



S.A.No.2254 of 2003

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.06.2023

CORAM:

THE HONOURABLE MRS. JUSTICE R. HEMALATHA

S.A.No.2254 of 2003

Ramaswamy

..Appellant

vs.

Palaniswami Gounder (Died)

1.Ramalingam

2.Kolanthayathal

3.Shanthamani

..Respondents

PRAYER: Second Appeal filed under Section 100 of Civil Procedure Code against the decree and Judgment dated 14.01.2000 in AS.No.129 of 1999 on the file of the Principal District Court, Erode, upholding the decree and Judgment dated 26.02.1999 in OS.No.299 of 1994 on the file of the Sub Court, Dharapuram.

For Appellant : Mr.S.Thangavel

For R1 : Mr.R.Rajarajan



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JUDGMENT

The unsuccessful plaintiff before both the Courts below has filed the present second appeal. The plaintiff filed the suit in O.S.No.299 of 1994 before the Sub Court, Dharapuram, for partition of the suit properties into two equal shares and to allot one such share to him.

2. For the sake of convenience, the parties are referred to as per their ranking in the trial court and at appropriate places, their rank in the present second appeal would also be indicated.

3. The case of the plaintiff in nutshell is as follows:

The suit properties originally belonged to one Chinnasamy Gounder. On 07.07.1969 Chinnasamy Gounder and his sons Palanisamy Gounder (first defendant) and Thangavel Gounder partitioned the suit properties. First item of the suit property was allotted to the share of the first defendant. Second item of the suit property was allotted to the share of Chinnasamy Gounder. Chinnasamy Gounder died intestate on 05.06.1984. Thangavel Gounder also died in the year 1993. The defendants 2 to 4 are the legal heirs of Thangavel Gounder. Since there is



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a dispute with regard to the enjoyment of the suit properties between the plaintiff and the defendants, the plaintiff demanded the defendants to divide the suit properties into two equal shares and to allot 1/2 share in the first item of the suit property and 1/4 share in the second item of the suit property.

4. The suit was resisted by the defendants 2 to 4 on the following grounds:

- i. As far as the second item is concerned late Chinnasamy Gounder and his son Thangavel Gounder were in enjoyment of the same in pursuance of the Will dated 17.10.1973 (Ex.B2).
- ii. The defendants 3 & 4 relinquished their right in respect of the second item of the suit property in favour of the second defendant. Therefore, the second defendant alone is in possession and enjoyment of the suit properties and the plaintiff cannot claim any right over the said properties.



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5. On the basis of the above pleadings, the trial Court framed the following issues :

- i. Whether the plaintiff is entitled for a preliminary decree on partition and separate possession in respect of all the suit properties as prayed for by him?
- ii. Whether the defendant is entitled to the second item of the suit property pursuant to the Will dated 17.10.1973?
- iii. Whether the relinquishment deed dated 16.09.1994 is true and valid?
- iv. To what relief, the plaintiff is entitled?

6. In the trial Court, the plaintiff examined himself and one another witness and marked Ex.A1 to Ex.A7. The second defendant examined himself and one another witness and marked Ex.B1 to Ex.B15.

7. The learned Subordinate Judge, Dharapuram, after analysing the oral and documentary evidence adduced on both sides decreed the suit only in respect of Item No.1 and dismissed the suit in respect of Item No.2 vide her decree and judgment dated 26.02.1999, aggrieved over



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which the plaintiff filed an appeal in A.S.No.129 of 1999 before the Principal District Court, Erode. Learned Principal District Judge dismissed the appeal and upheld the findings recorded by the trial Court.

8. Now the present second appeal is filed by the plaintiff and the same is admitted on the following substantial questions of law.

- i. "Whether the execution of the Will Ex.B2 is proved in accordance with Section 63 of the Indian Succession Act and Section 65 of the Indian Evidence Act ?
- ii. Whether the Courts below were right in shifting the burden of disproving the fact that the testator of the Will was in sound and disposing state of mind on the appellant?
- iii. Whether the Courts below were right in not framing proper and necessary issues for determination of the disputes involved in this case?"

9. A perusal of the records shows that the second respondent died on 26.09.2022 and till date no steps have been taken to implead the legal heirs of the deceased second respondent.



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10. Heard Mr.S.Thangavel, learned counsel for the appellant and Mr.R.Rajarajan, learned counsel for the respondents.

11. Mr.S.Thangavel, learned counsel for the appellant contended that both the Courts below did not appreciate the evidence in proper perspective and dismissed the suit in respect of Item No.2 of the suit property.

12. At the outset it may be observed that the defendants 2 to 4 claim absolute right in respect of Item No.2 of the suit property on the basis of the registered Will dated 17.10.1973 (Ex.B2) executed by Chinnaamy Gounder in favour of his son Thangavel Gounder who also died on 02.12.1993. In order to prove the Will, the defendants had examined one of the Attestors to the Will as D.W.2. The contention of the plaintiff is that the Will was obtained by late Thangavel Gounder from his father late Chinnaamy Gounder by deceit and that even after the death of Chinnaamy Gounder the second item of the suit property was in joint possession and enjoyment of the plaintiff, the first defendant and late



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Thangavel Gounder. According to him the Will was not at all acted upon and therefore, the defendants 2 to 4 cannot claim any right in the Will Ex.B2. The plaintiff had further averred that late Chinnsamy Gounder was suffering from serious illness during the execution of the Will Ex.B2.

13.It is pertinent to point out that the Will Ex.B2 was executed on 17.10.1973 and the testator died on 05.06.1984. Both the Courts below, after analysing the evidence adduced on both sides, had concurrently held that the plaintiff had failed to prove that late Chinnasamy Gounder was not in sound state of mind at the time of execution of the Will Ex.B2. It was further observed that no oral and documentary evidence was adduced on the side of the plaintiff to substantiate any of his contention. These are all the findings based on facts and in the memorandum of grounds the first substantial question of law is that "Whether the execution of the Will Ex.B2 is proved in accordance with Section 63 of the Indian Succession Act and Section 65 of the Indian Evidence Act ?". It is to be pointed out that the defendants had proved the Will Ex.B2 by examining one of the Attestors to the Will as per Section 63 as mandated in the Section 63 & 65 of the Indian



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Evidence Act. Moreover, the plaintiff was aged about 23 years during the year 1973 and there is no averment in the plaint that Chinnasamy Gounder was not in good state of mind during the execution of the Will Ex.B2. Only in the reply statement of the plaintiff he had contended that late Chinnasamy Gounder was not having good health during the relevant point of time. It is also averred in the reply statement that late Chinnasamy Gounder met with an accident during the year 1972 and he was admitted in the hospital at Erode and he was totally bedridden. His further contention is that Chinnasamy Gounder lost his eyesight and he was not having good health and good state of mind to execute the Will Ex.B2. No oral and documentary evidence was adduced by the plaintiff in order to show that Chinnasamy Gounder was admitted in the hospital during the year 1972 at Erode and that he lost his eyesight and was not having mental state of mind to execute the Will Ex.B2.

14.On the other hand, the defendants had examined one of the attestors to the Will who had clearly deposed about the execution of the Will by late Chinnasamy Gounder. Apart from that, Ex.B4 to Ex.B15 precisely show that the defendants are in possession of Item No.2 of the



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suit property pursuant to the Will Ex.B2. The First Appellate Court in

Para No.11 had observed thus :

11) It is worth-while to mention that the alleged Will is a registered Will. One of the attesor was also examined as DW2 to prove the genuiness of the Will. If that being the case, the plaintiff has no locus-standi, at this stage, to question the validity and propriety of the Will without proving the fact that the executant of the Will was not in sound state of mind at the relevant point of time as alleged by the plaintiff in the reply statement. So, it is proved through document that defendants 2 to 4 became the absolute owner of the suit property in pursuance of the Will Ex.B2 to item 2 of the suit property. Apart from that, this item of property is in possession and enjoyment of the defendants only and they are paying kists for the same after obtaining necessary patta. Ex.B4 to B15 are proof to this fact. Even as per Ex.A3, on 08.03.1971 late Chinnsamy Gounder pledged his property in favour of his son late Thangavel. This exposes that late Chinnsamy Gounder and late Thangavel were in cordial terms, during the relevant point of time. It also exposes that late Chinnasamy Gounder was only under the care and custody of late Thangavel which necessitated late Chinnasamy Gounde to execute a Will Ex.B2 in respect of item No.2 of



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the suit property in favour of his son late Thangavel after retaining life estate in favour of his wife. So, no motive can be attributed in respect of the act of late Chinnasamy Gounder in executing the Will in favour of one of his son namely late Thangavel. If late Thangavel acted malafidely to snatch the property in his favour, he would not have written the Will in such a way by retaining life interest in favour of his mother before passing of, the right to the property in his favour. The conduct of late Chinnsamy Gounder in retaining life interest in favour of his wife would exposes his genuine act only and not otherwise. The evidence of DW1 and DW2 coupled with Ex.B4 to B15 would prove that the second item of the suit property is in possession and enjoyment of the defendant only and not otherwise. The contention of the plaintiff that the second item of the suit property was in joint possession and enjoyment of the first defendant and late Thangavel has no force in the case."

15.Suffice to say that all the observations made by both the Courts below are perfectly right and I do not see any reason to interfere with the findings recorded by both the Courts below. Thus, the substantial questions of law are answered accordingly.



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16.In the result,

- i. the Second Appeal is dismissed. No costs.
- ii. The decree and judgment dated 14.01.2000 in A.S.No.129 of 1999 on the file of the Principal District Court, Erode and the decree and judgment dated 26.02.1999 in OS.No.299 of 1994 on the file of the Sub Court, Dharapuram, are upheld.

01.06.2023

mtl

Index : Yes/No

Speaking / Non-speaking order



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R.HEMALATHA, J.

mtl

To

1. The Principal District Court, Erode.
2. The Sub Court, Dharapuram.
3. The Section Officer, VR Section, High Court, Madras.

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