



THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.10.2023

CORAM:

THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR. JUSTICE N.SENTHILKUMAR

A.S.No.338 of 2012

G.Mohan Kumar

...Appellant

Vs.

- 1.B.Sampath Kumar
- 2.G.Rajendran
- 3.Chandrakala
- 4.Anandan
- 5.R.Logambal
- 6.R.Govindarajan
- 7.Balu
- 8.S.N.Thangavel
- 9.Dhanalakshmi
- 10.Arunkumar
- 11.A.P.Muruganandam
- 12.D.Raghu
- 13.REPCO Bank,
Rep. by its Manager E.Krishnan
774, First Floor, Sathy Road,



Gandhipuram, Coimbatore – 641 012.

14.C.Natarajan

15.Gunasekaran

16.V.Senthilkumar

...Respondents

Prayer: Appeal Suit filed under Section 96 of the Code of Civil Procedure against the judgment and decree dated 16.09.2011 made in O.S.No.100 of 2006 on the file of the Additional District Sessions Court, (FTC No.I), Coimbatore.

For Appellant : Mr.S.Mukunth, Senior Counsel
for Mr.N.Krishnakumar
M/s.Sarvabhauman Associates

For Respondents : Mr.S.S.Mathivanan for R1 and R2
Mr.K.P.Chandrasekaran for R6
RR3, 5, 9, 11, 14, 15 & 16 – No appearance
RR4, 7, 8, 10, 12 & 13 – No Residence

J U D G M E N T

(Judgment of the Court was made by **R.SUBRAMANIAN, J.**)

The plaintiff is on appeal aggrieved by the dismissal of his suit in O.S.No.100 of 2006 in respect of the suit item No.1.



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2. The case of the plaintiff is that the suit properties belonged to Kamalammal who is the sister of her grandmother as her self-acquired property. The plaintiff would claim that the said Kamalammal who had no issues had executed a registered Will on 22.10.1978 bequeathing the suit item No.1 to the plaintiff and defendants 1 and 2, who are brothers. As regards item No. 2 the plaintiff would claim that the said Kamalammal and her brother Venguduswamy had executed a Will on 10.09.1986 bequeathing the suit item No.2 to the plaintiff and defendants 1 to 3. The plaintiff and defendants 1 to 3 are the children of Govindasamy, one of the sons of Sayammal, sister of Kamalammal. Relying upon the above two testamentary instruments dated 22.10.1978 and 10.09.1986 the plaintiff would claim 1/3rd share in the suit 1st item and 1/4th share in the suit 2nd item. While the defendants 1 to 3 are brothers and sister of the plaintiff, the defendants 4 to 16 are the tenants in respect of the suit property.

3. The suit was resisted by the defendants 1 and 2 contending that while it is true that Kamalammal executed two Wills dated 22.10.1978 and 10.09.1986 as claimed by the plaintiff, she herself had executed a third Will



dated 11.03.1996 cancelling the Will dated 22.10.1978 and bequeathing the suit 1st item to the defendants 1 and 2 only. Therefore, according to the

defendants 1 and 2, the plaintiff does not have a share in the suit item No.1.

The defendants however admitted the Will dated 10.09.1986 and conceded the plaintiff's 1/4th share in the suit 2nd item. An additional written statement was filed by the defendants contending that the occupation of the plaintiff of the suit 1st item would amount to trespass and therefore he should pay damages. A reply statement was also filed by the plaintiff.

4. On the above pleadings, the learned trial Judge framed the following issues:-

- 1) *Whether it is true that Kamalammal had executed registered Wills dated 22.10.1978 and 10.09.1986 and whether those Wills are true and valid?*
- 2) *Whether the Will dated 22.10.1978 was not acted upon?*
- 3) *Whether the Will dated 11.03.1996 executed by Kamalammal is true, valid and acted upon?*
- 4) *Whether the plaintiff is entitled to partition?*
- 5) *Whether the plaintiff is entitled to mandatory injunction as prayed for?*



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6) *Whether the plaintiff is entitled to permanent injunction as prayed for?*

7) *To what relief the plaintiff is entitled?*

5. At trial the plaintiff was examined as PW1 and one Saraswathi attestor of the Will dated 22.10.1978 was examined as PW2. Exs.A1 to A5 were marked. The Wills dated 22.10.1978 and 10.09.1986 were marked as Exs.A1 and A2. On the side of the defendants, the 1st defendant was examined as DW1 and one P.K.Devaraj, attestor of the Will dated 11.03.1996 was examined as DW2. Exs.B1 to B8 were marked. The registered Will dated 11.03.1996 was marked as Ex.B8.

6. The learned trial Judge upon consideration of the evidence on record concluded that all the three Wills are true. On the aforesaid finding, the learned trial Judge decreed the suit in respect of the suit item No.2 and as far as item No.1 is concerned, the learned trial Judge concluded that since the Will dated 22.10.1978 was specifically cancelled by the Will dated 11.03.1996, the same cannot be acted upon and the subsequent the Will



dated 11.03.1996, having been proved in accordance with law, would only prevail and therefore the plaintiff would not be entitled to a share in item No.1 of the suit properties. On the said finding the learned trial Judge granted a preliminary decree declaring 1/4th share of the plaintiff in respect of the suit 2nd item. The trial Court also negated the reliefs of mandatory injunction and permanent injunction, since it was found that the plaintiff was not entitled to any right over the suit 1st item. Aggrieved the plaintiff is on appeal.

7. We have heard Mr.S.Mukunth, learned Senior Counsel instructed by Mr.N.Krishnakumar, learned counsel for the appellant, Mr.S.S.Mathivanan, learned counsel appearing for the respondents 1 and 2 and Mr.K.P.Chandrasekaran, learned counsel appearing for the 6th respondent. The other respondents though served are not appearing either in person or through counsel duly instructed.

8. Mr.S.Mukunth, learned Senior Counsel appearing for the appellant would vehemently contend that the learned trial Judge over looked the fact that the attesting witness of Ex.B8 Will is the father-in-law of the 1st



defendant and therefore it is clear that the Will was created by the defendants 1 and 2 in collusion. He would also contend that Kamalammal was not in a sound and disposing state of mind on the date of execution of the said Will. Therefore, according to Mr.S.Mukunth, learned Senior Counsel, the trial Court was not justified in concluding that the Will dated 11.03.1996 marked as Ex.B8 was proved in accordance with law.

9. Contending contra Mr.S.S.Mathivanan, learned counsel appearing for the respondents 1 and 2 would submit that the evidence of DW2, attesting witness has not been shaken in any manner. The Will dated 11.03.1996 has specific reference to the Will dated 22.10.1978 and the Will dated 22.10.1978 is specifically cancelled by the subsequent Will. Therefore, according to the learned counsel, once the subsequent Will is proved, the earlier Will will automatically go. The trial Court was right in concluding that the Ex.B8 Will is proved and hence the plaintiff will not get a right over the suit item No.1.

10. We have considered the rival submissions. The only question that would arise for determination in this appeal is as follows:



Whether the trial Court was right in concluding that

WEB COPY *Ex.B8, Will has been proved?*

Point

11. DW2 is the attesor to the Will. We have been taken through his evidence by the learned counsel for the appellant. His evidence satisfies the requirements of Section 68 of the Evidence Act. His evidence relating to execution of the Will is inspiring and the same has not been demolished or tarnished in cross-examination. No doubt he is the father-in-law of the 1st defendant. The Hon'ble Supreme Court has in **Indu Bala Bose & others Vs. Manindra Chandra Bose & another** reported in **1982 (1) SCC 20** pointed out that the mere fact that the Will is attested by the close relative will not be a ground to dis-believe the execution and the attesor of the Will. The Hon'ble Supreme Court observed that it is a normal human conduct to choose a close relative to attest the Will.

12. In the light of the above judgment of the Hon'ble Supreme Court, we do not think that we can accept the submission of the learned



Senior Counsel appearing for the appellant that the Will should be disbelieved because it was attested by the father-in-law of the 1st defendant, more so, when the evidence of DW2 is quite convincing. Once, Ex.B8 is upheld, it naturally follows that Ex.A1 Will dated 22.07.1978 stand cancelled. There is express cancellation of Will dated 22.07.1978 in the Will dated 11.03.1996, Ex.B8.

13. We are therefore unable to fault the trial Court for concluding that the plaintiff will not be entitled to a share in the suit 1st item of property. There is no appeal by the defendants in respect of the preliminary decree granted in respect of the suit 2nd item. Hence, the appeal fails and it is accordingly **dismissed**. Considering the relationship between the parties there shall be no order as to costs.

(R.S.M.,J.) (N.S.,J.)
17.10.2023

dsa
Index :No
Internet :Yes
Neutral Citation :No
Speaking order

To

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The Additional District & Sessions Judge,
Fast Track Court No.I, Coimbatore.

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R.SUBRAMANIAN, J.
and
N.SENTHILKUMAR, J.

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