



S.A No.288 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.04.2023

CORAM:

THE HON'BLE MRS. JUSTICE T.V.THAMILSELVI

S.A No.288 of 2013

M.P No. 1 of 2013

1.Malarvizhi

2.Sulochana

3.Pushpa

... Appellants/Defendants

Vs.

M.Vijayalakshmi

...Respondent/Plaintiff

PRAYER: This Second appeal filed under Section 100 of the Code of Civil Procedure against the decree and judgement of the learned Additional District Judge, Salem dated 21.03.2012 passed in A.S No. 4 of 2011 reversing the decree and judgement of the Additional Subordinate Judge, Salem dated 29.06.2004 passed in OS No.636 of 1995.

For Appellants: Mr. S.T.Bharath Gowtham
For Respondent : No appearance

JUDGMENT

The appellants herein are the defendants in suit O.S No. 636 of



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1995, on the file of the Additional Subordinate Judge, Salem, filed by the respondent herein/plaintiff for the relief of partition claiming 5/8 share in the entire suit property. The contention of the plaintiff is that entire suit property is joint family property of one Perumal Gounder who died leaving behind his son Manivel as legal heir. The said Manivel married the plaintiff/respondent herein in the year 1993. Subsequently, in the year 1994 the said Manivel was died leaving behind the plaintiff/respondent herein as a legal heir. The defendants/appellants herein are the sisters of the said Manivel they are having 1/8 share each in the suit properties and the plaintiff/respondent having 5/8 share in the suit properties but the appellant herein/defendant refused to give 5/8 share in the properties to the plaintiff. Hence the plaintiff filed the suit.

2. On the other side, the defendants admitted the relationship between the plaintiff and themselves but they denied the plaintiff's right over the suit properties. The contention of the defendants is that their brother Manivel married the plaintiff on 24.02.1993 and within 3 days the plaintiff left the matrimonial house due to misunderstanding with the plaintiff's husband Manivel, due to the said act of the plaintiff the said Manivel mentally disturbed. Subsequently he committed suicide. Before his



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death the said Manivel, on 10.09.1993 executed a Will in favour of the these appellants herein/defendants by bequeathing all his properties in their favour expect the share sold to third parties by him. On 28.05.1994, the said Manivel committed suicide hence after his demise as per the Will the defendants who are sisters of the said Manivel enjoyed the properties as absolute owners. Further they contended that plaintiff/respondent herein was never in possession of the property nor she enjoyed any share in the property. Hence they prayed to dismiss the suit.

3. On the side of the plaintiff, she examined herself as P.W.1 and the documents Ex.P1 to Ex. P.7 were marked. On the other side, the defendants' one of the sister of the said Manivel was examined as D.W.1 and the attesor of the Will was examined as D.W.2 and the documents Ex.B1 to B6 were marked. On considering oral and documentary evidence the Trial Court dismissed the suit. Aggrieved over the same, the plaintiff/respondent herein preferred an appeal before the Additional District Judge, Salem, which independently analysed the facts and evidence decreed the suit in favour of the plaintiff. Accordingly, appeal was allowed. Challenging the same the defendants preferred this second appeal. When the matter was taken up for hearing there is no representation on the side of the



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plaintiff/respondent herein.

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4. The learned counsel for the defendants/appellants herein submitted that the lower appellate Court failed to appreciate the evidence of D.W.2/attestor of the Will, who spoke about the testator's state of mind while executing Will. In spite of that the lower appellate Court disbelieved the Will as such is unfair and liable to be set aside. Further he argues that the lower Court ought not to have held that Will is not a genuine one merely because the Will was not filed while filing written statement. Hence he prayed to allow this appeal.

5. This Court admitted the appeal with the following questions of law:

i. Whether the lower appellate Court was not in error in holding that Ex.B6 Will as not genuine in the context of the fact that the defendants have clearly proved the Will in compliance with Section 63 (c) of the Indian Succession Act?

6. Considering the submission on the side of the appellant and also materials available on records, it reveals that plaintiff/ respondent herein is the wife of one Manivel and the defendants are sisters of the said Manivel. Originally suit properties was belongs to Manivel's father Perumal



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Gounder. On 24.02.1993 the said Manivel married the plaintiff/ respondent herein but within short span of time she left the matrimonial house, following which, the said Manivel committed suicide on 28.01.1994. Thereafter, as a legal heir of the Manivel the plaintiff/wife claiming 5/8 share in the suit property. On the other hand, the appellants herein/defendants sisters of the said Manivel claimed the suit properties based on the Will dated 10.09.1993 and also stated that the Manivel was mentally suffered due to the conduct of the plaintiff/respondent herein. Hence after the demise of his brother Manivel the defendants/appellant herein are entitled and enjoyed the suit properties based on the Will dated 10.09.1993, thereby denied the plaintiff's/respondent herein right.

7. Though the Trial Court dismissed the suit by holding that as per the Will the plaintiff/respondent herein have no share in the suit property, the lower appellate Court held that Will was surrounded with suspicious circumstances and it was not proved by the defendants/appellants herein beyond reasonable doubt because the Will was not produced before the Court of law at earliest point of time nor the evidence of D.W.2 not proved the execution of the Will/Ex.B6 by the said Manivel beyond reasonable doubt. But the some of the property were sold with regard to



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remaining property alone the lower appellate Court allotted 5/8 share to the plaintiff. The learned counsel for the appellants argued that Ex.B6 was unregistered Will and it was attested by the two witness as one of the witness was no more remaining witness was examined as D.W.2 hence execution of the Will proved beyond reasonable doubt but the lower appellate Court erroneously held that it is unregistered Will its execution has not been proved beyond reasonable doubt as such is unfair and liable to be set aside. Further, he argues that it is settled proposition of law that Will need not be registered besides the Will also proved beyond reasonable doubt by examining any one of the witness as required under Section 68 of Evidence Act. Accordingly, D.W.2 attesor was examined. Hence he prays to allow this appeal. The parties are denoted as per the suit.

8. The point to be decided is whether the Will is proved beyond reasonable doubt. Before filing of the suit the plaintiff issued notice on 12.04.1995 and claiming partition, for which the defendants gave reply on 17.07.1995 which was marked as Ex.B1. On perusal of the reply given by the defendants, it reveals that the defendants mentioned about the execution of the Will dated 10.09.1993 but the copy of the Will was not produced while producing written statement before the Trial Court. Further, the



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evidence of D.W.2 who is attesor of the Will stated that after completion of eight days he handed over the Will to the defendants. If really will was handed over to the defendant the defendants/appellants herein should have produced the copy of that Will while filing the written statement, as rightly pointed out by the Lower Court copy of the Will was not enclosed with written statement. D.W.1 also admits that after 7 days of the Manivel's death she came to know about the said Will and also admits that they have not produced copy of the Will at the time of the filing of the written statement. Further she deposed that she handed over the Will to her counsel but she was not aware of the fact that whether it was produced before the Court below or not. But her evidence was not sufficient to prove as to why the copy of Will was not produced at that time of filing of the written statement. As per the evidence of D.W.2 said Will was written by the testator but on perusal of the unregistered Will/Ex.B6 it reveals that it was typed written Will but the D.W.2 attesor stated that it was hand written Will. So evidence of D.W.2 totally contradictory since the recitals in the said Will is typed written and the name of the person who typed the Will also mentioned in the said Will. On the contrary witness D.W.2 stated that Will was written by the Manivel/testatore which itself creates suspicious over the minds of this



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Court whether it was executed by the Manivel or not. Thus, the lower appellate Court rightly held that Will has not been proved beyond reasonable doubt which needs no interference by this court, moreover custody of the disputed Will also not been proved properly. Therefore the findings of the Court below with regard to execution of the Will needs no interference. Accordingly, the question of law is answered. Some of the properties were sold long back hence some of the properties not belongs to family. Considering the findings of the properties by the Manivel and his father Perumal Gounder executed remaining property alone lower Court granted relief of 5/8 share in favour of the plaintiff's. Admittedly the defendants are legal heirs of the Perumal Gounder and all the properties belongs to the father of the defendants. They also deemed to be co-sharers along with his brother Manivel. So, defendants/appellants herein equally entitled to share in the suit property as a legal heir. Furthermore, all the daughters were unmarried. Therefore, except S. No. 4, 5 and 35 in Ex.B5, in the remaining suit properties, the said Manivel's wife/respondent herein entitled to $\frac{1}{4}$ share remaining $\frac{3}{4}$ share belongs to defendants/appellants herein. Therefore, the findings rendered by the lower appellate



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Court is partly set aside and the suit is decreed partly, accordingly plaintiff

is entitled $\frac{1}{4}$ share in the suit property except Serial NO. 4, 5 and 35 in

Ex.B5.

9. In result, the second appeal is partly allowed. There shall be no order as to costs. Consequentially Connected Miscellaneous petition is close.

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T.V.THAMILSELVI,J.

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To

1. The Additional District Judge, Salem.
2. The Additional Subordinate Judge, Salem.
3. The Section Officer,
V.R Section,

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