in his office. This Will deed was type written. D.W.2 could not recognize who had come to office for preparing this Will, possibly on account of efflux of time. Thus, from the evidence, the Subordinate Court formed an opinion that the Will was not prepared as per the dictation of the testator. Even though D.W.2 had admitted that he was a scribe for Ex.B.1 Will deed, the first defendant, who was examined as D.W.1 has admitted that the Ex.B.1 Will document may be written by some persons in the Registered Office. He further admitted that one of the attesting witness was residing in the same street in which he resides. The identifying witness was examined as D.W.3 and the said identifying witness also completely ignorance of the contents of the Will at the time of execution of the disputed Will.

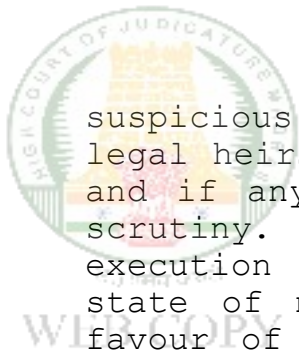


D.W.3 deposed that he did not know anything. The Registrar Clerk came from the house of Karuppi and they asked me to put signature and accordingly, he signed in the paper. Further, D.W.2 did not know anything about the content or nature of the document or contention therein. Even he did not know whether the mother of the plaintiff and the first defendant was in a sound state of mind during the relevant point of time, the Will was signed by the testator. Therefore, the Subordinate Court had no hesitation in forming of an opinion that there is no evidence regarding the fact that the Will deed was read over to the said Karuppi and she understood the contents and thereafter affixed her thumb impression in the Will deed. Even from the evidence of D.W.3-identifying witness, the Will deed was not established. From the evidence of the first defendant himself, it creates doubt about the execution of the Will deed, by following the procedures. It is admitted by D.W.1 that the testator died after 15 days but the testator died after 6 days which is the short period of time. The Will deed was submitted for registration in the Registrar Office only after 4 days and all these facts and circumstances regarding the execution of the Will raised suspicious circumstances and therefore, the Subordinate Courts arrived a conclusion that the Will cannot be accepted.

8.The point of limitation was raised by the first defendant. The said point was also well considered by the Subordinate Courts by holding that the plaintiff herself has clearly stated that the first defendant was paying a share in respect of the property belonged to their mother. When the first defendant was paying some amount of share from the out of the family property to the plaintiff and there is no reason to reject the suit on the ground of limitation as the cause was continuing. In this regard, the first appellate Court considered under Article 110 of the Limitation Act and held that the period of limitation will be applicable only when the exclusion becomes known to the plaintiff. Thus, the suit claim is not barred by the law of limitation. This apart, the plaintiff herself after receiving $\frac{1}{2}$ share from the first defendant for a considerable length of time and only if the share was denied. Though such facts were not established by all the parties. The over all facts and circumstances reveals that there was a dispute between the brother and sister and fact regarding the Will was not found to the plaintiff.

9.This being the concurrent findings of the Subordinate Courts, this Court is of the considered opinion that there is no reason to deny $\frac{1}{2}$ share to the plaintiff for which, she is legally entitled as the legal heir of the deceased Karuppi. Thus, the plaintiff and the first defendant are entitled for equal share in respect of the suit scheduled properties.

10.The substantial questions of law raised with reference to the Will Ex.B.1 was well considered by the Subordinate Court based on the pleadings, documents and the evidences. The right of



suspicious circumstances. Such right conferred under law to the legal heirs of the deceased mother, should not be denied ordinarily and if any Will or otherwise submitted must be placed for strict scrutiny. When there are suspicious circumstances regarding the execution of Will and the grounds are established regarding the state of mind of testator, then such suspicion must be held in favour of the plaintiff and in the present case, it was rightly adjudicated and thus, there is no infirmity as such in respect of the concurrent judgments and decree passed by the trial Court and the first appellate Court.

11. Accordingly, the judgment and decree dated 22.01.2002 passed in A.S.No.67 of 2021 on the file of the learned Additional District and Sessions Judge (Fast Track Court) Tenkasi, confirming the judgment and decree dated 12.08.2020 passed in O.S.No.168 of 2015 on the file of the learned Principal Subordinate Judge, Tenkasi are confirmed. Accordingly, this Second Appeal stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

To

1.The Additional District and
Sessions Judge (Fast Track Court),
Tenkasi.

2.The Principal Subordinate Judge,
Tenkasi.

Copy to

The Section Officer, V.R.Section,
Madurai Bench of Madras High Court, Madurai

+1 CC to M/s.A.RAJARAM, Advocate (SR-15472[F] dated 30/03/2022)

S.A(MD)No.208 of 2022and
C.M.P(MD)No.2441 of 2022
30.03.2022

SS(CO)

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