



S.A.Nos.1263 & 1372 of 2005

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 06.11.2023

CORAM :

THE HONOURABLE Mr. JUSTICE **C.KUMARAPPAN**

S.A.Nos.1263 and 1372 of 2005

Thambiannan

.. Appellant in both
second appeals

Vs.

Palaniammal

..Respondent in both
second appeals

Common Prayer: Second Appeals filed under Section 100 of the Code of Civil Procedure, against the judgment and decree dated 04.02.2005 passed in A.S.Nos.61 & 62 of 2004 respectively on the file of the Principal District Judge, Salem, confirming the judgment and decree dated 28.11.2003 in O.S.No.19 of 2001 and O.S.No.181 of 2002 respectively on the file of the Sub Judge, Mettur.

For Appellant in
both second appeals : Mr. S.Kalyanaraman

For Respondent in
both second appeals : Mr.P.J.Jagadeesan



WEB COPY



S.A.Nos.1263 & 1372 of 2005

COMMON JUDGMENT

The Second Appeal in S.A.No.1263 of 2005 is arising out of a suit filed by one Thambiannan against his sister Palaniammal in O.S.No.19 of 2001 for relief of declaration based upon the unregistered Will dated 02.01.1993. The other connected second appeal in S.A.No.1372 of 2005 is arising out of a suit filed by Palaniammal in O.S.No.181 of 2002 against his brother Thambiannan claiming partition of 1/4th share in the suit property.

2.For the sake of convenience, the parties will be referred in these second appeals according to their litigative status in O.S.No.19 of 2001.

The brief facts which give rise to filing of this Second Appeal is as follows:

3.The plaintiff filed a suit in O.S.No.19 of 2001 for the relief of declaration on the basis of the Will dated 02.01.1993, and the defendant filed a suit in O.S.No.181 of 2002 seeking partition. The Trial Court has disbelieved the Will/Ex.A4 dated 02.01.1993 and agreed with the



S.A.Nos.1263 & 1372 of 2005

defendant's case of intestate succession and granted a decree for partition of 1/4th share. Against which, the plaintiff has preferred first appeals in A.S.No.61 of 2004 and A.S.No.62 of 2004, respectively. However, the First Appellate Court has confirmed the decree and Judgment of the Trial Court. Aggrieved by the same, the plaintiff is before this Court by filing these second appeals.

Substantial question of law:

4.At the time of admission on 29.11.2005, this Court has framed the following substantial questions of law:

In S.A.No.1263 of 2005:

“a) Whether the failure to disclose the execution of the “will” by P.W.s 2 and 3 (attestors) would by itself be a suspicious circumstance to invalidate the “will”?

b) Would the failure on the part of the plaintiff to give the date on which the defendant (sister) got married is of such a vital nature which would go to the very root of the execution of the “will” itself?

c) Has not the Courts below misread the



S.A.Nos.1263 & 1372 of 2005

evidence of D.W.2 in holding that the “will” is not duly proved?”

In S.A.No.1372 of 2005:

“If the “will” relied upon by the defendant in the suit stands established (that is the issue in Second Appeal No.1263 of 2005) would the plaintiff get a share in the property forming the subject matter of the suit?”

5.All the substantial questions of law are revolves around the validity of Ex.A4/Will which was disputed by the defendant.

Submissions of either side counsel:

6.The learned counsel for the defendant contended that there is no necessity for their father Athiappan to execute such Will at the age of 62 years, when he was hale and healthy. Admittedly, the father of the plaintiff and defendant Athiappan died on 17.05.1993 on account of unfortunate accident of stung by crowded honey bees indiscriminately, which resulted his sudden death. This aspect was not disputed by either side.



7. At this juncture, in order to understand the legal position in respect of suspicious circumstances of the Will, this Court deem it appropriate to make reference of the judgment of the Hon'ble Supreme Court consisting three-Hon'ble judges in the case of ***Shivakumar and others v. Sharavanabasappa and others*** reported in ***(2021) 11 SCC 277***. In para 12, it has been held as follows:

“12. For what has been noticed hereinabove, the relevant principles governing the adjudicatory process concerning proof of a will could be broadly summarised as follows:

12.1. Ordinarily, a will has to be proved like any other document; the test to be applied being the usual test of the satisfaction of the prudent mind. Alike the principles governing the proof of other documents, in the case of will too, the proof with mathematical accuracy is not to be insisted upon.

12.2. Since as per Section 63 of the Succession Act, a will is required to be attested, it cannot be used as evidence until at least one attesting witness has been called for the purpose of proving its execution, if there be an attesting witness alive and capable of giving evidence.



12.3. The unique feature of a will is that it speaks from the death of the testator and, therefore, the maker thereof is not available for deposing about the circumstances in which the same was executed. This introduces an element of solemnity in the decision of the question as to whether the document propounded is the last will of the testator. The initial onus, naturally, lies on the propounder but the same can be taken to have been primarily discharged on proof of the essential facts which go into the making of a will.

12.4. The case in which the execution of the will is surrounded by suspicious circumstances stands on a different footing. The presence of suspicious circumstances makes the onus heavier on the propounder and, therefore, in cases where the circumstances attendant upon the execution of the document give rise to suspicion, the propounder must remove all legitimate suspicious before the document can be accepted as the last will of the testator.

12.5. If a person challenging the will alleges fabrication or alleges fraud, undue influence, coercion et cetera in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the



execution of the will may give rise to the doubt or as to whether the will had indeed been executed by the testator and/or as to whether the testator was acting of his own free will. In such eventuality, it is again a part of the initial onus of the propounder to remove all reasonable doubts in the matter.

12.6. A circumstance is “suspicious” when it is not normal or is “not normally expected in a normal situation or is not expected of a normal person”. As put by this Court, the suspicious features must be “real, germane and valid” and not merely the “fantasy of the doubting mind”.

12.7. As to whether any particular feature or a set of features qualify as “suspicious” would depend on the facts and circumstances of each case. A shaky or doubtful signature; a feeble or uncertain or uncertain mind of the testator; an unfair disposition of property; an unjust exclusion of the legal heirs and particularly the dependants; an active or leading part in making of the will by the beneficiary thereunder et cetera are some of the circumstances which may give rise to suspicion. The circumstances abovenoted are only illustrative and by no means exhaustive because there could be any circumstance or set of circumstances which may give



rise to legitimate suspicion about the execution of the will. On the other hand, any of the circumstances qualifying as being suspicious could be legitimately explained by the propounder. However, such suspicion or suspicious cannot be removed by mere proof of sound and disposing state of mind of the testator and his signature coupled with the proof of attestation.

12.8. The test of satisfaction of the judicial conscience comes into operation when a document propounded as the will of the testator is surrounded by suspicious circumstance(s). While applying such test, the court would address itself to the solemn question as to whether the testator had signed the will while being aware of its contents and after understanding the nature and effect of the dispositions in the will?

12.9. In the ultimate analysis, where the execution of a will is shrouded in suspicion, it is a matter essentially of the judicial conscience of the court and the party which sets up the will has to offer cogent and convincing explanation of the suspicious circumstances surrounding the will.”

8.In the case on hand, while projecting various suspicious



S.A.Nos.1263 & 1372 of 2005

circumstances, the defendant has contended that though the defendant was married admittedly during 1971, that was wrongly mentioned in the Ex.A4/Will as 1973, and that there was no description of property in the Will and that the Will was unregistered one. It was also contended that the signature of the testator is very much shaky and dissimilar to his admitted signature. Apart from that, the defendant would contend that the attestors of Ex.A4/Will are very much inimical to the defendant and on the other hand, very much close to the plaintiff. These aspects have been dealt by the Trial Court as well as the First Appellate Court and ultimately, held that Ex.A4/Will is not true.

9.To put it in other words, it was the finding of the Trial Court and the First Appellate Court that the execution of the Will has not been proved in the manner known to law, and it was the finding of the Trial Court and the First Appellate Court that this suspicious circumstance has not been dispelled by the plaintiff.

10.More pertinently, on behalf of the defendant, the Scribe of the



S.A.Nos.1263 & 1372 of 2005

disputed Will/Ex.A4 was examined. Wherein he has categorically stated that the Will was not prepared on the instruction of the testator/Athiappa Gounder and the said Will was prepared as per the instruction of the plaintiff, that too copying from the other paper. To crown it all, during cross-examination, the scribe of Ex.A4/Will has stated that the Will was written only after the demise of the testator. The above aspect has been very much relied by both the Courts below and disbelieved the Will/Ex.A4.

11. Therefore, taking into consideration of all these aspects cumulatively, and also taking into consideration of the ratio relied herein above, this Court is of the firm view that the finding of fact recorded by the Trial Court as well as the First Appellate Court cannot be found faulted. Further, the appellant did not put forth any material so as to interfere with the well considered finding of both the Courts below.

12. As per the substantial questions of law as extracted elsewhere in the order, the main substantial question of law to be dealt with in these



S.A.Nos.1263 & 1372 of 2005

second appeals is, as to whether Ex.A4/Will is proved or not. Whereas both the Courts below, by taking into consideration of all the material aspects and also taking into account of the settled legal position, have arrived at a right conclusion that Ex.A4/Will has not been proved. Therefore, this Court is of the view that the substantial questions of law formulated in the two Second Appeals are liable to be answered in favour of the defendant.

13.At this juncture, the learned counsel for the defendant by relying the latest judgment of the Hon'ble Supreme Court in the case of ***Vineeta Sharma vs. Rakesh Sharma & others*** reported in ***(2020) 9 SCC 1***, would submit that, now the female legal heirs are to be treated as coparcener and therefore, though the defendant claims 1/4 share, by following the above Hon'ble Supreme Court judgment, prayed this Court to pass preliminary decree for 1/2 share. It is pertinent to mention here that the prayer of the defendant is only for 1/4 share. Even the perusal of ***Vineeta Sharma vs. Rakesh Sharma & others case report in [(2020) 9 SCC 1]*** cited supra, the share is subject to the disposition or alienation,



S.A.Nos.1263 & 1372 of 2005

partition or testamentary disposition which had taken place before the 20th December 2004. Such aspects need to be proved independently. Therefore, at this stage, without having any amendment in the pleading or in the prayer, this Court is having it's own apprehension to apply the principles enunciated in the *Vineeta Sharma's* case cited supra, to the facts of the case in hand. Therefore, the submissions made by the learned counsel for the defendant by relying *Vineeta Sharma's* case cited supra, cannot be adjudicated in this appeal.

14.In the result, both the Second Appeals are dismissed by confirming the judgment and decree dated 04.02.2005 passed by the Principal District Judge, Salem in A.S.Nos.61 & 62 of 2004. There shall be no order as to costs.

06.11.2023

Internet : Yes/No
Index: Yes/No
apd



WEB COPY



S.A.Nos.1263 & 1372 of 2005

C.KUMARAPPAN,J.

apd

To

1. The Principal District Judge, Salem,
2. The Subordinate Judge, Mettur.
3. The Section Officer, V.R.Section, High Court, Madras.

S.A.Nos.1263 and 1372 of 2005

06.11.2023